ASYLUM AND IMMIGRATION TRIBUNAL

HS (Long Residence – effect of IDI September 2004) Pakistan
[2005] UKAIT 00169

THE IMMIGRATION ACTS

Heard at: Field House On 25 October 2005	Determination Promulgated 01 December 2005 ....

Before

Mr H J E Latter - Senior Immigration Judge
Ms D K Gill - Senior Immigration Judge

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr S Rossier of the Immigration Advisory Service
For the Respondent:	Miss M Donnelley-Wells, Home Office Presenting Officer

The provisions of IDI September 2004 do not set out a published policy providing a concession in the application of the provisions of paragraph 276B(i)(b) of HC395 when assessing a claim based on long residence. In the absence of a specific transitional or other saving provision, an application is assessed under the rules as at the date of decision not the date of application.

DETERMINATION AND REASONS

1. This is the reconsideration of an appeal by the appellant, a citizen of Pakistan, against the respondent's decision made on 20 June 2005 giving directions for his removal following a decision to refuse indefinite leave to remain on the grounds of long residence. The appeal was allowed by the Immigration Judge, Mr J E Camp. Reconsideration was ordered on 18 August 2005.

Background

2. The appellant first arrived in this country in about 1985 or 1986. There is no clear evidence as to the precise date. The appellant has asserted that it was 1985 but when he subsequently applied for indefinite leave the date of May 1986 was given. Whatever the date, it is common ground that the appellant made an illegal entry. He obtained a visit visa at the High Commission in Delhi but accepted when interviewed in May 1999 that he had intended to remain. He also accepted that he entered the United Kingdom using a false passport. The appellant stayed in the United Kingdom and by 1988 he was on the records of the Inland Revenue. He has worked as a machinist in a variety of clothing factories.

3. The appellant came to the attention of the authorities when he was stopped by the police in connection with a driving offence on 12 May 1999. He was interviewed by Immigration Officers on 13 May 1999. They were satisfied that the appellant was an illegal entrant and he was served with a form indicating that he was a person liable to removal. The appellant claimed asylum. This was refused by the Secretary of State in a letter dated 11 October 1999. He certified the claim as unfounded because the appellant was liable to be sent to a designated country. An appeal was submitted against this decision on 25 November 1999 but subsequently withdrawn on 21 January 2000 as the appellant intended to submit an application to remain on the basis of his length of residence.

4. This application is dated 8 November 2001 and was submitted with a letter from the appellant's representatives dated 19 February 2002. The application is date stamped as received on 2 April 2002. This application was not decided until 20 June 2005. It was refused on the basis that the appellant could not show 14 years continuous residence by reason of the provisions of paragraph 276B(i)(b)of HC 395 which provides that any period spent in the United Kingdom following the service of a notice of liability to removal should be excluded when calculating whether there is 14 years continuous residence. For the appellant to comply with

requirements of the rules he would have to have entered this country on or before 12 May 1985. His application gave a date of May 1986 which was particularised as 17 May 1986 in the solicitor's letter of 19 February 2002. It was the Secretary of State's view that the appellant had deliberately sought to evade or circumvent immigration control by using forged documents. Enforcement action had commenced on 12 May 1999. The Secretary of State was not satisfied that there were sufficient compassionate circumstances to justify the exercise of discretion outside the rules. He took into account Article 8. It was his view that any private life had been established when the appellant was in the country unlawfully. Removal would be proportionate.

