



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

Appeal Number: HU/23109/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 28th May 2019**

**Decision & Reasons Promulgated
On 10th June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

**SANKAR RAMASAMY PILLAI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Coleman of Counsel instructed by Paul John & Co.
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Ruth promulgated on 26 February 2019. The Appellant's appeal before Judge Ruth was linked to that of his wife [KS] (d.o.b. 28 October 1982) (ref. HU/18522/2018). The appeal of the Appellant's wife was allowed, but the Appellant's appeal was dismissed.
2. The respective immigration histories are helpfully set out in the preliminary paragraphs of the Decision of Judge Ruth.

3. Before the First-tier Tribunal the Appellant's wife essentially relied upon an assertion that she was entitled to leave to remain having completed ten years' continuous lawful residence in the United Kingdom. The Appellant had been included as a dependant in an application made to the Respondent on such a basis.
4. It appears that before the First-tier Tribunal Counsel for the Appellants, Mr Coleman, relied upon a single submission: paragraph 39E(2)(b)(ii) of the Immigration Rules operated in respect of the period of time between 2 May 2018 when the Appellant's wife having become 'appeal rights exhausted' pursuant to an earlier application, and 14 May 2018 when she made the application the refusal of which became the subject of the appeal. The Appellant's wife fell short of the ten year period when she had become appeal rights exhausted having been in the UK for 9 years and 7 months; however, it was argued that the period of overstaying was essentially to be disregarded by reason of paragraph 39E. The argument was successful, and the Appellant's wife's appeal was allowed on that basis.
5. As regards the Appellant, it appears that his case was conceded before the First-tier Tribunal. Paragraph 9 records this in its opening sentence:

"Mr Coleman for the appellants submitted that it was accepted the second appellant could not succeed and he would be making another application as the dependent of his wife in due course."

I note that the Record of Proceedings in this regard confirms the essential fact set out at paragraph 9, and adds the detail that the concession appears to have been made on the basis that the Appellant had not yet obtained the necessary English language certificate.
6. For the avoidance of any doubt, it seems clear to me that in making the concession it was not being suggested that if the Appellant's wife should succeed in her appeal that the Appellant should also succeed 'in line'; rather it was expressly indicated that the plan was to make a further application as a dependant - necessarily on the premise that she succeeded in her appeal.
7. Mr Coleman, who appears again for the Appellant, acknowledged this to have been the position before the First-tier Tribunal. More particularly for present purposes, Mr Coleman also acknowledges that in circumstances where the Appellant's case was conceded before the First-tier Tribunal, he is in very serious difficulties in advancing any arguments that the First-tier Tribunal may have fallen into error in the way that it approached the Appellant's case. In my judgement those difficulties are insurmountable:

in such circumstances I can find no basis to criticise the approach of the First-tier Tribunal. This is adversely determinative of the challenge before the Upper Tribunal: I find no error of law and the appeal is dismissed accordingly.

8. Had it been otherwise I would still have been minded not to interfere with the decision of the First-tier Tribunal pursuant to the discretion in section 12(2)(c) of the Tribunals, Courts and Enforcement Act 2007. This is because the single basis upon which the Appellant's wife's case was put to the First-tier Tribunal was, in my judgement, misconceived. Paragraph 39E of the Rules does not have the effect contended by Mr Coleman and accepted by Judge Ruth.
9. Paragraph 39E of the Immigration Rules comes under the heading 'Exceptions for overstayers'. Before the First-tier Tribunal Mr Coleman was correct to identify that the terms of 39E(2)(b)(ii) were indeed engaged. However, what seems to have been missing from the submission - and in turn the analysis of the First-tier Tribunal - was due and proper consideration of how that circumstance was to be factored into consideration of paragraphs 276A and 276B of the Immigration Rules. In defining the meaning of 'continuous residence' under paragraph 276A(a), and the meaning of 'lawful residence' under 276A(b), there is no role for the 'exemption for overstayers' pursuant to paragraph 39E. The significance of paragraph 39E is in the context of further requirements under paragraph 276B, and in particular that of 276B(5) which is in these terms:

"The applicant must not be in the UK in breach of immigration laws except that where paragraph 39E of these Rules applies any current period of overstaying will be disregarded."
10. In short, the significance of paragraph 39E is that an applicant who promptly makes a further application for leave to remain having become 'appeal rights exhausted', is exempted from the requirement that she must not be in the UK in breach of immigration laws - notwithstanding that she is technically an overstayer. Paragraph 39E does not mean that the applicant thereupon acquired any form of lawful residence within the meaning of paragraph 276A(b).
11. In such circumstances, it seems to me that the Secretary of State's initial decision that the Appellant's wife had not completed a ten year period of continuous lawful residence was the correct position; it was not remedied in any way by the operation of paragraph 39E. It is unfortunate that the submission was not more closely considered before it was made. It is unfortunate that the submission was not more closely considered by the Secretary of State's Presenting Officer - who seemingly made no express

submissions on the matter but simply invited the Tribunal Judge to determine it (paragraph 10). And it is unfortunate that the submission was not more closely considered by the First-tier Tribunal Judge.

12. Be that as it may, I do not have any jurisdiction in respect of the appeal of the Appellant's wife. She was successful in her appeal, and the Secretary of State has not sought to challenge the outcome. Indeed, I am told that since the hearing before the First-tier Tribunal she has now been granted indefinite leave to remain.
13. It is of course now open to the Appellant to consider what application he may make in light of the circumstance of his wife having been granted indefinite leave to remain. I am told that he has now obtained the necessary certification in English language / life in the UK tests. The position is essentially that which was indicated before the First-tier Tribunal – the Appellant *"would be making another application as the dependent of his wife in due course"*.
14. In summary: whilst it seems to me that the basis upon which the Appellant's wife succeeded was misconceived, I have no jurisdiction to interfere with the decision in her appeal; however, I would have been minded to the view that such a circumstance would justify not interfering in the adverse decision in the Appellant's appeal; but, in the event, the matter does not arise because there is no substance to the Appellant's challenge, his case having been conceded before the First-tier Tribunal.

Notice of Decision

15. The decision of the First-tier Tribunal contained no material error of law and accordingly stands.
16. The Appellant's appeal remains dismissed.
17. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed:

Date: **3 June 2019**

Deputy Upper Tribunal Judge I A Lewis