Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/02703/2018
and HU/17127/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 January 2020	**On 2 March 2020**

Before

THE HONOURABLE MRS JUSTICE MOULDER
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
and
UPPER TRIBUNAL JUDGE REEDS

Between

Ms ZAKIA SULTANA and MR MOHAMMED ROBI ULLAH
Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

Representation:
For the Appellant: Mr Malik, Counsel instructed by Hamlet Solicitors.
For the Respondent: Mr Melvin, Senior Presenting Officer

DECISIONS AND REASONS

1. This is the reserved judgment on the appeal of the Appellants against the decision of First-tier Tribunal (Judge Eden) (the "FtTJ") promulgated on 9 January 2019. That decision dismissed their appeals from decisions of the Secretary of State made on 19 November 2017 and 3 January 2018 to refuse their human rights claims made in conjunction with decisions to refuse their applications for applications for indefinite leave to remain.

Background

2. The Appellants arrived in the UK in July 2007. The Appellants had leave to remain until 31 January 2011. On January 2011 the Appellants applied for further leave to remain but failed to complete a section of the application form. By letter of 21 February 2011 the Appellants were informed that they had not completed the application form and were informed that they should resubmit their application form. On 6 April 2011 the Appellants made an application in person and were granted leave to remain.

3. At [5] the FtTJ identified the issue between the parties was whether the Appellants period of lawful residence in the UK was broken in the period between them receiving the letter dated 21 February 2011 and then applying for leave to remain at the premium Service appointment on 6 April 2011.

Relevant law

4. The Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2007/882 (the "Regulations") provided (so far as material):

> *"16.—*
> *(1) The following procedures are prescribed in relation to an application for which a form is prescribed by regulations 3 to 14:*
> *(a) the form shall be signed and dated by the applicant, save that where the applicant is under the age of eighteen, the form may be signed and dated by the parent or legal guardian of the applicant on behalf of the applicant;*
> *(b) the application shall be accompanied by such documents and photographs as specified in the form; and*
> *(c) each part of the form shall be completed as specified in the form.*
> *Insert section 3C of the Immigration Act (the "Act")*
> *17.—*
> *(1) A failure to comply with any of the requirements of regulation 16(1) to any extent will only invalidate an application if:*
> > *(a) the applicant does not provide, when making the application, an explanation for the failure which the Secretary of State considers to be satisfactory,*
> > *(b) the Secretary of State notifies the applicant, or the person who appears to the Secretary of State to represent the applicant, of the failure within 28 days of the date on which the application is made, and*
> > *(c) the applicant does not comply with the requirements within a reasonable time, and in any*

event within 28 days, of being notified by the Secretary of State of the failure."

Immigration Rules

5. The relevant rules are as follows:

> *"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, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where –*
>
> *(a) the previous application was made before 24 November 2016 and within 28 days of the expiry of leave; or*
>
> *(b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied.*
>
> *276A. For the purposes of paragraphs 276B to 276D and 276ADE (1).*
>
> *(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:*
>
> *(i) has been removed under Schedule 2 of the 1971 Act, section 10 of the 1999 Act, has been deported or has left the United Kingdom having been refused leave to enter or remain here; or*
>
> *(ii) has left the United Kingdom and, on doing so, evidenced a clear intention not to return; or*
>
> *(iii) left the United Kingdom in circumstances in which he could have had no reasonable expectation at the time of leaving that he would lawfully be able to return; or*

(iv) has been convicted of an offence and was sentenced to a period of imprisonment or was directed to be detained in an institution other than a prison (including, in particular, a hospital or an institution for young offenders), provided that the sentence in question was not a suspended sentence; or
(v) has spent a total of more than 18 months absent from the United Kingdom during the period in question.

(b) "lawful residence" means residence which is continuous residence pursuant to:
(i) existing leave to enter or remain; or
(ii) temporary admission within section 11 of the 1971 Act (as previously in force), or immigration bail within section 11 of the 1971 Act, where leave to enter or remain is subsequently granted; or
(iii) an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain.

