Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02427/2015

THE IMMIGRATION ACTS

Heard at : (UT)IAC Birmingham	**Decision Promulgated**
On : 12 June 2017	**On : 14 June 2017**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ASHWANT SHIBDOYAL

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Mr N Ahmed, instructed by Ishwar Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Shibdoyal's appeal against the respondent's decision to refuse his application for indefinite leave to remain on long residence grounds and to refuse his human rights claim.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Shibdoyal as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

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3. The appellant is a citizen of Mauritius born on 11 June 1983. He entered the United Kingdom on 6 June 2004 with entry clearance as a student valid until 30 September 2006 and was granted further leave to remain as a student until 31 October 2007. On 30 October 2007 he applied for further leave to remain as a student but his application was rejected as invalid. He then made a valid application on 16 November 2007 which was refused on 10 January 2008 on the basis that he had failed to show evidence of satisfactory progress on his CIMA course of study, having failed a significant number of his examinations.

4. The appellant unsuccessfully appealed against that decision. At a hearing before Judge Petherbridge on 26 February 2008 he conceded that he could not succeed under the rules because of his examination failure but relied on a letter from a different college which stated that it was believed that he could pass his examinations if he was offered another chance. Judge Petherbridge dismissed the appeal on 7 March 2008 and commented that it was open to the appellant to bring the college letter to the respondent's attention in a fresh application for consideration outside the immigration rules.

5. The appellant then wrote to the Home Office on 11 March 2008 requesting that his application be reconsidered outside the immigration rules. In the meantime, on 17 March 2008 he became appeal rights exhausted. In an undated letter of reply, which is said to have been sent on 12 June 2008, the respondent declined to exercise discretion in the appellant's favour or to take any further action and suggested the option of making a fresh application for leave outside the rules.

6. On 2 July 2008 the appellant applied for leave to remain outside the immigration rules on form FLR(O). His application was treated as a student application and he was granted Tier 4 leave on 23 October 2009 until 30 April 2010. Further periods of leave as a Tier 4 student were granted until 30 April 2015. On 12 August 2014 the appellant applied for indefinite leave to remain on the basis of completing 10 years continuous lawful residence. His application was refused on 22 December 2014 with no right of appeal.

7. On 21 April 2015 the appellant applied again for ILR on the basis of 10 years continuous lawful residence. His application was refused on 16 July 2015 on the basis that he was without lawful leave in the UK from 14 November 2007 until the next grant of leave on 23 October 2009 and therefore had not demonstrated 10 years continuous lawful residence and did not satisfy the requirements of the immigration rules in paragraph 276B(i). The respondent went on to consider the appellant's family life and private life but considered that the criteria in Appendix FM and paragraph 276ADE(1) could not be met. The respondent considered that there were no exceptional circumstances justifying a grant of leave outside the immigration rules.

8. Prior to that decision, and in response to the appellant's request for reconsideration of the decision of 22 December 2014, the respondent accepted that the appellant's application of 16 November 2007 was wrongly recorded as out of time and considered that the appellant's period of 3C leave ended on 17

March 2008 and that the relevant period of time in the UK without lawful leave was therefore 18 March 2008 until 23 October 2009.

9. The appellant appealed against the decision of 16 July 2015. His appeal was heard by First-tier Tribunal Judge Hollingworth on 23 September 2016 and was allowed in a decision promulgated on 7 October 2016. Judge Hollingworth considered that the appellant’s reconsideration request of 11 March 2008, which had been made within the period for seeking permission to appeal, extended the appellant’s 3C leave until the decision of 12 June 2008. He considered that since the 2 July 2008 application was made within 28 days of the 12 June 2008 decision, the period from 12 June 2008 until 2 July 2008 fell within paragraph 276B(v) as being a period of overstaying which was to be disregarded for the purposes of calculating the 10 years of continuous lawful residence. He concluded that the appellant was not without lawful leave and had established 10 years of continuous lawful residence. The judge considered that the appellant’s ability to meet the requirements of the immigration rules was a weighty matter in assessing proportionality under Article 8 and that the interference with the appellant’s private life caused by the refusal decision was disproportionate and in breach of Article 8. He allowed the appeal.

10. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge had arguably erred by considering the appellant’s correspondence of 11 March 2008 as an application for the purposes of the immigration rules. The grounds asserted that the correspondence was not an application and that the appellant was unlawfully in the UK between 17 March 2008 and 2 July 2008. The judge’s error had infected the remainder of his decision.

11. Permission to appeal was granted on 4 January 2017.

Appeal Hearing

12. Mr Mills expanded upon the grounds, submitting that the judge had erred by considering the 11 March 2008 letter as an application triggering section 3C leave, whereas it clearly was not an application complying with the Immigration (Leave to Remain)(Prescribed Forms and Procedures) Regulations 2006. The appellant’s leave ended when he became appeal rights exhausted on 17 March 2008 and he made his subsequent application outside the relevant 28 day period. He was therefore without lawful leave from 18 March 2008 to 23 October 2009. The judge was therefore wrong to allow the appeal under the immigration rules and that in turn infected his Article 8 findings.

13. Mr Ahmed said that he was not running the 3C argument and I summarise his submissions as follows. He submitted that the long residence rule did not require the appellant to have made a valid application for the provisions to bite and that, provided there was a pending application before the Secretary of State, such as the appellant’s request for the exercise of discretion in his favour, that was sufficient for the purposes of paragraph 276B. The judge was entitled to come to the conclusion that he did on the basis that he was satisfied

that the appellant had been trying throughout to regularise his status. The absence of any deliberate or intentional breach of the immigration rules weighed in the appellant's favour and the judge was therefore entitled to allow the appeal on Article 8 grounds.

14. I advised the parties that in my view the judge had materially erred in law by considering the 11 March 2008 letter as an application extending the appellant's leave under section 3C. I agreed with the respondent that the appellant had had no leave between 18 March 2008 and 23 October 2009 and was unlawfully in the UK throughout that period so that he could not succeed in demonstrating 10 years of continuous lawful residence. The judge was wrong to find that the appellant could meet the requirements of paragraph 276B and this in turn infected his proportionality assessment under Article 8. I therefore set aside the judge's decision and asked the parties how they would wish me to re-make the decision. Both were content to make further submissions and Mr Ahmed confirmed that the appellant's circumstances had not changed and that there was no further evidence to be considered. I then heard further submissions with a view to re-making the decision.

15. Whilst Mr Ahmed's submission was that the respondent had failed to carry out an exercise of discretion under paragraph 276B, Mr Mills submitted that discretion had been considered in accordance with the Long Residence Guidance, as found at page 172 of the appellant's appeal bundle. There was nothing in the appellant's circumstances to meet the scenarios given in the guidance to justify the exercise of discretion in his favour. There was nothing exceptional about the appellant's circumstances. In any event the respondent had clearly considered the question of discretion and had reconsidered the appellant's application in her letter of 27 May 2015. The appellant could not succeed on an Article 8 claim outside the rules on private life grounds. As a student his leave was always precarious and accordingly little weight could be attached to his private life.

16. Mr Ahmed said that discretion had not been properly considered. The appellant's removal was not in the public interest. He had been in the UK lawfully, he spoke English and was well integrated and not a burden on the taxpayer. Mr Ahmed referred to the respondent's delay in considering the appellant's application and the fact that the GCID notes at page 57 showed that it was decided to consider his application as one for student leave and to grant leave on 23 October 2009.

17. At this point the appellant passed Mr Ahmed a further document showing his admission notice to examinations in May 2017. Mr Ahmed said that his circumstances had otherwise not changed and that he was simply awaiting the outcome of this appeal.

Consideration and Findings

18. I have to confess to having had some difficulty in following Mr Ahmed's submissions which appeared to include a concession that section 3C leave was

not a matter being relied upon but to then proceed on the basis that the appellant was nevertheless able to meet the requirements of paragraph 276B given that any periods without leave were spent seeking to regularise his status. I did not, in any event, find merit in his submissions.

