**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: HU/12836/2016**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 10 October 2017** | **On 24 October 2017** |

**Before**

**THE HONOURABLE LORD BURNS**
**DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**SUMAN CHALISE**
(ANONYMITY DIRECTION NOT MADE)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr H Diem, Counsel, instructed by N C Brothers & Co Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is a challenge by the Respondent against the decision of First-tier Tribunal Judge Chamberlin (the judge), promulgated on 12 June 2017, in which she allowed the appeal on human rights grounds. That appeal arose from the Respondent's decision of 13 May 2016, refusing the Appellant's human rights claim. The claim had been based squarely on the Appellant's assertion that he had acquired ten years' lawful and continuous residence in the United Kingdom by virtue of various periods of

leave as a student in this country. In refusing the Appellant's application the Respondent had stated that there was a significant break in the Appellant's leave between the end between October 2010 and February 2011, when a further period of leave was granted.

## The judge's decision

2. Somewhat unfortunately, the Respondent was not represented before the judge. Partly on the basis of this, the judge found the Appellant to be a credible witness (paragraph 12). She deals with the series of events relating to the Appellant's application for further leave to remain in 2010. She finds that a first attempted application for further leave was rejected by the Respondent due to the Appellant's failure to provide mandatory information within the application form. She notes the Appellant's expeditious attempts at rectifying his initial error. She finds that the Appellant did in fact provide relevant bank statements with the valid application made in November 2010. She finds that the Appellant had not remained without leave for a period of over three months, as alleged by the Respondent. In the judge's view, the Respondent should have exercised what is described as "evidential flexibility" in respect of the application for leave to remain. In light of this the judge goes on to state that she was placing "considerable weight" on her finding that the Appellant in fact satisfied the requirements of paragraph 276B of the Immigration Rules and the consequent finding that the Respondent should have exercised discretion in his favour back in 2010/2011 (paragraph 28). She also states that considerable weight had been placed upon her findings as to the reasons why the Appellant had been without lawful leave for a period in excess of twenty eight days (paragraph 28). In light of this the appeal was duly allowed.

## The grounds of appeal and grant of permission

3. There are four grounds of appeal. In essence, they make the following arguments. First, the judge erred in effectively purporting to reach a judicial decision against the decision of the Respondent made back in 2010, a decision that had not been challenged at the time. Second, the judge was not entitled to purportedly exercise discretion or to state that the Respondent should have done this. Third, that the judge should have adjourned the appeal of her own volition given the absence of a representative for the Respondent and the material conflict of fact relating to which bank statements had in fact been submitted by the Appellant. Fourth, the judge was wrong to have relied on any delay by the Respondent in deciding the Appellant's applications in 2010/2011.

4. Permission to appeal was granted by First-tier Tribunal Judge J M Holmes on 13 July 2017.

## The hearing before us

5. Mr Clarke submitted that although the issue of the bank statements had been stated in the Appellant's witness statement, this evidence had only been provided some five days before the hearing and the Respondent had not had a chance to respond to it. The judge acted unfairly in failing to adjourn the appeal. In respect of the discretion issue, Mr Clarke submitted that the judge had failed to make any reference to what, if any, policy on evidential flexibility she was purporting to apply. In addition, she had made no reference to any duty arising out of common law fairness. The judge had also erred in relying on delay on the Respondent's part.

6. Mr Diem submitted that the judge had been entitled to take various factors into account. She had not been bound to adjourn the appeal given that the issue of the bank statements had been raised in the witness statement and this evidence had been provided to the Respondent in advance of the hearing.

## Decision on error of law

7. We conclude that the judge has materially erred in law. Our reasons for this conclusion are as follows.

8. We see nothing material in the adjournment issue. Administrative matters relating to the provision of Presenting Officers at appeal hearings do not generally provide a sound basis for suggesting that judges should, of their volition, adjourn hearings simply where additional evidence has been provided by the Appellant, particularly when this has been done in advance of the hearing. In this case that was done only a fairly short time beforehand, but of course it may be that additional evidence is provided many months before a hearing. There has been no suggestion that appeal hearings should be routinely adjourned in such circumstances. Furthermore, Mr Clarke has not provided us with any evidence (by way of an application under Rule 15(2A) of the Upper Tribunal Procedure Rules) to indicate that there was evidence from the Respondent which made any material difference to the judge's consideration of the case.

9. The errors of law lie in the judge's approach to the issue of discretion and conclusion that the requirements of paragraph 276B of the Rules had in fact been met. The decisions of the Respondent, particularly that dated 4 January 2011, had not been challenged by the Appellant. Therefore the judge could not and should not have provided what was in effect a judicial decision on the correctness or otherwise of the Respondent's decision at that point in time. Further, we cannot see the basis for the purported exercise of discretion relating to evidential flexibility. There is no reference to a particular policy in existence at the time, nor does the judge purport to rely on any common law duty of fairness.

