Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/19843/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House *via Skype for Business*	**Decision & Reasons Promulgated**
On 21 December 2020	**On 11 January 2021**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

SRI HARI REDDY SEERAPU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Representation:
For the Appellant: Mr. S Bellara, Counsel, instructed by Legend Solicitors
For the Respondent: Ms. S Cunha, Senior Presenting Officer

Introduction

1. The appellant is a national of India and is aged 42. He appeals a decision of the respondent to refuse to grant him indefinite leave to remain in this country on long-residence grounds under the Immigration Rules, and in the alternative leave to remain on human rights (article 8) grounds.

2. His appeal was initially considered by Judge of the First-tier Tribunal Maka ('the Judge'), who dismissed his appeal by a decision sent to the parties on

18 March 2020. The appellant was granted permission to appeal and I set aside the decision of the First-tier Tribunal on 2 October 2020 having determined that the Judge had materially erred in law.

3. I preserved findings of fact made by the Judge, namely those identifiable within paras. 37 and 39 of his decision.

4. This matter was listed before me on 21 December 2020 for the resumed hearing.

Remote hearing

5. The hearing before me was a Skype for Business video conference hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

Background

6. The appellant entered the United Kingdom on 6 December 2009 with entry clearance as a Working Holidaymaker, valid from 5 June 2009 to 5 June 2011. He left the country and on 10 July 2011 he re-entered having secured entry clearance as a Tier 2 (General) Migrant valid from 27 June 2011 to 26 July 2014.

7. He made an in-time application on 25 July 2014 for further leave to remain as a Tier 2 (General) Migrant. The respondent refused the application by a decision dated 8 October 2014.

8. Om 22 October 2014, within 28 days of the previous refusal, the appellant applied for leave to remain as a Tier 2 (General) Migrant. The respondent refused the application by a decision dated 15 January 2015.

9. On 19 January 2015, the appellant applied for leave to remain as a Tier 2 (General) Migrant. The respondent granted leave by a decision dated 10 February 2015, with such leave expiring on 15 February 2018.

10. The appellant applied for further leave to remain as a Tier 2 (General) Migrant on 9 November 2016. The application was refused by a decision dated 13 September 2017. He continued to enjoy previously granted leave until it was curtailed to end on 18 December 2017.

11. On 2 October 2017 the appellant applied for leave to remain as a Tier 2 (General) Migrant. The respondent refused the application on 14 October

2017 and re-affirmed the decision on 13 November 2017 consequent to Administrative Review.

12. The appellant applied in-time for leave to remain outside the Immigration Rules on 18 December 2017. This application was subsequently varied on 12 January 2018 and by a decision dated 22 February 2018 the respondent granted the appellant leave to remain as a Tier 4 (General) Student until 1 July 2019.

13. On 1 July 2019 the appellant applied in-time for leave to remain as a Tier 2 (General) Migrant and subsequently varied the application on 29 August 2019 and again on 14 November 2019 to one seeking indefinite leave to remain on the grounds of 10 years long residence.

14. By a decision dated 18 November 2019, the respondent refused the application for indefinite leave to remain under paragraph 276B of the Immigration Rules, concluding:

> 'Careful consideration has been given to your immigration history … It is noted that your application of 25 July 2014 was refused on 08 October 2014. You made a further application on 22 October 2014 which was refused on 15 January 2015. Following this you [made] a further application on 19 January 2015 which was granted on 10 February 2015.
>
> As your application was refused on 08 October 2014 and your subsequent application was also refused you had no lawful leave to remain in the UK from 08 October 2014 until 10 February 2015 when you were next granted leave. This is a gap of 125 days (4 months 2 days) in your lawful leave.
>
> Therefore, as you have not had 10 years continuous lawful residence in the UK you fail to meet the requirements of paragraph 276B(i)(a) of the Immigration Rules.
>
> The Secretary of State has therefore refused your application for indefinite leave to remain in the United Kingdom on the basis of completing 10 years Long Residence in the United Kingdom under paragraph 276D of the Immigration Rules as you do not meet the requirements of Paragraph 276B(i)(a) with reference to 276A(b) of the Immigration Rules.'

Decision

15. I observe the relevant Immigration Rules:

> 276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:
>
> (i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.

…

(v) the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where –

(a) the previous application was made before 24 November 2016 and within 28 days of the expiry of leave; or

(b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied.

276C. Indefinite leave to remain on the ground of long residence in the United Kingdom may be granted provided that the Secretary of State is satisfied that each of the requirements of paragraph 276B is met.

16. The decision of 2 October 2020 preserved the following findings of the Judge:

'37. I accept the appellant's immigration history as indeed both representatives did before me. The only issue taken in the refusal letter is the gap between 2014 and 2015. The appellant's application of 25 July 2014 was refused on 8 October 2014. He re-applied on 22 October 2014 and this was again refused on 15 January 2015. He made a further application on 19 January 2015 and this was granted on 10 February 2015. The argument is that he had no leave to remain in the UK from 8 October 2014 until 10 February 2015, being a gap of 125 days. The appellant argues that [the] gap of 125 days was due to an error of the respondent. When he applied on 22 October 2014, he contacted the respondent asking to vary his application as he [had] found a new employer.[1] He was told in order to assign a new COS, his existing employer had to withdraw the current COS before a new form could be sent with the new employer's details. He was given 7 days to provide this. Without notice on 15 January 2015, the respondent went onto refuse the application due to their being no COS on file.

