



**Upper Tribunal
(Immigration
Chamber)**

and

Asylum

Appeal Number: HU/17113/2019

THE IMMIGRATION ACTS

**Heard at Field House (via MS Decision & Reasons Promulgated
Teams)**

On 4 January 2022

On 26 January 2022

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MD MASUM BILLAH
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr S Whitwell, Senior Presenting Officer

For the Respondent: Mr Z Malik QC, instructed by Lawmatic Solicitors

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals, with permission granted by the First-tier Tribunal, against the decision of Judge Traynor to allow Mr Billah's appeal against the refusal of his human rights claim.
2. To avoid confusion, I shall refer to the parties as they were before the FtT: Mr Billah as the appellant and the Secretary of State as the respondent.
3. The appellant applied for Indefinite Leave to Remain on grounds of long residence. He had entered the UK as a student in September 2009 and he submitted in his application that he had completed ten years'

continuous lawful residence, as required by paragraph 276B of the Immigration Rules. The respondent refused the application on 1 October 2019. The gravamen the refusal is summarised in the following excerpt:

Consideration has been given to your application and it is noted from your immigration history that you had lawful leave following your arrival in the United Kingdom on 16 September 2009 until 17 January 2019.

You did seek to vary your leave on 17 January 2019 however this application was refused with an admin review. You submitted your admin review request, however the decision was maintained as a refusal on 1 May 2019, it is at this point your provision of section 3C ended, therefore your valid leave to remain expired on 1 May 2019.

You submitted an out of time application on 27 May 2019, after your previous leave had expired. It must be pointed out that any time spent following the submission of an out of time application awaiting for consideration of the application is not considered lawful even if that application is subsequently granted. Therefore you have been without valid leave from 1 May 2019 until present, a period of 152 days. As such, your period of continuous lawful residence is considered to have been broken at this point.

As you have remained without any leave to enter or remain since 1 May 2019 you cannot demonstrate 10 years continuous lawful residence in the UK and cannot meet the requirements of the Immigration Rules with reference to paragraph 276B(i)(a).

4. The appellant's appeal against this decision was allowed by the judge because, in disagreement with the respondent's analysis, he considered that the appellant was able to meet the requirement of ten years' continuous lawful residence. The basis upon which he reached that conclusion may be summarised quite shortly. He found that the appellant had actually been notified of the administrative review decision on 16 May 2019 and that he had made a further application for leave to remain on 27 May 2019. Since the latter date was within 14 days of the former, the judge reasoned that the respondent should have considered whether to exercise her discretion to treat the intervening period as a period in which the appellant's leave continued. The judge applied paragraph 39E of the Rules to that period and disagreed with the respondent's decision to treat the appellant as an overstayer. On the contrary, the judge found that he had 'held continuous and lawful leave to remain'. The appellant was consequently entitled to Indefinite Leave to Remain on grounds of long residence and his human rights claim was allowed on that basis, and on that basis alone.
5. The respondent appealed to the Upper Tribunal on two grounds. The first was that the judge had erred in concluding that the respondent

had failed to turn her mind to the existence of a discretion, since that discretion had been considered in the refusal letter. The second was that the judge had failed to give adequate reasons for concluding that the appellant had only received the decision on his application for administrative review on 16 May 2019, since that decision had been dispatched on 1 May 2019. Permission was granted by First-tier Tribunal Judge O'Garro, who considered the grounds, and in particular the first, to be arguable.

6. In the afternoon of 30 December 2021, Mr Whitwell sent two emails to the Upper Tribunal, copied to the appellant's solicitors. In the first, he made an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce further evidence in support of the second ground. In the second email, he made an application to vary the grounds of appeal to submit, in light of authority which post-dated the decision of the FtT, that the judge had erred in his conclusion that paragraph 39E of the Immigration Rules had the effect of requiring him (or the respondent) to treat the period between 16 May 2019 and 27 May 2019 as lawful residence for the purpose of paragraph 276B of the Immigration Rules.
7. At the outset of the hearing, it became clear that Mr Malik QC had not been provided with either of these emails by those instructing him. He had been informed of their contents by Mr Whitwell, however, and he did not anticipate any difficulty. I required Mr Whitwell to provide Mr Malik with copies of the emails and I rose for a short while so that he could consider their contents. On resuming, he confirmed that he was not placed in difficulty. I indicated that I would hear submissions on the application to amend the grounds.
8. Mr Whitwell accepted that the application had been made late. There were only two reasons for that delay. The first was that he had only personally been provided with the file on 30 December and had made the applications promptly thereafter. The second was that the decision in R (Afzal) v SSHD [2021] EWCA Civ 1909, upon which the application to vary the grounds was premised, had only been handed down by the Court of Appeal on 17 December 2021. He submitted that there was clear merit in the amended grounds, however, and that to refuse the application to vary would permit the appellant to benefit from a decision which was plainly contrary to decided authority.
9. Mr Malik submitted that the Upper Tribunal should adopt the conventional, three-stage approach to relief from sanctions when considering the application to amend the grounds: Ejiogu [2019] UKUT 395 (IAC). He submitted that the delay was significant, since time had started to run from 29 May 2020, that being the final day for an appeal to be lodged in time against the FtT's decision. He submitted that there was no real explanation for the delay. The fact that Mr Whitwell had only taken custody of the case on 30 December 2021 was immaterial, given the resources of the Secretary of State. The handing down of R (Afzal) v SSHD on 17 December 2021 was also immaterial, given that the appellant's was a case of 'open-ended' overstaying and not 'book-ended' overstaying. There was a need for litigation to be

