



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/03140/2016

THE IMMIGRATION ACTS

Heard at Birmingham  
On 3 May 2018

Decision & Reasons Promulgated  
On 5 June 2018

Before

UPPER TRIBUNAL JUDGE LANE

Between

HUSSAIN AHMED  
(NO ANONYMITY DIRECTION)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sarwar, instructed by Justmount & Co Solicitors  
For the Respondent: Ms Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Hussain Ahmed, was born on 22 February 1981 and is a male citizen of Bangladesh. He appeals against the decision of the respondent dated 21 January 2016 to refuse his human rights claim. His appeal to the First-tier Tribunal (Judge Astle) which was promulgated on 30 January 2017, was dismissed. The appellant now appeals, with permission, to the Upper Tribunal.
2. There were two issues before the First-tier Tribunal. First, the appellant's leave had been curtailed by a decision dated 30 March 2012 and an appeal to the First-tier Tribunal led to the decision being "remitted back" to the Secretary of State for

reconsideration. The decision was remade on 19 December 2014 and the appellant was served with enforcement papers (IS151A) on the basis that he had perpetrated deception in order to obtain leave. That decision appears to have been withdrawn on 29 May 2015 the appellant having, on 26 January 2015, applied for indefinite leave to remain on the basis of long residence. One of the issues before the First-tier Tribunal was that concerned with the refusal under paragraph 322(2) of HC 395 (as amended). The Secretary of State alleged that the appellant had perpetrated deception in an ETS test. The appellant denied having done so. On that issue, Judge Astle found in favour of the appellant. The remaining issue before the First-tier Tribunal was that of long residence. On that issue, the judge found against the appellant.

3. Mr Sarwar, who appeared for the appellant before both the First-tier Tribunal and the Upper Tribunal, provided a helpful skeleton argument for the Upper Tribunal hearing. Mr Sarwar submits that the appellant undoubtedly had invalid leave to remain until 30 April 2009. The appellant claims that before the expiry of his valid leave on that date he had made a further application for leave. The application had been made on the form FLR(S) which had become obsolete by the time of the application. The appellant claims that the application was returned to him as invalid and he has now produced a copy of a letter purportedly from UK Border Agency dated 30 April 2009 indicating the same. The appellant claims that he then made an application under Tier 4 on the correct form on 11 May 2009. That application was made within 28 days of the returned invalid application. The appellant relies on paragraph 276B(v) of HC 395 which provides as follows:

The applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period.

4. On 10 July 2009, the Secretary of State refused the appellant's 11 May 2009 application. He was given no right of appeal. The appellant submitted a further application on 23 July 2009 and, by a decision dated 11 September 2009, the Secretary of State granted the appellant leave to remain until 1 June 2010.
5. The appellant argues that he would not have been granted leave in respect of that subsequent application if he had overstayed for a period in excess of 28 days. I disagree. The submission amounts to nothing more than speculation. We have no evidence to show that the Secretary of State granted the appellant leave on the later application for that or, indeed, any other reason. It was a matter wholly within the discretion of the Secretary of State. It is also unclear why the appellant was not granted a right of appeal on his July 2009 decision. However, the appellant seems to have made no complaint about having been granted no right of appeal; in all the circumstances, it appears that he did have valid leave to remain when he made the application and in consequence had no right of appeal to the First-tier Tribunal.
6. However, there is a greater problem for the appellant. The letter purportedly written by the Secretary of State to the appellant on 30 April 2009 was not before the First-tier Tribunal judge. In his skeleton argument, Mr Ahmed complains that that was the fault

of the Secretary of State but I am reminded that it was for the appellant to prove his case before the First-tier Tribunal; if he had the copy letter (and there was no evidence to suggest that he did not have it at the time of the hearing before the First-tier Tribunal) then he should have produced it to Judge Astle. Instead, no reference to the letter appears to have been made before the First-tier Tribunal.

7. It would seem that the appellant had not given full instructions to his solicitors and to Mr Ahmed before the First-tier Tribunal. He has failed to provide any explanation for his failure to bring the letter to their attention or to that of the judge.. Ms Aboni, who appeared for the Secretary of State before the Upper Tribunal, told me that she had checked the computer files of the Home Office but could find no record at all of the letter of 30 April 2009; it would appear that the Secretary of State could not have produced the letter even if there had been any obligation her to do so.
8. I make no finding as to the authenticity of the letter of 30 April 2009 now produced by the appellant. I do observe, however, that (i) the appellant has not explained why the letter has not been produced before the First-tier Tribunal or its existence revealed to his own legal advisers; (ii) Judge Astle cannot be criticised for failing to take account of evidence which was not before her. On the evidence before her, the judge was correct to find that the appellant could not demonstrate 10 years of continuous lawful residence. In the light of that finding, her subsequent findings at [23–24] as regards Article 8 ECHR are, in my opinion, incontrovertible.

**Notice of Decision**

9. This appeal is dismissed.
10. No anonymity direction is made.

Signed

Date 28 MAY 2018

Upper Tribunal Judge Lane

**TO THE RESPONDENT**  
**FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 28 MAY 2018

Upper Tribunal Judge Lane