Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00220/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 March 2018	**On 2 May 2018**

Before

Deputy Upper Tribunal Judge Pickup

Between

Nitin Vijay Jangda
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Mr Z Nasim, instructed by Milestone Chambers
For the respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge O'Malley promulgated 17.3.17, dismissing his appeal against the decision of the Secretary of State, dated 10.12.15, to refuse his application made on 23.9.15 for indefinite leave to remain (ILR) on the basis of 10 years' continuous lawful residence, pursuant to paragraph 276B of the Immigration Rules.

2. It is common ground that because the appellant did not have the necessary English language qualification, he was not entitled to ILR, but pursuant to paragraph 276A2, he would, if he could prove 10 years'

continuous lawful residence, be entitled to an extension of stay for a period not exceeding two years.

3. The complicated immigration history is set out in the decision of the First-tier Tribunal and need not be rehearsed here. However, whether or not the appellant could demonstrate 10 years' lawful residence depended on the resolution of two matters which were said to interrupt that 10-year period. The first of those, relating to a break in 2006, described at [18] of the decision was conceded by the Secretary of State's representative at the hearing, which the judge accepted and found in favour of the appellant at [26] of the decision. It is not necessary to address or detail that issue further.

4. The second, and sole remaining issue at the First-tier Tribunal related to an alleged break between 2009 and 2010. It is not necessary to go into all the detail of the extension of leave by s3C, etc., but in summary an application made in August 2009 was rejected in October 2010 because payment for the application was in some way ineffective, whether declined or refused. The upshot is that if the failure of that payment was the fault of the Secretary of State, rather than the appellant, the appellant was entitled to continuation of his leave and thereby would be able to demonstrate the full 10-year period of continuous lawful residence relied on.

5. Mr Nasim, who represented the appellant at the appeal, submitted and Mr McVeety could not prove otherwise that the Secretary of State produced no evidence to the First-tier Tribunal as to why the payment of the fee was not made or taken. On the other hand, the appellant had produced evidence to demonstrate that his aunt, from whose account the payment was to be made, had funds in the account and an arranged overdraft at the date of the application, and thus there is no reason why the payment was not taken. The judge accepted this evidence.

6. Resolution of the issue before the First-tier Tribunal turned on the burden of proof. Mr Nasim submitted that the burden was on the Secretary of State to satisfy the Tribunal that the failure of the payment of the fee was not her fault. Reliance was made on Basnet [2012] UKUT 113, to the effect that it is for the Secretary of State to establish that the appellant has no right to bring the appeal. The judge also took into account the decision of the Upper Tribunal in Mitchell (Basnet revisited) [2015] UKUT 00562 (IAC), which clarified that there may be a number of reasons why a payment might be declined and the Secretary of State does not have access to those reasons, so that a more nuanced approach to the burden of proof was required.

7. Judge O'Malley considered at [51] that whilst the appellant had provided information to show there were funds in one account, there were a number of deficiencies in the evidence and in particular "a lack of clarification," in respect of the payment, including as to the completion of the cheque. The judge in consequence found that the appellant failed to

establish that he properly provided a fee for the August 2009 application, so that the decision to refuse the application for non-payment was properly made. The effect was that it brought the appellant's 3C leave to and end and, as the next application in November 2009 was made more than 28 days later, his period of continuous lawful leave was broken.

8. First-tier Tribunal Judge Davies refused permission to appeal on 2.10.17. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Jordan granted permission on 19.12.17.

9. In granting permission to appeal, Judge Jordan was unclear whether the judge's approach, dwelling on evidence as to whether the cheque was validly made out, etc., was legitimate or whether it reversed the burden of proof "in a manner which is not permitted."

10. Thus it was the matter came before me on 7.3.18 as an appeal in the Upper Tribunal.

Error of Law

11. For the reasons summarised below, I found an error of law in the making of the decision of the First-tier Tribunal such as to require the decision of Judge O'Malley to be set aside.

12. Since the promulgation of the decision the issue of the correct burden of proof in demonstrating validity of application has been further clarified in the very recent decision of the Upper Tribunal panel in Ahmed & Ors (valid application – burden of proof) [2018] UKUT 53 (IAC).

13. The Upper Tribunal concluded that as there exists a further procedure undertaken by the Secretary of State in order to process payment in relation to which applicants are not privy and over which they have no control, it remains appropriate for the Secretary of State to bear the burden of proof. "Whether the Secretary of State ultimately discharges the legal burden of proof will depend on the nature and quality of evidence she is able to provide having regard to the timing of the any request for payment details and the reasons for any delay, balanced against any rebuttal evidence produced by an appellant.

14. In essence, the Secretary of State has an initial burden of proof to raise sufficient evidence to support her invalidity allegation. This may depend on whether any request was made to provide the payment details within 18 months of receipt by the payment processing centre. At [49] the Upper Tribunal noted that "It will be rare in a statutory appeal for the respondent's assertion that an application is invalid to be entirely unsupported by other evidence." However, as Mr Nasim points out and Mr McVeety could not contradict, absolutely no evidence was advanced by the Secretary of State at the First-tier Tribunal. The only evidence on the matter was the 'rebuttal' evidence adduced on behalf of the appellant, as described above.

15. It follows that in this case the legal burden remained on the Secretary of State throughout and that she did not discharge the evidential burden, requiring evidence from the appellant. The rejection of the application without consideration of its merits rested solely on the bare assertion that payment was not made so that the application was rejected as invalid. In Ahmed the process of attempting to obtain payment after the submission of the application form was a matter solely within the knowledge of the respondent and thus the burden remained on her. The fact that the challenge to the invalidity decision was only raised during a subsequent appeal against a later decision, "while ultimately relevant when assessing whether the respondent has discharged the burden of proof, has no bearing in determining where the burden of proof laid, [52]."

16. In the circumstances, I am satisfied that the First-tier Tribunal Judge reversed the burden of proof, when the Secretary of State failed to raise any evidence at all on the issue, let alone sufficient to discharge the initial burden of proof. As stated, the only evidence at all on the issue came from the appellant and was entirely in his favour.

17. Of course, the clarification in Ahmed was not available to the First-tier Tribunal and thus could not have assisted Judge O'Malley. However, it remains the case that in the light of Ahmed, the decision was in error of law, as ultimately accepted by Mr McVeety, in the way the judge put the burden on the appellant to demonstrate that payment was proffered and that failure to take the payment was the fault of the Secretary of State. In the circumstances, the decision cannot stand and must be set aside.

18. Following implementation of the Immigration Act 2014, the only right of appeal against the decision of the Secretary of State is on human rights grounds. However, the extent to which the appellant meets the requirements of the Rules is a weighty factor in any article 8 assessment outside the Rules. For the reasons set out above, I have found that the Secretary of State failed to demonstrate that his August 2009 application was invalid, and thus in consequence the appellant met the 10-year continuous lawful residence requirements of the Rules, so that he should have been granted an extension of leave in accordance with the Rules. That is a weighty consideration highly relevant to the article 8 human rights assessment.

19. It is not necessary to take any further evidence or submissions on the matter. Mr McVeety accepted that if the rejection of the August 2009 application was in error, the 10-year period would be met.

20. In the circumstances, applying the Razgar stepped approach of which the crucial element is the proportionality balancing exercise, I am satisfied that the decision to refuse his application for further leave was disproportionate to his article 8 rights of respect for private and family life. Mr McVeety did not pursue any argument to the contrary.

Conclusion & Decision

21. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by allowing it.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014. Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make a whole fee award.

Reasons: The appeal has been allowed.

Signed

Deputy Upper Tribunal Judge Pickup
Dated