Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02331/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 January 2020	**On 28 January 2020**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

MD MOTIAR RAHMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Saini, Counsel, instructed by Shah Jalal Solicitors
For the Respondent: Ms R Bassi, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Freer (the judge) who, in a decision promulgated on 8 August 2019, dismissed the appellant's human rights appeal against the respondent's decision of 23 January 2019 to refuse his human rights claim (made in the context of an application for Indefinite Leave to Remain under the long residence rules).

Background

2. The appellant is a national of Bangladesh who was born on 11 July 1984. He entered the UK on 9 February 2009 in order to study. He was subsequently granted further leave to remain as a Tier 1 (Post Study) Migrant, and then as a Tier 4 (General) Student. This last period of leave was valid until 25 July 2016. On that date the appellant made an application for leave to remain as a Tier 1 Migrant. This application was refused on 9 September 2016, with a right to Administrative Review. The appellant exercised his right to Administrative Review. On 27 October 2016 the Administrative Review maintained the original decision.

3. On 11 November 2016 the appellant made an application for leave to remain on Form FLR (FP) based on his private/family life. On 9 March 2018 the appellant varied this claim using Form FLR (HRO) to a human rights claim outside the immigration rules. The respondent purported to refuse this application on 15 March 2018. The appellant maintains that he never received this decision. The appellant purported to vary his application on 13 January 2019 using the Form SET (LR) to one based on his being continuously lawfully present in the UK for at least 10 years.

4. The respondent did not accept the appellant's claim that he had at least 10 years continuous lawful residence. The respondent considered that the appellant's leave to remain ceased on 27 October 2016. The respondent went on to consider the appellant's human rights claim under Appendix FM and paragraph 276ADE of the immigration rules, and to consider whether there were exceptional circumstances outside the immigration rules that would render a refusal of leave to remain a breach of Article 8 ECHR. The respondent concluded there would be no such breach. The appellant exercised his right of appeal under s.82 of the Nationality, Immigration and Asylum Act 2002.

The decision of the First-tier Tribunal

5. The judge heard oral evidence from the appellant and considered two bundles of documents provided by the appellant. The judge summarised the Reasons for Refusal Letter.

6. At [8] the judge stated,

> "The respondent suggested that leave expired on 27 October 2016. It is said there was a year (dates not given) without leave, presumably thought to be ending in late 2017. This is possibly derived from having continuous leave from 9 February 2009 to 27 October 2016. That is a period of 8 years and 2 months."

7. At [9] the judge stated,

> "I am not able to clarify that reasoning any further; I note that there was no mention of section 3C of the Immigration Act, which presumably could have extended leave while applying on 11 November 2016."

8. The judge summarised the submissions made on behalf of both parties. In the section of his decision containing his findings of fact the judge noted that the appellant was married with two very young children, and that his eldest son had some developmental concerns. The judge found that these developmental concerns could be addressed in Bangladesh [40]. The judge noted that neither the appellant nor his partner was British or settled in the UK [supra]. The judge found that the family could relocate to Bangladesh.

9. The judge then set out the requirements of paragraph 39E (relating to a 'grace' period where an application has been made within 14 days of an applicant's leave expiring) and paragraph 276B (establishing the requirements for leave to remain on the basis of long residence) of the immigration rules, and the conclusions of Mr Justice Sweeney in **R (on the application of Ahmed) v Secretary of State for the Home Department (para 276B – ten years lawful residence)** [2019] UKUT 00010 (IAC), from paragraphs 73 to 80.

10. At [50] the judge stated,

> "The respondent has it is said refused one of the applications, done in March 2018 with only an out of country right of appeal, which right I find has not been exercised. The Appellant has more importantly not sought either to obtain a copy of that decision, extend time for that appeal or convert it to an in country right of appeal, an outcome often achieved in this jurisdiction by pursuing a judicial review in the Upper Tribunal. This is a matter which the Appellant may want to raise with his representative on the issue of costs. I am surprised that a party can be told of a decision that they say they do not have any it appear to have made no efforts to secure a late copy thereafter. Time was running. It seems that section 3C leave expired before 10 years accrued, probably in 2018, so the Appellant never achieved the continuous lawful 10 years he might otherwise now have."
>
> [judge's emphasis]

11. Having found that section 3C leave stopped running within the 10 year period, and having regard to the date of the respondent's decision under appeal (23 January 2019), the judge found that the 14 day grace period could not carry the appellant through to 9 February 2019, the 10 year anniversary of his arrival date [52]. The judge concluded that the appellant had not achieved at least 10 years continuous lawful residence [54]. The judge noted that the appellant's children had not resided in the UK "for anything approaching 7 years" [55], that neither the appellant, nor his partner, nor their children were British or settled in the UK, and concluded that there would be no significant obstacles on their return to Bangladesh. The judge

considered the evidence relating to the private lives established by the appellant and his family in the UK, with reference to s.55 of the Borders, Citizenship and Immigration Act 2009, s.117B of the Nationality, Immigration and Asylum Act 2002, and the authorities of **Razgar** [2004] UKHL 27 and **Agyarko** [2017] UKSC 11, and weighed these up against the public interest ([58] to [66]). The judge concluded that the appellant's removal would not result in unjustifiably harsh consequences for him or his family. The appeal was dismissed.

