Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24415/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22 March 2013	**On 12 June 2013**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

HESHAM HMDI SHIBANI SAWEHLI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M. Al-Rashid, Counsel
For the Respondent: Ms L. Kenny, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Libya, born on 5 November 1977. On 26 October 2012 a decision was made to refuse to vary leave to remain. His application was for indefinite leave to remain based on long residence. His appeal against the decision to refuse to vary leave to remain was dismissed by First-tier Tribunal Judge Hembrough after a

hearing on 19 December 2012. Permission to appeal having been granted by a judge of the First-tier Tribunal, the matter came before me.

2. The issue in the appeal is whether the appellant has acquired the necessary 10 years lawful residence such as to mean that he is entitled to indefinite leave to remain on the grounds of long residence under paragraph 276B of HC 395 (as amended).

3. The appellant first arrived in the UK on 22 September 2001 with leave as a student. The application for indefinite leave to remain which is the subject matter of this appeal, was made on 29 February 2012. In the intervening periods he has been granted successive extensions of leave but, to summarise, with periods outside the UK when it is said that he had no leave to remain, or at least no qualifying leave for the purpose of the Rules.

4. I refer to the parties' submissions before me as necessary during the course of my assessment.

My assessment

5. There are four periods of time which give rise to the issue in this appeal. The first is between 23 November 2001 and 23 January 2003. On 21 November 2001, a day before his then leave expired, he applied for further leave to remain. The application was still not decided by 23 September 2002. As recorded at [18] of the determination, the appellant's case is that he received news that his mother in Libya was very ill. On 23 September 2002 he asked the Home Office for the return of his passport as he needed it to travel to Libya to visit his mother. He returned to the UK on 23 January 2003 with leave as a student, having made the application in Libya for a new student visa.

6. The First-tier judge noted that because the appellant made an in-time application to extend his leave, by virtue of section 3C of the Immigration Act 1971 ("the 1971 Act") his leave was statutorily extended until it was either decided or withdrawn (under s.3C(2)(a)).

7. However, he also concluded at [32] that the request for his passport amounted to a withdrawal of the application. In addition he referred to s.3C(3) which provides that statutorily extended leave shall lapse if the applicant leaves the UK.

8. Putting aside the question of whether the judge was correct to decide that asking for his passport back amounted to a withdrawal of the application, the effect of s.3C(3) is that the appellant's statutorily extended leave lapsed when he left the UK.

9. Further, under paragraph 276A "continuous residence" means residence in the UK for an unbroken period. The period is not to be considered as broken where there is absence from the UK for a period of six months or

less at any one time "provided that the applicant in question has existing limited leave to enter or remain upon their departure and return". Although the appellant returned on 23 January 2003 with a valid student visa, his leave lapsed when he left the UK. Therefore, he did not have existing leave on his departure. Albeit for different reasons, at [34] the First-tier judge clearly concluded that the absence between 23 September 2002 and January 2003 amounted to a break in continuous residence.

10. It is not correct therefore, as the grounds before me suggest, that the judge found that this first period did not amount to a break in "continuous residence". Paragraph 33 of the determination, whilst referring generally to breaks in the continuity of residence, indicates that the judge considered that this applied to the first period as much as to the others. In any event, as I have explained, on the basis that his leave lapsed on his departure on 23 September 2002, the appellant did not then have existing leave as required by 276A. Far from having "existing limited leave to enter or remain upon [his] departure", his leave ceased to exist on his departure.

11. Mr Al-Rashid submitted in relation to that first period, and generally, that the appellant had never been in the UK without leave, and although he never had leave to remain when he was in Libya, he did not need it. He only needed leave when present in the UK. That submission however, is not strictly correct. Under paragraph 276A he needs to have had leave on his departure, which he did not; his leave lapsed by the very act of departure.

12. That conclusion does not mean that no-one with existing leave would ever be able to leave the UK without breaking the continuity of residence. It is only those who have statutorily extended leave under section 3C of the 1971 Act to whom this applies. Others with existing leave are free to depart and return subject to the restrictions under paragraph 276A.

13. On the basis of that analysis, the appellant's appeal against the refusal of indefinite leave to remain could not have succeeded because of the break in the continuity of residence between 23 September 2002 and 23 January 2003.

14. The second period potentially representing a break in the continuity of residence is that between 7 June 2011 and 27 September 2011. However, that potential break in continuous residence was not relied on by the respondent as can be seen from [23] of the determination. No further comment on that period is therefore needed.

15. The next period is between 31 March 2010 and 31 May 2010. His leave is said to have expired on 31 March 2010. On the application form for further leave to remain the appellant has given a schedule in manuscript of the dates of leaving and returning to the UK, although the

copy on the Tribunal file is incomplete. He has given 31 March 2010 as a date of departure; the date his then leave expired. It is not suggested however, that he overstayed at that point and so it is reasonable to conclude that although he left on the day his leave was due to expire, he left during the currency of his leave. He returned on 28 June 2010 with a valid student visa issued on 31 May 2010.