(c) 'lived continuously' and 'living continuously' mean 'continuous residence', except that paragraph 276A(a)(iv) shall not apply.

276D. Indefinite leave to remain on the ground of long residence in the United Kingdom is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 276B is met.

<u>Home office guidance: Long residence Version 16 (not in force at the time of the relevant decision)</u>
Out of time applications
This page tells you about 'out-of-time' applications submitted for 10 years long residence applications.
An applicant applying for an extension of stay or indefinite leave to remain (ILR) on the basis of long residence must not be in breach of the Immigration Rules.
Applications made before 24 November2016
Where the application was made before 24 November2016 a period of overstaying of 28 days or less on the date of application will be disregarded.

The 28-day period of overstaying is calculated from the latest of the:

•end of the last period of leave to enter or remain granted (including where an in-time application was submitted but the application was considered invalid)
•end of any extension of leave under sections 3C or 3Dof the Immigration Act 1971
•the point that a migrant is deemed to have received a written notice of invalidity, in relation to an in-time application for further leave to remain where that application was deemed invalid due to the failure by the applicant to provide biometrics."

Decision letter

6. In the decision letter dated 3 January 2018 the Secretary of State took the view that the appellants had failed to meet the requirements of 276B of the Immigration Rules in that they had failed to show 10 years continuous lawful residence. The conclusion of the Secretary of State was as follows in this regard:

"On 27 January 2011, you submitted an in-time application for leave to remain in the United Kingdom as a Tier 4 (General) student. The application was rejected on 21 February 2011 as you had failed to complete a mandatory section of the application form.
...
It is noted that you took 41 days from receiving the rejection letter on 23 February 2011 to submit another application. You did not make a further application for leave to remain in the United Kingdom until 6 April 2011, therefore there was a gap of 63 days from when your leave to enter expired to when you were granted further leave to remain on the 6 April 2011.
As this exceeds the 28 days that can be disregarded for applications prior to 24 November 2016, the secretary of state is not satisfied that you have spent a continuous lawful period of 10 years in the United Kingdom.
.... If you had chosen to make a further application (which was subsequently granted) in a timely manner within 28 days of receipt of the rejection letter, your continuous lawful period would not have been broken....
As there is a gap of 63 days from when your leave to enter expired to when you were granted further leave to remain on 6 April 2011, a period which exceeds the 28 days that can be disregarded, the Secretary of State is not satisfied that you have spent a continuous lawful period of 10 years in the United Kingdom. As you have failed to meet the requirements of 276B your application is refused under 276 D of the Immigration Rules." [emphasis added]

First-tier Tribunal

7. The appeal to the First-tier Tribunal was under section 82 of the Nationality Immigration and Asylum Act 2002 against decisions of the respondent made in respect of the first appellant on 3 January 2018 and in respect of the second appellant on 19 November 2017 to refuse their human rights claims, made in conjunction with decisions to refuse the applications for indefinite leave to remain in the UK on the basis of 10 years residence.

8. The First-tier Tribunal judge noted that although their appeals listed a number of grounds of appeal, the only ground permitted under section 84 of the 2002 Act is that the decision was unlawful under section 6 of the Human Rights Act 1998.

9. Before the First-Tier Tribunal counsel for the Secretary of State relied on the reasons set out in the refusal letter and stated that there was a gap in the 10 years of lawful residence required by paragraph 276B (at [13] of the judgment).

10. For the Appellants it was submitted that the application made on 27 January 2011 was not decided until the appointment on 6 April 2011. It was also argued that the premium service appointment was made on 27 February 2011 which was within the 28-day grace period provided for.

11. The FtTJ stated (at [17]) that the burden is on the appellants to show that the respondent's decisions are unlawful under section 6 of the Human Rights Act. He then stated that in determining whether the appellants had shown that the decisions were in breach of article 8, he adopted the approach set out in *R (Razgar) v SSHD* 2004 UKHL 27.

12. He took the view that the failure to grant the appellants leave to remain was an interference with their private life and it would be of sufficient gravity to engage article 8. He also concluded that refusal of leave to remain was in accordance with the law and would be for the purposes of maintaining effective immigration controls. As to proportionality he first considered the position within the Immigration Rules.

