Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10558/2019 (P)

THE IMMIGRATION ACTS

Decided without a hearing under rule 34
On 8 September 2020

Decision & Reasons Promulgated
On 14 September 2020

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

MD IBRAHIM [K]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Taj Solicitors (written submissions)
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer (written submissions)

DETERMINATION AND REASONS

Introduction

1. The appellant is a citizen of Bangladesh who was born on 3 February 1981.

2. The appellant appeals, with the permission of the First-tier Tribunal (Judge M Robertson), against a decision of the First-tier Tribunal (Judge Shamash) which dismissed the appellant's appeal relying on Art 8 of the ECHR against the respondent's decision taken on 6 June 2019 to refuse to grant the appellant Indefinite

Leave to Remain ("ILR") based upon 'long residence' under para 276B of the Immigration Rules (HC 395 as amended).

3. In the light of the COVID-19 crisis, the Upper Tribunal (UTJ Lindsley) issued directions on 23 June 2020 stating that it was the UT's provisional view that it would be appropriate to determine whether the First-tier Tribunal's decision involved the making of an error of law and, if so, whether to set that decision aside without a hearing. The parties were invited to make written submissions on the substantive issues in the appeal and also, no later than 21 days after the directions were sent, to indicate whether a hearing was necessary.

4. In response to those directions, both parties made written submissions. In a skeleton argument (sent on 8 July 2020), the appellant's representatives made written submissions on the substance of the appeal but did not seek an oral hearing. On 1 July 2020, the respondent also made written submissions on the substance of the appeal and indicated that it was the respondent's view that an oral hearing was unnecessary to determine the error of law issue.

5. In the light of those submissions, and having regard to the nature of the issues raised in the appeal, I am satisfied that it is in the interests of justice to determine the error of law issue under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) without a hearing.

The Appellant's Immigration History

6. The appellant's immigration history is helpfully set out by Judge Shamash at paras 3-15 of his determination from which I gratefully borrow. It is not without complexity.

7. The appellant entered the United Kingdom on 27 March 2008 with entry clearance as a student valid until 31 March 2010. Thereafter, a number of applications for further leave as a student were made and granted such that the appellant was eventually granted leave to remain until 22 August 2014.

8. On 22 August 2014, he applied for further leave to remain as a Tier 2 Dependent Partner of his wife which was granted until 3 November 2019.

9. On 21 September 2014, the licence of the sponsor of the appellant's wife was revoked. As a result, on 22 October 2015 the appellant's leave was curtailed to 27 December 2015. Following a pre-action Protocol letter challenging that decision, on 27 November 2015 the respondent maintained her decision to curtail the appellant's leave.

10. On 26 November 2015, the appellant submitted a pre-action Protocol letter challenging the respondent's decision. On 27 November 2015, the respondent maintained that decision.

11. On 29 December 2015, according to the respondent's chronology, the appellant applied for further leave to remain which was refused and certified as clearly unfounded on 8 June 2016. That would have made the application out of time. The appellant contended that the application was made in-time on 27 December 2015, the date to which his leave was curtailed, when the application was posted. The judge did not question the appellant's position and no point is now taken on this matter and it should now be accepted.

12. On 23 June 2016, the appellant applied for further leave to remain relying upon his private and family life in the UK. That application was refused on 1 December 2017 without a right of appeal. Following a pre-action Protocol letter, on 5 January 2018 the respondent undertook to reconsider that decision. As a result, on 7 March 2018, the Secretary of State again refused the appellant's application.

13. On 16 March 2018, the appellant submitted an application for ILR based upon ten years' continuous lawful residence in the UK under para 276B of the Immigration Rules (HC 395 as amended).

14. On 3 April 2018, a pre-action Protocol letter challenged the respondent's earlier reconsideration and refusal of the appellant's Art 8 claim on 7 March 2018. On 17 April 2018, the Secretary of State agreed to reconsider that decision. It was subsequently reconsidered and, on 22 June 2018, the appellant's application for leave to remain based upon his private and family life was again refused.

