Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08729/2015

THE IMMIGRATION ACTS

Heard at : Field House	**Decision & Reasons Promulgated**
On : 29 August 2017	**On: 30 August 2017**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHAMEEN PARVEZ POKEERBUX

Respondent

Representation:
For the Appellant: Mr P Singh, Senior Home Office Presenting Officer
For the Respondent: Mr B Hawkin, instructed by SG Law

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Pokeerbux's appeal against the decision to refuse his human rights application for indefinite leave to remain on long residency grounds.

2. For the purposes of this decision, I shall refer to the Secretary of State as the respondent and Mr Pokeerbux as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Mauritius born on 21 June 1979. He arrived in the United Kingdom on 14 September 2004 and was given leave to enter as a student. He was subsequently granted further periods of leave to remain as a student until 31 August 2010. On 24 February 2011 the appellant applied for a residence card as the partner of an EEA national exercising treaty rights in the UK, under the Immigration (EEA) Regulations 2006. His application was refused on 29 June 2011, but subsequent to a successful appeal against that decision his application was reconsidered on 30 September 2011 and he was issued with a residence card valid until 30 September 2016.

4. On 7 May 2015 the appellant applied for settlement based on ten years' long residence in the UK. His application was refused on 8 October 2015 on the basis that he had failed to meet the requirements of paragraph 276B of the immigration rules, specifically paragraph 276B(i)(a) and (v). The respondent considered that the appellant's period of continuous lawful residence in the UK had been broken from the expiry of his leave to remain until 29 September 2011, the day before he was issued with a residence card. The respondent noted that the appellant claimed to have been in a relationship with an EEA national from 2008 to the present day but considered that he had failed to provide evidence of a subsisting relationship with the EEA national and evidence to show that she was exercising treaty rights from the date of issue of the residence card until the current date. As such, it was not accepted that the appellant could rely upon being the partner of an EEA national as contributing to the ten year period of lawful leave. The respondent went on to consider whether the appellant could meet the requirements of Appendix FM and paragraph 276ADE(1) and concluded that he could not. The respondent found no exceptional circumstances justifying a grant of leave outside the immigration rules.

5. The appellant appealed against that decision on human rights grounds. His appeal was heard by First-tier Tribunal Judge Buckwell on 8 November 2016. It was argued before the judge by the respondent that the appellant could not meet the requirements of the immigration rules owing to the break in his continuous lawful residence between August 2010 and September 2011, a period of 13 months. Judge Buckwell noted the determination of the First-tier Tribunal in the appellant's previous appeal in which the Tribunal had found, in its decision of 12 September 2011, that the appellant had been cohabiting with his EEA national partner in a genuine and subsisting relationship since 2008. Judge Buckwell accepted the evidence that the appellant's EEA national partner had been exercising treaty rights in the UK from August 2010, when his leave to remain expired. He concluded, therefore, that the appellant had demonstrated a ten year period of continuous lawful residence in the UK, initially under the immigration rules and thereafter as the family member of an EEA national exercising treaty rights. He found that the appellant met the requirements of paragraph 276A and he allowed the appeal.

6. Permission was then sought by the respondent to appeal that decision on the basis that the judge had materially erred in law by allowing the appeal under paragraph 276B, whereas he could only have allowed the appeal to the

extent that the decision was not in accordance with the law and he ought to have remitted the matter to the Secretary of State.

7. Permission was granted on 6 July 2017.

8. The matter came before me and both parties made submissions.

9. It was agreed by all parties that the only ground of appeal open to the appellant under section 84 of the Nationality, Immigration and Act 2002, as amended, was that the decision was unlawful under section 6 of the Human Rights Act 1998 and that a remittal to the SSHD on the basis that the decision was not in accordance with the law, as asserted in the respondent's grounds, was not an option available to the judge.

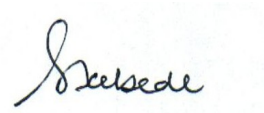
10. It was Mr Hawkin's submission that since the respondent consistently asserted that the immigration rules were human rights compliant and that they set out the overall balance between an individual's human rights and the public interest, the appellant's ability to meet the requirements of the immigration rules was sufficient in itself, in this case, for the appeal to be allowed on human rights grounds. As Mr Hawkin submitted, the respondent had raised no public interest points in the refusal decision but had refused the appellant's application solely on the basis of a break in the continuity of lawful residence following the expiry of his leave to remain and a lack of evidence of his EEA national exercising treaty rights since the issue of the residence card to him on 30 September 2011, matters which had been determined by the judge in his favour.

11. Having heard Mr Hawkin's submissions and been directed to the judge's acceptance that there was evidence to show the exercise of treaty rights from August 2010 by the appellant's EEA national partner, Mr Singh agreed that the judge had been entitled to find that the appellant had demonstrated ten years of continuous lawful residence in the UK. Whilst he submitted that the appeal should not have been allowed under the immigration rules, as that was no longer a ground of appeal available under section 84, he agreed with Mr Hawkin's submission that that was not a material error and that there was no need to set aside Judge Buckwell's decision.

12. Accordingly, in light of the parties' agreement, and for the reasons given, I do not consider there to be any material error of law in Judge Buckwell's decision requiring it to be set aside. The decision should be read as allowing the appeal on human rights grounds. It will now be for the Secretary of State to take the appropriate course on the basis of the findings made by the judge.

DECISION

13. The making of the decision of the First-tier Tribunal did not involve an error on a point of law requiring the decision to be set aside. The decision of the First-tier Tribunal to allow the appellant's appeal therefore stands.

Signed 
Upper Tribunal Judge Kebede

Date: 29 August 2017