Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36998/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 24 July 2014	**On 30 July 2014**

Before

THE HONOURABLE MR JUSTICE LEWIS
UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR TEEJO THOMAS

Respondent

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Mr P Richardson, Counsel

DETERMINATION AND REASONS

1. This is an appeal against a decision of the First-tier Tribunal dated 18 April 2014. By that decision the Tribunal allowed an appeal by Mr Teejo Thomas against the decision of the Secretary of State refusing leave to remain and deciding to remove Mr Thomas from the United Kingdom. The

appeal was allowed on the basis of Article 8. The Secretary of State appeals against the decision of the Tribunal.

2. The facts are as follows. The respondent, Mr Thomas, is a national of India. He was born in October 1979. He arrived in the United Kingdom as a student. He did extremely well as a student. His leave was extended on a number of occasions and he had a number of visas including visas for graduate studies, for post-study work and eventually as a Tier 1 (General) Migrant.

3. He was first self-employed and then he became employed by a particular company. The original anticipation was that Mr Thomas would work in the United Kingdom for some time and work abroad for some time and return to the United Kingdom. Due to circumstances connected with the employment he spent longer outside the United Kingdom than was originally anticipated.

4. On 24 February 2013 Mr Thomas applied for indefinite leave to remain in the United Kingdom on the basis of ten years' continuous lawful residence in the United Kingdom. We have emphasised the word **continuous residence**. That is defined in paragraph 276ADE of the Immigration Rules and the two important aspects of the definition are these.

5. Firstly, continuous residence means residence in the United Kingdom for an unbroken period, and for these purposes a period shall not be considered to have been broken where an applicant is absent from the United Kingdom for a period of six months or less at any one time, provided that the applicant in question had existing limited leave to remain at that stage.

6. There is a second aspect of the definition that must be met. The applicant must not have spent a total of more than eighteen months away from the United Kingdom during the period in question. If there are periods in total of more than eighteen months out of the same years then the continuous residence has been broken.

7. Following the decision of the Secretary of State Mr Thomas appealed the decision to the First-tier Tribunal. The Tribunal recorded at paragraphs 6 and 7 the reasons why it was that Mr Thomas had had periods of absence abroad. The periods of absence are these. Firstly, there was one period when Mr Thomas was away from the United Kingdom for more than six months. There was one period when he was absent from 30 August 2010 to 10 July 2011. That is a total of 313 days.

8. Looking at all the days of absence in total they amounted to more than eighteen months. It appeared to have been a total of 575 days, so Mr Thomas did not meet the two parts of the definition of continuous residence. There was one period when he had been away for more than six months and then a total absence of more than eighteen months.

9. As I say, the reasons given which deal with his employer, it had been anticipated that he would work for two weeks abroad and two weeks in the United Kingdom, and that would have enabled him to maintain his continuous residence requirement but due to circumstances to do with his work he spent more time in Qatar and in India than had been anticipated. The Tribunal also records that it was accepted that the respondent could not satisfy the Immigration Rules in relation to long residence for those reasons.

10. At paragraph 10 the Tribunal referred to the well-known cases of **MF (Nigeria)** and **Nagre [2013] EWHC 720 (Admin)**, the latter for the proposition that only if there may be arguably good grounds for a grant of leave outside the Immigration Rules was it necessary for Article 8 purposes to consider if there were compelling circumstances.

11. Then at paragraph the Tribunal says this:

> "In the present case, in view of the somewhat unusual circumstances, I find that there are sufficiently good grounds for considering the matter under Article 8 outside the Immigration Rules",

and the Tribunal then proceeded to do so.