13. The FtTJ concluded at [21] that the Appellants did not meet the requirements of paragraph 276B of the Immigration Rules. He stated:

> *"I agree with the respondent that they have not had 10 years continuous lawful residence in the UK, as required by paragraph 276B(i)."*

14. The FtTJ found that on 21 February 2011 the respondent did write to the first appellant stating that there was a problem with the application

and stating clearly what the Appellants needed to do in order to meet the requirements of regulation 16. He held at [28]:

> *"therefore, the appellants had 28 days from 23 February 2011, the date on which the first appellant acknowledged receipt of the 21 February 2011 letter, to meet the requirements of regulation 16. This period expired on 23 March 2011. I consider that on 24 March 2011, the appellants' applications were invalidated."*

15. At [29] he held that the Appellants did not make an application until 6 April 2011 and the making of an appointment did not count as an application. At [31] he concluded:

> *"as the 27 January 2011 application lapsed on 23 March 2011 and the making of a premium service appointment does not count as an application, there is no possibility of the 28-day grace period for overstaying (either under the immigration rules in 2011, paragraph 276 B (v) of the current immigration rules or the respondent's current policy) applying."*

16. As to the position outside the rules, the tribunal judge concluded that there were no exceptional circumstances which would render the refusal of leave to remain a breach of article 8.

Submissions

17. It was submitted by Mr Malik for the Appellants that:

    1. By virtue of regulation 17 of the Regulations the application was only invalidated by reason of the Appellants failure to comply with the requirement within 28 days of being notified of the failure to complete the form. Accordingly, the applications were only invalidated on 24 March 2011.

    2. Since the application was valid when made in January, their leave was automatically extended under Section 3C of the Act until 24 March 2011.

    3. The gap in lawful residence was a period of 12 days from 24 March until 6 April 2011 and this should be disregarded, consistent with the respondent's guidance on Long Residence.

18. In the respondent's written submissions for this hearing, it was submitted that the application of 27 January was not a valid application and therefore did not give rise to section 3C leave under the Immigration Act 1971. The respondent relied on the decision in R (on the application

of Mirza, Iqbal and Ehsan) v Secretary of State for the Home Department [2016] UKSC 63 at [33]:

> *"an application which is not validly made can have no substantive effect" and could not engage section 3C of the 1971 Act as a result."*

19. The respondent therefore submitted that the decision of the First-Tier Tribunal on this issue disclosed no material error of law.

20. Mr Malik for the Appellants rejected the respondent's reliance on paragraph 33 of Mirza which was dealing with the non-payment of fees accompanying an application and for which there was express provision in the relevant regulations.

21. Mr Malik submitted that the position in this case was akin to the position in Mizra in relation to the failure to provide biometric information, namely that failure to comply did not render the application void ab initio but the application only became void if there was a failure to comply once the notification of the failure to comply had been given.

Discussion

22. The relevant passage relied upon by the respondent in Mirza was dealing with specific language in different regulations as is clear when the entire passage is set out:

> *"33. We must accordingly decide the present appeals within the legislation as it stands, there being no challenge to the legality or rationality of the relevant rules and regulations. The issues have to be approached by the application of the ordinary principles of statutory interpretation. They start from the natural meaning of the words in their context. On that basis I have no doubt that, at least in respect of Mr Iqbal and Mr Mirza, the Court of Appeal reached the correct conclusion. There is no ambiguity in the words of regulation 37 of the 2011 Regulations. It provides in terms that if an application is not accompanied by the specified fee the application "is not validly made". In ordinary language an application which is not validly made can have no substantive effect. There is nothing in the regulation to exclude section 3C from its scope."*

23. As set out in the judgment the relevant regulation being considered was in relation to fees and were the Immigration and Nationality (Fees) Order 2011 and the Immigration and Nationality (Fees) Regulations 2011 ("the 2011 Order" and "the 2011 Regulations"). Regulation 37 of the 2011 Regulations provided:

> *"Consequences of failing to pay the specified fee*
> *37. Where an application to which these Regulations refer is to be accompanied by a specified fee, the application is not validly made unless it has been accompanied by that fee." [emphasis added]*

24. The date on which the application was invalidated is a question of construction of the Regulations.

25. Mr Malik relied on the decision of the Supreme Court in Mirza as supporting his submission.

26. In our view the decision in that case provides little if any assistance on the construction of the Regulations. The provisions at issue in that case related firstly to a non-payment of fees where, as referred to above, there was specific provision in the relevant regulations that if the application was not accompanied by the relevant fee it was "not validly made".

