



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number: HU/06218/2019 (P)

THE IMMIGRATION ACTS

On the papers on 15 June 2020

**Decision & Reasons Promulgated
on 23 June 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**MITHUN VINCENT
(anonymity direction not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ERROR OF LAW FINDING AND REASONS

1. The appellant is a citizen of India born on 7 April 1984. His immigration history reads:
 - i. 12 March 2008 arrived in the UK with entry clearance as a student valid to 31 January 2010
 - ii. 29 March 2010 applied for leave to remain as at Tier 4 (General Student) granted to 21 May 2011
 - iii. 20 May 2011 applied for leave to remain outside the Rules refused on 21 July 2011 with limited right of appeal. 26 August 2011 appellant appealed out of time which was withdrawn on 5 March 2012 leaving the appellant appeal rights exhausted on that date.

- iv. 28 February 2012 applied out of time for leave to remain as a Tier 1 (Highly Skilled) Post Study migrant - granted on 8 August 2012 to 8 August 2014.
 - v. 8 August 2014 applied for leave to remain as a Tier 1 (Highly Skilled) Entrepreneur granted on 6 October 2014 with leave valid to 6 October 2017.
 - vi. 6 October 2017 applied for leave to Tier 1 (Highly Skilled) Entrepreneur refused on 3 April 2018 with right of Administrative Review. 17 May 2018 Administrative Review request was received but on 15 May 2018 the decision maintained.
 - vii. 29 May 2018 applicant applied for leave to remain on human rights grounds and an application for indefinite leave to remain in the United Kingdom on the basis of 10 years continuous lawful residence and his private life.
2. The application was considered by the decision-maker pursuant to paragraph 276B of the Immigration Rules but refused for although it was accepted the appellant held continuous lawful residence between 12 March 2008 when he arrived in the UK on 21 July 2011, he had a gap in his continuous lawful residence between 21 July 2011 and the next grant of leave to remain on 8 August 2012 as he had appealed out of time. It was accepted the appellant held continuous lawful residence from 8 August 2012, but such lawful leave only amounted to 6 years and 7 months.
 3. The decision-maker also refused the application under the Immigration Rules and outside the Rules; concluding that it had not been established that the decision to refuse was disproportionate on the basis the appellant had not established a right to remain pursuant to paragraph 276 ADE or established there was anything in his circumstances to warrant a grant of permission outside the Rules.

Background

4. The appellant's appeal against the refusal came before First-tier Tribunal Judge Siddiqi sitting at Manchester on 18 June and 25 September 2019. In a decision promulgated on 15 October 2019 the Judge sets out findings specific to the long residence question at [18 - 21] in the following terms:
 18. The Appellant initially sought to argue that the Respondent's decision of 21 July 2011 was not received until 19 August 2011 and I found his evidence to be credible on this point. I note that he had the same legal representatives acting for him in 2011 and at the hearing before me. His legal representatives would clearly have been aware of the implications of the Appellant submitting a witness statement which referred to delayed service of the decision of 21 July 2011 if in fact he had received the decision before 19 August 2011. It is extremely difficult for an appellant to prove a negative i.e. that a decision was delayed in the post and I was not persuaded by the Respondent's argument that such delay cannot be taken into account when assessing whether the appellant is in overstayer.
 19. However, at the hearing of 18 June 2019, I queried whether in any event, the Appellants section 3C leave had come to an end once he had withdrawn his appeal against the decision of 21 July 2011. In his

submissions of 18 June 2019, Mr Rai sought to persuade me that paragraph 39E of the Rules applied and therefore the Appellant would not be an overstayer. However, he now accepts that this argument no longer assist the Appellant following the judgement in Ahmed.

20. In Ahmed it was held that

“The disregarding of current or previous short periods of overstaying for the purposes of subparagraph (v) does not convert such periods into periods of lawful LTR; still less are such periods to be “disregarded” when it comes to considering whether an applicant has fulfilled the separate requirement of establishing “10 years continuous lawful residence” under paragraph (i) (a).”

21. The Appellant has spent more than 10 years in the UK but not all of that residence is lawful. Therefore, he does not meet the long residence requirements of the Rules.

5. The Judge records at [22] that it was accepted the appellant could not meet the requirements of paragraph 276 ADE and at [26] that the respondent’s decision outside the Immigration Rules is proportionate.

6. The appellant sought permission to appeal which was initially refused by another judge of the First-tier Tribunal but granted on a renewed application by a judge of the Upper Tribunal, the operative part of which is in the following terms:

2. The issue to be decided is whether the appellant could demonstrate that he had resided in the UK lawfully for a continuous 10-year period. Given that the Judge accepted that the respondent had delayed in sending the decision of 21 July 2011 and that his appeal against this decision was therefore in time while noting that the appellant withdrew that appeal having previously been granted leave to remain, it is arguable that the appellant’s leave was not interrupted. All grounds may be argued.

