Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03425/2020 (V)

THE IMMIGRATION ACTS

Heard by Skype for business	**Decision & Reasons Promulgated**
On the 23 June 2021 and further written replies dated 23 July 2021 from the respondent and 28 July 2021 from the appellant's solicitors	**On 16 August 2021**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

MR KAUSHALYA SAMARAKOON BANDARA HALOYADDE MUDIYANSELAGE
(ANONYMITY DIRECTION NOT MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms F. Allen, Counsel instructed on behalf of the appellant.
For the Respondent: Mr C. Avery, Senior Presenting Officer

DECISION AND REASONS

Introduction**:**

1. The appellant is a national of Sri Lanka. He first arrived in the UK on 4 March 2008 with his mother and sister; they had leave as the

dependents of the appellant's father, who was a student, which was valid until 31 December 2008.

2. On 29 December 2008, and in time application was made for leave to remain in the same capacity which was granted until 30 April 2010. In February 2010, an application was lodged for leave to remain as dependent of a PBS migrant. This was refused with an in country right of appeal. Contrary to the assertion initially made by the respondent, the right of appeal was exercised in time but was dismissed on 11 October 2010 with permission to appeal being refused on 29 October 2010. By 10 November 2010, appeal rights were considered to have been exhausted.

3. On 14 December 2010 the appellant's father lodged an application for asylum with the appellant being named as 1 of his dependents. His father was granted temporary admission on that date, and it is now accepted that the appellant was included in that grant.

4. On 5 July 2013, the appellant was granted temporary admission in his own right, as he had reached adulthood. Temporary admission was renewed regularly until 16 June 2015. Originally, his father's asylum application was refused, and the decision was certified. However, on review, whilst the refusal was maintained, the certification was not, and the appellant's father was granted a right of appeal which he exercised in time. His appeal was dismissed on 26 June 2013 but permission to appeal to the UT was granted. However, the tribunal dismissed the appeal and permission to appeal to the Court of Appeal was refused and once again appeal rights were exhausted by 19 July 2013.

5. On 25 March 2015 the appellant lodged a human rights application, and he was granted leave on 8 June 2015 which is valid until 7 December 2017. He made another in time application on 24 November 2017, and leave was granted to 13 October 2020. His application to extend that leave was outstanding at the date of the hearing.

6. The application which gave rise to the appeal before the FtT (Judge Fisher) was made on 6 February 2020. The appellant sought indefinite leave to remain on the basis of 10 years lawful residence. The respondent refused that application on 17 February 2020.

7. The appellant exercised his appeal rights, and it came before FtTJ Fisher. It is common ground that the issue before the FtTJ was whether the appellant's temporary admission could amount to lawful residence and if so, by the date of the hearing, the appellant's submission was that he had accrued 10 years lawful residence if calculated from 14 December 2010 when the asylum application was lodged and temporary admission was granted, regardless of the earlier periods of lawful leave.

8. In his decision promulgated on 11 January 2021, the FtTJ considered this issue and whether the appellant had achieved 10 years continuous lawful residence but for the reasons set out in his decision, he reached the conclusion that the appellant could not meet the 10 years continuous lawful residence requirement and was not entitled to indefinite leave to remain under paragraph 276B of the Immigration Rules.

9. In summary, the FtTJ considered the argument that from 14 December 2010 the appellant had established continuous lawful residence and that he had crossed the 10-year threshold by the date of the hearing. The judge referred to the guidance on long residence which provided the 10-year period "can be completed whilst appeal is pending" (at paragraph 12). However the judge found that by applying the decisions in SC (Jamaica) and CI (Nigeria), that the leave to enter or remain must be granted in the same capacity as that initially sought. The grant in the appellant's case on 8 June 2015 was discretionary outside the rules and as the family's asylum claim was refused an appeal against that decision was dismissed, the judge found that his temporary admission did not constitute lawful residence.

10. Th FtTJ therefore dismissed the appeal. Permission to appeal was sought and permission was granted by UTJ Martin on 7 April 2021.

11. The FtTJ did not make an anonymity order and no application was made for such an order before the Upper Tribunal.

12. The hearing took place on 23 June March 2021, by means of *Microsoft teams* which has been consented to and not objected to by the parties. A face -to- face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended as did the appellant remotely via video.

13. There were some technical problems encountered during the hearing which led to time being lost and there were also a number of documents missing from the papers which had to be emailed to the presenting officer and the tribunal and for the parties concerned to read the material. In the time remaining, the tribunal was able to hear from Ms Allen on behalf of the appellant but there was insufficient time to hear the submissions on behalf of the respondent and there had been no rule 24 response. The appeal was therefore adjourned part heard and I gave directions for th further hearing which included the written submissions of the respondent to be filed.

