Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08034/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 January 2019	**On 13 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

MR ALISHER KHUSAINOV
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Norman, of Counsel
For the Respondent: Mr Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Uzbekistan. He was born on 24 September 1990.

2. He appealed against the respondent's decision to refuse him leave to remain dated 27 March 2017.

3. Judge Andonian (the Judge) dismissed the appeal in a decision promulgated on 23 July 2018.

4. The grounds claim that the judge failed to consider whether the respondent should have exercised discretion, adopted a flawed approach to the new matter raised by appellant's Counsel and erred with regard to the Article 8 considerations. I will address them in turn.

Ground 1

5. The grounds claimed that the failure to consider whether there existed any exceptional circumstances which prevented the applicant from applying within the first 28 days of overstaying in accordance with the respondent's own policy amounted to an error of law. The appellant claimed that the application that was rejected causing him to overstay for a period of 34 days was completed by an agent through his place of study. The appellant was not informed of that rejection and had no knowledge of it until his indefinite leave to remain application was refused. As he had no knowledge of the rejection and subsequent period of overstaying, he could not be said to be at fault which should have been considered an exceptional circumstance and the respondent should have exercised discretion accordingly.

Ground 2

6. At the hearing it was submitted that the appellant met the requirement for a grant of ILR on the basis of long residence if counted from 19 July 2007 to the date of the hearing and that was accepted by the judge at [18] of the decision. The failure to consider whether the appellant qualified for ILR under the long residence Rule at the date of the hearing amounted to an error of law. See **MU (Statement of Additional Grounds – long residence – discretion) Bangladesh [2010] UKUT 442 (IAC)**.

Ground 3

7. The judge accepted the appellant had accrued ten years' lawful residence such that he was in error when he found there was nothing "exceptional" in the appellant's case.

8. Judge Grimmett refused permission to appeal on 4 September 2018. He said inter alia as follows:

> *"2. The appellant says the judge erred in failing to consider whether the respondent should have exercised her discretion in considering exceptional circumstances. Those circumstances seem to be the appellant's failure to contact his then representative to ascertain the position with regard to his application. I could find no error in those circumstances.*
>
> *3. Ground 2 suggests the appellant should succeed as a s.120 Notice could have been issued but that is a matter of discretion for the respondent and shows no arguable error in the decision. Ground 3 is difficult to follow as at paragraph 1 it says that the appellant has accrued ten years' lawful residence but at paragraph 5 that it was twelve years save for a 34 day period. As*

the appellant did not appear to have 3C leave during those 34 days I could find no arguable error of law."

9. The grounds were renewed to the Upper Tribunal and set out more clearly inter alia as follows:

> *"1. … essentially the appellant made an application for leave to remain under paragraph 276B of the Immigration Rules on the basis that he had had continuous lawful residence for over ten years.*
>
> *2. The application was rejected on the basis that he had not had lawful residence between 15 June 2007 and 19 July 2007. There had been a "gap" of 34 days. The acceptable maximum is 28 days.*
>
> *3. However, by the date of the hearing which was 28 June 2018, this gap had become academic. The appellant had had continuous lawful residence from 19 July 2007 onwards.*
>
> *4. The judge agreed that this formed part of the overall Article 8 assessment given that an appeal could no longer be brought under the Rules.*
>
> *5. If an appellant is able to show that they meet the criteria of the Rules this will be a very strong, perhaps decisive, indicator that the appeal should succeed under Article 8.*
>
> *6. It is submitted that the Immigration Judge erred in law. At paragraph 18 he concludes rather confusingly that 'a Section 3C leave applies which I do not believe in it applies here … he does not benefit from Section 3C leave. There is no question of the appellant having lawful leave on a continuous ten year basis from 19 July 2007 to date.'*
>
> *7. Taken with what is said at paragraph 17, it appears that the judge was making a finding that leave granted pursuant to an application made outside the currency of existing leave is not 'lawful residence'. If so, then that finding is wrong. The fact that the appellant did not have s.3C leave when he made his out of time application does not render the subsequent leave to remain unlawful in any way.*
>
> *8. It follows that he had indeed had ten years continuous lawful residence by the date of the hearing, which should have been a near decisive factor in his favour in the Article 8 consideration as he met the criteria 276B. This has not been properly considered by the Immigration Judge.*
>
> *9. It is submitted that in refusing permission the judge did not engage with the argument.* ***MU (Bangladesh)*** *is authority for the proposition that a Tribunal may consider the ten years' continuous lawful residence from the date of the hearing back ten years. There is no need for an s.120 Notice where, as here, permission has been given by the judge to argue the matter within the existing framework of an Article 8 appeal."*

10. Deputy Upper Tribunal Judge Chalkley granted permission on 19 November 2018 saying only that the grounds were properly arguable.

11. There was no Rule 24 response.

Submissions on Error of Law

12. Ms Norman relied upon her skeleton argument. Mr Walker conceded that the judge had materially erred in terms of the grounds.

Conclusion on Error of Law

13. Prima facie, the appellant did have leave to remain from 25 July 2007 to date. That included the period of the EEA residence card from 13 April 2012 to 13 April 2017. Since then, the appellant had the benefit of 3C leave. The judge materially erred because he was confused in terms of the appellant's entitlement to s.3C leave. See in particular [17]–[18] of the decision.

Notice of Decision

14. The judge's decision is set aside in its entirety and will be remade in the First-tier following a de novo hearing.

No anonymity direction is made.

Signed Date: 30 January 2019

Deputy Upper Tribunal Judge Peart