



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/37891/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 14 September 2015**

**Decision & Reasons Promulgated
On 15 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

v

Mr Joseph GALEH

Respondent

Representation:

For the Appellant: Mr S Jeshani, counsel, instructed by Aston Brooke solicitors

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

ERROR OF LAW DECISION & REASONS

1. The Respondent is a national of Ghana, born on 12.1.66. He arrived in the UK on 5.10.04 with a student visa and was last granted leave to remain until 30.7.12 also as a student. On 27.7.12 he applied for leave to remain in the UK on the basis of his private life. This application was refused on 22.8.13. The hearing of his appeal came before First Tier Tribunal Judge Wylie for hearing on 6 January 2015. The Respondent's counsel sought an adjournment to enable the Secretary of State to conduct checks, given that the Respondent had on 24.12.14 lodged additional grounds of appeal asserting that he had been lawfully and continuously resident in the UK for more than 10 years and thus qualified under paragraph 276B/276A1 of the Immigration Rules.

2. The case was put back in order that the Home Office Presenting Officer could take instructions, but in the event she opposed the adjournment request and the appeal proceeded. The Respondent had not yet undertaken the Life in the UK test although he had a date of 20.1.15 but the Home Office had retained his passport. Aside from that it was contended that he satisfied the requirements for Indefinite Leave to Remain. The Judge heard evidence from the Respondent. He then proceeded to dismiss the appeal on the basis of his private life but found at [20] that the Respondent had been continuously resident in the United Kingdom for ten years from 5.10.04 and that he was entitled to an extension of stay under paragraph 276A1 [21]. The Judge went on to find that the requirements of paragraph 276B(i)(ii) and (v) are met [23] and allowed the appeal under the immigration rules.

3. The Secretary of State applied for permission to appeal on 6.3.15. The grounds in support of the application asserted that the Judge had erred materially in law in that: (i) at the point of application the Respondent was some way off achieving 10 years continuous residence and has only achieved such through 3C and (ii) in allowing the appeal under paragraph 276A2 the Judge failed to properly consider paragraph 276B(ii) which requires the SSHD to exercise discretion in relation to the public interest, this involves carrying out background checks and as the original application was not made in respect of paragraph 276B the SSHD had not been able to carry out the necessary checks in order to consider exercising discretion. Therefore, the Judge erred in exercising discretion when allowing the appeal under paragraph 276A2: Ukus (discretion: when reviewable) [2012] UKUT 00307. It was submitted that the correct approach would have been for the Judge to find that the decision was not lawful and to have then left the matter of discretion to the SSHD. Permission to appeal was granted by First Tier Tribunal Judge Lambert in general terms.

4. At the hearing before me, Mr Clarke made submissions in line with the grounds of appeal and provided a copy of the decision in Ukus (discretion: when reviewable) [2012] UKUT 00307. Mr Jeshani then provided a copy of his rule 24 response and sought to defend the Judge's decision to allow the appeal outright.

5. I then gave my decision, which is that the First Tier Tribunal Judge erred materially in law in allowing the appeal under the Immigration Rules, given that the SSHD had not had the opportunity to consider the long residence application under paragraph 276A2 and 276B, because it only came into being during the currency of the appeal process. It is clear from Ukus (discretion: when reviewable) [2012] UKUT 00307 that the correct approach when discretion has not been exercised by the decision maker, that the Tribunal's jurisdiction on appeal is limited to a decision that the failure renders the decision "*not in accordance with the law.*" The First Tier Tribunal Judge did consider the documentary and oral evidence in coming to his decision that the requirement of paragraph 276B(i) (ii) and (v) are met but in so doing acted outwith his jurisdiction in that it is a matter for the SSHD to consider whether "*having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of*

long residence.”

6. For the avoidance of doubt, I do not consider there to be any substance in the first of the SSHD’s grounds of appeal as to when the application for long residence was made, given that the Home Office guidance on long residence at page 28 is clear that: *“A person may complete 10 years continuous lawful residence whilst they are awaiting the outcome of an appeal and submit an application on this basis. Under sections 3C and 3D, it is not possible to submit a new application while an appeal is outstanding. However, the applicant can submit further grounds to be considered at appeal.”*

7. The findings of fact by the First Tier Tribunal Judge were not impugned by the Secretary of State in her application for permission to appeal. Therefore, whilst the First Tier Tribunal Judge erred materially in law in allowing the appeal outright, I substitute a decision allowing the appeal on the basis that the decision was not in accordance with the law and the appeal is consequently remitted back to the Secretary of State to consider the exercise of her discretion in respect of the Appellant’s continuous residence for 10 years, with reference to paragraph 276B (i) (ii) and (v) of the Immigration Rules.

Deputy Upper Tribunal Judge Chapman

14 September 2015