



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

Appeal Numbers: IA/46343/2014,
IA/46356/2014,
IA/46369/2014,
IA/46364/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 19 February 2016**

**Determination
Promulgated
On 6 April 2016**

Before

UPPER TRIBUNAL JUDGE STOREY

Between

**[AMITA H] + 3
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Coleman, Counsel, instructed by Charles Simmons
Solicitors

For the Respondent: Mr P Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of India. The first appellant entered the UK on 19 March 2005 as a student, followed shortly after by the second appellant who was granted entry clearance as her dependent spouse and the third appellant who is a child of their union. The fourth appellant was born in the UK. On 21 August 2014 the appellants made an application on Form FLR-FP for leave to remain based on 10 years residence under the family life as a parent and private life routes. This was stated as being made whilst the first appellant still have leave to remain (set to expire on 21 August 2014).
2. In her refusal decision the respondent stated that the first two appellants failed to qualify under the partner route, the parent route or under the private life route and the children failed because it had not been shown that it would be unreasonable for them to return to India with their parents. .
3. In a decision sent on 5 August 2015 First-tier Tribunal Judge Maxwell dismissed their appeals against decisions made by the respondent on 31 October 2014 refusing them leave to remain on the basis of family and private life ties. The judge did not find that the appellants met the requirements of the Immigration Rules and had failed to show exceptional circumstances such as to warrant a grant of leave to remain outside the Rules.
4. The grounds of appeal do not as such challenge the judge's conclusions as regards the Immigration Rules applied on the basis that the first two appellants had failed to show 10 years continuous lawful residence. However, they challenged the assumption that the appellants had not accrued 10 years of continuous lawful residence and in this regard were essentially twofold.
5. First it was submitted that the judge had erred in failing to consider that by the time of the hearing before the judge the first two appellant had spent 10 years continuous lawful residence in the UK and had produced evidence of that continuous residence and of their ability to meet the other requirements of para 276B of the Rules. Second it was contended that the judge materially misdirected himself as to the law in failing to comply with section 85(4) of the 2002 Act. In the latter regard, issue was taken with the judge's refusal of the appellants' application to amend the grounds to include claims said to have been made in the appellants' section 120 notices under the long residence rules. It was said this involved wrongful reliance on the decision in AQ (Pakistan) [2012] INLR 33 at [36]-[39].
6. During the hearing reference was made by appellants' counsel to the Home Office policy on Long residence, governing variations of an

application or varying grounds during the appeal process, where an individual reaches 10 years lawful residence in the course of an application or an appeal; but this was not available in full at the hearing before me. In accordance with my directions the appellants' solicitors duly forwarded to the Tribunal a document entitled Long residence, Guidance-Long residence-v13.0 published 8 May 2015. This version post-dates the decisions of the respondent under challenge in these appeals, but it is not dispute that the same policy was in operation then and to illustrate that the further documents adduced in accordance with my directions post-hearing included IND IDIs dated May 2007.

7. As regards the first ground, it is not in dispute that as the first appellant had only arrived in the UK on 19 March 2005 and 6 July 2005 respectively, the could not qualify as person having been continuously resident for 10 years unless it was possible to calculate the relevant 10 year period so as to cover their period of leave to remain under section 3C(2). Between their dates of arrival and the respondent's decision made on 31 October 2014 there was less than 10 years.
8. I am not persuaded that ground 1 is made out. For the purposes of meeting the requirements of Appendix FM and paragraphs 276ADE the issue of whether they had shown 10 years continuous lawful residence stood to be assessed by reference to their period of lawful residence as at the date of decision. There is ample authority for the proposition that appellants must take the Rules as the find them and that the respondent is entitled to consider matters as they stand under the Rules at the date of decision: see e.g. Odelola v Secretary of State for the Home Department [2009] UKHL 25. The appellant's grounds referred to there being no "historic time line" set down in paragraph 276. That is correct but that misses the point. Whilst the judge did refer (unhelpfully) in [11] to "historic time lines", that concept has been applied in decided cases in relation to the date of an application, not the date of decision. The judge in this case did not seek to rely on any historic time lines going back to the date of application. The judge relied simply on the period of continuous lawful residence accrued as at the date of the respondent's decision.
9. As regards the second ground, I see no merit in Mr Wilding's initial argument that I need not consider that because the appellants' challenge is in fact to the judges' refusal to amend the grounds of appeal, not to his refusal to accept that there were additional grounds that the appellants had raised in a section 120 notice. Mr Wilding is correct to point out that the propriety of a decision to accept or refuse permission to amend grounds of appeal must be considered under Rule 4(3)(c) the Tribunal Procedure Rules 2014, but whether or not the judge erred in this regard must still turn ultimately on whether there was in fact legal merit in the appellants' argument based on s.120 of the 2002 Act when applied in the context of a decision regarding long residence.

