Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10116/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 July 2019	**On 22nd July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HAMIS KASSANGA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Bramble, Senior Home Office Presenting Officer
For the Respondent: Mr P Nath, Legal Representative

DECISION AND REASONS

Introduction

1. In this decision, from hereon I will refer to the parties by their designations before the First-tier Tribunal. This is an appeal by the respondent against the decision of First-tier Tribunal Judge Clarke (Judge Clarke) on 19 November 2018 to allow the appellant's Article 8 appeal. Judge Saffer gave the respondent permission to appeal that decision on 18 February 2019 because he was concerned that Judge Clarke arguably had erred in relation to the ten years' lawful residence test for the purposes of paragraph 276B of the Immigration Rules. That Rule requires an appellant

who wishes to rely on a period of long residence in the UK in support of an application for indefinite leave to remain (ILR) to show that for a continuous period of ten years he has been lawfully resident in the UK. However, in calculating that 10-year period any period of overstaying will be ignored provided the application was made before 24 November 2016 and within the period of 28 days of expiry of leave or paragraph 39E of the Rules applied. That paragraph provided that where an application was made within 14 days of expiry of the applicant's leave expiring and the respondent considered there was a good reason beyond the control of the applicant or their representative why the application was not made in time. In either of those cases that period will not count towards that continuous ten-year period.

2. The case came before me for a consideration as to whether there was an error of law on 12 April 2019 and my decision to allow the respondent's appeal was promulgated on 14 May 2019. I indicated that the continuous lawful residence test was arguably not met and therefore it was necessary to look further at the evidence with a view to considering the ultimate disposal. The appeal was allowed to the extent that I found a material error of law, set-aside the decision of the First-tier Tribunal and directed the hearing listed on 5 July 2019.

3. At that hearing, Mr Nath attended with his client and his client's brother, but in fact there was no challenge to their evidence, which is included in a bundle of documents supplied to the Tribunal on 3 July 2019. The bundle of documents includes two supplemental witness statements for each of those witnesses. It also includes documents which relate to the appellant's alleged private or family life in the UK with his brother, Mnukwa Mohammed Khamis Kassanga.

Background to the current appeal

4. The background to the appeal which came before Judge Clarke is that the appellant came to the UK on a student visa on 15 January 2008. That was extended on 6 January 2009. He converted his application to a spouse application on 26 April 2010. According to the chronology which Mr Bramble read out on behalf of the respondent, the crucial date he identified was the date of lawful leave which expired on 21 June 2013. He said that left a gap in the appellant's lawful leave in the UK between 21 June 2013 and 4 February 2014 when the appellant made an application under Appendix FM of the Immigration Rules. He said that that broke the period of lawful residence for the purposes of paragraph 276B of the Immigration Rules as it went well outside the 28-day period. There was in fact a later period which exceeded 28 days by a small number of days, three days he thought, but he was not relying on that.

The hearing

5. Mr Bramble also took me to the Court of Appeal decision in **The Queen (on the application of Masum Ahmed) v Secretary of State for the**

Home Department [2019] EWCA Civ 1070 in which the Court of Appeal at paragraph 15 analysed the nature of continuous lawful residence for the purposes of paragraph 276B. The court said that "continuous residence" was to be defined by an "unbroken period" but it shall not be considered to be broken by certain periods of absence from the UK. "Lawful residence", on the other hand, means unbroken period of certain types of leave, temporary admission, immigration bail and exemption from immigration control. Unlike paragraph 276B (v) (a), sub-paragraph (b) contains is no corresponding provision which allows residence which is not continuously lawful to be deemed unbroken. It is here one would expect to find the saving which the applicant incorrectly contends is created by 276B, but one does not. We consider it to be clear indication that the lawfulness of continuous residence must be unbroken.

6. I therefore identify that the key issue before the Tribunal today appeared to me to be whether there was a sufficiently strong private and/ or private life in the UK for his rights under the European Convention on Human Rights (ECHR) to override the fact that there had in fact been a failure to meet the requirement of continuous lawful residence for ten years as required by 276B of the Immigration Rules. Mr Nath appeared to disagree with that, stating that he did not read the provision in the same way as Mr Bramble did. He did not necessarily accept that the Court of Appeal had decided the issue in the way that I have described in summarising paragraph 15(5) of the court's decision. Furthermore, he said that he relied on evidence that his client had been in the UK committing no criminal offences and enjoying a close family life with his brother and their children since 2008. He also prayed in aid the fact that his father was living in Tanzania who had ill-health.

7. Mr Bramble in reply, said it had been established in the course of argument that the continuous ten-year period had not been met. He said that the appellant did not qualify under Article 8. The relationship with the brother and sister-in-law were not "compelling circumstances" and the issue as to the father's ill-health went both ways. The fact that the appellant might be returning to Tanzania to resume family life with the father or be closer to the father may in fact be a favourable factor in his father's long-term care. Furthermore, there was no evidence that the appellant was actually sending money to his father in Tanzania.

8. There were a number of documents produced which tended to go to the issue of whether the appellant had formed a private or family life in the UK, but they were not verified. Many of the authors of the documents had not provided witness statements and they had not attended the Tribunal. Overall, the evidence was not particularly compelling at all. In the circumstances, I was invited to dismiss the appeal before the First-tier Tribunal having allowed the appeal to the Upper Tribunal by the respondent.

9. Mr Nath by way of brief reply said that his client had always tried to regularise his status. He was not an overstayer, had not "sat on his

hands" and had taken steps at every juncture to try and regularise his status.

Discussion and conclusion

10. Having on the previous hearing decided that this was a case where Judge Clarke had materially erred in the way he had approached the matter, I decided it was not appropriate simply to substitute my decision for that of the First-tier Tribunal without hearing further argument and carefully considering the evidence. However, having heard further argument and considered that evidence:

    (1) I am satisfied as a matter of law that the continuous period of lawful residence test was not met in this case, because of the break between the expiry of lawful leave on 21 June 2013 and 4 February 2014, when the appellant made an application under Appendix FM of the Immigration Rules;

    (2) That following the commencement into force of the Immigration Act 2014, the appellant's sole ground of appeal to the First-tier Tribunal (FTT)was that the decision on 17 April 2018 to refuse him further leave to remain, amounted to an unlawful refusal of his human rights claim (see section 82 of the Nationality, Immigration And Asylum Act 2002, as amended);

    (3) There are limited circumstances where the FTT will interfere with such a decision, which is, for the reasons I have found, compliant with the Immigration Rules on the basis that it is nevertheless not in accordance with the ECHR. The refusal must result in justifiably harsh consequences for the appellant so as to make it disproportionate.

11. In the circumstances of this appeal, I have decided that the FTT's Article 8 decision is unsustainable on the evidence before the FTT as supplemented by the evidence filed in advance of the second hearing before the Upper Tribunal. The nature of the relationship with the appellant's brother and his family is not of sufficient, compelling or weighty a character to outweigh all other considerations. Those considerations include the need to enforce proper immigration controls in the wider public interest of controlling immigration. The appellant's private and family life is by no means of the strongest and the factors Mr Nath identified, such as his client's non-commission of criminal offences, are in practice neutral factors.

12. In the light of that I have decided that it is appropriate to substitute the decision of the Upper Tribunal below for FTT's decision.

Decision

13. The appeal to the Upper Tribunal by the respondent is allowed. The decision of the FTT is set as aside. The decision of the Upper Tribunal is substituted which is to dismiss the appeal against the Secretary of State's refusal of further leave to remain in this case.

14. No anonymity direction is made.

Signed Date 16 July 2019

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date16 July 2019

Deputy Upper Tribunal Judge Hanbury