19. It is plain that the appellant’s letter of 11 March 2008 was not an application triggering 3C leave. It was merely a request for reconsideration of his original application, following the suggestion made by Judge Petherbridge. Neither was the respondent’s response of 12 June 2008 an immigration decision, but it was merely a refusal by the respondent to take any further action in the appellant’s case followed by an advice to make a fresh application if he required there to be consideration of his position outside the immigration rules. In any event, as I advised the parties, the appellant was not able to make a valid application whilst his appeal was still pending, further to section 3C(4) of the Immigration Act 1971. Accordingly the appellant’s lawful residence, and his 3C leave, came to an end when his appeal rights were exhausted on 17 March 2008. The next valid application made was on 2 July 2008, which was more than 28 days later and was therefore made at a time when he was an overstayer.

20. As to the exercise of discretion by the respondent in regard to the gap in the appellant’s residence between 18 March 2008 and 23 October 2009, the Home Office guidance makes it clear that there must be exceptional reasons for an application to have been made more than 28 days out of time. Mr Ahmed’s submission in that respect was, I believe, that the respondent had failed to consider the exercise of discretion and that discretion ought to have been exercised in the appellant’s favour because he was following the advice of Judge Petherbridge in requesting a reconsideration and was seeking to regularise his status throughout the relevant period. However it is clear that the respondent did consider the exercise of discretion but declined to exercise it in the appellant’s favour. The respondent considered whether to exercise discretion in relation to the decision refusing further student leave, as seen in her reply of 12 June 2008 (page 73 of the appeal bundle) and considered discretion when reconsidering the 22 December 2014 decision to refuse ILR in her letter of 27 May 2015. In the decision of 16 July 2015 consideration was given to whether there were any exceptional circumstances arising in the appellant’s case, albeit in the context of Article 8. In any event there clearly were no exceptional reasons justifying a grant of discretion in the appellant’s favour in respect of the gap in his lawful residence. Mr Ahmed relied on the GCID notes at page 57 as providing some justification given that the caseworker decided to change his status back to that of a student following his application outside the immigration rules when granting leave in October 2009. However it is relevant to note that the following entries, which Mr Ahmed did not draw to my attention, refer to the appellant’s continued failure in his examinations. Indeed it is not clear why leave was granted in October 2009.

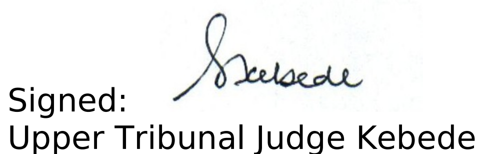
21. Accordingly the appellant plainly could not meet the requirements of paragraph 276B on the basis of 10 years continuous lawful residence. It is not suggested that he is able to meet the criteria in paragraph 276ADE(1) and I

find there to be nothing in the evidence to suggest that there are any compelling circumstances justifying a grant of leave outside the rules or that the appellant's removal would be disproportionate and in breach of Article 8. Although Judge Hollingworth took into account the appellant's ties to the UK in terms of his employment, education and friends, there is in fact limited evidence of such ties and the bundle of documents, whilst referring to the appellant's registration for examinations, does not actually include any evidence of educational achievements or qualifications. The admissions notice submitted by the appellant at the hearing before me shows no more than the appellant is continuing to take examinations some eight years after the appeal before Judge Petherbridge. In accordance with section 117B(5) little weight is to be accorded to the appellant's private life in any event, and the fact that he speaks English and is financially independent are neutral factors.

22. For all of these reasons the appellant cannot succeed in his Article 8 claim. He has no current basis of stay and plainly any interference with his private life in the UK would be proportionate and in the public interest. I therefore dismiss his appeal on human rights grounds.

DECISION

23. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed and the decision of the First-tier Tribunal is set aside as stated above. I re-make the decision by dismissing Mr Shibdoyal's appeal.

Signed: 

Upper Tribunal Judge Kebede   Dated: 13 June 2017