Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32065/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 February 2015	**On 9 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

MR RAMATHAN ALI RAMATHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr F Oboro, Gromyko Amedu Solicitors
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Kenya and his date of birth is 16 June 1978. He entered the UK on 28 August 2001 with valid leave as a student. He was granted subsequent periods of leave. He made an application on 7 April 2009 to vary his leave to that of a Tier 1 Highly Skilled Post-Study Migrant and this application was refused on 27 May 2009. His appeal was dismissed by the First-tier Tribunal on 24 July 2009. The appellant

made an application for a High Court review which was refused on 5 February 2010 when according to the respondent the appellant became appeal rights exhausted. On 15 February 2010 the appellant made another application to vary his leave to a Tier 1 Highly Skilled Post-Study Migrant. This application was rejected by the Secretary of State on 11 March 2010 because the appellant had not completed a part of the application form.

2. The appellant made an application on 1 April 2010 for leave as a Tier 1 Highly Skilled Post-Study Migrant and this application was granted by the Secretary of State in a decision of 6 August 2010. His leave expired on 28 August 2012. On 3 August 2012 the appellant made an application for indefinite leave to remain pursuant to paragraph 276B of the Immigration Rules on the basis of lawful and continuous residence. This application was refused by the Secretary of State in a decision of 10 July 2013. The Secretary of State refused the application on the basis that the appellant was unable to satisfy the requirement in 276 B (i) which requires ten years' continual and lawful residence. According to the Secretary of State he was without leave between 6 February 2010 and 5 August 2010 (when his leave was subsequently varied). In this case the appellant has a gap in continuous and lawful residence of 179 days. According to the Secretary of State the appellant's application (on 1 April 2010) was submitted 53 days out of time and paragraph 276B(v) does not apply to him. (This states that overstaying for 28 days or less will be disregarded for the purposes of 276B). The application was also refused under Appendix FM and paragraph 276ADE relating to the appellant's private life.

3. The appellant appealed against the decision of the Secretary of State and his appeal was dismissed by Judge of the First-tier Tribunal A A Wilson in a determination that was promulgated on 16 September 2014, after a hearing on 4 September 2014. Before Judge Wilson there was the appellant's witness statement and other evidence in support of his appeal.

4. Permission to appeal was granted by Designated Judge of the First-tier Tribunal Baird in a decision of 28 October 2014. Thus the matter came before me, initially on 10 December 2014, but on this occasion I adjourned the matter as a result of lack of court time until 4 February 2015.

The Decision of the FtT

5. The Judge of the First-tier Tribunal made findings which can be found at paragraphs 13 – 18 of his determination:

> "13. The starting position in respect of leave is of course that it takes effect from the date it is granted **AQ (Pakistan) v SSHD [2011] EWCA Civ 833**. Commonly of course persons lodge applications whilst they have leave and having regard to the Immigration Act 1971 Section 3C there is a statutory extension of their leave and during an appeal.

14. I am satisfied that the Appellant became appeal rights exhausted in February 2010 and there was a substantial gap, therefore of 179 days. I am satisfied that the Appellant therefore has a gap in excess of 28 days and therefore his application for indefinite leave to remain based on ten years' continuous lawful residence in the United Kingdom therefore fails.

15. Although it was argued that the Secretary of State should have used her discretion differently it is clear that there was no request for the exercise of the Secretary of State nor any facts put before the Secretary of State that could have led her or a responsible official to conclude that such matters did in fact arise. Indeed nothing has come out in evidence before me even very much later to that effect. I am therefore satisfied there is no reason why it can be argued that the discretion should have been exercised differently.

16. Turning to the question of the appeal against the removal directions I am satisfied having regard to Appendix FM and paragraph 276ADE that the Appellant has not lived in the UK for more than twenty years. I accept that he has lived in the UK now for thirteen years. I am not satisfied that he has lost all family and social cultural ties with his home country Kenya.

17. I am satisfied that at all times the Appellant has only had periods of temporary leave or indeed no leave whilst he has been in the United Kingdom, that he is fit and he is well, he has been successfully academic, there is no reason on the papers before me that he cannot conclude his PhD by research. I accept that his involvement in the Faculty of the City University would be adversely affected by his not being physically present. I accept also that he may well be able to mitigate that, but it would only be mitigation, to some extent through internet and Skype conferences etc.

18. I am satisfied therefore that his appeal against removal under the terms of the Immigration Rules therefore fails. There are no exceptional circumstances that have been drawn to my attention in evidence that could lead me to conclude that the Appellant's case needs to be considered fully and independently outside the Immigration Rules. Nevertheless for the sake of completeness I formally confirm that I am satisfied the Appellant has been in the United Kingdom for thirteen years, that he has established a private life in the UK and the decision of the Respondent does interfere with that. I am satisfied it is a lawful decision made in pursuance of immigration control and that I have regard to the final step which is indeed a proportionate decision having regard to the nature of the Appellant's stay in the United Kingdom, the

fact that it was temporary, the need together with the need to ensure that a fair and efficient transparent system of immigration control that it is a proportionate one. The Appellant's appeal therefore under the Human Rights Convention therefore fails."