14. The submissions made on behalf of the appellant set out the chronology that I have referred to above with particular reference being made to 14 December 2010 when the appellant's father claimed asylum with the appellant as his dependent. This was accepted in the letter of 13 November 2020 and the appellant was

treated as having temporary admission at that time. Thus the operative date she relied upon was 14 December 2010 and therefore by 2020 if the period of temporary admission had been taken into account, the appellant would have accrued 10 years continuous lawful residence.

15. Ms Allen, in her submissions referred to the chronology as set out above and highlighted that whilst the appellant's father's application for asylum was refused after 14 December 2010, on 5 July 2013 the appellant was granted temporary admission in his own right as he had reached 18 years of age. On 25th of March 2014 further submissions were made and on 8 June 2015 the appellant was granted limited leave to remain in the UK on a discretionary basis outside the rules until 7 December 2017. He was granted an extension until 13 October 2020 and following a further extension the appellant currently had leave to remain until 26 August 2023.

16. It was therefore submitted that the issue was whether the appellant's temporary admission amounted to lawful residence so that he was able to meet the requirements of paragraph 276B. Ms Allen submitted that neither paragraph 276A nor the guidance stated that the grant of leave to remain must be on the same basis of the application upon which temporary admission was granted. In addition, the guidance provided relief be granted in order for an application under the long residence rule to be made by a person on temporary admission. The guidance set out "applicants in the UK with temporary admission- if an applicant with Temporary admission meets all the other requirements of rule 276B, discretion can be exercised by border force to grant them 6 months code 1 outside immigration rules, so they can make an application in the UK. "

17. Ms Allen submitted this concerned the regularisation of a stay in the UK to make an application under paragraph 276B and therefore temporary admission was seen as "lawful residence". By reference to the chronology and decision making in this case, whilst the appellant's initial temporary admission was on the basis that he was dependent on his father's asylum claim, before that claim was concluded on 19 July 2013, the respondent had granted temporary admission to the appellant in his own right on 5 July 2013. This grant of temporary admission was not in respect of any asylum claim that the appellant had made that could only have been granted to ensure that having reached 18 years, the appellant did not remain in the UK unlawfully that he was permitted lawfully, pursuant to temporary admission to remain in the UK. In essence, Ms Allen submitted that the situation was analogous to the situation in guidance (which was before the judge) and that the application giving rise to temporary admission did not have to have been successful in order for any previous temporary admission to be considered lawful residence for the purposes of paragraph 276B.

18. In her submissions she made reference to the decisions of SC (Jamaica) and CI(Nigeria) both of which were deportation decisions considering rule 399A and section 117C (4) (a) and not specifically paragraph 276B. She relied upon the argument set out in the grounds and in the earlier skeleton argument provided in support of her overarching submission that the particular circumstances of the appellant demonstrated that he had been permitted by law to remain in the UK under temporary admission and that this was "lawful residence" and that after the grant of temporary admission he was granted leave to remain. He therefore met the requirements of paragraph 276B.

19. At the conclusion of the submissions made on behalf of the appellant, there was insufficient time to hear the submissions of the respondent and I gave directions for written submissions to be submitted and for the appeal to be resumed.

20. The tribunal has now received a reply on behalf of the Secretary of State dated 23 July (although received by me in an email sent on 26 July 2021).

21. It states as follows:

> "I am writing further to the adjourned hearing of 23 June 2021 and the subsequent directions sent on 7 July 2021. The Secretary of State apologises for the delay in responding, this was due to an IT failure.
>
> After considering the arguments advanced on behalf of the appellant the Secretary of State accepts that the appellant has completed 10 years lawful residence and that therefore the First-Tier judge erred in dismissing his appeal.
>
> In the circumstances the tribunal is invited to set aside the decision of the first tier and substitute a decision allowing the appeal."

22. Following the above correspondence I sent directions to the appellant's solicitors to confirm whether they were in agreement with the above correspondence and disposal of the appeal. On the 28 July 2021, an email was received indicating their agreement to the above course on behalf of the appellant.

23. In the light of the contents of the replies received, it is not necessary to reconvene the hearing and the subsequent delay that such a course would take. I need not set out any further analysis of the appeal because as set out above, it is accepted on behalf of the respondent that the decision of the FtTJ dismissing the appeal involved the making of an error on a point of law and that it is now accepted on behalf of the respondent that the appellant has completed 10 years lawful residence and therefore met the requirements to satisfy paragraph 276B. Whilst this is a human rights appeal, applying the structured approach in *TZ (Pakistan and PG India) v SSHD* [2018] EWC Civ 1109, and where an appellant meets the requirements of the Immigration Rules that is positively

determinative of the appeal in their favour (at [34]). The respondent has accepted that the requirements under the Immigration Rules are met, and that the appeal should be allowed. I therefore make a decision in those terms.

Notice of Decision.

24. The decision of the First-tier Tribunal did involve the making of an error on a point of law and therefore the decision is set aside. The appeal is remade as follows: **the appeal is allowed on human rights grounds.**

Signed Upper Tribunal Judge Reeds

Dated 28 July 2021

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.