…

39. In closing submissions, I asked the presenting office whether he had something on file or note on his system counter-acting the interpretation given by the appellant to the GCID notes in his case, obtained by him. The presenting officer could not point me to anything. I am satisfied, on a balance of probabilities, the

[1] For clarity, the appellant's evidence is that he contacted the respondent in mid-December 2014 seeking advice as to how he could name a new employer in respect of his October 2014 application for leave to remain as Tier 2 (General) Migrant.

> appellant's interpretation is correct. This was an innocent error by the respondent. I accept the appellant has contacted the respondent seeking to change his employer and was told his original COS would have to be withdrawn and a new form submitted to enable it to be changed. I accept the GCID notes are not wholly clear. Nevertheless, they support the appellant's interpretation in that the application was refused on 14 January 2015 purely on the basis of there being no COS without reference to the entry of 16 December 2014. I also accept Counsel's submission, an out of time application (or more than 125 days) would not have been accepted a month later unless there was some consideration, or exercise of 'discretion' having regard to the earlier confusion over the absent COS. I am therefore satisfied this constituted an 'exceptional circumstance' beyond the appellant's control as it was an error of the respondent. I do not hold this against him as this was an error of the respondent.'

17. By a position statement, authored by Mr. Lindsay, Senior Presenting Office, and dated 23 November 2020 the respondent confirmed that only one issue was to be considered by the Tribunal, at [5]-[9]:

> '5. A single specific grounds for refusal was identified in the RFRL; a gap in continuous lawful residence of 125 days between 8 October 2014 and 10 February 2015 (hereafter 'the break' for convenience).
>
> 6. The SSHD maintains that the break is fatal to A's claim under para 276B of the Immigration Rules; and is the only basis upon which that claim should be held to fail. Accordingly, it is respectfully submitted that the RFRL is correct and should be upheld. The following submissions are intended to clarify the underlying reasoning.
>
> 7. The immigration history of A as set out in the RFRL was not in dispute before the FTT and was accepted by Judge Maka at [37]. A's immigration history as recited by the Judge includes at [19] that A's in-time application as a Tier 2 Migrant was refused on 8 October 2014. It is clear that leave was not extended by [section 3C of the Immigration Act 1971] past this point; and further leave was not granted until 10 February 2015.
>
> 8. Accordingly, the break relied upon in the RFRL did occur. This is consistent with the FTT's analysis at [37-39]. it is also consistent with the Upper Tribunal's decision on error of law at [8]. The clear findings of the Tribunal therefore that the break did occur, but it was not A's fault.
>
> 9. It is respectfully submitted that the effect of the break is that para. 276B(i)(a) is not met by A because he has not demonstrated at least 10 years continuous lawful residents in the UK. This is so not withstanding that the break was not the fault of A.

18. The starting point for my consideration is that the appellant's in time application for leave to remain as a Tier 2 (General) Migrant was refused

on 8 October 2014. He was next granted leave to remain on 10 February 2015.

19. As previously found by the Judge, the appellant was not at fault for the adverse decision of 15 January 2015. Rather, having informed the appellant as to steps to take to amend his application, the respondent proceeded to make the decision whilst on notice that such steps, as advised, were being undertaken but not completed. I am satisfied that no reasonable public authority, such as the respondent, would refuse to exercise discretion in favour of the applicant if this were the only adverse matter placed against him.

20. That leaves for consideration the out-of-time application for further leave to remain made on 22 October 2014, 14 days after the respondent's refusal of the earlier in-time application for leave to remain. Observing the recent Court of Appeal judgment in *Hoque v. Secretary of State for the Home Department* [2020] EWCA Civ 1357 the second disregard in paragraph 276B(v) concerned with overstaying is to be applied as a qualifying sub-paragraph of paragraph 276B(i)(a). I observe paragraph 276B(v)(a) of the Rules and the respondent's 'Long Residence' (version 15) guidance, the latter in place at the time of the latest decision in this matter. Any short gaps in lawful residence through making previous applications out-of-time by no more than 28 calendar days where those gaps end before 24 November 2016 will be disregarded when considering continuous residence under paragraph 276B(i)(a). Being mindful of the guidance provided by the Court in *Hoque* the appellant is to be considered a 'book-ended' overstayer, namely a person whose previous period of overstaying fell between periods of lawful leave and so falls into the category of person who benefits from paragraph 276B(v).

21. I note at this juncture that whilst Ms. Cunha did not concede this matter, she acknowledged that the Court of Appeal decision in *Hoque* identifies the present approach to paragraph 276B(i)(a) and (v) of the Rules.

22. I find that the appellant meets the requirement of paragraph 276B(i)(a) of the Rules. As this is the sole ground of refusal relied upon by the appellant, his human rights (article 8) appeal must be allowed.

23. Consequently, there is no requirement to proceed to consider the appellant's article 8 rights outside of the Rules.

Notice of Decision

24. By means of a decision dated 12 October 2020 this Tribunal set aside the Judge's decision promulgated on 18 March 2019 pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.

25. The decision is re-made, and the appellant's appeal is allowed on human rights (article 8) grounds.

Signed: D. O’Callaghan
Upper Tribunal Judge O’Callaghan
Dated: 22 December 2020