IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006270 & UI-2022-006271
First-tier Tribunal No:
HU/57255/2021 (LH/00477/2022)
HU/57256/2021 (LH/00478/2022)

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 12 August 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR GAGANDEEP SINGH DHALIWAL
MS HARJOT KAUR DHALIWAL
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Ahmed, Counsel
For the Respondent: Mr Tan, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 25 July 2023

DECISION AND REASONS

1. The Appellants are nationals of India, born on 11 September 1988 and 12 September 1990 respectively, who on 26 July 2021 applied for indefinite leave to remain on human rights grounds.

2. The Respondent refused their applications in decisions sent out on 9 November 2021 because they had not accumulated the requisite period necessary to be granted indefinite leave and they had not demonstrated there were very significant obstacles as defined by paragraph 276ADE(i)(vi) HC 395 and there were no exceptional circumstances which merited a

grant outside the Immigration Rules. The Appellants appealed those decisions.

3. The case was listed before Judge of the First-tier Tribunal Frantzis (hereinafter referred to as the FTTJ) on 18 October 2022 and in a decision promulgated on 11 December 2019 the appeal was dismissed.

4. Permission to appeal was sought on behalf of the Appellants by their representatives on 11 November 2022. Permission to appeal was granted by Judge of the First-tier Tribunal Boyes on 30 December 2022 who found it arguable there was an error in law because:

> "2. The grounds assert that the Judge erred in the assessment of continuous lawful residence in light of the concessions made by the Home Office.
>
> 3. For the reasons given in the application, the grounds are arguable. The Judge has arguably, not realised the impact of the notification of a decision requirement and has arguably erred in the assessment of the factual matrix.
>
> 4. Permission is granted on all matters raised."

5. Mr Ahmed relied on the grounds of appeal and submitted the FTTJ identified the critical issue at paragraph [5] of her determination and at paragraph [6] of her determination stated:

> "In light of the acceptance by Mr McHale that the Appellants moved address on 14thDecember 2017 and doing the best I can on the documentary and oral evidence before me, I am prepared to accept that the Appellants relied upon their former solicitors, Prestige to conduct their immigration affairs diligently and in accordance with their best interests. I also accept that the Appellants were not aware of their various applications until the index Decision Letters refusing them Indefinite Leave to Remain. I consider this in favour when balancing whether their removal from the United Kingdom is disproportionate. I accept that the Appellants have been trying to regularise their immigration status which weights in their favour."

6. Mr Ahmed submitted that section 39E HC 395 applied and argued the Appellant were therefore here lawfully when they made their applications. Alternatively, Mr Ahmed submitted the FTTJ's proportionality assessment under article 8 ECHR was flawed.

7. No Rule 24 response was filed, but Mr Tan opposed the application. He referred the Tribunal to paragraphs [25] to [27] of the FTTJ's determination and submitted the FTTJ had properly considered whether the applications were lodged in time and had given a detailed explanation for finding the

applications were not lodged in time and had also lodged invalid applications which meant Section 3C leave could not apply in this case. The FTTJ acknowledged the Appellants were represented and Mr Tan submitted service on nominated representatives was still good service.

8. No anonymity direction is made.

DISCUSSION AND FINDINGS

9. The ground of appeal in this case raised an issue regarding whether the service of a decision was valid and whether the Appellants had appealed the decision in accordance with the Immigration Rules.

10. The following facts were not in dispute:

    a. The Appellants had instructed Prestige Solicitors to represent them in their application to extend their leave.

    b. Notices were sent to Prestige Solicitors.

    c. The Appellants were personally unaware that their applications had been refused until the current decision refusing them indefinite leave to remain.

11. The first-named Appellant came to this country lawfully as a student on 24 February 2011 and the second-named Appellant entered lawfully as his dependent on 13 July 2011. Their leave was due to expire on 28 June 2013 but was extended until 16 May 2015. However, on 19 June 2014 their leave was curtailed to end on 23 August 2014. The Appellants therefore lodged an application to remain as Tier 4 student and dependant on 11 August 2014 but this was refused and their in time appeals were dismissed and their appeal rights were exhausted on 5 December 2016.

12. Thereafter applications were lodged on 3 February 2017 but these were rejected as invalid and subsequent applications made on 17 March 2017 and 13 December 2017 were refused on 17 January 2018 with an in-country right of appeal. Nothing happened after that until the current application was lodged.

