



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

Appeal Numbers: IA/07701/2015  
IA/09983/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 7 July 2016**

**Decision &  
Promulgated  
On 26 July 2016**

**Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**NAHID NAZMUL ISLAM  
NAHID NIGER  
(ANONYMITY DIRECTION NOT MADE)**

Respondents

**Representation:**

For the Appellant: Mr S Whitwell, Home Office Presenting Officer

For the Respondent: Mr M Biggs, Counsel, instructed by London Law Associates

**DECISION AND REASONS**

1. The Claimants are citizens of Bangladesh born respectively on 15 March 1976 and 21 February 1978. The first Claimant came to the United

Kingdom on 10 October 2004 and was granted a student visa which he then extended. He subsequently married and his wife joined him in the United Kingdom as his dependant on 11 July 2007.

2. Further applications were made to extend their leave until 26 February 2010 when the first Claimant applied for further leave. This application was rejected on 6 April 2010 and a further application was made on 22 May 2010 which was also rejected on 4 June 2010 on the basis that it was an attempt to resubmit an invalid application out of time. On 12 June 2010 the Claimant made a further application which was granted on 15 October 2010 and he was given further leave to remain which was extended.
3. A further application made on 3 October 2014 was refused on 6 February 2015 on the basis that the period of continuous lawful residence was considered to have been broken in relation to the application that was rejected on 6 April 2010, the next application having been submitted out of time on 12 June 2010, which exceeds the 28 days permitted under 276B(5).
4. The Claimant and his wife appealed against this decision on 23<sup>rd</sup> February 2015 and the appeal came before First-tier Tribunal Judge J C Hamilton for hearing on 25 August 2015.
5. In a decision dated 29 December 2015, the First tier Tribunal Judge in a very detailed and careful decision allowed the appeal on two different bases. He says at [47]

*"47. Looking at the evidence as a whole I have concluded that:*

- (1) The Respondent failed to notify the appellant about the non-compliant photographs submitted with his February 2010 application within the 28 day period provided for by the Regulations. As a result she lost the opportunity to treat that application as invalid and had no power under the law to do so.*
- (2) As the February 2010 application remained valid and outstanding the Appellant's leave to remain in the UK did not lapse. His May 2010 application should either have been ignored or treated as a variation of the February 2010 application.*
- (3) The Respondent's procedures are manifestly unfair. She misled the Appellant about how he could address this non-compliance and failed to give him the opportunity he was entitled to under the Regulations to rectify this non-compliance.*

*48. This means that on the evidence available to me I am satisfied the appellant meets the continuous lawful residence requirement*

*in paragraph 276B(i)(a). The Respondent's decision is therefore contrary to the Immigration Rules and is unlawful.*

49. *There is no evidence in the refusal letter that the Respondent carried out the 'public interest' assessment, required by paragraph 276B(ii), or considered any of the other requirements in the paragraph. As I understand it, prevailing legal opinion is that the public interest assessment requires the respondent to exercise her discretion and I cannot usurp that role. Therefore I cannot allow the appeal outright. I can only find the Respondent's decision that the appellant did have 10 years continuous residence was unlawful.*

50. *Had I allowed the appeal on the above basis I would have allowed it on the basis of the Respondent's breach of her public law duty of fairness. This remains a secondary basis for refusal for the reasons given at paragraphs 41-42 above.*

51. *Accordingly I was satisfied that the refusal decisions were contrary to the Immigration Rules and unlawful and for the reasons set out above, I am satisfied that the Appellants have shown that the Respondent's decision was not in accordance with the law."*

6. The Secretary of State sought permission to appeal in time on 12 January 2016 on two grounds. The first ground asserted that the judge had made a material misdirection of law in relying on the Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2007 because these have ceased to have effect from 29 February 2008 and the relevant provision in force at the time of the rejection was paragraph 34C of the Immigration Rules. The second ground asserted that the First-tier Tribunal Judge materially misdirected himself in law in his interpretation of 276B of the Rules holding at [29] that the requirements of a break to be less than 28 days referred solely to the status of the Appellant at the time of the current application which is a misreading of 276B(v) and that the reference to time between periods of entry clearance would be meaningless if only the Appellants' current status was relevant.