15. On 23 July 2018, the respondent refused the appellant application for ILR made on 16 March 2018. A pre-action Protocol letter challenging the decision of 23 July 2018 was received on 23 August 2018. That decision was maintained by the respondent on 28 August 2018.

16. On 5 September 2018, the appellant lodged an appeal against the decision of 22 June 2018 refusing (on reconsideration) his Art 8 claim. That appeal was dismissed by the First-tier Tribunal on 19 November 2018 and permission to appeal was refused by both the First-tier Tribunal and Upper Tribunal on 12 February 2019 and 1 April 2019 respectively.

17. Following the commencement of a judicial review challenge to the refusal of ILR on 23 July 2018 (maintained on 23 August 2018), on 25 March 2019 the respondent agreed to reconsider that decision. On 6 June 2019, the respondent again refused the appellant's application for ILR which the appellant unsuccessfully appealed to the First-tier Tribunal and against which he now appeals against to the Upper Tribunal.

The Judge's Decision

18. The principal issue before Judge Shamash was whether the appellant could establish ten years' lawful continuous residence in the UK since he first arrived on 27 March 2008. It was contended by the respondent that the appellant's leave expired on 8 June 2016 when his application for leave, made on 29 December 2015, was refused and certified as clearly unfounded. That decision was not challenged. The appellant

could, therefore, only establish a little over 8 years and 2 months continuous lawful residence.

19. The appellant contended that he had made a further application for leave within 14 days on 23 June 2016 which, applying para 39E of the Immigration Rules, meant that the subsequent period during which he had no leave should not be regarded as such in calculating whether he had acquired the required ten years' continuous lawful residence. He had, therefore, established 10 years' continuous lawful residence.

20. In his decision, Judge Shamash rejected the appellant's argument which, the judge concluded, was contrary to the decision of the Court of Appeal in R (Ahmed) v SSHD [2019] EWCA Civ 1070.

The Grounds of Appeal

21. The appellant's grounds of appeal, as supplemented by the subsequent written submissions, raise four points.

22. First, it is contended that the appellant was, notwithstanding the Court of Appeal's decision in Ahmed entitled to rely upon para 39E and that the period of overstaying since 8 June 2016 could count as part of a period of continuous lawful leave in order to satisfy the requirements of para 276B(i)(a) ("Ground 1").

23. Secondly, it is contended that the Secretary of State's guidance as set out in her guidance "Applications from overstayers (non family routes)" (Version 7.0) (24 November 2016) provides that the Secretary of State will disregard any period between the expiry of an individual's leave and a current application if the latter is made within 14 days ("Ground 2").

24. Thirdly, it is contended that the appellant has a legitimate expectation, based upon longstanding practice of the respondent, that individuals will be granted ILR despite short gaps between periods of lawful residence ("Ground 3").

25. Finally, it is submitted that the judge failed to consider properly Art 8 of the ECHR on the basis of the appellant's private and family life in the UK, including the best interests of his two children who were born in the UK ("Ground 4").

Discussion

26. The relevant Immigration Rule upon which the appellant relies is para 276B which, so far as relevant provides as follows:

> "The requirements to be met by an applicant for indefinite leave to remain on the grounds of long residence in the United Kingdom are that:
>
> (i) (a) he has had at least ten 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 further 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."

27. Paragraph 39E provides as follows:

"This paragraph applies where:

(1) the application was made within 14 days of the applicant's leave expiring and the Secretary of State considers that there was a good reason beyond the control of the applicant or their representative, provided in or with the application, why the application could not be made in-time; or

(2) the application was made:

(a) following the refusal of a previous application for leave which was made in-time and

(b) within fourteen days of:

(i) the refusal of previous application for leave; or

(ii) the expiry of any leave extended by Section 3C of the Immigration Act 1971; or

(iii) the expiry of the time-limit for making an in-time application for administrative review or appeal (where applicable); or

(iv) any administrative review or appeal being concluded, withdrawn or abandoned or lapsing."