12. In terms of the fourth stage recognised by the case of **Razgar [2004] UKHL 27** the Tribunal said this. That question is concerned with whether or not there is, to put it broadly, a legitimate aim which the Secretary of State is pursuing in terms of Article 8. It is whether it is an interference necessary in a democratic society in the interests of national security, public safety, economic wellbeing, the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedoms of others, and what the Tribunal said is this:

> "17. Thus there are two aspects to the matter, namely whether the interference is necessary in a democratic society or whether it is in the interests of the economic wellbeing of the country.
>
> 18. In addressing those matters I find that the appellant is in fact an asset to the United Kingdom, rather than a drain on its resource. He has used his undoubted skills to benefit the British economy by bringing large sums of money into the country from hundreds of overseas students whom he has recruited to educational institutions. The amount involved has not been specifically quantified but it is said by his former employer to amount to millions of pounds. His efforts were pursued at the cost of his ability to qualify for indefinite leave to remain through ten years' continuous lawful residence of which he was fully aware, yet he remained loyal to his employer company (a British company) so that it would be able to continue trading for longer than it might otherwise have done, thus helping to preserve other people's jobs. He seeks to make his home in this country where he has

established a strong private life over the last eleven years and is working again for a British company servicing an international client, American Express, thereby bringing more money into the economy.

19. In these circumstances, I find that it is neither necessary in a democratic society nor is it in the interests of the economic wellbeing of the country to interfere with the appellant's rights under Article 8(1) of the ECHR. The only reason for doing so would be to maintain the strict letter of the system of immigration control which, by itself, is an insufficient reason to justify such interference."

13. For those reasons the Tribunal found that there was no legitimate interest at stake which the Secretary of State was pursuing, and for completeness I note that at paragraph 21 the Tribunal said: "It is not in those circumstances we need to consider whether or not any interference was proportionate on the facts of this case" although it did say it thought it would have had little difficulty holding that the interference was not proportionate.

14. We turn then to the general law. It is important to start with the terms of Article 8 of the ECHR itself. That provides as follows. Under the heading "right to respect for private and family life" it says this:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

15. Against that background we bear in mind the following. First, it is important to bear in mind that Article 8 does not entail a general obligation for a state to respect an immigrant's choice as to the country in which they wish to reside. States are entitled to control entry and residence of foreign nationals into the state. That has been recognised numerous times, for example by Lady Hale in **ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4** at paragraph 18.

16. Secondly, Article 8 is a qualified right. Interference with the right to respect for private and family life will not contravene Article 8 if it is in accordance with the law, it is in pursuit of a legitimate aim, that is one of the aims recognised in Article 8(2) and if the interference is proportionate.

17. Thirdly, the maintenance of effective immigration control is a legitimate aim. That aim is as a minimum an aspect of the protection of the economic wellbeing of the country. Should authorities for that be necessary one can read the observations of Lady Hale in the decision in **Razgar** at paragraph 45.

18. As noted by the House of Lords in **Huang [2007] 2 AC 167** there is an interest in ensuring the desirability of applying known Rules in a system of immigration which are workable, predictable, consistent and fair as between one applicant and another; conversely there is damage to good administration and effective control if a system is perceived unpredictable, porous or perfunctory.

19. Fourthly, if there is an interference in accordance with the law and if it is done for a legitimate aim it is thereafter necessary to consider whether the action taken is proportionate to that aim. The approach to the question of proportionality is in our judgment well-settled by decisions such as those of Mr Justice Sales in **The Queen on the application of Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin)**, **MF (Nigeria) [2014] 1 WLR 544** and most recently by the Court of Appeal in **Haleemudeen [2014] EWCA Civ 558**.

20. The starting point for the assessment of proportionality is the Immigration Rules. As Lord Justice Beatson explains in paragraph 40 of **Haleemudeen** this is because the Immigration Rules are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interests and rights of people who have come to this country and wish to settle in it.

21. Overall the Secretary of State's policy as to when an interference with an Article 8 right will be regarded as disproportionate is more particularised in the new Rules than it had previously been. The new Rules require stronger bonds with the United Kingdom before leave will be given under them. The decision-maker should therefore first consider whether or not the applicant is entitled to leave to remain under the Rules.

