



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/10306/2015

THE IMMIGRATION ACTS

Heard at Field House

On 11th May 2016

**Decision & Reasons
Promulgated
On 3 June 2016**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ALI AKMAL
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer
For the Respondent: Mr M Iqbal, instructed by Ashmans solicitors

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal by the Secretary of State in relation to a decision of First-tier Tribunal Judge Baldwin sitting at Hatton Cross on 6th October 2015.

2. For the purposes of continuity and clarity I will, in this decision, continue to refer to Mr Akmal as the Appellant and the Secretary of State as the Respondent.
3. The Appellant is a citizen of Pakistan born on 21st February 1978. He had applied for indefinite leave to remain on the basis of ten years lawful residence in the UK. That application was refused on the basis that there was a gap of 168 days in his period of lawful residence prior to the application on 20th May 2014, such that he had not achieved ten years lawful residence.
4. The First-tier Tribunal, in a Decision and Reasons promulgated on 13th October 2015, allowed the appeal. In the Decision and Reasons the First-tier Tribunal Judge noted that the Appellant had first arrived in the UK on 30th June 2004 as a student. After various applications and failed appeals he had eventually exhausted his appeal rights, according to the Secretary of State, on 3rd December 2013 when the Upper Tribunal refused permission to appeal to the Court of Appeal. The Appellant thereafter made EEA applications in March 2014 but these were withdrawn. The application made on 20th May 2014 for Indefinite Leave to Remain under the ten year Rule was the decision under appeal before the First-tier Tribunal.
5. Before the First-tier Tribunal it was argued, successfully by the Appellant's representatives, that in fact there had been a renewed application for permission to appeal direct to the Court of Appeal after permission was refused by the Upper Tribunal. That application was decided on 24th February 2014 and so that is when the "clock stopped" bringing s.3C leave to an end. It was argued that the gap referred to by the Secretary of State did not exist. The Appellant claimed that on that basis he did qualify under the ten year provision. The Appellant had claimed that he could succeed because there was no gap as claimed by the Secretary of State.
6. It is significant however that, irrespective of whether s.3C leave expired in December 2013 or February 2014, by the time he made his application in May 2014 he was without leave.
7. Mr Duffy argued that the clock had stopped earlier than February 2014 because Judge Kekic, when refusing permission to appeal to the Court of Appeal had found the application to be way out of time. Be that as it may, neither Judge Kekic's decision to that effect nor the application to the Court of Appeal, now relied upon by the Secretary of State, was before the First-tier Tribunal. What the First-tier Tribunal did have was the Court of Appeal's decision refusing permission to appeal. However permission to appeal was not refused because it was out of time. I agree with the Appellant that there was no gap and so his s.3C leave expired only on the date of the Court of Appeal's decision, namely 24th February 2014.
8. Nevertheless, even finding in the Appellant's favour on that point, he is still unable to succeed under the Rules. The Appellant arrived in the UK on

30th June 2004. He would have accumulated ten years lawful residence only on 30th June 2014. His leave having expired in February 2014, as I have found above, he was short by four months. Mr Iqbal was unable to make any submissions to the contrary. The fact that there had initially been an EEA application does not add anything to the case because that application was withdrawn.

9. The Judge in the First-tier Tribunal therefore, in allowing the appeal under the Rules, erred and his decision to allow the appeal under the Rules must be set aside.
10. I note that in the Decision there are lengthy findings as to the nature of the relationship between the Appellant and his Polish partner all of which are positive; the judge finding that the relationship is genuine. However, whilst those findings may be of benefit at some future date they do not take this particular appeal any further because it was not an EEA decision that was under appeal before the First-tier Tribunal. However, it is of note that those positive findings have not been challenged by the Secretary of State so could be relied upon in any future EEA application by the Appellant.
11. The Decision to allow the appeal under the Immigration Rules, namely the ten year provisions, is tainted by a material error of law. The Appellant cannot succeed on that basis and his appeal against the Secretary of State's decision must fail.

Notice of Decision

The appeal to the Upper Tribunal is allowed such that the decision of the First-tier Tribunal is set aside. In redeciding the appeal the Appellant's appeal against the Secretary of State's decision is dismissed.

No anonymity direction is made.

Signed

Date 1st June 2016

Upper Tribunal Judge Martin

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

Signed

Date 1st June 2016

Upper Tribunal Judge Martin