



**Upper Tribunal  
(Immigration and Asylum Chamber)**      Appeal Number: HU/00975/2021 (V)

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 12<sup>th</sup> January 2022**

**Decision & Reasons Promulgated  
On 7<sup>th</sup> February 2022**

**Before**

**UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**MR RAZIB DEY  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr L Kareem, instructed by Anchor Legal Solicitors  
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals against the decision of First-tier Tribunal Judge Kudhail (“the judge”), who dismissed the appellant’s appeal against the Secretary of State’s decision dated 19<sup>th</sup> January 2021 to refuse an application under Appendix FM and under the Immigration Rules. Specifically, the Secretary of State refused his application under Appendix FM on the basis that he had no partner or dependent children and further refused the application under paragraph 276ADE(1) and outside the rules under Article 8.

2. The application for appeal on the IAF-5 made by the appellant to the First-tier Tribunal stated that he had lived in the UK for eleven years and four months, that he had been abused by his EEA partner, noted that he was not entitled as an extended EU family member to apply for a retained right of residence and therefore lodged a human rights application. He stated he was suffering from depression and the Secretary of State failed to consider his “legal long residence and established private life” and that he had been issued with a five year visa and therefore he challenged the reasons for refusal decision under “Article 8 and Article 3”. That was the basis on which he appealed to the First-tier Tribunal.
3. His immigration history was recorded by the First-tier Tribunal Judge and by the Secretary of State in her reasons for refusal letter. The appellant entered the United Kingdom on 10<sup>th</sup> September 2009 with leave to enter as a Tier 4 Student and his leave was subsequently extended to 22<sup>nd</sup> November 2013. His in time application on 21<sup>st</sup> November 2013 was refused on 14<sup>th</sup> October 2014 with no right of appeal. The appellant himself stated that he applied for a residence card on 20<sup>th</sup> October 2014 and that was refused on 11<sup>th</sup> November 2014. He made a further application on 14<sup>th</sup> January 2015 for a residence card which was granted on 15<sup>th</sup> June 2015.
4. The grounds of appeal to the Upper Tribunal challenging the dismissal by the judge asserted that the judge failed to consider his ten years’ lawful residence in the UK even though she had noted it in the chronology and pointed out that he had been continually living in the UK to 11<sup>th</sup> June 2020. He was granted a residence card on 15<sup>th</sup> June 2015 but prior to the expiry of his residence card his relationship with his EEA national partner had broken down and they were separated.
5. The grounds of appeal to the Upper Tribunal made no challenge to his immigration history as recorded nor to the findings made under paragraph 276ADE(1).
6. Subsequent to the grounds a further skeleton argument was submitted asserting to be grounds of appeal which referred to the failure to consider paragraph 276B and the application of **Hoque [2020] EWCA Civ 1357**.
7. Initially, Mr Kareem did not attend the hearing (owing to the court being moved and through no fault of the representative) and the matter proceeded without him but when he presented himself to the correct court the hearing was resumed de novo and he confirmed that he was content with that approach and that he considered there to be no procedural error.
8. Mr Kareem submitted that the case was clear that the appellant came in to the UK in 2009, met a lady in 2013 and attempted to get married but was subject to a raid by Immigration Officers and his marriage was disrupted. Leave of residence card was finally granted to him on 15<sup>th</sup> June 2015 and he was given five years’ residence. He had more than ten years’ continuous residence in the UK with no break.

9. Mr Whitwell submitted that the submissions were wrong in law. The Rule 24 response set out that the judge confirmed the grounds of appeal to the First-tier Tribunal at paragraphs 15 and 16 and the grounds before the First-tier Tribunal did not rely on paragraph 276B. Indeed, the application made by the appellant on 11<sup>th</sup> June 2020 was made outside the Rules. The judge could not be criticised for a point that she had not been asked to consider, that is paragraph 276B, and, in any event, any error was immaterial for the following reasons. His immigration history was not disputed. He had leave to 14<sup>th</sup> October 2014 and then his application was refused. The appellant stated that his relationship ended prior to the expiry of his residence card in 2020. (The appellant stated, as Mr Kareem confirmed, that the relationship commenced in 2013 and the appellant in his documentation and as recorded by the judge stated that the relationship lasted 4 years). There was a gap in the appellant's continuous lawful residence and when the appellant's relationship finished thereafter, he had no leave. The residence card was merely declaratory of his rights under EEA law and as he was not residing as an extended family member ("EFM") in accordance with the Immigration (European Economic Area) Regulations 2016, his rights ceased prior to April 2017. The appellant confirmed and accepted that he did not have a retained right of residence as he was an EFM. With the effect of the appellant's breakdown with his EEA national partner his leave had stopped. Evidentially and legally he could not succeed under the Rules and indeed, the length of residence was taken into account lawfully under paragraph 276ADE and under Article 8 outside the rules.

### **Analysis**

10. The Secretary of State did not consider paragraph 276B in her refusal letter, having set out the immigration history of the appellant. The application was considered only under paragraph 276ADE(1) on private life grounds under Article 8 with reference to any exceptional circumstances.
11. The judge at paragraphs 15 and 16 stated the following:

*"15. The appellant within the IAFT 5, states the following with regards to the Human Rights appeal:*

*'I have lived in the UK for 11 years and 4 Months and I have continued to present myself to the home office department On the 11th 2020 I lodged a human rights application based on the fact that my EU national sponsor my ex-partner Sylwia Sawicka separated from me after 4 year relationship. My residence card was issued 16 June 2015 and visa expired on 16 June 2020. Having regards to the fact that extended EU family members are not entitled to apply for retained right of residence my solicitor advised me to lodge a human rights application. The respondent the SSHD failed to consider my exceptional circumstances as well as my established private life in the UK. The respondent the SSHD failed to consider my legal long residence and established*