10. Turning to the purported satisfaction of the requirements of paragraph 276B, we cannot see that is a sustainable conclusion. This is so because the judge was not in a position to exercise her own discretion in respect of evidential flexibility, and of course the Respondent had not exercised any

residual discretion in the Appellant's favour. In turn, there had in fact been a break in the Appellant's leave for a period in excess of twenty eight days, something apparently acknowledged by the judge in the same paragraph in which she has also stated that the requirements of paragraph 276B were met. It follows that the judge had placed "considerable weight" on a factor (satisfaction of the Rules) to which no weight was, in the event, attributable.

11. The judge's approach to the issues arising out of events in 2010/2011 is materially erroneous.

12. We therefore set her decision aside.

## Re-making the decision

13. Both representatives were agreed that we could remake the decision on the basis of the evidence before us. We invited submissions as to the merits of the Appellant's case.

14. It is fair to say that there was a degree of discussion in respect of how the chronology of events in 2010/2011 was relevant to the Appellant's status during this period. Mr Diem submitted that in light of the Respondent's policy on applications from overstayers (version 6.0, dated 20 October 2014), the "grace" period of twenty eight days to be disregarded only started to run from the Respondent's notification to the Appellant of 4 November 2010 that his initial purported application made on 30 September 2010 was invalid. He submitted that the valid application made on 10 November 2010 was within this twenty eight day grace period, although he accepted that it was made beyond the expiration of the Appellant's previous leave to remain on 11 October 2010. Mr Diem accepted that the valid application had been made 29 days after that previous leave had run out (calculating the period between 12 October 2010 and 10 November 2010). He suggested that that single day should not have a material bearing on our consideration.

15. Mr Clarke submitted that in essence it was the Appellant's fault for failing to include mandatory information in the original application form, this had led to subsequent difficulties. Ultimately, submitted Mr Clarke, the Appellant's lawful leave had been broken. This lawful residence had been at the core of his initial human rights claim. Once this fell away there was nothing in the case to indicate any exceptional or compelling circumstances. The Appellant had always been in this country on a precarious basis as a Tier 4 Student. There had never been any expectation that he would be able to remain in the United Kingdom permanently. We were asked to consider all the relevant mandatory factors under section 117B of the Nationality, Immigration and Asylum Act 2002.

16. Mr Diem had nothing further to add by way of reply.

**Findings and conclusions on the re-making of the decision**

17. We find that this Appellant arrived in the United Kingdom on 23 January 2006 with leave as a student. He obtained various extensions, the last of which ran to 11 October 2010. Having considered the application form submitted on 30 September 2010, we agree with the Respondent that mandatory information was not provided (specifically two boxes had not been ticked by the Appellant). We find that the Respondent was correct to have rejected that attempted application as being invalid. We find that the Appellant did not challenge the decision of 4 November 2010 by way of judicial review.

18. We find that the Appellant then put in a valid application on 10 November 2010. We are prepared to accept that the Appellant did in fact provide bank statements issued on 15 September 2010 and 15 October 2010, as he has claimed in his witness statement. We note that the judge had found the Appellant to be a generally credible person and we have no additional evidence before us to suggest to the contrary, although Mr Clarke submitted that the judge had been unfair not to have adjourned the case in order for the Respondent to be able to provide additional evidence, no such evidence has been forthcoming. There was nothing before us to suggest that these two bank statements had not in fact been provided by the Appellant.

19. We find that the Appellant's application was refused by the Respondent on 4 January 2011. This decision did not carry with it a right of appeal because of course at that time the Appellant did not have leave to remain. Although there was a period of just under three months between the application being made and the Respondent's decision, we do not find this to have involved an inordinate delay. We have not been referred to any cases or materials by the Appellant to suggest the contrary.

20. We find that the Appellant made his second valid application on 14 January 2011. This application was granted by the Respondent on 7 February 2011.

21. We find there are no issues of misconduct on the Appellant's part in this case. We find that he has maintained himself throughout his residence in this country, speaks perfectly good English, and has sought to maintain a lawful presence here as best he could.