22. As Mr Justice Sales explained in **Nagre**, the new Rules do provide better explicit coverage of the factors identified in case law which are relevant to an analysis of proportionality under Article 8 than was formerly the position, so in many cases the main points for consideration in relation to Article 8 will be addressed by decision-makers applying the new Rules.

23. Pausing there, in our judgment what Mr Justice Sales is saying is that the factors that are relevant to an assessment of Article 8 may well be specifically addressed and contained within the Immigration Rules themselves. If so, the application of the Rules themselves will usually indicate the answer as to whether or not action is proportionate or disproportionate.

24. Where, however, there are circumstances which are not governed by the Rules then it may be necessary to go outside the Rules to see whether there are good grounds or what in some cases are referred to as compelling circumstances for granting leave outside the Rules. That approach has been endorsed recently in our judgment by the Court of Appeal in **Haleemudeen**, see for example paragraph 43 of that judgment.

25. We have noted the argument of Mr Richardson on behalf of Mr Thomas that that approach is not now necessary or at the very least the Tribunal could depart from it. The basis of his submissions was effectively the decision of the Court of Appeal in the case of **The Queen on the application of MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA Civ 985**. In particular he relied upon paragraphs 1 to 8.

26. However, one needs to bear in mind two things. Firstly, this Court of Appeal decision was not seeking to depart from the other Court of Appeal decisions nor would it do, which approves the approach in **Nagre**, and secondly, it is quite clear that in the **MM** case the court was dealing not with individual claims nor whether action in individual cases was disproportionate. Rather it was dealing with whether or not a particular Rule was itself a breach of Article 8. The context was therefore different.

27. In the **Nagre** line of cases the court was looking at whether or not action is disproportionate. Where the factors that were relevant to that were factors that were already dealt with and weighed up within the Rules there would need to be some other compelling circumstance different from the ones that had already been weighted in the Rules to justify considering the grant of leave outside the Rules. That is the situation we are dealing with here. Where, however, you are dealing in the abstract where the question is whether or not a legal provision is contradictory to Article 8 different considerations may or may not apply.

28. Turning then to the Tribunal's decision in the present case, in our judgment the Tribunal erred in law in a number of different ways. Firstly, the starting point here is the Immigration Rules. The basis on which the respondent was seeking to justify being allowed to remain in the United Kingdom was the length of residence he had had here. The longer you have resided in a place the stronger the bonds you will have formed in that place. However, those factors are dealt with under the Rules and the respondent cannot establish a right to remain in the UK on the basis of residence under the Rules. He has not established ten years' continuous residence.

29. In those circumstances the Tribunal would need to identify what compelling circumstances might exist such as were not covered by the Rules which would make it appropriate to consider the grant of leave outside the Rules. The Tribunal, however, does not identify any such compelling circumstances. It refers to what it calls the unusual circumstances of the respondent's case but the only circumstance in

which the appellant in fact had erred is in the fact that the respondent for particular reasons does not satisfy the requirements of ten years' continuous residence. Consequently the Tribunal has not in fact identified any compelling circumstances in a situation not covered by the Rules which could justify consideration of a grant of leave outside the Rules. Rather, the Tribunal is treating the fact that the respondent cannot satisfy the Immigration Rules as itself being a compelling circumstance for going outside the Rules. That in our judgment is an error in approach and reflects a failure to apply and understand the relevant case law.

30. Secondly, the Tribunal erred in concluding that the defendant was not acting in a way that was in pursuance of a legitimate aim within the meaning of Article 8(2). The maintenance and enforcement of immigration control including as it does the fair application of provisions governing eligibility based on residence is a legitimate aim. It is a reflection of the protection of the economic wellbeing of the country. It is therefore action which potentially seeks to pursue a legitimate aim. The Tribunal erred in paragraphs 17 to 19 by not treating the maintenance of fair and effective immigration control as a legitimate aim.