27. The second type of case considered by the Supreme Court in Mirza involved a failure to provide biometric information. In that case the relevant regulations (Immigration (Biometric Registration) Regulations 2008) provided that a person subject to immigration control must apply for the issue of a biometric immigration document and that on failure to comply the Secretary of State "may" take any of the actions specified in paragraph (2) of Regulation 23 which included:

> *"(b) treat the person's application for leave to remain as invalid …".*

28. The present case differs from those cases in that:

- There is no specific provision either if the sections of the form are not completed, that the application is "not validly made" or that the Secretary of State can determine (at a subsequent date) to treat the application as invalid.

- Unlike the position with the biometric information which had to be supplied subsequent to the submission of the application form, this tribunal is concerned with the initial submission of the application form itself.

29. We do not accept the submission by Mr Malik that this issue was determined by the FtTJ at [28]and it is not open to respondent to challenge that finding. As set out above, at [28] of the judgment the FTT judge stated:

> *"I consider that on 24 March 2011, the appellants' applications were invalidated."*

30. In our view by this statement the FtTJ found that the date on which the Appellants had failed to remedy the failure was 24 March, being the date on which the 28-day period expired, but he did not make a finding in that paragraph as to whether the effect of the Regulations was that the application was then void ab initio.

31. Mr Malik also relied on the decision in *Kishver* [2011] UKUT 00410 (IAC). The tribunal was dealing with an earlier version of the regulations which for these purposes are in all material respects the same where the appellant had used the wrong form. The Tribunal held at [5]:

> *"5. Those Regulations make it clear that it was open to the Secretary of State to treat an invalid application as one which was valid, because invalidity would only arise if the Secretary of State notified the failure..."*

32. It seems to us that the language of Regulation 17 would suggest that it is not intended to render the application void ab initio. Regulation 17 states:

> *"An application will be invalidated..."*

33. Whilst the language is not free from ambiguity, in our view the language suggests that rather than an application "being void/invalid" if the form is not completed in full, it is only invalidated if, in the future, the failure is identified, and not remedied. This interpretation of the words used is consistent with the provisions which then allow for the failure to be notified and remedied within a specified period. This is consistent with the approach taken in *Kishver*.

34. As to the purpose behind the language, we were not referred to any materials.

35. In our view Mr Malik is correct in his interpretation of the Regulations and therefore the period in question for which there was no valid leave ran from 23rd March 2011 until 6 April 2011.

36. Accordingly, the conclusion of the FtTJ (and the basis of the decision in the letter of the respondent of 3 January 2018) that the period for which there was no leave exceeded the 28-day grace period is incorrect.

The decision in *Ahmed*

37. Mr Malik in accordance with his duty properly brought to our attention the decision of the Court of Appeal in *R (Ahmed) v SSHD* [2019] EWCA Civ 1070.

38. Mr Malik submitted that the decision in *Ahmed* related solely to the Immigration Rules and does not displace the published guidance. Mr Malik sought to pray in aid the head note in the decision of the Upper Tribunal *in SF v SSHD* [2017] UKUT 120(IAC):

> *"Even in the absence of a "not in accordance with the law" ground of appeal, the Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular outcome in the instant case. Only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal."*

39. As Mr Malik had raised the authority of *Ahmed,* we invited the Home Office Presenting Officer to address this tribunal on the implications of *Ahmed* but he maintained his position that, if the Tribunal found that the application only lapsed on 23 March 2011 and was not void ab initio, the Appellants would be within the 28-day grace period allowed for in the Guidance and therefore the Appellants would succeed.