7. On 4 May 2020, the appeal was listed for an Initial Hearing at Field House which had to be vacated as a result of the Covid-19 pandemic and subsequent arrangements for the administration of the work of the Upper Tribunal. Accordingly, on 1 May 2020 directions were served upon the parties advising that the Upper Tribunal had reached a provisional view that the question of whether the Judge had erred in law and whether that was material to the decision to dismiss the appeal could be dealt with on the papers; giving the parties time in which to make representations. Such representations have been received and the Tribunal is of the opinion that the matter can be fairly disposed of on the papers at this stage.

Submissions

8. The appellant’s grounds erroneously refer to the decision of First-Tier Tribunal Judge Easterman but that was the decision of the First-Tier Tribunal which initially refused permission to appeal and does not have any further relevance following the grant of permission to appeal by the Upper Tribunal.

9. The appellant's original Grounds asserted the Judge erred in law relying upon the decision in Ahmed [2019] EWCA Civ 1070 and the respondent's updated guidance, asserting procedural unfairness as the principles of that case were not relevant to the issues at large in this appeal as the appellant has never overstayed. The appellant asserts that his leave, either lawfully granted or pursuant to section 3C Immigration Act 1971 always continued.
10. The appellant also asserted that an application of 28 February 2012 was granted by the respondent without mentioning any period of overstaying as it was made prior to the end of the appellants section 3C leave and was therefore to be considered a valid application for further leave. The judge breached the fairness principles and failed to consider whether discretion should have been exercised in the appellant's favour on the basis it was claimed the appellant had completed 10 years long residence in the UK.
11. The appellant also pleads at Ground 4, in the alternative, a claim the respondent failed to consider a policy and implication in respect of the human rights claim for the reasons set out in the pleadings the 21 February 2020.
12. Additional submissions provided by the appellant sent under cover of an email of the 6 May 2020 assert, inter alia,;
 - i. The FTJ in this appeal accepts at [18 and 19] of the determination that he was not persuaded by the respondent's argument that such delay in lodging an appeal on 26 August 2011 cannot be taken into account when assessing whether an appellant is an overstayer, as such it is concluded that A leave was extended until the withdrawn appeal of 05 March 2012.
 - ii. FTJ has further conceded that A's 3C leave would have come to an end once he had withdrawn his appeal against the decision of 21 July 2011 on 05 March 2012.
 - iii. FTJ has failed to oversee that A has submitted his application for leave to remain on 28/02/2012, which is prior to the assumed end of 3C leave is determined, as such there is not even a single day gap in the continuous lawful residence of A and therefore even the application of *Ahmed* is not tenable.
 - iv. Therefore, reliance on the authorities was erroneous, especially given the very difficult factual scenario in this appeal and given that the respondent's guidance falls squarely within the circumstances that arise in this appeal.
13. The appellant repeats the claim to have always had lawful leave and to be entitled to a right to remain in the United Kingdom pursuant to paragraph 276B(i)(a) of the Immigration Rules.
14. The respondent's further submissions received on 20 May 2020 oppose the application asserting it was accepted by the appellant's representative that the appellant could not benefit from paragraph 39E of the Immigration Rules and that the Judge had therefore not erred in law in finding there was a break in the appellant's period of lawful leave in the United Kingdom.
15. The respondent argues there is no unfairness in the Judge's decision noting the Judge could raise the issue of the effect of the withdrawal of the application of 5 March 2012 but also granted an adjournment

for both parties to provide further submissions. The respondent maintains that the appeal against the decision of 21 July 2011 had been submitted out of time and therefore the appellant's section 3C leave had ended.

- 16.** The respondent disagrees with the appellant's submission that the Judge failed to consider discretion and adopted an incorrect approach and asserts the Judge has given adequate reasons for why the matter was approached in the manner it was and that mere disagreement is insufficient. The respondent's grounds note a contradiction in the appellant's pleadings in that in Ground 1 the appellant suggested the decision in Ahmed [2019] EWCA Civ 1070 did not apply as the appellant did not overstay whereas in Ground 4 the appellant is suggesting that that case law should apply. The respondent's position is however that the guidance claimed did not assist the appellant and it is claimed it was not an argument raised in the Grounds before the Judge or contained in an early skeleton argument and therefore amounted to a new matter.