The challenge to the judge's decision

12. Permission was sought two grounds, but granted on only one ground. There has been no challenge respect of the refusal on the 2nd ground, and I say no more about it.

13. The appellant contends that the judge made a finding of fact that he held section 3C leave (that is, leave pursuant to section 3C of the Immigration Act 1971) up to 15 March 2018. The appellant relies on what the judge said at [9] and [50], as set out above. The appellant contends that the respondent has not challenged the judge's findings. On the basis that section 3C leave continued until the decision purportedly made on 15 March 2018, and in light of the appellant's assertion that the purported decision of 15 March 2018 was not lawfully served in accordance with the requirements of the Immigration (Leave to Enter and Remain) Order 2000 (as amended), the appellant's section 3C leave continued. The grounds note that the purported decision of 15 March 2018 was an unpublished document as it was not served by the respondent (indeed there was no bundle of documents from the respondent at all). The judge failed to reach a decision on this issue, and failed to consider the relevance of the absence of the purported decision dated 15 March 2018.

14. At the error of law hearing Mr Saini sought to adopt and expand upon his grounds. I drew to his attention a point clear from his own grounds of appeal (at [11] and [12]), that the appellant's application for further leave to remain as a Tier 1 (Entrepreneur) Migrant was refused on 9 September 2016 and that his Administrative Review, maintaining the earlier decision, was determined on 27 October 2016. I ascertained that Mr Saini was aware of section 3C(2)(c) of the Immigration Act 1971, which reads,

> 'The leave is extended by virtue of the section during any period when –
>
> (a) …
>
> (b) …
>
> (c) …

(d) an Administrative Review of the decision on the application for variation –

(i) could be sought, or

(ii) is pending'

15. I indicated that, on my preliminary view, the appellant's section 3C leave expired on 27 October 2016 in accordance with the above provision. There had been a decision in respect of the Administrative Review and it was neither being sought nor pending. Mr Saini submitted that the judge found, as a fact, that the appellant had section 3C leave until March 2018, that this factual finding had not been challenged by the respondent, that I was bound by the judges factual finding and that he (Mr Saini) was simply completing the judge's 'circle of thinking'.

16. I gave Mr Saini an opportunity to take instructions from the appellant. On his return Mr Saini indicated that there was nothing further he wished to add to his submissions. He sought an adjournment of the appeal on the basis that the Upper Tribunal may he planning to revisit the decision in **R (on the application of Ahmed)** but he could provide no specific details. I refused the application to adjourn due to the absence of details and because the issue of section 3C leave in the present appeal was clear cut. Having heard from Mr Saini I indicated that the appeal would be dismissed.

Discussion

17. Mr Saini's ground of appeal relies on what he claims is an unchallenged factual finding by the judge. I am not persuaded that the judge did make clear factual findings in respect of the appellant's leave under section 3C of the Immigration Act 1971. At [9] the judge exclaimed that section 3C could "presumably" have extended the appellant's leave when he made an application on 11 November 2016. There is no clear finding by the judge. At [50] the judge was not clear as to when he believed section 3C leave expired, stating that it was "probably in 2018." But in any event, the question whether leave to remain is extended under section 3C is not a factual question but a legal one. The law on this point is clear. In the context of an Administrative Review, leave will be extended by virtue of section 3C whilst the Administrative Review is being sought or while it is pending. If a final Administrative Review decision has been made, section 3C leave will come to an end.

18. There was no dispute between the parties that the Administrative Review decision in respect of the appellant's Tier 1 (entrepreneur) Migrant application was made on 27 October 2016. After this date the appellant no longer had any lawful leave to remain in the UK. To

proceed with the appeal on any other view would be to ignore the legal reality and to engage in legal fiction.

19. The appellant's section 3C leave expired on 27 October 2016. He has not had any lawful leave since that date. The appellant could not, on any rational view, contend that he had achieved 10 years continuous lawful residents in the UK as he arrived on 9 February 2009. Any failure by the judge to engage with the appellant's contention that the purported decision of 9 March 2018 was not lawfully served on him cannot assist him. Any such mistake by the judge was not a legal error requiring the decision to be set aside.

Notice of Decision

The appeal is dismissed.

D.Blum

Signed

20 January 2020

Date

Upper Tribunal Judge Blum