Ground 1

28. The appellant relies upon para 276B(v) and para 39E(2) read together. His submission is that he made an application within fourteen days of the refusal of his previous application on 8 June 2016 and, as a consequence, para 39E applied and para 276B(v) therefore requires that his period of overstaying since 8 June 2016 should be disregarded and counted as lawful residence for the purposes of calculating whether or not he can establish ten years' continuous lawful residence.

29. There are a number of insuperable difficulties in sustaining this submission.

30. First, it is far from clear that the appellant, in fact, made an application "within fourteen days" of the expiry of his leave on 8 June 2016. His application for further leave to remain based upon his private and family life under Art 8 was, it would appear from the respondent's decision letter, made on 23 June 2016. This is fifteen days after the expiry of his leave on 8 June 2016.

31. Secondly, the decision of the Court of Appeal in Ahmed is wholly inconsistent with this submission and that decision is binding both upon the Upper Tribunal and the First-tier Tribunal. In Ahmed, the Court of Appeal rejected the very submission relied upon in this appeal. At [14]-[15], the Court of Appeal (Floyd and Haddon-Cave LJJ) said this:

> "14. The point which arises is a short point of construction. 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).
>
> 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.
>
> (3) Third, there is no difficulty in giving sub-paragraph (v) a self-contained meaning. It makes use of the provisions of paragraph 39E of the Rules. Paragraph 39E is the 'exceptions for overstayers provision' which, in effect, grants a 14-day period of 'grace' in respect of the lodging of LTR applications in certain circumstances. Under sub-paragraph (v), where paragraph 39E applies, any *current* period of overstaying as well as any *previous* period of overstaying after the advent of the amendment to the rules on 24th November 2016 will be "*disregarded*". In addition, periods of overstaying of less than 28 days before that date are also disregarded. The reference to previous periods means that, in requiring that the applicant should not "*be in the United Kingdom in breach of immigration laws*", the sub-paragraph is not looking simply at the applicant's status at the date of the application, but also looks back in time to his previous immigration status. Mr Sarker confirmed that the sub-paragraph referred to all previous periods of overstaying. This is, of course, subject to the SSHD's residual discretion.
>
> (4) 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 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).
>
> (5) Fourth, there is a marked contrast in the drafting of the definitions of "*continuous residence*" and "*lawful residence*" in paragraph 276A sub-paragraphs (a) and (b) respectively. In respect of continuous residence, in addition to defining it as an unbroken

period, the sub-paragraph goes on to deem that it "*shall not be considered to be broken*" by certain periods of absence from the UK. Lawful residence, on the other hand, is simply required to be continuous residence (*i.e.* unbroken) pursuant to certain types of leave, temporary admission, immigration bail or exemption from immigration control. Unlike sub-paragraph (a), in sub-paragraph (b) there is no corresponding provision which allows residence which is not continuously lawful to be deemed unbroken. It is here that one would expect to find the saving which the Applicant incorrectly contends is created by paragraph 276B(v), and one does not. We consider that to be a clear indication that the lawfulness of continuous residence must be unbroken.

(6) Fifth, by contrast, there are examples elsewhere in the Rules expressly providing that "*continuous periods*" of lawful residence in the UK shall be considered "*unbroken*", notwithstanding periods of overstaying, where paragraph 39E applies. There are to be found in specific areas where such an exception was clearly intended, *e.g.* Appendix ECAA relating to ECAA Nationals and settlement and *e.g.* Part 6A of the Rules in relation to the Points Based System. Part 6A provides as follows (emphasis added):

> "***Part 6A***
>
> ***Points-based system***
>
> *245AAA. General requirements for indefinite leave to remain*
>
> *The following rules apply to all requirements for indefinite leave to remain in Part 6A and Appendix A:*
>
> *(a) References to a "continuous period" "lawfully in the UK" means, subject to paragraph (e), residence in the UK for an unbroken period with valid leave, and for these purposes a period shall be considered unbroken where:*
>
> *…*
>
> > *(iv) the applicant has any previous period of overstaying between periods of leave disregarded where: the further application was made before 24 November 2016 and within 28 days of the expiry of leave; or the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied. …*" (emphasis added)

(7) Sixth, applying ordinary rules of statutory construction and the presumption of ideal, rational legislation, these differences in drafting should not be read as accidental or unintended (*c.f.* Bennion on *Statutory Construction*, section 9.3).

