Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06600/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 October 2019	**On 5 November 2019**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

Ronald Migiro Ombui
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Rehman, of Counsel, instructed by Lawfare Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before me following the grant of permission to appeal by Upper Tribunal Judge S Smith on 9 September 2019, against the determination of First-tier Tribunal Judge Rose. Judge Rose heard the appeal at Hatton Cross on 4 June 2019 and dismissed it in a determination promulgated on 25 June 2019.

2. The appellant is a Kenyan national born on 14 December 1985. He appeals against the respondent's refusal to grant him indefinite leave to remain on the basis of ten years of continuous lawful residence. For that reason, his immigration history is important and is set out in detail below.

3. The appellant entered the UK as a student on 30 May 2008 with leave until 31 October 2011. An in-time application made on 27 October 2011 was refused on 31 January 2012. It is then unclear whether or not the appellant was given a right of appeal. According to the respondent he was given a limited right of appeal under s.82(1) because he had sought leave for a purpose not covered by the rules. The appellant's representatives, however, maintain that there was no right of appeal at all. At the hearing before me, Ms Everett was able to confirm from the January 2012 decision notice that there had been a limited right of appeal. The appellant chose not to exercise that and, instead, asked for reconsideration of the decision on 19 March 2012 (not on 10 April 2012 as the respondent claimed but perhaps processed on that date). That request was refused on 2 or 6 May 2014, this time with an in country right of appeal. The appellant lodged an appeal, but it was dismissed on 6 February 2015, permission to appeal was refused on 14 April 2015 (served on 23 April 2015) and the appellant's appeal rights were exhausted on 11 May 2015. On 29 May 2015, he made a further application for leave which was granted on 23 July 2015 with leave to remain until 22 January 2018. On 6 January 2018, the respondent received the appellant's application for indefinite leave to remain based on ten years' lawful residence. This was refused on 15 November 2018 as the appellant had not accrued ten years at the time he made that application. The appellant then made a further application on the same basis on 21 November 2018. This was refused on 27 March 2019. On the same date, he was granted immigration bail.

4. The respondent's case is that the appellant was without leave between 31 January 2012 and 23 July 2015 and that he did not have 3C leave during that period. The appellant's case is that he had temporary admission between January 2012 and July 2015 and that is lawful residence under paragraph 276A(b)(ii). Evidence of reporting for temporary admission has been adduced to cover the period from 7 May 2014 until the grant of leave in July 2015. Additionally, he argues that the fact that the respondent gave him an in country right of appeal when she agreed to his request for reconsideration means that the original decision of January 2012 was defective and superseded

by the later decision in May 2014 and that he therefore had 3C leave during that period of time.

5. Judge Rose, in deciding the appeal, found that the appellant's 3C leave ended in January 2012 and that he had been without leave until 23 July 2015 when he had been granted further leave. He found that the appellant had not accrued ten years of continuous lawful residence.

6. The appellant sought permission to appeal and his application was granted on the basis that the judge had arguably erred by not taking account of the period during which the appellant had had temporary admission which should have been classed as lawful residence under the terms of the Immigration Rules. It was clarified at the hearing before me, that the rule referred to by the appellant's representatives in the grounds was incorrectly stated and that the definition of lawful residence was contained in paragraph 276A(b)(ii). The repeated references to Pakistan in the skeleton argument (for eg. at paragraph 14) are plainly also careless errors by his representatives.

The Hearing

7. The appellant attended the hearing at which I heard submissions from the parties. For the appellant, Mr Rehman relied upon the grounds. He argued that after the appellant's application was refused under paragraph 322(1) on 31 January 2012, the appellant sought reconsideration of his application on 19 March 2012. He submitted that the respondent, whilst refusing the application in May 2014, gave the appellant an in-country right of appeal which meant that she had considered the original decision to be defective. For that reason, he argued, this decision superseded the earlier one and 3C leave continued. I pointed out to Mr Rehman that the request for reconsideration was made some 7 weeks after the January 2012 refusal but he submitted that the respondent had not raised any issue over that gap when she made her May 2014 decision. he maintained that meant she had used her discretion and so the gap should be overlooked when the period of long residence was calculated.

8. As an alternative argument, Mr Rehman submitted that the appellant had been on temporary admission since 2012. He submitted that that claim had not been challenged by the Secretary of State at the hearing as could be seen from paragraph 14 of the determination. I suggested to Mr Rehman that the absence of challenge was to the appellant's oral

testimony as set out at paragraphs 11-13 of the determination and there was no reference therein to temporary admission. Mr Rehman then pointed to paragraph 7(a) of the determination where the respondent's case had been summarised by the judge. I suggested to Mr Rehman that in fact that demonstrated that the respondent had directly challenged the appellant's status between 31 January 2012 and 23 July 2015. Mr Rehman made no response to that but submitted instead that there had been a failure to consider s.117 and article 8.