The Hearing before the Immigration Judge

5. The appellant appealed against this decision. At the hearing before the Immigration Judge, the appellant gave oral evidence that he had arrived in the United Kingdom in 1985 but he could not remember the month. He lived with his cousin-brother, his cousin's wife and their two daughters. He had a father, brother and sister in India but had no contact with them. He had paid income tax and national insurance. He had never received benefits. He regarded his cousin's family in the United Kingdom as his own. In cross-examination he said that he had no proof of the date of his arrival. The date of 17 May 1986 given in his solicitor's letter was an estimate. He accepted that he had arrived in this country under a false name and with a false passport. The Judge accepted the submission made by the Presenting Officer that it was not certain that the appellant would have been accepted in 2001 as being within the provisions of the long residence concession had his application then been dealt with expeditiously as it was not clear that he had been in the United Kingdom for 14 years at that date. The judge commented that by the date of decision (20 March 2005) there could be no doubt that the appellant had been in the United Kingdom for at least 16 years provided that there was no event which "stopped the clock". It was the respondent's contention that this happened by the enforcement action notified to the appellant in 1999. The judge noted that it was conceded that the appellant had been subject to removal directions in 1999 and commented that as at the date of application it appeared that only a notice of intention to deport would have the effect of stopping time running.

6. He held that new rules which did not apply at the date of application should not be applied as at the date of decision. They could not be retrospective without specific provision to that effect. He found that at the date of decision the respondent should have considered the appellant to have

been resident in the United Kingdom for at least 16 years commenting that it would have been inequitable for an applicant to be disadvantaged by delay on the part of the Home Office. He noted the tension in the Immigration Rules and Home Office policy as expressed in IDI September 2004 headed "The Long Residence Concession". It was his view that the respondent's current policy was reflected by the IDI despite the apparently stricter requirements of the Immigration Rules. He referred to paragraph 6 of the IDI dealing with time spent following the service of notice of intention to deport which referred to each case being considered on its merits and to the length and quality of the overall period of residence being taken into account to go with all other relevant factors and balanced against the need to maintain effective control. He found that the appellant had been in the United Kingdom since at least 1988 and possibly since 1985. He had been continuously employed since 1994 and had lived with relatives and become part of their close family. He said that this was an appeal where the requirements of maintaining a fair immigration policy weighed heavily. The appellant had arrived in the United Kingdom illegally and done nothing to regularise his situation before he was arrested in 1999. This had to be balanced under the IDI with the length and quality of his residence. This exercise was similar to considering the question of proportionality under Article 8. It was the Judge's view that the appellant had demonstrated that the balance was in his favour. Further, he found that the appellant had a legitimate expectation that his application would be dealt with within a reasonable time on the basis of a Home Office letter of 3 April 2002 which had indicated that his application might take "6 months or a little longer to deal with". If it had been dealt with within that time, he would have benefited from the concession. The judge found that the decision was not in accordance with the law or the Immigration Rules. The appeal was allowed on this basis. The judge said that he need not consider the application of Article 8. He directed that the appellant should be given indefinite leave to remain.

The Application for Review

7. In the grounds it is argued that the Judge was wrong to hold that new rules, which had not applied at the date of application, should not be applied as at the date of decision. The appeal should have been determined on the basis of the rules in force at the date of decision not the date of application. It was not open to the judge to suggest that the Secretary of State's discretion should have been exercised differently in the light of his comment that it was not certain that the appellant would have been accepted in 2001 as being within the provisions of the concession, had the application

been dealt with expeditiously. The judge was also wrong to conclude that the decision was not in accordance with the law. Reconsideration was ordered, the Senior Immigration Judge summarising the issues as follows:

1. Whether the Judge erred in concluding that the appellant's application for leave to remain should have been determined under the terms of the respondent's long residence concession in force at the date of the application rather than under the terms of paragraph 276B of HC 395 as amended in force at the date of decision.

2. Whether he erred by concluding that the respondent's discretion should have been exercised differently and

3. Whether he erred in concluding that the respondent's decision was not in accordance with the law.

The Submissions

8. Miss Donnelley-Wells submitted that the decision should be made in accordance with the rules as at the date of decision. There were no transitional provisions to counteract the effect of paragraph 4 of HC 395. Assuming the appellant to have entered the United Kingdom in 1986, he would only have completed about 13 years continuous residence when enforcement papers were served. He fell outside the provisions of paragraph 276. The appellant did not comply with the rules and no issue of discretion within the rules applied. The decision was in accordance with the law.