Error of law

- 17.** No procedural unfairness arises in the Judge's decision. The appeal initially came before the Judge on the 18 June 2019 at which the Judge raised the issue of whether the appellant's 3C leave ended at the time the appellant withdrew an appeal on 5 March 2012. As this was not a matter in the refusal the Judge adjourned to enable further submissions to be made, bringing the matter back before the tribunal on the 25 September 2019.
- 18.** The Judge refers to an issue being raised concerning the date of receipt of a decision and whilst that may be relevant to assessing whether it was appropriate for a person who lodged an appeal to challenge the decision out of time, as a result of the delay in a decision being received by them, any delay between the decision of 21 July 2011 and receipt on 19 August 2011 does not, arguably, have the effect of retrospectively reinstating leave that may otherwise have expired.
- 19.** An overstayer is a person who has remained in the UK beyond the period they are permitted. This will either be the expiry date on their most recently issued visa, or the date any leave that has been extended by Section 3C or Section 3D of the Immigration Act 1971 ends.
- 20.** The appellants immigration history shows he applied for leave to remain outside the Rules on 20 May 2011, in time, which was refused on 21 July 2011 with limited right of appeal. On 26 August 2011, the appellant appealed the decision out of time.
- 21.** The appellant relies upon section 3C Immigration Act 1971 which provides that a person will have section 3C leave if:
- they have limited leave to enter or remain in the UK
 - they apply to the Secretary of State for variation of that leave

- the application for variation is made before the leave expires
- the leave expires without the application for variation having been decided
- the application for variation is neither decided nor withdrawn.

22. Leave can also continue pursuant to section 3C during any period when:

- an in-country appeal could be brought (ignoring any possibility of appeal out of time with permission)
- the appeal is pending (within the meaning of section 104 of the Nationality, Asylum, and Immigration Act 2002), meaning it has been lodged and has not been finally determined.

Or pending Administrative Review, as Section 3C leave continues during any period when:

- an administrative review could be sought
- the administrative review is pending, in that it has not been determined
- no new application for leave to remain has been made

23. It is not disputed the appeal lodged on 26 August 2011 was out of time which will have the effect of ending the appellant's leave as the possibility of an appeal out of time with permission is ignored in the assessment as noted above.

24. Even if the appellants section 3C leave continued as a result of the out of time appeal, the appellant, in any event withdrew the appeal on 5 March 2012 making him appeal rights exhausted on that date as found by the Judge.

25. Paragraph 39 E of the Immigration Rules reads:

39E. This paragraph 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 of a previous application for leave which was made in-time; and

(b) within 14 days of:

1. (i) the refusal of the previous application for leave; or
2. (ii) the expiry of any leave extended by section 3C of the Immigration Act 1971; or
3. (iii) the expiry of the time-limit for making an in-time application for administrative review or appeal (where applicable); or
4. (iv) any administrative review or appeal being concluded, withdrawn or abandoned or lapsing.

- 26.** The appellant's representative quite properly accepted that an argument the appellant's leave had been extended as a result of a subsequent application had no merit in light of Ahmed is factually correct. The effect of this provision is that if the requirements are met the fact a person is an overstayer will not be held against an applicant, as it was in the past when there were numerous refusals solely on the basis that a person had overstayed their leave and made an out of time application. Paragraph 39E provides a 14-day period in which an application will be considered on its merits and not rejected solely on the basis that the person is an overstayer, but this does not assist the appellant in this case.
- 27.** The appellant assert the Judge has failed to take into account that when the appellant submitted his application for leave to remain on 28 February 2012 that was before the end of his section 3C leave which the Judge found had ended on 5 March 2012.
- 28.** The difficulties for the appellant with this argument are twofold. The first is that as the appeal against the decision of 2 July 2011 was out of time the appellant did not have section 3C leave from the expiration of the limitation period provided in the Procedure Rules for lodging an appeal in time. The second problem is the effect of section 3C(4) which reads:
- (4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.
- 29.** In the alternative and taking the appellants case at its highest, if the lawful leave granted to the appellant expired on 21 May 2011 and even if that leave was extended pursuant to section 3C until 5 March 2012 unless the appellant had withdrawn the appeal against the refusal such that his section 3C leave came to an end he could not make a valid application on 28 February 2012 for further leave to remain. Even though the respondent appears to have granted leave sought until 8 August 2014 that does not have the effect of overriding the statutory effect of section 3C. It is for the respondent to decide whether to exercise discretion and grant leave which appears to have occurred in this case even though the application was invalid. That does not, however, have the effect of extending section 3C leave in this appeal.
- 30.** I find when the chronology and appropriate legal provisions are examined in detail there is no legal error material to the decision of the Judge to dismiss the appeal sufficient to warrant the Upper Tribunal interfering any further in this matter.

Decision

- 31. There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

- 32.** The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed
Upper Tribunal Judge Hanson

Dated the 15 June 2020