*private life in the areas of studying in the UK and having a Master degree, working in the UK and paying national insurance tax contributions and having been issued 5 years visa to having permanent residence and all thrown into the ocean by the respondent. Therefore, I challenge the reasons for the refusal decision of my application under Article 8 and Article 3 and kindly ask the court to strike off the reasons of the respondent refusal decision and to consider my appeal.'*

16. *The appellant also seeks to appeal the decision under the Immigration (European Economic Area) Regulations 2016 ("EEA Regulations 2016"), citing the following as grounds:*

*'The respondent the SSHD failed to exercise discretion in considering my application because the respondent was aware that I was issued with residence card on 16 June 2015 and residence card expired on 16 June 2020. Please find attached the residence card issued by the SSHD. The relationship with my EU sponsor ex-partner lasted over 4 years which would have enabled me if I was a direct family member of my EU sponsor; marriage at the registry.'*

12. Although there was acknowledgement in both the Secretary of State's refusal letter and the First-tier Tribunal Judge's decision that the appellant had lived in the UK since 2009 it was not accepted, specifically at paragraph 26 of the decision, that the appellant had continuous *lawful* residence since 2009. The judge, as can be seen from above, identified the issues that were in the application to the Secretary of State and further, the issues raised in the grounds of appeal to the First-tier Tribunal and refused to consider under **Mahmud (new matters) [2017] UKUT 488** the EEA Regulation point as a new matter. The respondent had not considered the issue of the new matter in the appeal and the judge noted that "having considered the evidence, I find the factual matrix as presented by the appellant's representatives confirms that it was accepted the appellant could not satisfy the EEA Regulations 2016". At paragraph 21 the judge noted that no consent was forthcoming from the Secretary of State to consider the new matter. At no point was Section 276B raised in the grounds to the First-tier Tribunal and, as Mr Whitwell submitted, the judge cannot be criticised for failing to consider a matter that was not before him.
13. Even if it should have been considered, it was not material because the appellant's leave was refused on 14<sup>th</sup> October 2014 and his application within the 28 day "grace" period on 20<sup>th</sup> October 2014 was for a residence card but that was refused on 11<sup>th</sup> November 2014. His further application for a residence card on 14<sup>th</sup> January 2015 was granted on 15<sup>th</sup> June 2015 but the simple point is that he had no leave between 14<sup>th</sup> October 2014 and 15<sup>th</sup> June 2015 and had not made an application for 'leave'. Although it was put to me that the Secretary of State must have accepted the two year partnership as at 15<sup>th</sup> June 2015 which would mean that he was

lawfully in the UK from 2013, I note that the application for a residence card had been previously refused in November 2014, so that was not the case. Further, it is open to the Secretary of State to consider that there is a durable relationship without the requirement of two years 'living together'. It was open to the Secretary of State to accept a durable relationship under the Immigration (European Economic Area) Regulations 2006 (the appellant maintains his card was issued prior to the introduction of the 2016 regulations) if the appellant could provide proof. Nevertheless, as Mr Whitwell also submitted, the relationship of the appellant must have broken down in 2017 (as the appellant claims it commenced in 2013 and broke down after 4 years) and on its breakdown, the appellant accepted that he had no retained rights of residence. His residence card expired on 16<sup>th</sup> June 2020, but his relationship broke down by 2017 and thereafter he had no right to remain. Even if the latter is incorrect, Section 3C leave is not extended by an application for a residence card under the EEA Regulations and further, the appellant had his first application for a residence card refused under the EEA Regulations and therefore made no application for leave under paragraph 39E, within the grace period. Indeed he made an application for an EEA residence card which was in the first instance refused. The appellant had no leave following 14<sup>th</sup> October 2014 and no form of Section 3C leave. The authority **AS (Ghana) v Secretary of State [2016] EWCA Civ 133** confirms an application for a residence card does not trigger Section 3C leave. From his refusal on 11<sup>th</sup> November 2014 to the grant of a residence card on 15<sup>th</sup> June 2015 he had no leave. Neither **Hoque v Secretary of State [2020] EWCA Civ 1357** nor **R (Afzal) v Secretary of State [2021] EWCA Civ 1909** which apply to applications for leave under the Immigration Rules can assist on the facts of this case.

14. I am not persuaded that there was any error of law in the First-tier Tribunal decision. Consideration of paragraph 276B would have been a new matter for which no consent was granted as per **Mahmud (S. 85 NIAA 2002 - 'new matters') [2017] UKUT 488 (IAC)**. The judge was clearly alive to the relevance of new matters as the judge considered the EEA Regulation point. The challenge in the skeleton argument to the proportionality assessment effectively relied on the failure by the judge to consider his 'long residence' and his inability to integrate into Bangladesh. That is an attempt to reargue the case. The judge conducted a careful assessment of the appellant's ability to reintegrate into Bangladesh, and was fully aware of the length of residence, but noted he claimed in his application his mother in Bangladesh supported him financially, there was no evidence of his claims of harassment, and he confirmed that he had friends in Bangladesh. Having directed herself appropriately legally, from [26] to [34] the judge made a careful assessment of any 'very significant obstacles' finding there were none. The judge made a proper assessment in relation to Article 8 outside the Rules and adopted the balance sheet approach recommended in **TZ (Pakistan) and PG (India) [2018] EWCA Civ 1109**. To the appellant's advantage, when considering Section 117B of Nationality, Immigration and Asylum Act 2002 the judge did not factor

in the point that the appellant subsequent to the demise of his relationship has been an overstayer.

***Notice of Decision***

15. I find no error of law in the decision and the First-tier Tribunal decision will stand.

Signed Helen Rimington

Date 25<sup>th</sup> January 2022

Upper Tribunal Judge RIMINGTON