Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/16592/2018**

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 25th July 2019	**On 8th August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

PADUKKAGE DON BUDDHIKA DE ALWIS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs L Barton of Counsel, instructed by OTS Solicitors
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Macintosh (the judge) of the First-tier Tribunal (the FtT) promulgated on 26th March 2019.

2. The Appellant is a Sri Lankan national born 2nd July 1985. He appealed to the FtT against the Respondent's decision dated 1st August 2018 to refuse his application for indefinite leave to remain in the UK on the basis of long

residence and on the basis of his private life. His application had been made on 21st February 2018.

3. The judge set out the Appellant's immigration history at paragraphs 2 – 9 noting that he had arrived in the UK on 18th October 2007 with leave to enter as a student.

4. The judge noted that in January 2012 he applied for leave to remain as a Tier 1 (Post-Study) Migrant and this application was granted until 30th August 2014. On 29th August 2014 prior to expiry of his leave the Appellant submitted an application for further leave to remain as a Tier 4 Student, which application was granted until 26th June 2016. The Appellant's leave was then curtailed to expire on 22nd December 2015. On 30th October 2015 he applied for leave to remain outside the Immigration Rules on compassionate grounds. This application was refused on 4th February 2016. The judge incorrectly records this refusal date as 4th February 2014.

5. The Appellant then requested a judicial review but permission was refused. On 16th June 2016 the Appellant applied for leave to remain relying upon Article 8 of the 1950 European Convention. This application was refused and certified on 7th December 2016. On 19th December 2016 the Appellant submitted further submissions which were rejected on 24th January 2017.

6. On 8th February 2017 the Appellant submitted an application for an EEA residence card as the family member of an EEA national. This application was rejected on 15th September 2017. On 26th September 2017 the Appellant made a further application for an EEA residence card which was rejected on 24th October 2017. A further application for an EEA residence card was made on 6th November 2017, again as a non-EEA extended family member, which was refused on 8th February 2018.

7. On 21st February 2018 the Appellant made an application for indefinite leave to remain based on long residence.

8. The Appellant's case before the judge was that he lived with his brother and sister-in-law in the UK and assisted in caring for his niece. He claimed he had no family in Sri Lanka. The judge heard evidence from the Appellant's brother and sister-in-law. The sister-in-law is an Irish national living in the UK.

9. The judge found at paragraph 32 that the Appellant had not proved that he had ten years' continuous lawful residence in the UK.

10. The judge then considered paragraph 276ADE concluding that the Appellant could not satisfy any of the requirements contained therein, and had not shown that there would be significant obstacles to his integration in Sri Lanka.

11. Having considered the Immigration Rules the judge then considered Article 8 of the 1950 Convention. The judge found that the Appellant's removal

from the UK would interfere with his private life but decided that there were no exceptional circumstances or compelling reasons, and therefore the Appellant's removal from the UK would be proportionate and dismissed the appeal.

The Application for Permission to Appeal

12. Reliance was placed upon three grounds of appeal.

13. Firstly, it was contended the judge had erred at paragraph 32 in providing inadequate reasons for concluding that the Appellant did not satisfy the ten year long residence requirement.

14. Secondly, the judge had erred by failing to make any reference to the Appellant's niece when considering Article 8 of the 1950 Convention. The judge had failed to consider the best interests of the child.

15. Thirdly, the judge had erred by failing to consider "paragraph 117 at all in the determination and this only adds to the fact his consideration outside the rules is not complete." The grounds were drafted by the Appellant's solicitors who presumably meant to refer to section 117B of the Nationality, Immigration and Asylum Act 2002.

The Grant of Permission to Appeal

16. Permission to appeal was granted by Judge P J M Hollingworth of the FtT in the following terms;

> "It is arguable that the judge has set out an insufficient analysis at paragraph 32 of the decision in finding that the Appellant failed to meet the ten year requirement. In the light of the evidence adduced it is arguable that the judge has set out an insufficient analysis in relation to the application of section 55. It is further arguable that the proportionality exercise has been affected and that an insufficient analysis has been set out in relation to applying the criteria pursuant to section 117."

17. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision should be set aside.

