



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

Appeal Numbers: HU/11598/2015  
HU/11593/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 4 December 2018**

**Decision & Reasons  
Promulgated  
On 16 January 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE LATTER**

**Between**

**VEEJAYEN SOONDRUM  
YUVARANEE SOONDRUM  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

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

Respondent

**Representation:**

For the Appellants: Mr M Jaufurally, Solicitor

For the Respondent: Mr S Whitwell, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by the appellants against a decision of the First-tier Tribunal dismissing their appeals against the respondent's decision of 9 November 2015 refusing further leave to remain on human rights grounds.

Background

2. The appellants are citizens of Mauritius, the first appellant was born on 17 June 1961 and is the father of the second appellant born on 22 September 1993. The first appellant's wife has indefinite leave to remain in the UK and there is another adult child of the family. They live together as a family unit in the UK.
3. The first appellant entered the UK in January 2006 as the dependant of his wife who was a student. His leave was extended on a number of occasions and finally expired on 27 May 2015. On 26 May 2015 he applied for leave to remain on the basis of his private and family life. The second appellant is dependent on his application.
4. The decision was considered under the ten-year partner route and, whilst it was accepted that he had a genuine and subsisting relationship with his Mauritian wife who has indefinite leave to remain, there was no evidence that there were insurmountable obstacles in accordance with para EX.2. i.e. that there would be very significant difficulties in continuing family life outside the UK in Mauritius, which could not be overcome or would entail very serious hardship. The application was also considered under the ten-year parent route but their children were over the age of 18 at the date of application. The respondent was not satisfied that the appellant could meet the private life requirements of the Rules or that there were any exceptional circumstances relating to the family which might warrant a grant of leave outside the requirements of the Rules.

#### The Hearing Before the First-tier Tribunal

5. The judge also found that the appellants could not meet the requirements of the Rules and went on to consider the position under article 8. He accepted that both family and private life was engaged but for the reasons he set out in [51], he found that the interference with their right to respect for their private and family life was outweighed by the public interest in maintaining effective and fair immigration control. For this reason, the appeal was dismissed.
6. In the grounds of appeal, it is argued that there was procedural unfairness in that amended grounds were filed in January 2017 on the basis that the appellants could meet the requirements of para 276B of the Rules as they had acquired ten years' lawful residence. The appeal, originally listed for 6 January 2017, had been adjourned with directions given by the First-tier Tribunal ordering the return of passports to enable the appellants to sit the para 276B(iv) tests. They did so and were successful. The respondent was to withdraw the decision so that the appellants could make an application on the basis of long residence but there was no response and the Tribunal by direction dated 1 October 2017 confirmed that the appeal was to go ahead. At the resumed hearing on 2 November 2017, the relevant certificates were given to the judge and submissions were made about the length of the appellants' residence.

7. The second ground argues that the judge failed to give adequate reasons for his decision and had failed to assess whether the appellants met the terms of para 276B in the light of the direction given to the respondent to supply the appellants with their passports, the amended grounds and the request to the respondent to withdraw the earlier decision. Thirdly, it is argued that the judge erred by failing to take into account all the documentary evidence provided to the Tribunal.
8. Permission to appeal was granted by the Upper Tribunal on the basis that at the date of the hearing the appellants had lived in the UK for over ten years and it was arguable that the judge had erred in law by failing to consider the facts as at that date or to consider whether the appellants could satisfy the Rules in relation to long residence.

### Submissions

9. At the hearing before me Mr Jaufurally adopted his grounds. He also referred to the skeleton argument dated 6 January 2017 raising the issue of the length of the appellants' continuous lawful residence and to the Home Office guidance that a person may complete ten years' continuous lawful residence while they are awaiting the outcome of an appeal and submit an application on this basis, although it was not possible to submit an application when an appeal was outstanding but an applicant could submit further grounds to be considered at the appeal. The judge had erred, so he argued, by failing to deal at all with the issue of continuous residence.
10. Mr Whitwell conceded that the judge had erred in this respect but submitted that it would not be appropriate for the appeal to be allowed to the extent of granting indefinite leave but if the decision was re-made and allowed, the issue of what leave should be granted to the appellants should be a matter for the respondent who would have the opportunity of considering whether there were any reasons whether it would be undesirable for them to be given indefinite leave to remain.

### Assessment of the Issues

11. I am satisfied that the judge erred in law by failing to consider the issue of long residence when assessing proportionality. The issue had been raised on behalf of the appellants when the application was made for the appellants' passports to be released so that they could take the Knowledge about Life in the UK test and the hearing of 6 January 2017 had been adjourned accordingly. The appellants subsequently passed the test and original certificates were produced at the resumed hearing. The appellants also filed amended grounds of appeal raising the long residence issue in accordance with the guidance set out in Long Residence Guidance 14.0 p.22. The appellants had also written to the respondent asking for the decision under appeal to be withdrawn so that they could make a fresh

application on the basis of long residence but there was no response. In these circumstances, it is understandable why the Tribunal directed that the hearing should proceed.

12. In the light of the failure to consider the appellants' claim to be entitled to indefinite leave to remain on the basis of ten years lawful residence, the proper course is for the decision to be set aside. Both representatives accepted that I should re-make the decision taking that matter into account.
13. There is no doubt that the appellants meet the requirements of para 276B(i), (iv) and (v). The respondent has, constructively at least, been aware of this application in the light of the amended grounds and the request to withdraw the decision but nothing has been produced to show that there is any public interest making it undesirable for the appellants to be granted leave or that they fall for refusal under the general grounds for refusal. There is nothing in the evidence before me to suggest that either is the case, but the respondent has not yet considered this issue. I am satisfied on the evidence before me that the strong likelihood that they were entitled to indefinite leave to remain at the date of the hearing before the First-tier Tribunal substantially diminishes the public interest in maintaining effective and fair immigration control such that removal at this stage would be a disproportionate interference with their right to respect for private and family life.
14. I think that the right course is to allow the appeal on human rights grounds under article 8. It is in the public interest that the respondent does have an opportunity to consider whether there are reasons which would justify refusing the appellants indefinite leave to remain under para 276B (ii) or (iii). It will therefore be for the respondent to decide, hopefully without undue delay, what leave should be given to the appellants in the light of this decision.

### Decision

15. The First-tier Tribunal erred in law and the decision is set aside. I substitute a decision allowing the appeal on human rights grounds under article 8. No anonymity direction was made by the First-tier Tribunal.

Signed            H J E Latter

Date: 3 January 2019

Deputy Upper Tribunal Judge Latter