



In the Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05552/2017

THE IMMIGRATION ACTS

Heard at Field House
On 31st August 2018

Decision & Reasons Promulgated
On 18th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MR GHAI BASHIR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Miah of counsel

For the Respondent: Miss Kiss, a Home Office presenting officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Pakistan who was born on 19th of October 1981.
2. This is the appellant's appeal against the decision of the First-tier Tribunal (FTT) to dismiss his appeal against the respondent's refusal to grant the appellant further leave to remain on the basis of 10-years long residency in the UK.

The Appellant's Immigration History

3. The appellant entered the UK on 9 February 2007 as a student. He subsequently obtained various extensions to his leave, the last such extension having expired on 15 September 2015. He subsequently applied for further leave to remain as a Tier 2 student but that was refused on 10 December 2015. He lodged an application for administrative review on 21 December 2015 (I assume within the time allowed) but that decision was maintained on 14 January 2016. However, on 1 February 2016 the appellant sought judicial review of the decision to refuse further leave to remain. That application for judicial review was withdrawn on terms set out in a letter (the letter) and a consent order (the consent order). The terms of the letter and the consent order have been the subject of detailed consideration in the present appeal. The terms included an agreement on the part of the respondent, set out in the letter, that any application for leave to remain made within 28 days of the date of receipt of that letter (say 23 October 2016) "will be treated as if it had been made within 28 days of the expiry of your last grant of leave and will not be refused on the basis you are an overstayer". However, the subsequent consent order, dated 21st of October 2016 but sealed on 25 October 2016, merely recites that the respondent in a supplementary letter had invited the applicant "due to the specific circumstances of this case to make a new valid out of time application for leave to enter or remain". Finally, on 16 November 2016, the appellant applied for indefinite leave to remain on the basis of 10-years continuous lawful residence. That application was refused on 31st March 2017, which triggered the subsequent appeal to the FTT. That appeal came before First-tier Tribunal Judge Brewer (the immigration judge).

The appeal hearing before the First-tier Tribunal (FTT)

4. The appellant claimed that he compromised his claim for judicial review on terms that, provided he made the application for leave to remain within 28 days of the date of the letter, which had accompanied the subsequent consent order, it would be treated as an "in-time" application. Given that he made his application on 16 November 2016, i.e. before the 28 days had elapsed, the application for leave to remain under paragraph 276B of the Immigration Rules ought to be treated as though it was "made in time". The immigration judge described the appellant's feelings of "injustice or breach of assurance" as "understandable" but noted that the respondent's view, as set out in the refusal letter, was that did not affect the fact that as a matter of law the appellant's continuous residence for the purposes of the Immigration Act 1971 and/or the Immigration Rules expired on 14 January 2016. The immigration judge's conclusion in relation to this matter was set out at paragraph 13 of his decision:

"It seems to me plain from that paragraph that the only assurance the Secretary of State was giving was that the appellant's application will not be penalised simply because he had overstayed by more than 28 days at the date of the application. To understand the significance of that assurance, one has to bear in mind that at the time when the assurance was given, the Immigration Rules provided that any application made by a person who was overstaying in this country by more than 28 days would be refused for that reason alone. Properly

understood all the Secretary of State was saying was that provided the application the appellant made otherwise met the eligibility requirements it would not be refused solely on account of the fact that it was made when the appellant had overstayed by more than 28 days”.

5. The immigration judge went on to consider whether the date of the application (16 November 2016) the appellant had accrued the necessary 10 years lawful residence but concluded that he had not, and, in the circumstances, it was “no surprise” that his application on “long residency grounds” was refused.
6. The immigration judge was invited to allow the appeal on “human rights grounds” but decided that as the appellant had lived in the UK 10 years as required by the Immigration Rules, as a matter of practical reality the appellant had only achieved that 10 years since the application had been made. It would “defeat the objective of paragraph 276B” to treat his application as being a lawful one having regard to the fact that the whole purpose of paragraph 276B was to grant indefinite leave to those who had lived continuously in the UK for 10 years or more and the appellant’s short duration of residence was insufficiently substantial to engage the Human Rights Convention. Further, or alternatively, section 117B of the Nationality, Immigration and Asylum Act 2012 (2002 Act) rendered the decision to refuse to grant leave proportionate. The immigration judge also commented on the fact that the appellant’s family lived in Pakistan and that the appellant had lived in the UK knowing of his limited immigration status. In the immigration judge’s view, the appellant did not have a family life in the UK “deserving of legal protection”. The immigration judge therefore dismissed the appeal, made no anonymity direction and no fee award on 3 March 2018.

The hearing before the Upper Tribunal

7. At the hearing, I heard submissions by both representatives. Mr Miah, on behalf of the appellant, referred to his grounds of appeal (which extend to 5 pages) and in particular to ground three. In that ground it states that the FTT erred in its interpretation of the order, which can only be properly understood by also reading the letter. He submitted that the letter formed the whole basis for the consent order. It followed that because the appellant had acted in accordance with the letter and had made his application within the 28 days stipulated in paragraph 3 thereof, it had made the application lawful- in other words if an application was made in time then all limbs would be treated as being satisfied. The “clock” did not stop “ticking” and the appellant could not be treated as an illegal overstay for the purposes of section 3C of the Immigration Act 1971. That provision allowed a person with limited leave to enter or remain in the UK to apply for a variation or appeal against the decision and that section extended his leave until the outcome of that application or appeal was known. Whilst the application for variation or appeal is pending leave is automatically extended. The same would presumably apply to an application for administrative review.
8. Miss Kiss, on the other hand submitted that the consent order was limited to recording the appellant’s right to make a new “valid out of time application for leave to enter or

remain". This did not mean that the whole gap between expiry of the appellant's leave and the subsequent application was thereby validated. This last expired following an administrative review, which the appellant availed himself of, on 14 January 2016. At the time the consent order was agreed it could not be known whether the appellant would actually make such an application. The appellant had come to the UK as a student but overstayed and the letter did not have the effect of retrospectively validating his period of residence in the UK, indeed it says nothing about that. He would probably be better advised to seek to maintain an application under the "private life route" given that he had not formed a family life in the UK. This would require 20 years "continuous residence". The context in which the judicial review application was entered related to the respondent's refusal under paragraph 322 (1A) of the Immigration Rules. That rule allows the respondent to refuse an application for leave to remain where representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge) or material facts have not been disclosed in relation to the application or in order to obtain documents from the Secretary of State. The respondent had indeed agreed to withdraw that decision and the letter was properly understood in that context. Furthermore, as Judge Cruthers noted in granting permission in this case, the grant of permission was not any indication that it will ultimately be successful. The appellant seems to have formed no private life in the UK and such family life as he has established mainly based in in Pakistan. I was invited to dismiss the appeal on the basis that there was no material error of law. In any event, the appeal was under section 82 of the 2002 Act and this can only be maintained on human rights grounds. The appellant failed to establish that there was any material error in the approach of the FTT to the appeal.

9. In reply Mr Miah said that the order was clearly understood by the appellant to mean that he could make a fresh application and continue to accrue time for the purposes of calculating continuous residence under paragraph 276B of Immigration Rules. Since the immigration judge was wrong to treat him as an illegal overstayer, it followed that his continuous period of residence for 10 years was established and that is appeal should have succeeded under article 8. Accordingly, the respondent be invited to grant him leave to remain on this basis.
10. Following the hearing I decided to reserve my decision which I will set out below having discussed the merits of the arguments presented before the Upper Tribunal.

Discussion

11. I have regard to the fact that the correct approach to construing legal documents, including orders by courts and tribunals, is to construe them objectively against the known background facts.
12. If the appellant's understanding of the order was that it validated an application for leave under paragraph 276B of Immigration Rules regardless of its contents, that was certainly not the respondent's understanding. It seems plain that the intention of both parties was to waive any procedural objection to the lateness of the application, but

that concession did not affect the substantive validity of the application which, of course, would have to be considered by the respondent on its merits. Nothing was said in either the letter or the consent order about extending the period of lawful residence beyond 14 January 2016, when the respondent confirmed her refusal of the appellant's latest application for indefinite leave to remain. Had it been the respondent's intention to extend the period of continuous lawful residence until any challenge against that decision was finally determined, it would have been made clear in either the letter or the consent order.

13. Accordingly, when the present application for indefinite leave to remain was considered by the respondent the appellant had only been in the UK for nine years and nine months – less than the 10 years continuous period of residence he needed to qualify under 276B of the Immigration Rules so as to qualify for indefinite leave to remain. Furthermore, the sole application which came before the respondent, and ultimately came before the FTT on 26 January 2018, was that the appellant's human rights under article 8 of the E C HR on the basis that the respondent's decision unlawfully interfered with the appellant's protected human rights. This is because appeal post-dated the commencement into force of the Immigration 2014. The appellant was advised of his limited appeal rights in paragraph 5 of the refusal letter.

Conclusions

14. The consent order makes it clear that the appellant was able to make an application for leave to enter or remain and no time point would be taken against him. No time point was taken against the appellant. Looking at the consent order and the letter in context they cannot be taken as extending the appellants substantive rights. The respondent did not accordingly accept there by that the appellant had established 10 years continuous lawful residence or waive the right to argue that he had not been continuously resident for ten years when the application was originally traced as determined on 14 January 2016. That application was considered under rule 276B Of the Immigration Rules but rejected. In any event the appellant did not establish that his private or family life would be unlawfully interfered with in the context of article 8 of the ECHR. Accordingly, the respondent was right to reject the application for further leave to remain and the immigration judge was right to dismiss his appeal. Accordingly, the present appeal must also be dismissed.

Notice of Decision

The appeal which is solely on human rights grounds is **hereby dismissed**

No anonymity direction was made by the FTT and I make no anonymity direction.

Signed

Date

Judge Hanbury
Judge of the First-tier Tribunal

TO THE RESPONDENT
FEE AWARD

The FTT made no fee award and the appeal to the Upper Tribunal has been unsuccessful and accordingly there can be no fee award.

Signed

Date 14 September 2018

Deputy Upper Tribunal Judge Hanbury