9. Mr Rossier submitted that there was a current policy in the IDI September 2004 which relaxed the requirements of the rules. Even assuming the rules applied as at the date of decision, the Secretary of State should have considered the application on the basis of paragraph 6 of the IDI. The immigration judge had been entitled to take these factors into account. There had been unconscionable delay in making the decision. The appellant had been told that the decision would be made within 6 months or perhaps a little longer. In fact that there had been a delay of 3 years. If the appellant could not succeed within the rules or the policy, the length of the delay was such that removal would now be disproportionate. He relied on the judgments of the Court of Appeal in *Bakhtear Rashid* [2005] EWCA Civ 744 and *Akaeke* [2005] EWCA Civ 947. Where the delay was unreasonable the appellant could still rely on it even if he was unable to show any specific prejudice.

Consideration of the Issues

(i) Which rules apply to the decision made on 20 June 2005

10. The first issue is whether the decision made on 20 June 2005 should have been made in accordance with the rules then in force or those in force as at the date of application. The general principle is clear: immigration appeals are to be decided in accordance with the rules in operation at the date of decision. It is provided by rule 4 of HC 395 as follows:

> "These rules come into effect on 1 October 1994 and will apply to all decisions taken on or after that date save that any application made before 1 October 1994 for entry clearance, leave to enter or remain or variation of leave to enter or remain other than an application for leave by a person seeking asylum shall be decided under the provisions of HC 251, as amended, as if these rules had not been made."

This rule illustrates that the general principle is subject to any transitional provisions to the contrary. The rule provides that non-asylum claims made prior to 1 October 1994 would be decided in accordance with HC 251. The rules have been subsequently amended on a number of occasions but there has been no provision to which our attention has been drawn for transitional provisions in relation to these amendments. The rules relating to long residence were introduced by HC 538 to take effect on 1 April 2003 but it does not contain any transitional provisions. In the course of submissions we referred the parties to McDonald's Immigration Law and Practice 6th Edition at paragraph 1.50 which reads as follows:

> "Where changes are made to the Immigration Rules, it is sometimes difficult to establish whether the old or new rules apply. The transitional provisions in the current rules, HC 395, provide that applications extant prior to their coming into force will be decided under the previous rules. We suggest that the same logic should apply with regard to the amendments, so that applications made before the amendments take effect should be dealt with under the unamended rules. Any other rule penalises the applicant for Home Office delays. New editions of the rules often contain transitional provisions which may give rise to problems of interpretation."

Whether or not the same logic should apply to subsequent amendments, in our judgement in the absence of specific transitional provisions, the general principle set out in Rule 4 must apply and the decision must be made in accordance with the rules as at the date of decision.

11. It follows on this basis that the appellant's application could not succeed under paragraph 276B by reason of the provisions of paragraph 276B(i)(b). He is unable to show that he had at least 14 years continuous residence excluding any period spent following the service of removal directions. It is accepted that notice of liability to removal was served in May 1999 and time stopped running at that point.

(ii) Have the rules been modified by the IDI of September 2004

12. The second argument relates to the issue of whether the rules have been modified by the provisions of the IDI dated September 2004. The Judge took the view the respondent's current policy was reflected by this IDI despite the apparently stricter requirements of the immigration rules. He noted (rightly) that the IDI is dated after the amendment to the rules but appears to have been drafted in ignorance of the current rules as paragraph 1 states wrongly that there is no provision within the rules for a person to be granted indefinite leave to remain solely on the basis of the length of his or her residence, that the grant of indefinite leave is discretionary and that each case should be considered on its merits. This document sets out what constitutes continuous residence and in paragraph 6 it considers time spent following the service of a notice of intention to deport. This paragraph reads as follows:

> "Where a person has been served with a notice of intention to deport account should be taken of the decision in the case of *Ofori*. This judgment held that the Secretary of State was entitled to conclude that the extra period of residence gained by the appellant while pursuing his appeal should not count to wards the 14 years continuous residence of any legality required under the LRC. However, each case should be considered on its merits and the length and quality of the overall period of residence should still be taken into account, together with all other relevant factors, and balanced against the need to maintain an effective control."