22. We now apply our findings of fact to the relevant legal framework. Turning first to paragraph 276B of the Rules, we conclude that even taking the Appellant's case at its highest, there is still a material gap in lawful residence, a gap which precludes him from being able to satisfy the requirements of ten years' continuous lawful residence in the United Kingdom pursuant to paragraph 276B(i)). In light of the Respondent's 2014 guidance, even if the twenty eight day grace period only started to run from the date of the Respondent's decision of 4 November 2010, further leave to remain was not granted until 7 February 2011, a timescale

which is clearly well over that period. It is important to note in this regard that the twenty eight day period does not statutorily extend leave to remain under section 3C of the Immigration Act 1971, but is simply a period of unlawful presence which falls to be disregarded.

23. Although we have accepted that he submitted the two relevant bank statements with the first valid application, the fact remains that the refusal of this application on 4 January 2011 was never challenged by the Appellant by way of judicial review (we accept that there was no right of appeal). By the time he put his second valid application in on 14 January 2011, he had been without leave to remain since 11 October 2010 and had remained in this country well beyond the twenty eight day grace period which (for the sake of argument) ran from 4 November 2010. In light of the above, the Appellant could not and cannot satisfy the requirements of paragraph 276B of the Rules. That is significant for reasons which we shall expand on below.

24. There has been no suggestion by Mr Diem that the Appellant could otherwise satisfy the provisions of either Appendix FM or paragraph 276ADE of the Rules. We find that he cannot.

25. We turn then to an assessment of Article 8 outside the context of the Rules. We find the Appellant does enjoy a private life in the United Kingdom, built up over the course of fairly lengthy residence here. We find that his removal from the United Kingdom in consequence of the Respondent's decision would constitute an interference with that private life. The Respondent's decision is clearly in accordance with the law and it pursues the legitimate aim of maintaining effective immigration control and thereby the economic wellbeing of the United Kingdom.

26. We come to the issue of proportionality. The significant difficulty faced by the Appellant is that his human rights claim was always based firmly upon the continuous lawful residence and what he believed was his ability to satisfy the requirements of paragraph 276B of the Rules. In light of our findings and conclusions above, this has not turned out to be the case. Thus, the essential plank of his claim falls away.

27. In addition, the following factors weight against the Appellant. The public interest in maintaining effective immigration control is powerful (section 117B(1) of the 2002 Act). Here, the Appellant is unable to meet the provisions of any Article 8–related Rules. We have accepted that the Appellant did take steps to regularise his situation back in 2010/2011. Whilst we have some sympathy for his predicament, it remains the fact that he failed to complete that initial attempted application made whilst he still had leave to remain. Whilst the failure to tick a couple of boxes in the application form may on one view appear trivial, they concerned mandatory information and the Respondent was perfectly justified in setting those requirements and rejecting applications which omit such information as being invalid.

28. The Appellant has always been in this country on a precarious basis: his leave has been that of a student and there has never been any expectation that he would inevitably be permitted to settle in the United Kingdom.

29. The requirement to attribute a little weight to the Appellant's private life is not in our view mitigated by any other compelling circumstances (Rhuppiah [2016] EWCA Civ 803).

30. We have found that the Appellant is, and has been, financially independent, and that he speaks good English. These are therefore neutral factors.

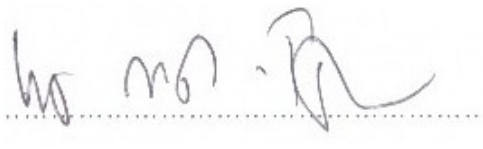
31. What else is there which can be said in the Appellant's favour which might go to outweigh the factors in the Respondent's side of the scales? In our view there are no circumstances in this case which can properly be described as compelling, exceptional, very significant, or particularly strong. No such circumstances have ever been put forward on the Appellant's behalf as far as we can see, and certainly there is no evidence of any before us. We fully appreciate that the essential test in Article 8 cases is whether a "fair balance" has been struck between the public interest on the one hand, and the rights of the individual on the other. However, if an Appellant cannot satisfy any of the requirements of relevant Rules, they need to be able to point to additional circumstances which disclose some other important or strong reasons on which to found success. In this case, there simply are none. In light of the above the Appellant's appeal is dismissed.

**Notice of Decision**

**The decision of the First-tier Tribunal contains material errors of law and we set it aside.**

**We re-make the decision by dismissing the Appellant's appeal on Article 8 grounds.**

**We do not make an anonymity direction**

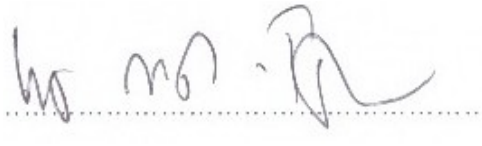
Signed  Date: 21 October 2017

Deputy Upper Tribunal Judge Norton-Taylor

**TO THE RESPONDENT**

**FEE AWARD**

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

Signed  Date: 21 October 2017

Deputy Upper Tribunal Judge Norton-Taylor