(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."

32. At [16]-[17], the Court of Appeal set out its conclusion:

> "16. It will be apparent, therefore, that we agree with the decision and reasoning of Sweeney J in *Juned Ahmed* (*supra*). As Sweeney J correctly held, paragraph 276B(v) involves a freestanding and additional requirement over and above the requirements of paragraph 276B(i)(a).
>
> 17. In summary, it is clear as a matter of construction of the Immigration Rules that an applicant cannot rely on paragraph 276B(v) to argue that any period of overstaying should be disregarded for the purposes of establishing "*10 years continuous lawful residence*" under paragraph 276B(i)(a)."

33. It is clear that the Court of Appeal rejected the argument that para 39E of the Immigration Rules has the effect, when read with para 276B(v), of allowing current or previous periods of overstaying to be disregarded and treated, in effect, as periods of lawful leave in determining whether an individual meets the requirement in para 276B(i)(a) of "ten years' continuous lawful residence". The Court of Appeal concluded that was not the effect of para 39E. Consequently, even if the appellant's application on 23 June 2016 was within fourteen days of the expiry of his leave on 8 June 2016, from that latter date the appellant had no lawful leave and, applying Ahmed, he cannot establish ten years' continuous lawful residence from his date of entry on 27 March 2008.

34. The judge was correct to reach that conclusion in para 24 of his determination in accordance with the binding authority of the Court of Appeal in Ahmed.

Ground 2

35. The appellant's second argument seeks to rely upon the respondent's guidance in relation to overstaying ("Applications from overstayers (non family routes)" (version 7.0) (24 November 2016). That provides as follows:

> "The Immigration Rules were amended with effect from 24 November 2016 to abolish the 28 day grace period, under which applications for leave to remain were not refused on the basis of overstaying if made within 28 days of the expiry of leave. The Immigration Rules now provide for current overstaying to be disregarded in a limited number of scenarios but otherwise it is now a ground for refusal.
>
> First, overstaying will be disregarded if the Secretary of State considers that there is good reason beyond the control of the applicant or their representative, provided in or with the application, why it could not be made in-time, provided that the application is made within 14 days of the expiry of leave.

> Second, overstaying will be disregarded where the applicant previously made an in-time application, or an application which fell within the first exception above, which was refused and the current application was made within 14 days of:
>
> - the refusal of previous application for leave;
> - the expiry of any leave extended by 3C of the Immigration Act 1971;
> - the expiry of the time-limit for making an in-time application for administrative review or appeal (where applicable);
> - any administrative review or appeal being concluded, withdrawn or abandoned or lapsing."

36. The guidance is not concerned specifically with para 276B and, in particular, the application of para 276B(v) (but see guidance referred to in Ahmed at [15(8)]).

37. As is plain from reading this guidance together with para 39E of the Immigration Rules, it is merely seeking to set out the terms of para 39E and its application. The guidance itself states at the outset: "This guidance is based on the Immigration Rules". At its highest, therefore, this guidance recites the Secretary of State's understanding of how para 39E applies and, for the present purposes, I will assume as applied in respect of para 276B. Even if it were applicable to applications for ILR under para 276B, the interpretation and reliance placed upon it by the appellant would be contrary to the Court of Appeal's interpretation of para 276B, in particular para 276B(v), in Ahmed.

38. In my judgement, the Secretary of State was not purporting to set out a policy beyond the terms of para 276B. Applied to para 276B, the guidance is inconsistent with the law as to the proper application of that provision. I see no proper basis upon which the appellant can rely upon this erroneous interpretation of para 276B when it is inconsistent with the correct meaning and application of that provision as set out in Ahmed either as a policy or so as to create any legitimate expectation that the respondent will apply guidance, applicable to para 276B, which sets out an erroneous interpretation of that provision.