The Grounds Seeking Leave to Appeal and Oral Submissions

6. The first ground of appeal argues that the appellant's application of 15 February 2010 was made within ten days of him overstaying. His 3C (section 3C of the 2002 Act) leave expired on 5 February 2010. According to the appellant the application of 15 February 2010 was resubmitted by the appellant on 1 April 2010 and they were one and the same application pursuant to Regulations 16(1) and 17(1) of the Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2007. The appellant's case was that the application of 15 February 2010 was not invalid and therefore he was entitled to the benefit of paragraph 276B (v). The Judge erred in finding that the appellant could not satisfy the requirements of paragraph 276B of the Rules. There was no break in continuous and lawful residence.

7. The second and third grounds of appeal relate to Article 8. The second ground of appeal argues that the Judge failed to take into account a material matter and reference is made to [16] of his determination. The Judge did not take into account that the appellant has lived in the UK for thirteen years and that he was a full-time student with City University in the UK where he has part-time employment and he is studying a PhD. It is argued that the Judge failed to apply the **Maslov** criteria (**Maslov v Austria 1638/03 [2008] ECHR 546**). Ground 3 is in similar terms to ground 2 and again asserts that the Judge failed to take into account material matters.

8. Both parties made submissions. Mr Oboro made submissions in the context of the grounds of appeal and Mr Duffy made submissions in the context of his skeleton argument.

The Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2007

9. The appellant relies on paragraphs 16 and 17 of the 2007 Regulations:

"**Prescribed procedures**

16. -(1) The following procedures are prescribed in relation to an application for which a form is prescribed by regulations 3 to 14:

(a) the form shall be signed and dated by the applicant, save that where the applicant is under the age of eighteen, the form may be signed and dated by the

parent or legal guardian of the applicant on behalf of the applicant;

(b) the application shall be accompanied by such documents and photographs as specified in the form; and

(c) each part of the form shall be completed as specified in the form.

(2) The following procedures are prescribed in relation to delivery of an application for which a form is prescribed:

(a) in relation to an application for which a form is prescribed by regulation 3, the application shall be sent by prepaid post or by courier to the Border and Immigration Agency of the Home Office; it may not be submitted in person at a public enquiry office,

(b) in relation to an application for which a form is prescribed by regulation 4, the application shall be:

(i) sent by prepaid post or by courier to Work Permits (UK) at the Border and Immigration Agency of the Home Office, or

(ii) submitted in person at the Croydon public enquiry office (but no other public enquiry office),

(c) in relation to an application for which a form is prescribed by regulation 5, the application shall be sent by prepaid post or by courier to Work Permits (UK) at the Border and Immigration Agency of the Home Office, and may not be submitted in person at a public enquiry office,

(d) in relation to an application for which a form is prescribed by regulations 6 to 12 and regulation 14, the application shall be:

(i) sent by prepaid post to the Border and Immigration Agency of the Home Office, or

(ii) submitted in person at a public enquiry office,

(e) in relation to an application for which a form is prescribed by regulation 13, the application shall be sent by prepaid post to the Border and Immigration

Agency of the Home Office; it may not be submitted in person at a public enquiry office.

17. -(1) A failure to comply with any of the requirements of regulation 16(1) to any extent will only invalidate an application if:

(a) the applicant does not provide, when making the application, an explanation for the failure which the Secretary of State considers to be satisfactory,

(b) the Secretary of State notifies the applicant, or the person who appears to the Secretary of State to represent the applicant, of the failure within 28 days of the date on which the application is made, and

(c) the applicant does not comply with the requirements within a reasonable time, and in any event within 28 days, of being notified by the Secretary of State of the failure.

(2) For the purposes of this regulation, the date on which the application is made is:

(a) in the case of an application sent by post, the date of posting,

(b) in the case of an application submitted in person, the date on which the application is delivered to, and accepted by, a public enquiry office, and

(c) in the case of an application sent by courier, the date on which the application is delivered to Work Permits (UK) at the Border and Immigration Agency of the Home Office."