My Analysis and Conclusions

18. The Appellant was represented at the hearing by Mrs Barton who relied and expanded upon the grounds contained within the application for permission to appeal. Mr McVeety, on behalf of the Respondent, accepted that the judge had erred in law by failing to make reference to section 117B, but submitted that this error was immaterial as section 117B could not assist the Appellant's case. It was also an error to fail to refer to the Appellant's niece when considering Article 8 but again this was not a material error, as the only conclusion that could have been reached in relation to the niece was that her best interests would be served by remaining with her parents.

19. Mr McVeety, in relation to the ten years' residence point referred to the recent Court of Appeal decision, the Queen (on the application of Masum Ahmed) [2019] EWCA Civ 1070 in submitting that the judge was correct to find that the Appellant could not satisfy ten years' continuous lawful residence.

20. In relation to the first Ground of Appeal, I find that the judge did not provide adequate reasoning in paragraph 32 but this is not a material error. The judge made a finding that given the Appellant's immigration history he failed to meet the ten year requirement under the Immigration Rules. In my view that is a correct finding but reasons should have been given. The reasons are in fact to be found in the Respondent's refusal decision (unfortunately the paragraphs are not numbered) at page 5 in that the Appellant had lawful leave from his arrival in the United Kingdom on 18th October 2007 until 4th February 2016 when his application for leave to remain outside the rules was refused with no right of appeal. That meant he had lawful residence of approximately eight years and three months.

21. Submissions had been made to the FtT that he had made repeated further applications for leave within the time limit set out in the Home Office guidance, those applications having been made within 28 days or 14 days.

22. The decision in Ahmed confirms the legal position that those periods cannot be lawful leave to remain. I refer in particular to paragraph 15(4) of Ahmed which specifically confirms disregarding current or previous short periods of overstaying does not convert such periods into periods of lawful leave to remain and it is also stated "still less are such periods to be disregarded when it comes to considering whether an applicant has fulfilled the separate requirement of establishing ten years' continuous lawful residence under sub-paragraph (1)(a)." For the reasons given, the judge's error in not fully explaining the finding, does not amount to a material error of law.

23. With reference to the second ground, as conceded by Mr McVeety, it was an error not to make reference to the Appellant's niece. The best interests of a child are a primary consideration. This does not mean that the best interests of the child are a paramount consideration or the only consideration. The best interests can be outweighed by other considerations.

24. In this case, based upon the evidence before the FtT, the only conclusion that the judge could have reached in relation to the best interests of the Appellant's niece would be that she should remain with her parents. The evidence did not indicate that the Appellant played a parental role. The child is very young, having been born in November 2017. The Appellant is her uncle not her parent. There was no satisfactory evidence before the judge to indicate that a child of that age would be adversely affected if her uncle had to return to Sri Lanka. Therefore the error in not making reference to the niece was not material.

25. It was an error of law for the judge to fail to refer to section 117B of the 2002 Act. Section 117A(2) confirms that when considering the public interest a Tribunal must have regard in all cases to section 117B.

26. The error is not material because had the judge considered section 117B this could not have assisted the Appellant's case. Section 117B confirms that the maintenance of effective immigration controls is in the public interest. On this point it is relevant that the Appellant cannot satisfy the Immigration Rules in order to be granted leave to remain.

27. It is also provided that it is in the public interest that a person seeking leave to remain can speak English and is financially independent. The Appellant can speak English, and was financially dependent upon his brother and sister-in-law, not the state. These factors are neutral in the balancing exercise.

28. It is provided that little weight should be attached to a private life established when a person has been in the UK with a precarious immigration status or without leave. This applies to the Appellant because initially he had a precarious immigration status in that he had limited leave to remain. Thereafter he remained without leave.

29. Section 117B(6) could not have assisted the Appellant because he does not have a parental relationship with a qualifying child.

30. Therefore had the judge considered section 117B, he would, in my view, have been bound to find against the Appellant.

31. In conclusion, although the decision of the FtT discloses errors of law, the errors are not material and did not make a difference to the outcome of the appeal.

Notice of Decision

The FtT decision does not disclose material errors of law and is not set aside. The appeal is dismissed.

There has been no request for anonymity and I see no need to make an anonymity order.

Signed Date 25th July 2017

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed. There is no fee award.

Signed Date 25th July 2019

Deputy Upper Tribunal Judge M A Hall