13. The case referred to is *R v SSHD ex parte Michael Ofori* [1994] Imm AR 581. This was an application for judicial review of the Secretary of State's decision to refuse an applicant leave to remain on the basis of the 14 years residence concession. The applicant had entered the United Kingdom on 9 January 1980 when he was granted leave to enter and remain as a student until 31 January 1986. He overstayed and on 20 June 1991 applied for indefinite leave to remain. The application

was refused and a deportation decision was made dated 22 July 1992, by which time the applicant had been in the United Kingdom for over 12 years. He then appealed against that decision. An Adjudicator dismissed the appeal and the Tribunal subsequently refused leave. The passage of time during these proceedings took the applicant beyond the 14 year milestone and he applied to stay on the basis of the policy then in force.

14. McPherson J noted that the only reason the appellant had been able to remain was because of the progress and processing of the procedures by which he was entitled to appeal against the deportation order. He regarded it as outlandish that it should be regarded as almost automatic that in those circumstances the applicant should be allowed to remain. He held that the Secretary of State was entitled to conclude that the extra period of residence while pursuing his appeals did not justify his benefiting from the concessionary policy.

15. There is nothing to indicate in this judgment that any distinction should be drawn between someone subject to removal by deportation or removal as an illegal entrant. There is no possible justification for any such distinction. It happened to be a deportation decision in *Ofori* because the applicant had originally been granted leave to enter as a student. The significant feature was that the applicant was able to achieve 14 years residence by reason of the length of the appeal proceedings. As the Judge accepted, the appellant was entitled to exercise his rights of appeal but he clearly took the view that it would be a very unsatisfactory result if, having been unsuccessful in his appeal, the applicant could then rely on time spent in pursuing unsuccessful appeal to establish a claim under the concession.

16. This principle is recognised in paragraph 276B(i)(b) which draws no distinction between the various types of enforcement procedure whether by removal directions or a notice of intention to deport. There is nothing in the case of *Ofori* to suggest that any such distinction could properly or sensibly be made. We cannot read paragraph 6 of IDI September 2004 as providing for any concession in the interpretation of paragraph 276B. If anything it confirms the principle that period spent after notice of enforcement proceedings should not count towards continuous residence. The advice that each case should be considered on its merits does not seem to us to add anything to the factors set out in paragraph 276B(ii). In summary we are not satisfied that IDI September 2004 provides any material qualification by way of concession to the provisions of paragraph 276B.

(iii) Legitimate Expectation

17. The next issue is whether there was a legitimate expectation that the appellant's application would be determined in accordance with the concession rather than the rules. This claim is based on the fact that in response to the submission of his application the appellant received a letter dated 25 February 2002 indicating that a case worker in the initial consideration unit would consider it within the next 6 weeks and inform him of the decision or give a progress report. The progress report came in the letter dated 3 April 2002 which indicated that the matter was being passed to a case management unit and that some cases were currently taking up to 6 months or a little longer to deal with. That was an optimistic estimate as the decision was not in fact made until June 2005. Despite this wholly unacceptable delay, we are not satisfied that these letters form any adequate foundation for a representation or assurance that the application would be dealt with under the concession as opposed to the rules in force at the date of decision.