Ground 3

39. To the extent that it is now asserted that the appellant has a legitimate expectation that the respondent will condone "*short gaps between periods of lawful residence*" based upon "a promise or a longstanding practice", the appellant offers no factual basis for that assertion. In any event, even taken at face value, this is not a case where the respondent is being asked to condone "short gaps between periods of lawful residence". The appellant has simply not had leave since 8 June 2016. He still does not have lawful leave and so, this is not a case falling within the appellant's claimed "longstanding practice" in any event.

40. For these reasons, the appellant has failed to establish Grounds 1, 2 and 3 and to establish that the judge erred in law in reaching his finding that the appellant could not establish the ten years' continuous lawful residence and, therefore, his entitlement to ILR under para 276B of the Immigration Rules.

Ground 4

41. That then leaves the final ground of appeal which is that the judge failed to consider the appellant's Art 8 claim in a broader context, beyond the terms of para 276B, taking into account his residence in the UK over a twelve year period and the best interests of his two children, both of whom were born in the UK and one of whom is aged 6 years old.

42. It is self-evident from reading the determination that the judge did not consider the appellant's claim either under para 276ADE or outside the Rules under Art 8. It is clear, however, that the appellant raised the broader application of Art 8 to his circumstances in the grounds of appeal to the First-tier Tribunal. There is supporting material in the appellant's bundle that was before the judge.

43. The judge's determination gives no indication that this aspect of his Art 8 claim was not pursued at the hearing. The judge makes reference to written post-hearing submissions made by the parties but those submissions are not contained within the Tribunal file. It may well be that the focus of the hearing was on para 276B and the establishment of ten years' continuous lawful residence but, as I have said, there is nothing to indicate in the decision that the wider application of Art 8 was not pursued or was abandoned by the appellant's representative. The Tribunal file also provides no indication that it was not pursued. The respondent's written submissions to the UT go no further than stating that the Art 8 claim had no "prospect of success" given that it had already been rejected by the First-tier Tribunal in the earlier appeal on 15 August 2019 and that that might explain as "unsurprising" that the focus of the judge in this appeal was on para 276B. In their present submissions, the broader Art 8 claim has been put forward by the appellant's solicitors. If, in fact, the broader claim had not been pursued before the judge it would be misleading to now state that it was a "live issue". I am not prepared to infer that the appellant's legal representatives would act in this way. I accept Art 8, in its broader application, was a "live issue" at the hearing. The judge was, therefore, required to consider this aspect of the appellant's claim and he wrongly failed to do so.

44. Given that the appellant has lived in the UK for more than twelve years, and that his two children were born in the UK in January 2014 and October 2017, I am unpersuaded that the Art 8 claim had *no* prospect of success even if it may ultimately not succeed.

45. Consequently, I accept Ground 4. In my judgment, the judge materially erred in law by failing to consider the broader aspects of Art 8 under para 276ADE and outside the Rules, in particular taking into account the best interests of the appellant's two children and the overall circumstances of the family.

Decision

46. For these reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal under Art 8 involved the making of an error of law and that decision is set aside.

47. Given the scope and nature of the fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, I have concluded that the proper disposal of this appeal is to remit it to the First-tier Tribunal in order to remake the decision under Art 8. The appellant's broader Art 8 claim has not been considered at all. No factual findings have been made in relation to the circumstances of the appellant and his family beyond a finding as to the period of his lawful residence in the UK. It may be that the appellant will wish to rely upon oral and other evidence concerning, in particular, his children.

48. In reaching a decision in relation to Art 8, Judge Shamash's findings in respect of para 276B are preserved. The appellant cannot establish that he meets the requirements of para 276B based upon 'long residence'.

49. Consequently, I remit the appeal to the First-tier Tribunal in order to remake the decision under Art 8 to the extent that I have indicated above.

Signed

Andrew Grubb

Judge of the Upper Tribunal
8 September 2020