9. I then heard from Ms Everett. She stated that the Secretary of State's position was as set out in the decision letter. There was no basis in law for the assertion that the reconsideration decision superseded the original decision and nothing to suggest that such a view had been taken in this case. No evidence of any grant of temporary admission between 2012 and 2014 had been adduced. The submissions on discretion were unclear. The respondent had applied the policy. Ms Everett accepted that the judge had erred in failing to consider the issue of temporary admission but she took the view that the error was not material as there was no evidence to show that the appellant had had temporary admission for 2012-2014.

10. In response, Mr Rehman conceded there was no further documentary evidence available to show any temporary admission had been granted between 1 February 2012 and May 2014. He referred me to pages 15-17 of the respondent's policy on long residence and to exceptional reasons being required to extend the permitted gap of 28 days. He submitted that the exceptional circumstance in this case was that the appellant had been granted a right of appeal even though that appeal had been dismissed.

11. That completed submissions. The parties agreed that were I to find a material error of law, I could proceed to re-make the decision without any further hearing or further submissions from them. I then reserved my decision which I now give with reasons.

Discussion and Conclusions

12. Having considered all the evidence and the submissions made, I make the following findings.

13. The crucial issue in this case was whether the appellant had accrued ten years of continuous lawful residence. The judge

clearly had that in mind (at 16-18) and I shall come to that point later.

14. The article 8 claim, which Mr Rehman raised almost as a throwaway point at the very end of his oral submissions, was not expanded on and there is limited evidence on any private/family life the appellant has established here. The appellant's evidence to the judge was that all his close family remained in Kenya (at 12), that although he had been in a relationship with a Turkish national that had come to an end (at 11), that he had not completed his university studies (at 11) and that he worked as an Uber driver and in a care home and lived in rented accommodation (ibid). On those facts it was open to the judge to find that the appellant would not face very significant obstacles with reintegration to Kenya on return and that removal would not be disproportionate. The grounds fail to put forward any factors which the judge is alleged to have overlooked and apart from a general criticism in the grounds that the matter was not adequately considered, there is no attempt to set out the nature of the claim at all. For all these reasons, I am not satisfied that there is any error of law in the judge's assessment of article 8. It is brief because of the limited oral and documentary evidence available. I also note that in granting permission to appeal, Judge Smith observed that there was a lack of merit in that ground.

15. I turn then to the key issue which is the nature of the appellant's leave. The argument is that he had either temporary admission or 3C leave to cover any gaps in his leave. The judge considered the issue of 3C leave in his determination (at 17) but found that the appellant did not have such leave because the request for reconsideration did not confer it. He did not, however, consider the temporary admission argument.

16. Mr Rehman argued, as he had before the judge, that because the Secretary of State reconsidered her decision of 31 January 2012 and gave the appellant an in country right of appeal in May 2014, that decision superseded the earlier refusal and meant that 3C leave had continued between 31 January 2012 and continued until he exhausted his appeal rights on 11 May 2015. The judge set out the provisions of s. 3C of the 1971 Act at paragraph 6 of his determination. He also considered the respondent's guidance and concluded that a reconsideration did not carry 3C leave.

17. It is the case that for 3C leave to be operative, a person has to make an application for variation of leave to enter or remain before the expiry of his/her existing limited leave. If the existing

leave expires without the application for variation having been decided the person's leave is extended by s.3C. It also comes into operation for the period when an appeal under the Nationality, Immigration and Asylum Act 2002 could be brought whilst the person is in the UK or for the period during which an appeal that has been brought is pending. Not one of those scenarios applies to the application made by the appellant's representatives on 19 March 2012. Indeed, by that time, it had been 48 days since the appellant's application had been refused and several weeks since the time limit for appealing had passed.

18. Moreover, the Home Office guidance on reconsideration specifically provides: "*If an applicant makes a reconsideration request, it does not: give them 3C or 3D leave: a reconsideration request is not an application for variation of leave or an appeal so it does not extend the applicant's leave under section 3C or 3D of the Immigration Act 1971 whilst you are reconsidering the decision* " (at p.16, version 10.0. 30 July 2018).