40. The decision of the Court of Appeal in *Ahmed* on the interpretation of 276B is clear.
At [14] the issue in that case was stated as follows:

> *"The issue on this application for PTA is whether it is arguable that paragraph 276B(v) operates so as to cure short 'gaps' between periods of LTR so as to entitle persons such as the Applicant in the present case to claim "10 years continuous lawful residence "under paragraph 276B(i)(a)."*

41. The court held at [15]:

> "*In our view, the wording of paragraph 276B is clear:*
> *(*1) First, the provisions of paragraph 276B(i)-(v) are separate, freestanding provisions each of which has to be met in order to for an applicant to be entitled claim "10 years continuous lawful residence "under paragraph 276B (see paragraph 276C).
> (2) Second, sub-paragraph (v) is not drafted as an exception to sub-paragraph (i)(a) and makes no reference to it. There are no words which cross-refer or link sub-paragraph (v) to sub-paragraph (i)(a), or vice-versa, whether expressly or inferentially.
> *…*
> *(4) <u>The critical point is that the disregarding of current or previous short periods of overstaying for the purposes of sub-paragraph (v) does not convert such periods into</u>*

periods of lawful LTR; still less are such periods to be" disregarded" when it comes to considering whether an applicant has fulfilled the separate requirement of establishing "10 years continuous lawful residence "under sub-paragraph (i)(a).

...

(8) If and insofar as reliance is placed on the SSHD's" Long Residence" Guidance (Version 15.0) published on 3rd April 2017, this does not avail the Appellant. We note that "Example 1" and "Example 2" on page 16 of the Guidance say that "gaps in lawful residence" can be disregarded because "the rules allow for a period of overstaying of 28 days or less when that period ends before 24 November 2016". This does not accord with the true construction of paragraph 276B as set out above, although it may reflect a policy adopted by the SSHD. However, it is axiomatic that the intention of the Rules is to be discerned "objectively from the language used" not from e.g. guidance documents (per Lord Brown in Mahad (Ethiopia) v. Entry Clearance Officer [2010] 1 WLR 48 (2009) at paragraph 10). The SSHD may wish to look again at the Guidance to ensure that it does not go any further than a statement of policy.

42. In our view in light of *Ahmed*, the appellants cannot succeed in their appeal on the basis that the FtTJ was in error in concluding that the appellants did not qualify for leave under the Rules.

43. The decision in *SF* related to the situation where an assessment of whether it would be reasonable for a British citizen child to leave the UK had to be made and there was published guidance as to what would be regarded as reasonable.

In such circumstances it was found that the tribunal should take into account the guidance in order to ensure consistency. The Upper Tribunal held:

"10. *It is clear that the appellants do not have available to them a ground of appeal on the basis that the decision was not in accordance with the law such as before the amendments made to the 2002 Act by the 2014 Act they might have had. Nevertheless it appears to us that the terms of the guidance are an important source of the Secretary of State's view of what is to be regarded as reasonable in the circumstances, and it is important in our judgement for the Tribunal at both levels to make decisions which are, as far as possible, consistent with decisions made in other areas of the process of immigration control*"

44. It was submitted by Mr Malik that in circumstances where the appellants are entitled to indefinite leave to remain, there is no

proportionate justification for their removal from the United Kingdom as the Secretary of State cannot point to the importance of maintaining immigration control as a factor weighing in her favour in the proportionality exercise.

45. It seems to us that contrary to the submissions of Mr Malik, the appellants are not "entitled" to indefinite leave to remain as they fail to meet the requirements of the Rules and do not meet the test of "exceptional circumstances" to be granted leave outside the Rules. The existence of the Policy does not bring them within the Rules, nor does it provide a basis on which they can establish a right to a grant of leave outside the Rules. The appellants have failed to show that the decision of the FtTJ involved the making of an error of law such that the decision should be set aside.

Decision:

Consequently, the appeals against the decision of the FtTJ are dismissed.

Signed Date: 28/2/20

Mrs Justice Moulder
Sitting as a Judge of the Upper Tribunal