



IAC-AH-KRL-V1

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

Appeal Number: HU/02760/2020

THE IMMIGRATION ACTS

**Heard at Field House
On 2 March 2021**

**Decision & Reasons Promulgated
On 20 May 2021**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**MR QAISAR MAHMOOD
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Turner, instructed by Prime Law Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Kinch, promulgated on 1 October 2020, dismissing his appeal against the decision of the respondent made on 5 February 2020 to refuse his application for indefinite leave to remain on the basis of ten years' continuous lawful residence in the United Kingdom and to refuse his human rights claim.

2. The appellant's case is that he has acquired ten years' continuous residence, as defined, and/or that his removal would be disproportionate given that he maintains a relationship with his children in the United Kingdom.

Long Residence

3. The appellant first entered the United Kingdom on 9 October 2008 with a student visa valid until 15 January 2010. An application made to extend that on 11 January 2010 was refused as the fee had been declined; further application made on 14 May 2010 was granted on 14 June 2010.
4. The appellant was then granted leave to remain as a Tier 1 Post-Study Worker until 6 July 2013, applying on that date for leave to remain as a Tier 1 Entrepreneur, an application refused on 10 February 2014. His appeal against that decision was lodged within time but it was dismissed on 13 August 2015. An application and then a renewed application for permission to appeal to the Upper Tribunal was refused, the latter being made on 15 January 2016. On 15 February 2016 the appellant applied for leave to remain as a Tier 1 Entrepreneur although that decision was originally refused it was reconsidered after administrative review and again refused. Following further administrative review, further reconsideration included a challenge by way of judicial review. Finally, the appellant's application was granted on 21 September 2017, granting him leave to remain until 21 September 2020.
5. The respondent refused the case on the grounds that the appellant had not had ten years' continuous leave to remain owing to:-
 - (a) his lack of lawful residence between 15 January 2010 and 14 June 2010;
 - (b) between 15 January 2016 and 21 September 2017.
6. The respondent considered also that the appellant did not meet the requirements of Appendix FM, noting a lack of evidence of his relationship with Asma Qaisar and a lack of evidence to demonstrate his sole parental responsibility for his children who were not, in any event British citizens settled in the United Kingdom or living here for at least seven years. She also concluded that the need to maintain the integrity of the Immigration Rules outweigh the possible effect on the appellant and the children having to re-establish a life outside the United Kingdom. She considered also that the applicant did not meet the requirements of paragraph 276ADE(1) of the Immigration Rules.
7. On appeal, it was accepted that, given that it was now more than ten years since the absence of leave in 2010, the sole issue was whether the appellant had had continuous leave to remain notwithstanding the break between 15 January 2016 and 21 September 2017.
8. The appellant's case is that as the notice of the Upper Tribunal's decision had not been served until 19 January 2016, the application made on 15 February 2016 was within the 28-day period permitted by Section 276B(v), the Immigration Rules. That was based on the application of Juned Ahmed v SSHD [2019] UKUT 10 and R (Masum Ahmed) [2020] EWCA 1070. The judge found that:

- (i) the law regarding the correct interpretation of paragraph 276B meant that the appellant did not have ten years' continuous lawful residence and could not therefore satisfy paragraph 276B(i)(a) of the Immigration Rules [28];
 - (ii) the only evidence the appellant had produced in support of his assertion that he was in regular contact with the children was in a form of a letter from Mr Arshad Hussain [33]; and,
 - (iii) taking the appellant's case at its highest his contact and financial contribution to the children appeared to be on an ad hoc basis [34];
 - (iv) there was no other documentary evidence in support of the claim to take an active role in the children's upbringing [35] and that evidence of contact and financial provisions could have been provided;
 - (v) the appellant had not shown he had an active role in his children's life or that he has a genuine and subsisting parental relationship with them [36];
 - (vi) the appellant had not shown that there were significant obstacles to his reintegration into Pakistan;
 - (vii) there were no exceptional circumstances in this case that refusal of leave to remain would result in unjustifiably harsh consequences for him;
 - (viii) little weight would be given to his private life given it has been established when his status was precarious [45];
 - (ix) the appellant had not provided sufficient evidence to demonstrate he has a genuine and subsisting parental relationship with his children given they had not lived with him since 2016.
9. The appellant sought permission to appeal on the grounds that the judge had erred in her approach to paragraph 276B in the light of Hoque and Others v SSHD [2020] EWCA Civ 1357 and that, on a proper application of paragraph 276B, the requirement for continuous residence in paragraph 276B(i)(a), the gap in the appellant's continuity of residence failed to be disregarded; and, that the judge's conclusions regarding the appellant's family life with his children were irrational even a failure to make proper findings as to the oral evidence of the appellant or his credibility.
10. On 14 November 2020 Upper Tribunal Judge Bruce granted permission.

The Law

- 11. The relevant provisions of the Immigration Rules are, as both parties accept, paragraphs 276A and 276 B.
- 12. In Hoque, Underhill LJ set out the relevant provisions of paragraph 276B, adding letters [A] to [C]:

"8. Paragraph 276B provides (so far as material for our purposes):

"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) [11](#) he has had at least 10 years continuous lawful residence in the United Kingdom.

(ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, ... and

(iii) the applicant does not fall for refusal under the general grounds for refusal.

(iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom

(v) [A] the applicant must not be in the UK in breach of immigration laws, [B] except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. [C] 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."

I have inserted the letters [A]-[C] before each of the elements in subparagraph (v) so as to make subsequent reference to them easier."