10. I concur nevertheless with the judge that AQ (Pakistan) [2011] EWCA Civ 833 is authority for the proposition that s.120 grounds do not require consideration of events subsequent to the Secretary of State's decision. It is clear from AQ (Pakistan) that it too was not concerned with "historic time lines" in the sense of the date of application. As is clear from [38] of AQ (Pakistan) the limitation imposed by s.3C leave is inconsistent with the argument that an application can rely on ...events occurring while the leave has been extended by virtue of the section". As noted by the judge, this dictum in AQ (Pakistan) was implicitly approved by the Supreme Court in Patel [2013] UKSC 72. I accept that Mr Wilding appears to agree with Mr Coleman that the judge was wrong to rely on AQ (Pakistan); but I do not accept that there was any error in the judge relying on this authority. It follows that the judge cannot be criticised for refusing to permit the appellants to amend their grounds so as to claim entitlement to ILR by reason of the first two appellants - by April 2015 and July 2015 - having achieved 10 years' continuous lawful residence in the UK.
11. The only Tribunal case adduced by Mr Coleman to support his argument was MU (statement of additional grounds; long residence; discretion) [2010] UKUT 442. However, that case was about an attempt to raise human rights as an additional ground of appeal, not with eligibility under existing Immigration Rules and the only discussion of the s.120 issue appears to have been in the context of a concession made by the respondent that the judge had erred in law by declining to entertain an Article 8 claim and that, as the decision on the appeal would have to be re-made, a statement under s.120 could be lodged on the principle expounded by the Court of Appeal in AS (Afghanistan). I do not consider there is any legal reasoning in this decision transferable to the appeal with which I am concerned here.
12. Mr Coleman's amplification of the grounds sought to raise the additional issue of whether, even if the judge was entitled to conclude that the appellants did not meet the requirements of the Rules, their appeals should be allowed nevertheless because the decisions made by the respondent failed to apply existing Home Office policy. What is actually said in the policy document on which he seeks to rely is set out at p.28 of this Guidance as follows:

"A person cannot make a fresh application for leave while they have 3C or SD leave pending the outcome of a decision on their outstanding application. This means that someone who reaches the 10 years threshold during this leave cannot apply for indefinite leave. This could occur in the following two situations:

...

The applicant completes 10 years continuous lawful residence while awaiting a decision on an appeal.

A person may complete 10 years continuous lawful residence whilst they are awaiting the outcome of an appeal and submit an application on this basis. Under sections 3C and 3D, it is not possible to submit a new application while an appeal is outstanding. However, the applicant can submit further grounds to be considered at appeal. “

13. I can find nothing in this policy that supports the argument that the respondent accepts that 10 years lawful residence can be accrued by taking account of s.3C leave.
14. Had I accepted that the judge erred in not granting permission for the appellants to amend their grounds, or in not acceding to the argument that they were entitled to rely on 10 years lawful residence on the basis of their position post-decision, I would, *pari passu*, also have accepted that the appellants had now shown they met the Life in the UK requirements of the Rules by virtue of the documents they submitted showing they passed the requisite tests in March and May 2015. At best, however, that would have resulted in a decision on my part to allow the appeal but only the extent that it remained outstanding before the respondent to consider whether the appellants met the requirements of para 276B(ii). But my principal finding is that the judge did not err.
15. For the above reasons I conclude that the First tier Tribunal judge did not err in law and accordingly his decision to dismiss the appellants' appeals must stand.

Signed



Date

Judge of the Upper Tribunal