13. The FTTJ was clearly aware that this history was going to form an important part of her decision because if the Appellants could show they had been here lawfully they would have accrued ten years lawful residence by the time this current application was lodged. However, if this could not be demonstrated then the applications for indefinite leave would fail.

14. Mr Ahmed referred the Tribunal to Section 3C leave and leave under Paragraph 39E HC 395. The purpose of section 3C leave is to prevent a person who makes an in-time application to extend their leave from becoming an overstayer while they are awaiting a decision on that

application and while any appeal or administrative review they are entitled to is pending.

15. Paragraph 39E applies where:

(1) The application was made within 14 days of the applicant's leave expiring and the Secretary of State considers that there was a good reason beyond the control of the applicant or their representative, provided in or with the application, why the application could not be made in-time; or

(2) The application was made:

(a) following the refusal or rejection of a previous application for leave which was made in-time; and

(b) within 14 days of:

(i) the refusal or rejection of the previous application for leave; or

(ii) the expiry of any leave extended by section 3C of the Immigration Act 1971; or

(iii) the expiry of the time-limit for making an in-time application for administrative review or appeal in relation to the previous application (where applicable); or

(iv) any such administrative review or appeal being concluded, withdrawn, abandoned or lapsing; or

(3) The period of overstaying was between 24 January and 31 August 2020; or

(4) Where the applicant has, or had, permission on the Hong Kong BN(O) route, and the period of overstaying was between 1 July 2020 and 31 January 2021.

16. It was not disputed that their last period of lawful leave expired on 5 December 2016 and the issue the FTTJ had to consider was whether the Appellants made an application within 14 days of this date.

17. The FTTJ found the Appellants' first application was only made on 3 February 2017 and gave her reason for this finding in paragraph [25(ii)] of her decision. Mr Tan made the point that this date was more than 14 days after the expiry of leave on 5 December 2016. By the time this application was made 46 days had passed. This application was rejected as no fee was paid.

18. Mr Ahmed argued that Section 39E could apply but for that to apply the Respondent had to be satisfied there were good reasons beyond the control of the applicant or their representatives, provided in or with the application, why the application could not be made in-time.

19. The FTTJ concluded, having looked at the WhatsApp messages, that there was no reference to any conversation between the Appellants and Prestige prior to the expiry of the 14 days and there was no reference to an application being made until 3 February 2017 which was the result of concerns being expressed by the first-named Appellant that he would be encountered and 'picked up' by Immigration Officials.

20. The FTTJ considered this issue in detail in paragraph [25] of her decision. The FTTJ had the benefit of hearing oral evidence from the first-named Appellant and noted his oral evidence was "vague and unclear" albeit she accepted this could be firstly due to the passage of time and secondly because more than one application had been lodged.

21. Looking at Paragraph 39E HC 395 I am satisfied, like Mr Tan and the FTTJ, that this has no application to this appeal as there was no evidence that the appeal was lodged within the time periods specified. The FTTJ explained this in detail in paragraph [26] of her decision. Leaving aside that papers may have been sent to their nominated solicitors, which is good service, the fact remained the application to extend leave was not made in time and this meant they could not apply for indefinite leave based on ten years lawful residence. Accordingly, the Appellants' leave had expired and they could not therefore qualify for indefinite leave to remain.

22. I therefore find that the FTTJ did not err in law when considering whether the Appellants had some form of leave enabling them to make their current application because for the reasons she gave there was no extant leave.

23. The FTTJ gave the Appellants the benefit of the doubt that they had relied on their representatives and considered the application outside of the Rules. Between paragraphs [27] and [32] of her decision the FTTJ considered the claim under article 8 ECHR. Mr Ahmed did not seek to address me on this second ground, but I have nevertheless considered the FTTJ's findings.

24. I am satisfied the FTTJ properly considered all the factors placed before her and properly applied Section 117B of the 2002 Act before considering whether it would be disproportionate to require the Appellants to leave this country. She made detailed findings which were clearly open to her and I find no material error on the remaining ground of appeal.

Notice of Decision

There is no error in law. The First-tier Tribunal's decision shall stand and the appeal is dismissed.

Deputy Judge of the Upper Tribunal Alis
Immigration and Asylum Chamber

1 August 2023