13. At [35], he also wrote this:

"35. It follows that we are faced with a choice between, on the one hand, giving element [C] no effect and, on the other, treating its placing within paragraph 276B as a drafting error and applying it as if it qualified subparagraph (i) (a). In my view we should choose the latter. It is unfortunately not uncommon for tribunals and courts to have to grapple with provisions of the Immigration Rules which are confusingly drafted, but it is our job to try to ascertain what the drafter intended to achieve and give effect to it so far as possible. In this case it is clear from its terms what the intended effect of element [C] is, but it has been put in the wrong place. Treating it as if it appeared in subparagraph (i) (a) does violence to the drafting structure, but I do not believe that that is a sufficient reason not to give effect to it."

14. Adopting the methodology for analysing these provisions as used by the Court of Appeal in Hoque, this is not a case in which the requirements of 276B(v) identified as [A] and [B] are relevant. That is because, as the respondent accepts, the appellant was not in the United Kingdom in breach of the laws as he had leave when the application was made and continues to do so under Section 3C of the 1971 Act nor was he currently overstaying. The sole issue is therefore whether any relevant period of overstaying fell within the terms of paragraph 39E, that is, was any application for further leave made within 28 days of leave lapsing.

15. On that basis, it is evident that the decision of the First-tier Tribunal involved the making of an error of law.
16. Mr Clarke submitted that, however, in this case although the First-tier Tribunal had erred in its assessment of paragraph 276B(v), this was not material because on any view, the appellant's overstaying exceeded the permissible 28 days. This was because his leave had ended on the date at which the Upper Tribunal had made its decision to refuse leave because leave was extended for the purposes of Section 3C of the 1971 Act only whilst an appeal was pending and the definition of an appeal pending were such that it came to an end (Section 104 of the 2002 Act) not when the decision was served but the decision was made.
17. Miss Turner submitted that the error was material as it had been accepted or conceded by the Secretary of State that the application made on 15 February 2016 had been made within time. This she submitted was on the basis of concessions made during the settlement of the judicial review action in 2017 and/or that this has been accepted by the Secretary of State in not holding the point against the appellant when granting him leave to remain in 2017.
18. Given that the relevant document was not before me I adjourned the hearing, having heard an argument on all issues, giving the appellant seven days in which to provide the relevant documents.
19. The relevant documents were provided, as were further submissions which were served on the respondent. Directions were made giving the respondent the opportunity to respond.
20. On 6 April the respondent wrote to the Upper Tribunal in the following terms:

"It is noted that the singular period in issue in this appeal, is the period between 15/1/16 (when A's PTA to the UT was refused) until 15/2/16 (when A submitted his Tier 1 application). Upon consideration of the "Leave Extended by 3C" policy guidance that was in effect at the material time that the application of 15/2/16 was considered and the provision that,

"The effective date on which a decision on appeal or permission to appeal is finally determined is the date on which the appellant receives notice of the determination from the Tribunal. This is deemed to be received 2 working days after postage unless the appellant can prove otherwise.

It is conceded by the Secretary of State that A is deemed to have received refusal of the PTA to the UT on 19/1/16. Notwithstanding the wording of 3C of the 1971 Act, it is accepted that the material period for the purposes of 276B was therefore less than 28 days.

As a consequence, the Secretary of State accepts that A benefits from 276B(v) in that *"any previous period of overstaying between periods of leave will also be disregarded where - (a) the previous application was made before 24 November and within 28 days of the expiry of leave...."*

It is therefore accepted that A has accrued 10 years lawful residence for the purposes of 276B. In these circumstances, the Upper Tribunal is respectfully invited to allow the Appellant's appeal"

21. In the light of this concession, and for the reasons set out above, I am satisfied that the decision of the First-tier Tribunal involved the making of an error of law and I set it aside on the basis that ground 1 is made out.
22. As regards ground 2, the submission made here is that the judge's decision was irrational. That is a high threshold to meet and I consider that the submission that the judge had failed properly to assess the evidence before her simply comes nowhere near that threshold. It is evident that the judge did take into account the evidence of Mr Hussain and gave adequate and sustainable reasons for not attaching much weight to it. It was open to the judge to observe that there was simply no documentary evidence to back up what the appellant said with regard to his children. This is not a question of whether the judge did not believe him the appellant or not, it is a question of whether the appellant's unsupported evidence was sufficient to show that he is in contact with his children. It was reasonable to expect that evidence to be provided in the circumstances and he did not do so. This was not a case just of whether there was contact but it was as to the quality of that contact, its duration and frequency. It was for the appellant to prove his case and it cannot be argued that the judge erred in not asking the appellant to produce the evidence and accordingly, I consider that ground 2 is not made out.
23. I turn next as to whether the appeal should be remade without the need for a hearing. There has been no correspondence from the appellant's solicitors since the respondent's concession of 6 April 2021 which was served on them. In all the circumstances, and bearing in mind the overriding objective, I am satisfied that it would be appropriate to remake the decision without a further hearing given it will not prejudice the appellant.
24. I remake the decision by allowing the appeal on human rights grounds on the basis that the appellant has met the requirements of the Immigration Rules. Following the principles set out in TZ(Pakistan) and PG (India) [2018] EWCA Civ 1109, and the concessions made by the respondent, I am satisfied that the decision to refuse leave is a disproportionate breach of the appellant's article 8 rights and I allow the appeal on that basis.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. I remake the decision by allowing it on human rights grounds
3. No anonymity direction is made.

Signed

Date 18 May 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul