IAC-HX-MC/12-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02825/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 March 2015	**On 13 July 2015**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR JANG HYEON CHOI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Whitwell
For the Respondent: Miss Heybroek

DECISION AND REASONS

1. Mr Choi is a citizen of South Korea born in 1988.

2. He appeals against a decision of the Secretary of State made on 17 December 2013 to refuse him indefinite leave to remain under paragraph 276 of the Immigration Rules (the ten year rule).

3. Following a hearing at Richmond on 13 November 2014 Judge of the First-tier Tribunal Seelhoff allowed the appeal under the Rules and on Article 8 human rights grounds.

4. Although in proceedings before me the Secretary of State is the Appellant for convenience I retain the designations as they were before the First-tier Tribunal, thus, Mr Choi is the Appellant and the Secretary of State the Respondent.

5. The immigration history is not in dispute. The Appellant arrived in the UK on 26 December 2002 with leave to enter as a visitor for six months. On 9 April 2003 he made an in time application for leave to remain as the dependent child of a student which was refused on 7 May 2003. A further in time application for leave to remain as the dependent child of a student and his leave was varied until 31 March 2004. On 8 March 2004 he made an in time application for further leave to remain as the dependent child of a student and his leave was varied until 31 January 2007. On 25 January 2007 he made an in time application for leave to remain as a dependant of a student and his leave was varied until 31 May 2008. On 3 May 2008 he made an in time application for leave to remain as a dependant of a student. On 19 June 2008 he withdrew his application.

6. His passport shows that he returned to South Korea on 25 June 2008. On 21 September 2008 he arrived in the UK with leave to enter as a student valid until 1 January 2012. On 22 November 2011 he made an in time application for Tier 1 study leave and his leave was varied until 16 December 2013. On 15 August 2013 he lodged his current application.

7. In refusing the application the Respondent was satisfied that the Appellant had lawful leave from his arrival in the UK on 26 December 2002 until 31 May 2008. Having submitted an in time application for further leave to remain on 3 May 2008 his leave continued under s3C until 19 June 2008 when his application was withdrawn at his request. His documents were collected from the Respondent on 20 June 2008 and he returned to South Korea on 25 June 2008.

8. As he left the UK after the expiry of his leave his continuous residence was considered to have been broken. An applicant, the Respondent stated, who leaves the UK after the expiry of his leave has a maximum of 28 days to apply for entry clearance and return to the UK, this includes any time spent in the UK without leave. He re-entered the UK with valid entry clearance on 21 September 2008, a period of 93 days after the expiry of his leave.

9. As a result he could not demonstrate ten years' continuous lawful residence in the UK and cannot meet the requirements of paragraph 276B(i)(a).

10. As indicated he appealed. The appeal was dealt with on submissions there being no dispute as to the facts and there being a single legal issue, namely, the interpretation of paragraph 276A and 276B(v) in the Appellant's situation where he had overstayed for six days having withdrawn his application and then been without leave for 88 days until he got entry clearance to return.

11. The judge noted paragraphs 276A and B including:

> '276A. For the purposes of paragraphs 276B to 276D and 276ADE
>
> (a) "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 6 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, but shall be considered to have been broken if the applicant [it goes on to list five specific circumstances which will breach continuous lawful residence none of which, it is agreed, have application in the present case]
>
> …
>
> (b) "lawful residence" means residence which is continuous residence pursuant to:
>
> (i) existing leave to enter or remain …
>
> 276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:
>
> (i)(a) he has had at least 10 years continuous lawful residence in the United Kingdom …
>
> …
>
> (v) the applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded, as will any periods of overstaying between periods of entry clearance, leave to enter or leave toremain of up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period.'

12. The judge's conclusions are at paragraph [7] ff. At [8] he commented that 276A(a) states that continuous lawful residence shall not be treated as being breached if an applicant has leave to remain at the date of which they leave the UK. '*However there is an ambiguity in the wording of paragraph 276A(a) in that it does not state that the opposite situation (i.e. one in which an applicant does not have leave to remain at the date of which they leave the UK) there will necessarily be a breach in continuous residence'*. He goes on to note the five circumstances which will breach continuous residence and that none of them apply to the instant case.

13. He continued (at [10]) '*Accordingly I find that there is a gap in the Immigration Rules where the condition that the Respondent alleges has led to a breach in the Appellant's continuous lawful residence might be implied from the wording of paragraph 276A(c) but is not expressly set out in the Immigration Rules'.*

14. He went on (at [11]) '*In considering the significance of this I have then taken into account the words of paragraph 276B(v) which states expressly that overstaying for periods of 28 days or less will be disregarded if it falls between periods of entry clearance, leave to enter or remain or any period of overstaying pending the determination of an application. In this case the Appellant has overstayed no more than six days between the expiry of 3C leave when the application for leave to remain as a part of his family was withdrawn and his being granted entry clearance to return to the UK on 21 September 2008. Whilst the gap between the effective expiry of leave to remain and the subsequent entry clearance was a total of 88 days the overstaying between these two grants of leave was just six days which is well within the normally permissible amount'.*

15. He ends on this matter (at [12]), '*Given the clear wording of paragraph 276B and the clear intention that periods of overstaying of less than 28 days would not lead to a breach in the continuous lawful residence I do not consider that it is appropriate to construe paragraph 276A(a) as containing the condition which the Respondent has implied into it. The condition is not expressly in the rules and runs contrary to express intentions in other sections of the relevant Rules'.*

16. The judge then went on to consider, if he was wrong in his interpretation of the Rules, whether the *de minimis* principle applied.

17. He found that that the Appellant had '*only technically overstayed'* [13] as a result of the delay between the passports being returned to him and his family and their being able to leave. Had they not been trusted by the Respondent they would have received their passports the same day they left at the point of departure and thus would have had leave until then.

18. He noted that it takes time to organise international journeys and that *'for all practical purposes the Appellant and his family left as soon as they could reasonably have been expected to on the return of their passports. Accordingly it would be irrational and perverse to treat the Appellant and his family as having overstayed or somehow have acted unlawfully'* [16].

19. The judge noted that the Appellant had been readmitted to the UK and given a number of periods of leave and that '*there has never been a real concern about his immigration history'* [17].

20. He concluded (at [17]) *'If the Immigration Rules do contain the condition that the Respondent asserts they contain, then on the facts of this case I consider that the de minimis principle would apply particularly in light of the clear intention of paragraph 276B that applicants would not be penalised for a period of overstaying of less than 28 days … it is not rational or reasonable to regard the Appellant and his family as having overstayed and that to all practical intents and purposes their residence was legitimate to the point of departure*' [17].

21. The judge ended by briefly considering Article 8 outside the Rules. He concluded that the Appellant does substantively meet the Rules. He went on to state that the application would only fail on a technicality. He had developed his private life in the UK while here lawfully. There would be no significant public interest in excluding him as he was a productive member of society and had always tried to comply with immigration control. He thus allowed the appeal under Article 8.

22. The Respondent sought permission to appeal which was granted by a judge on 8 January 2015.

23. At the error of law hearing before me Mr Whitwell adopted the brief grounds. The judge had used 276B(v) to construe 276A(a). That, in his submission, was wrong as 276A(a) is in clear terms. The judge erred in reading the words of the rule as somehow being less restrictive than they are. Further, his alternative finding under Article 8 was infected with the same error and in any event was an impermissible 'near-miss' argument. In addition, he was wrong to consider any breach under the Rules as *de minimis*. He invited me to set aside the decision and remake it by dismissing it under the Rules. Article 8 was tainted and would have to be remade.

24. In reply Miss Heybroek agreed that the judge erred in regarding any breach of the rule as *de minimis*. However, he was entitled to construe the rule as he did. Paragraph 276A provided the definition of '*continuous residence'*. Paragraph 276B was how it was applied. The judge's cross-referencing was sound. She invited me to uphold the decision under the Rules.

25. Miss Heybroek submitted that if I was not with her on the Rules the Appellant had a compelling case on human rights. He had come to the UK at the age of fourteen and had lived here effectively ever since. Whilst it was less than twenty years it was a significant period of time which together with his studies and the roots that he has taken up in society was compelling in his favour. The s117B factors were also all in his favour.

26. I reserved my decision.

27. In considering this matter Mr Whitwell was not able to assist me in the construing of paragraph 276B(v) and, in particular, why if the plain reading of paragraph 276A is that leave is required for a person leaving from and returning to the UK the Respondent considered in the refusal letter that it was acceptable to leave without leave as long as entry clearance was sought within 28 days of the previous leave expiring.

28. I do not find the relevant rules easy to construe. Paragraph 276A states that an applicant must have existing limited leave to enter or remain upon departure and return. The Appellant did not having existing leave on departure having withdrawn his latest in time application for further leave

and requested the return of his passport. On a plain reading of it he does not satisfy paragraph 276A (a).

29. However, it seems clear from paragraph 276B (v) that it is intended that a period of overstaying, thus without leave, for 28 days or less is condoned. In other words someone seeking to benefit from paragraph 276B (v) will not have had existing leave but, nevertheless, will be permitted to make an application as long as it made no later than the 28 days.

30. This Appellant overstayed for 6 days. Having left the UK he returned with leave having been absent for less than 6 months. I cannot see it to be to be the case that the situation for an individual who overstays 28 days and makes application is permitted, whereas this Appellant who overstayed 6 days and who was absent from the UK for less than 6 months and who returned to the UK with leave is not permitted. From my reading of the rules I see no basis for the assertion in the refusal letter that an applicant who leaves the UK after the expiry of their leave has a maximum of 28 days to apply for entry clearance and return to the UK. That is not my reading of paragraph 279B (v) which permits overstaying for up to 28 days. The Appellant overstayed 6 days. As indicated Mr Whitwell was not able to assist me on this matter.

31. I conclude that the First tier judge's analysis by which he construed paragraph 276B(v) across 276A (a) shows no material error of law and his decision allowing the appeal under the Immigration Rules stands. In these circumstances I do not need to consider Article 8.

Notice of Decision

The decision of the First tier Tribunal shows no material error of law and that decision allowing the appeal under the Immigration Rules shall stand.

Upper Tribunal Judge Conway