31. Thirdly, the Tribunal erred in conflating the question of what is a legitimate aim for the purposes of Article 8(2) with its view as to the value of the contribution made by the respondent and his work to the economy. In our judgment that is an incorrect approach. The protection of the economic wellbeing of the country entitles the executive to set out Rules governing when a person may enter and remain in the United Kingdom. Those Rules will strike a balance between the interests of those seeking to come to the country and the interests of society as a whole. The balance will include the identification of the periods of residence that a person needs to establish in order to demonstrate the requisite ties and bond with this country in order to qualify for leave to remain.

32. The Tribunal erred in conflating the establishment of such Rules which do reflect a legitimate aim with the different and separate question of whether it is proportionate in a particular case to apply those Rules to a particular individual given that individual's particular circumstances.

33. Put another way, the Tribunal allowed its personal judgment of the value of the respondent's employment to be used as a means of denying the existence of a legitimate aim in the maintenance of fair and efficient enforcement of the Immigration Rules. That in our judgment is an inadmissible approach.

34. For each of those separate reasons we are satisfied that the Tribunal erred in its determination and the determination must be set aside.

35. We then go on to remake the decision. We start by reminding ourselves that we are dealing with Article 8(1) and the claimed private life. This does not involve the claim for family life. The private life is essentially that Mr Thomas came to this country as a student and he said in his witness

statement to the Tribunal below that he has established a close circle of friends and has a meaningful and satisfying job in the United Kingdom. He has had connections now with the United Kingdom for over eleven years and he feels that he has in his own words "taken root here".

36. Secondly, we bear in mind that in terms of the strength of integration as evidenced by long residence the Immigration Rules require ten years' continuous residence. The respondent does not have ten years' continuous residence. He was absent for a period of almost a year from 30 August 2010 to 10 July 2011. Also, in the last ten years he has spent more than eighteen months outside the United Kingdom.

37. Thirdly, we consider carefully the gist of the grounds of appeal. What they allege is that there were good reasons why Mr Thomas was abroad, good reasons why he was not able to continue with his plans of coming back to the United Kingdom and maintaining his continuous residence. He was abroad for much of this period, probably all of it, at the request of his United Kingdom employer doing work which benefited the UK employer and indeed the UK economy generally.

38. Mr Richardson on his behalf also emphasised strongly that the ties that Mr Thomas had established were ones that he established when he was lawfully here making a valuable contribution and in the category of immigrants who if they complied with the Immigration Rules would eventually be able to obtain settlement.

39. We have considered those submissions and Mr Thomas' particular circumstances very carefully. In our judgment, however, the claim is essentially based on the length of residence that Mr Thomas has in the United Kingdom. The Rules require ten years' continuous residence. That requirement strikes a fair and reasonable balance between the interests of those who wish to settle in the United Kingdom and the wider community. Mr Thomas does not satisfy those Rules.

40. We do not see any other factors which would in truth amount to compelling circumstances which would justify consideration of a grant of leave notwithstanding that he does not meet those Rules. Using the language of **Nagre**, we consider that the factors that are relevant to Mr Thomas' case are on analysis ones that were already dealt with in the Rules and he does not meet the Rules. We see no compelling circumstances not already covered by the Rules which would justify consideration of a grant of leave outside those Rules.

41. Furthermore, if we were wrong about that and if it were appropriate to consider the matter outside the Rules we would not regard the decision to refuse leave and remove Mr Thomas as disproportionate. We recognise that there will be an impact on his private life although we recognise also that his private life is limited to his circle of friends and the fact that he has been employed here. But against that Mr Thomas would have known that he could only have expected to remain indefinitely in the United

Kingdom if he satisfied the Rules on continuous residence. He did not satisfy those Rules on continuous residence.

42. In all the circumstances therefore we would not have considered it disproportionate for the Secretary of State to take the action that she did.

43. In those circumstances we dismiss Mr Thomas' appeal against the decision of the Secretary of State.

Signed Date

Mr Justice Lewis