19. The whole purpose of s.118 of the Nationality, Immigration and Asylum Act 2002 which added s.3C to the Immigration Act 1971 was to prevent an applicant from becoming an overstayer by extending their leave while they were awaiting a decision on an in time application, or exercising a right of appeal against the refusal of such an application. The appellant's situation does not fall into either of these categories and I do not accept that the GCID record sheet adduced by the appellant (at p.30) is evidence that the application for reconsideration can be treated as an in time application for leave. The letter from the representatives repeatedly states that reconsideration of the refusal is sought (at 24, 28 and 29). Mr Rehman submitted that the subsequent grant of appeal meant that the earlier decision was defective however in the absence of any information as to the nature of that application and whether it differed from the application for reconsideration, I am not able to express a view on that argument. It may be that a different set of facts were presented to the respondent which generated appeal rights whereas the earlier application did not. In any event, there is no legal authority before me to support Mr Rehman’s contention. It is merely a submission without any justification in law.

20. Mr Rehman referred me to the section of the Long Residence guidance on breaks in lawful residence. That allows for the exercise of discretion to overlook short breaks in lawful residence where the gap is less than 28 days. That does not apply to the appellant. There is also provision for the consideration of any exceptional circumstances which

prevented an applicant from making an application within the first 28 days of overstaying. Mr Rehman argued that the exceptional circumstance to be considered was the fact that a right of appeal was provided but that has no bearing on why there was a delay in the making of the reconsideration request. Indeed, no explanation for that delay has been provided.

21. Mr Rehman also argued that there was no evidence that paragraph 39E had been considered or that a senior caseworker had considered the exercise of discretion but this was not raised as a ground of appeal and no application to amend the grounds was made. In any event, I was not referred to any evidence that a good reason for the late application was provided to the respondent and further, that does not resolve the question of any gaps in leave as a result of applications made before 24 November 2016.

22. It follows that I find that the judge reached a sustainable conclusion with regard to his consideration and conclusions on the matter of whether the appellant had 3C leave as a result of his request for reconsideration. No error of law is identifiable.

23. That leaves only the matter of temporary admission.

24. The appellant's skeleton argument clearly raises the issue of temporary admission and the fact that it is defined as a period of lawful residence within the terms of paragraph 276A(b)(ii) of the Immigration Rules. That skeleton argument was before the judge, but he makes no reference at all to this argument in his determination. Instead, when considering whether the period of lawful residence had been established, he focused solely on whether or not the appellant had 3C leave. That is plainly an error as temporary admission also constitutes lawful residence and in reaching his decision the judge disregarded a substantial part of the appellant's submissions.

25. The question then is whether the error is material. Ms Everett submitted it was not as there was no evidence to support the claim that the appellant had had temporary admission for all the required gaps in his leave. Mr Rehman was unable to provide any evidence for the period between 2012 and 2014 and confirmed that no further evidence would be forthcoming. On that basis, I find that although the judge erred in failing to address the issue of temporary admission, there was insufficient evidence before him to make a finding in favour of the appellant.

26. The appellant entered the UK on 30 May 2008 with leave from that date until 31 October 2011. He made an in time application which was refused on 31 January 2012 with a limited right of appeal. That decision notice is not before me but assuming that he would have had 14 days to exercise his appeal rights, which Ms Everett confirmed he had, albeit limited, he would have been covered by 3C leave until 14 February 2012. If I am mistaken and there was no right of appeal, as his representatives maintain, then 3C leave ended with the refusal on 31 January 2012. Either way, there was a gap in his leave of more than 28 days when, on 19 March 2012, his representatives forwarded a request for reconsideration to the Secretary of State.

27. It is the appellant's case that he had temporary admission throughout this time, from 1 February 2012 until July 2015 when he was granted further leave. To support this claim, he has adduced evidence in the form of Home Office notes to show that he was granted TA and required to report to an Immigration Officer on a fortnightly basis from 7 May 2014 with the last reporting date being 15 July 2015. That ties in with the refusal of his application for reconsideration in May 2014 and the grant of further leave in July 2015. On that basis, I accept that he had lawful leave during that time. The difficulty for the appellant, however, is that he is unable to show that he had temporary admission or any other kind of leave between February 2012 and May 2014. Indeed, there was no basis on which he could have been granted temporary admission as he was an overstayer by the time he made his request for reconsideration. He has failed to demonstrate that he has accrued ten years of continuous lawful residence and the judge was entitled to dismiss the appeal.

Decision

28. The determination of the First-tier Tribunal does not contain any material errors of law and the decision to dismiss the appeal on all grounds stands.

Anonymity

29. No request for an anonymity order was made.

Signed

Upper Tribunal Judge

Date: 31 October 2019