18. If we are wrong about that and the appellant was entitled to a decision made under the concession, we are not satisfied that it is arguable that the decision would have been in his favour. This argument is based on the assertion that under the concession time would only stop running if a notice of intention to deport was served. We are not satisfied that any such inference can be drawn from *Ofori* for the reasons we have already given. There is no justification for an illegal entrant being in a better position than someone who initially made a lawful entry. The concession as set out in the letter dated 19 February 2002 from the appellant's solicitors reads as follows:

> "Although there is no 14 year rule as such, because any concession based on length of residence is outside the Immigration Rules... once a person has been here continuously for 14 years or more, they would normally be granted indefinite leave to remain regardless of the fact that some or all of their residence was unlawful, provided that there were no other strong countervailing factors such as extant criminal record or deliberate, positive blatant attempts to evade or circumvent Immigration Control. Each case... is considered on its merits."

19. We note that the Immigration Officer who interviewed the appellant in May 1999 took the view the appellant's disregard for the Immigration Rules had been blatantly demonstrated both in the mode of entry employed by deception together with the fact that no attempt had been made to regularise his

stay. Taking this factor into account with the fact that the 14 year period was only subsequently completed due to making an application for asylum which was refused and a subsequent appeal withdrawn followed by a further application for indefinite leave to remain, we are not satisfied that in fact the appellant's claim would have been successful under the terms of the policy existing before the rules were amended in April 2003.

(iv) Summary

20. We are therefore satisfied that the Immigration Judge did err in law in his assessment of the application for indefinite leave to remain on the basis of long residence. The application should have been considered in accordance with the rules. The Secretary of State was right to refuse the application for the reasons he has set out in his decision letter dated 20 June 2005. As the appellant did not complete 14 years continuous residence within the rules the discretionary matters raised in Rule 276(b)(ii) did not fall to be considered and there was no discretion within the rules for the Judge to review. In so far as the Secretary of State has decided not to exercise his discretion outside the rules there is no right of appeal to the Immigration Judge and no basis for an argument that the Secretary of state failed to follow his own policy. No case arises on the basis of a legitimate expectation.

Article 8

21. The decision letter dealt with Article 8. The Judge took the view in the light of his findings that he need not consider Article 8. We heard submissions in this respect. We accept that the appellant has established private life. Removal would amount to an interference but would be in accordance with the law. The substantial issue is whether removal would be proportionate to the legitimate aim of maintaining an effective and rational immigration policy. The test is whether the appellant's circumstances are truly exceptional *Huang* [2004] EWCA Civ 105 In *Akaeke*, the Court of Appeal held that the Immigration Appeal Tribunal had not erred in law by dismissing an appeal against an Adjudicator's determination that removal in the particular circumstances of that appeal would be disproportionate. In that case the applicant had a separate claim to be allowed to enter under the rules. There was no reason to believe that that application would not be successful if made from abroad in accordance with the rules. The delay was against the background of protracted efforts by the applicant's representatives to obtain a decision. At the conclusion of his judgment, Carnwath LJ noted that the facts were very different from those in the decision of the Court of Appeal in *Strbac [2005]* EWCA Civ 848. In that case the

Court held that administrative delay in the determination of an application may if it proved to be substantial and to have brought consequences of weight beyond the bare passage of time be a factor which a decision maker was obliged to consider. But that factor must have very substantial effects if it was to drive a decision in the applicant's favour.

22. We are not satisfied in the present case that the delay has had any prejudicial effect upon the appellant apart from extending his unlawful stay in the United Kingdom. He has not any lost right to make a separate in-country application as in *Shala* [2003] EWCA Civ 233 The delay is not such as to make his circumstances truly exceptional as envisaged by the Court of Appeal in *Huang*. We have taken into account the appellant's statements and the submissions made on his behalf. The delay in taking enforcement action since 1999 has been caused in part by the appellant's pursuit of his legal remedies which were properly open to him and in part by the Secretary of State's delay in making a decision. Even so, we are not satisfied that removal can properly be categorised as disproportionate.

Decision

23. For the reasons we have given we are satisfied that the Immigration Judge did make a material error of law. For the reasons we have given, we are satisfied that the appellant's appeal against the decision to refuse indefinite leave to remain should be dismissed.

H J E Latter
Senior Immigration Judge