The Immigration Rules

10. Mr Duffy in his skeleton argument and oral submissions relied on Rule 34 of the Immigration Rules, specifically 34A and 34C:

"34A. Where an application form is specified, the application or claim must also comply with the following requirements:

(i) Subject to paragraph A34 the application or claim must be made using the specified form,

(ii) any specified fee in connection with the application or claim must be paid in accordance with the method

specified in the application form, separate payment form and/or related guidance notes, as applicable,

(iii) any section of the form which is designated as mandatory in the application form and/or related guidance notes must be completed as specified,

(iv) if the application form and/or related guidance notes require the applicant to provide biometric information, such information must be provided as specified,

(v) an appointment for the purposes stated in subparagraph (iv) must be made and must take place by the dates specified in any subsequent notification by the Secretary of State following receipt of the application, or as agreed by the Secretary of State,

(vi) where the application or claim is made by post or courier, or submitted in person:

(a) the application or claim must be accompanied by the photographs and documents specified as mandatory in the application form and/or related guidance notes,

(ab) those photographs must be in the same format specified as mandatory in the application form and/or related guidance notes, and

(b) the form must be signed by the applicant, and where applicable, the applicant's spouse, civil partner, same-sex partner or unmarried partner, save that where the applicant is under the age of eighteen, the form may be signed by the parent or legal guardian of the applicant on his behalf,

...

34C. Where an application or claim in connection with immigration for which an application form is specified does not comply with the requirements in paragraph 34A, or where an application for leave to remain in the United Kingdom is made by completing the relevant online application process, and does not comply with the requirements of paragraph A34(iii), the following provisions apply:

(a) Subject to sub-paragraph (b), the application will be invalid if it does not comply with the relevant requirements of A34(iii) or 34A, as applicable, and will not be considered. Notice of invalidity will be given in writing

and deemed to be received on the date it is given, except where it is sent by post, in which case it will be deemed to be received on the second day after it was posted excluding any day which is not a business day, unless the contrary is proved.

(b) The decision maker may contact the applicant or their representative in writing and give the applicant a single opportunity to correct any omission or error which renders the application invalid. The amended application and/or any requested documents must be received at the address specified in the request within 10 business days of the date on which the request was sent."

Conclusions

11. This was an application under the points-based system and it does not appear to me that the 2007 Regulations apply in these circumstances. I refer to the Statement of Changes in Immigration Rules HC 321 which contains the relevant Rules and in my view Rule 34 A (iii) and 34C apply. It follows that the application of 15 February 2010 was invalid. There is a significant gap in the appellant's leave as identified by the respondent and found by the Judge.

12. The grounds of appeal for permission relating to Article 8 are misconceived. There is no reference to paragraph 276ADE in the permission application but Article 8 generally is raised. The evidence before the Judge relating to the appellant having no ties with Kenya was skeletal. There is a bare assertion made in his witness statement. The appellant accepted in evidence before the FtT that his mother resides in Kenya. Mr Oboro referred to the case of **Bossadi (paragraph 276ADE; suitability; ties) [2015] UKUT 00042 (IAC)**, but in my view it was of no assistance to the appellant. It was open to the Judge to conclude that the appellant could not meet the requirement of paragraph 276 ADE (vi). The fact that the appellant has been here for thirteen years alone is obviously not enough to meet the requirement. It was up to the appellant to submit evidence relating to this aspect of his appeal.

13. The Judge found that there were no exceptional circumstances that would necessitate a consideration of Article 8 outside the Rules. The issue is whether or not he considered all aspects relevant to a proportionality assessment and I find that he did. The grounds are misconceived in relying on the case of **Maslov**. The facts in that case are not analogous and relate to a decision to deport an appellant who had been in the UK since childhood.

14. The appellant has done very well here in the UK. He has studied successfully and achieved educationally. He has made the most of his

time here but there is no reason to suggest that the Judge did not take this into account. There was no evidence before the Judge that the appellant could not complete his research in Kenya and I refer specifically to [17] and [18]. The Judge was mindful of the fact that the appellant had been here lawfully and for a significant period. The decision is consistent with the judgment of the Supreme Court in **Patel & Ors v SSHD [2013] UKSC 72** and I make specific reference to [57] of **Patel**, which reads as follows:

> "It is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the Rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the Rules are not reviewable on appeal: Section 86(6). One may sympathise with Sedley LJ's call in **Pankina** for 'commonsense' in the application of the Rules to graduates who have been studying in the UK for some years (see para 47 above). However, such considerations do not by themselves provide grounds of appeal under Article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under Article 8."

15. In considering whether there is an error of law I have had regard to **Nasim and others (Article 8) [2014] UKUT 00025 (IAC)** and the Upper Tribunal's consideration of Article 8 in the context of work and studies and one's private life, the effect of not having committed offences, legitimate expectation and the scope of **CDS (Brazil) (PBS "available" Article 8) Brazil [2010] UKUT 305 (IAC)**.

16. The decision of the Judge is consistent with relevant jurisprudence and the grounds fail to establish a material error of law. The decision to dismiss the appeal under the Immigration Rules and Article 8 stands.

Notice of Decision

The appeal is dismissed

Signed Joanna McWilliam Date 9 February 2015

Deputy Upper Tribunal Judge McWilliam