7. Permission to appeal was granted on 25 May 2016 by First-tier Tribunal Judge Cruthers who gave detailed comments in deciding that a grant of permission was appropriate. In relation to the first ground, he states

*"Although I consider the Respondent's grounds just arguable, the arguments are not attractive – not least because a crucial UKBA letter of 4 June 2010 stated that the Appellants' original application of February 2010 was returned on 16 April 2010 because it did not comply with the requirements of the Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2007."*

8. Judge Cruthers was not impressed by the ground in respect of paragraph 29 and the 28 day provision in 276B(5) because it was relatively clear that

the judge then went on to give consideration to whether or not the appeal should fail by reference to the “2010 gap”.

*“More generally I think the primary conclusion of the judge’s analysis was that the 2010 gap was effectively rectified/nullified because of the Respondent’s failings at the time that she rejected the first Appellant’s application in February 2010: see subparagraph 47(2) of the judge’s decision. But even if the judge’s reasoning in this respect was correct, I am not sure he was entitled to retrospectively rectify the 2010 gap to the effect that the appeal fell to be allowed pursuant to paragraph 276B as per the judge’s finding at [48]. ‘Overall there is sufficient in the grounds to make a grant of permission appropriate’.”*

### *Hearing*

9. The appeal came before me for hearing on 7 July 2016 when the Secretary of State was represented by Mr Whitwell and the claimant by Mr Biggs of Counsel. Mr Whitwell referred to the grounds of appeal and submitted that the Secretary of State was really taking issue with the judge’s use and method of continuous lawful residence. He relied on ground 1 in relation to the fact that the judge had referred to the incorrect law in respect of the 2007 Regulations rather than paragraph 34C of the Immigration Rules. He submitted that the only reason the Claimant’s February 2010 application had been refused was because the photographs did not comply with the correct Regulations and that the Claimant simply needed to provide additional photographs. It was on advice from his solicitors that the Claimant was told he needed additional financial information and essentially the judge was holding the Secretary of State to account when it was due to legal advice that there was a gap. He submitted it was not open to the judge to allow the appeal with reference to paragraph 276 of the Rules.
10. In relation to the second ground, he submitted that the judge had erred in law in misdirecting himself and there was no authority that extended the propositions in Basnett and Mitchell when the issue of fees was not involved.
11. In his clear and helpful response Mr Biggs submitted that even if there were errors of law, which was not conceded, it would not have made a difference. He accepted that at [29] the judge does seem to misinterpret paragraph 276B(v) but pointed out as Mr Whitwell accepted that the judge goes on to analyse the circumstances as if he had got the Rule correct and nothing turns on that.
12. Mr Biggs’s submissions primarily came down to what he referred to as the independent alternative basis for the judge’s decision at [50] and this was the public law duty of fairness. The judge’s reasoning in respect of this is set out at [41] and [42]:

*"41. I have considered whether it was the Respondent's responsibility to inform the Appellant about what he needed to do or the requirements of the Regulations. I have concluded that it was. This is because the Respondent unequivocally took on this responsibility when she wrote to the Respondent on 2 March 2010 in the following terms 'if there is any problem with the validity of the application, either because of the fee paid or another aspect of the application, a caseworker will write to you as soon as possible to advise what action you need to take to make a valid application'.*

*42. This representation would have led the appellant to believe that the Respondent had a duty to tell him what to do in the event of any non-compliance. This representation did not actively prevent the Appellant checking the position himself. However I find it likely the Appellant would have reasonably believed that the Respondent would give him accurate and impartial information that he did not need to check. He was therefore effectively deterred from checking the situation himself. In all the circumstances and very unusually I find that the Respondent made an unequivocal representation to the Appellant that he relied on to his detriment and that the appellant had a public law 'legitimate expectation' that the respondent failed to honour."*

13. Mr Biggs accepted that the gap between 6 April 2010 when the Appellant received the refusal of his application from the Secretary of State and 22 May 2010 when he made the next application was in excess of 28 days and therefore there was a gap. However it was a much shorter gap in residence than the 66 days asserted by the Secretary of State and relied upon in their refusal decision. Indeed the period in excess of 28 days is only eighteen days.

#### *Decision*

14. I find no material error of law in the decision of First-tier Tribunal Judge Hamilton for either of the reasons set out in the Secretary of State's grounds of appeal and I uphold the decision with the effect that the judge's decision that the Secretary of State's decision was not in accordance with the law stands. The matter will need to go back to the Secretary of State to reconsider in light of the judge's findings.

No anonymity direction is made.

Signed

Date **26 July 2016**

Deputy Upper Tribunal Judge Chapman