



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

**Appeal Number: HU/05702/2018**

**THE IMMIGRATION ACTS**

**Heard at Manchester**

**On October 2, 2018**

**Decision & Reasons  
Promulgated**

**On 19 October 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ALIS**

**Between**

**MR MUHAMMAD KAMRAN  
(NO ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Ahmed, Counsel, instructed by Rivington Solicitors

For the Respondent: Mr Tan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. No anonymity order is made.
2. The appellant is a national of Sri Lanka. The appellant entered the United Kingdom as a partner of a Tier 1 (General) Migrant on June 7, 2011 and his leave to remain was subsequently extended until June 7, 2016.
3. The appellant then lodged an application for indefinite leave to remain as the partner of a Tier 1 (General) Migrant on May 27, 2016 but this was refused by the respondent on July 11, 2017.

4. The appellant lodged an application for indefinite leave to remain as a dependant of a Tier 1 (General) Migrant on July 27, 2017 which he subsequently varied to an application under paragraph 276B HC 395 of October 4, 2017. This was refused by the respondent on February 15, 2018.
5. The appellant lodged grounds of appeal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on February 27, 2018.
6. His appeal came before Judge of the First-tier Tribunal Siddiqi (hereinafter called "the Judge") on May 10, 2018 and in a decision promulgated on May 17, 2018 she dismissed his appeal under article 8 ECHR.
7. The appellant appealed this decision on May 30, 2018. Permission to appeal was granted on August 8, 2018 by Judge of the First-tier Tribunal Adio who found it arguable the Judge procedurally erred by failing to allow the appellant's witness the opportunity to explain the case on the appellant's behalf and failed to resolve the issue of whether the appellant had lived continuously in the United Kingdom for ten years and whether the issue of compelling circumstances could have been resolved in the appellant's favour by the Judge exercising her own discretion.
8. No Rule 24 response was filed.

### **SUBMISSIONS**

9. Mr Ahmed submitted that there had been a number of errors both at the hearing and in the Judge's decision which had created confusion and led the appellant to wonder why he had lost his appeal. It was clear from the Judge's decision that she had doubts about aspects of the decision letter and Mr Ahmed submitted that the Judge should have adjourn the matter to enable a Presenting Officer to attend and address those concerns.
10. Mr Ahmed further argued the appellant's wife had been prevented from assisting her husband in his representations and this was procedurally unfair. He concluded his submissions by submitting the key issue was whether the appellant's absence from the United Kingdom was due to unavoidable circumstances because if it was this would carry weight in any article 8 assessment.
11. Mr Tan opposed the application and submitted that there was a large appellant bundle that set out the appellant's claim and this was not a case where the case proceeded without any evidence. The Judge was aware of why the appellant had been absent from the United Kingdom for 235 days and the Judge was well within her rights to uphold the respondent's decision. He also pointed out that inadequate reasoning was not something that had been raised in the grounds of appeal.

### **FINDINGS**

12. This was a case where the appellant had lawfully entered the United Kingdom on October 13, 2007 as a student. He had been given extended leave to remain in this country but on October 14, 2010 he left the United

Kingdom and returned to Sri Lanka and on December 2, 2010 he made an application for entry clearance as a partner of a Tier 1 General Migrant. He was not issued a visa until May 20, 2011 and the delay meant that he was absent from the United Kingdom for more than the permitted 180 days-the permitted period of absence in an application for indefinite leave to remain under paragraph 276B HC 395.

13. I pointed out to Mr Ahmed that at the date of application the appellant had not accrued ten years residence in the United Kingdom because of when he had submitted the application. He had submitted his application at least nine days short of the qualifying 10-year period. The application under paragraph 276B HC 395 could not have succeeded.
14. The grounds of appeal raised an issue concerning the Judge preventing the appellant's witness from giving evidence. I have reviewed the Judge's hand-written notes and find nothing in those notes that supports such an argument. There is clear reference in the notes to the wife giving oral evidence. I find no merit on this ground of appeal.
15. Mr Ahmed argued the Judge should have adjourned the case but for the reasons set out above I am satisfied that adjourning the matter would have achieved nothing because the respondent's letter made it clear that the appellant could not demonstrate ten years continuous residence regardless of any absence from the United Kingdom.
16. Mr Ahmed has submitted (a) The Judge erred by not making a finding that the appellant's absence from the United Kingdom had been unavoidable and (b) The Judge had not carried out a full balancing act on proportionality.
17. The first issue would not have assisted the Judge in deciding whether the appellant was entitled to indefinite leave to remain because the appellant had not completed ten years continuous residence. Mr Ahmed wanted an indication from this Tribunal that the 55-day period over and above the permitted 180 days should not have broken the continuous residence.
18. Paragraph 276B(i)(a) HC 395 makes it clear that the appellant must have completed 10 years continuous and lawful residence. As the appellant applied too early the respondent did not have to consider whether there were "compelling or compassionate circumstances".
19. Mr Ahmed invited me to make a finding on this period of delay and to conclude that there were compelling or compassionate reasons for excusing the excess absence. I do not feel it necessary to make such a finding because an application under paragraph 276B HC 395 was not being considered by either the Judge or the respondent because at the date of application the appellant had not accrued ten years residence.
20. If the appellant wishes to submit a fresh application for indefinite leave to remain under paragraph 276B HC 395 then the respondent will be required to consider the explanation further.

21. The final issue is whether the Judge gave due consideration to all the factors pertinent to an article 8 claim. The Judge noted the points that were put forward by the appellant and his wife at paragraphs 26 and 27 of her decision. The Judge took into account:
  - (a) The appellant spent 25 years living in Sri Lanka before he came to the United Kingdom.
  - (b) Both the appellant and his wife are Sri Lankan nationals and are well educated and had demonstrated an ability to obtain employment.
  - (c) They both speak the national language and there was nothing to prevent them returning to their country of nationality
22. The Judge took all factors into account and concluded there were no very significant obstacles to their integration. The Judge's finding at paragraph 27 was one that was open to her.
23. The Judge went on to consider the application under article 8 and at paragraph 28 of her decision the Judge assessed section 117B factors. At paragraph 30 the Judge, whilst accepting private life had been developed, found that as the appellant had not satisfied the Immigration Rules there were no compelling circumstances that would make removal disproportionate. The findings on article 8 were open to the Judge.
24. The appellant does of course have the option of submitting an application for indefinite leave to remain and whilst it is a matter for the respondent as to how he treats the 235-day absence I would expect the respondent to take into account all the circumstances including any delay that was occasioned by his office when considering such an application.

## **DECISION**

25. There is no error in law and the original decision shall stand.

Signed

Date 09/10/2018



Deputy Upper Tribunal Judge Alis