16. Judge Hembrough concluded at [35] that pursuant to 276A(a)(iii) the appellant had left the UK in circumstances in which he could have had no reasonable expectation at the time of leaving that he would lawfully be able to return. He also concluded that the "lawfulness" of his residence was broken because when he left, and for part of the time that he was outside the UK, he did not have existing leave to enter or remain pursuant to 276A(b)(i). This relates to the requirement of paragraph 276B(i)(a) that he needed "10 years continuous lawful residence".

17. As I have indicated, I am satisfied that when the appellant left on 31 March 2010 he still had leave, as he needed to have in order that the requirement of 276A, of having had leave on departure, is met. When he was outside the UK his leave expired. Mr Al-Rashid submitted that returning with leave granted out of country is sufficient. Although various authorities were submitted, the only one of real relevance is TT (Long residence. "continuous residence", interpretation) British Overseas Citizen [2008] UKAIT 00038. The Upper Tribunal decided that paragraph 276A does not require a person to have the same leave when returning to the UK as the leave he had when he left. In other words, such a person is not prohibited from obtaining further leave whilst outside the UK.

18. The situation in that case was rather different from that in the case of the appellant before me. The appellant's leave in relation to this period expired whilst he was outside the UK. It was only after expiry that he obtained entry clearance, taking effect as leave to enter. Both grants of leave were as a student.

19. It does not seem to me that there is any difference in principal between the circumstances in TT and those in the case of the appellant before me. In relation to that period he entered and left with valid leave. The rule does not state that it has to be the same leave.

20. I have considered whether the judge was correct to conclude that the appellant could not have had any reasonable expectation that he would lawfully be able to return in relation to that period of absence following the expiry of his leave on 31 March 2010. It was submitted on behalf of the appellant that that requirement under 276A(iii)(a) relates to those who have been removed from the UK. I would accept that it would include such persons but I do not consider that that requirement can be interpreted as applying *only* to such persons. If it were meant to apply only to those removed it could easily have said so without any

ambiguity. It seems to me to be much wider in application than the interpretation contended for on behalf of the appellant.

21. However, the question is, did the appellant leave the UK "in circumstances" in which he could have had no reasonable expectation at the time of leaving that he would lawfully be able to return. In this case the appellant had been granted successive periods of leave as a student for the previous nine years. It seems to me that far from having no reasonable expectation that he would lawfully be able to return, the opposite is true.

22. Thus, I am satisfied that the First-tier judge erred in law both in concluding that the continuity of residence was broken when the appellant's leave expired when outside the UK, and also in relation to the conclusion that he left in circumstances in which he could have had no reasonable expectation at the time of leaving that he would lawfully be able to return.

23. The last period in question is that identified by the judge at [30]; 30 November 2010 to 16 January 2011. It is not clear when he left the UK but he returned on 16 January 2011. Again, it has not been suggested that he overstayed his leave. It is reasonable to infer therefore, that he left prior to its expiry. However, his leave at the time of his departure was as a student but he returned as a visitor.

24. The judge came to the same conclusion in respect of this period as that previously discussed with reference to 31 March 2010 to 31 May 2010. The appellant's leave when he left on or before 30 November 2010 was as a student but he returned as a visitor. Again however, I cannot see that this makes any difference in terms of paragraph 276A. He had existing leave on departure and also on return, albeit in another capacity. Nothing has been put forward in terms of his immigration history or the circumstances of his departure which would indicate that he could have had no reasonable expectation he would lawfully be able to return. That he in fact returned as a visitor does not say anything about the circumstances in which he left and what he could reasonably have expected at that time.

25. It is not necessary for me to say much on the question of whether the judge was entitled to 'rely' on that period of absence as breaking the continuity of residence because it was not raised in the refusal letter or at the hearing. Suffice to say that it was for the appellant to establish that he met the requirements of the rule and to establish therefore, the necessary 10 year period of continuous residence. The appellant could have been expected to have dealt with all periods of leave and absences and the judge was not wrong to consider that period. For the reasons I have given however, I am satisfied that he erred in law in his assessment of that period.

26. I have concluded therefore, that there are errors of law in the judge's decision in respect of two of the potentially relevant periods of absence, namely between 31 March 2010 and 31 May 2010, and 30 November 2010 to 16 January 2011. However, given the conclusion I have come to in relation to the first period when he left on 23 September 2002 returning on 23 January 2003, those errors of law are not material to the outcome of the appeal. The appellant could not have established that he has had at least 10 years continuous lawful residence in accordance with paragraphs 276A and B. Thus, the errors of law are not such as to require the decision to be set aside.

27. No issue was raised in the grounds to the Upper Tribunal in terms of the judge's conclusions in relation to Article 8 and no submissions in relation to it were put before me.

28. Judge Hembrough dealt with the fact that the removal decision under section 47 of the Immigration, Asylum and Nationality Act 2006 is unlawful, having been made at the same time as the decision to refuse to vary leave to remain. A lawful removal decision will have to be made if the Secretary of State decides to remove the appellant.

Decision

29. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal is however, not set aside and the decision to dismiss the appeal under the Immigration Rules and under Article 8 stands.

Upper Tribunal Judge Kopieczek

11/06/13