conducted efficiently and the Court of Appeal had repeatedly enforced the need for procedural rigour in the Upper Tribunal.

10. I indicated that I would permit the application to amend the grounds and that I would give my reasons for that decision in writing. My reasons may be stated quite shortly. I agree with essentially all of Mr Malik's submissions. The judge's decision was issued on 15 February 2020. Permission to appeal was granted by the FtT on 16 June 2020. The decision of the Court of Appeal in Hoque & Ors v SSHD [2020] EWCA Civ 1357; [2021] Imm AR 188, to which I will return, was handed down on 22 October 2020. It should have been clear to the respondent from at least that date that the legal basis upon which the judge decided this appeal was incorrect. An application should have been made considerably sooner and I regard the delay as significant.
11. Nor do I consider there to be any real explanation for the delay. The respondent can be expected to keep ongoing cases under review in the same way as would be expected of a solicitor in private practice and the allocation of the file to Mr Whitwell on 30 December 2021 is immaterial, given the resources of the department. Mr Malik is also correct in his submission that R (Afzal) v SSHD is not really on point; this is a case of 'open-ended' overstaying and not the 'book-ended' type of overstaying which was under contemplation in that case.
12. There having been a significant delay and there being no reasonable explanation for the delay, the application to vary the grounds of appeal would ordinarily be resolved against the Secretary of State. That is particularly so when, as Mr Malik contended, the Court of Appeal has repeatedly underlined the need for procedural rigour in such matters: the observations of Singh LJ in R (Talpada) v SSHD [2018] EWCA Civ 841 come to mind, albeit that that was a judicial review case which began life in the Upper Tribunal.
13. It is clear from the authorities that it will be a rare case in which the merits of the case come into the assessment. As Lord Neuberger stated at [30] of HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd [2014] UKSC 64; [2014] 1 WLR 4495, it would be 'thoroughly undesirable' for a court to have to explore the strength of the parties' cases on each occasion that it came to consider an application for relief from sanctions.
14. It is also well recognised in the authorities, however, that the merits of a case may come into play in considering relief from sanctions when they are so strong that there is no real answer to them. That was the basis upon which the Supreme Court proceeded in the case cited above and Moore-Bick LJ (with whom Tomlinson and King LJ) agreed) noted at [46] of Hysaj & Ors v SSHD [2014] EWCA Civ 1633; [2015] 1 WLR 2472 that it was only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak that the merits will have a significant part to play in the balancing exercise.
15. As will become clear, this is one of those rare cases in which the amendment which Mr Whitwell seeks to make to the grounds of appeal

raises an unanswerable point of law. Notwithstanding my agreement with essentially all of Mr Malik's submissions, therefore, I was willing in the exercise of my discretion to accede to the application to amend the grounds of appeal.

16. Having announced that decision at the hearing, Mr Malik helpfully interjected before I could turn to Mr Whitwell to make his submissions on the merits. He indicated that he was unable, on the current state of the law, to oppose the additional ground of appeal and that he was unable to defend the judge's decision that the appellant was able to satisfy paragraph 276B of the Immigration Rules. He could not oppose the appeal being allowed on the amended ground, therefore, and he submitted that the proper course was for the appeal to be remitted to the FtT for consideration of the appellant's remaining Article 8 ECHR claim, which had not been considered by the judge due to his conclusion that paragraph 276B applied. He noted that the appellant wished to advance new arguments and new evidence in support of that claim, and that the appellant's wife also had an appeal pending before the FtT, which should properly be linked with this appeal on remission.
17. Mr Whitwell was content with the course of action proposed by Mr Malik, although he noted that the appellant's wife's appeal had not yet been listed. I indicated that the appeal would be allowed and remitted to the FtT for consideration of the appellant's wider Article 8 ECHR claim. I suggested, in the circumstances, that the proper course would be for the appellant's solicitors to write to the First-tier Tribunal, enclosing a copy of this decision and requesting that the appellant's wife's appeal be listed at Taylor House so that it might be linked to this appeal.
18. Given the stance adopted by the parties, I can explain quite briefly why Mr Malik was plainly correct to make the concession he did about sustainability of the judge's decision. The judge proceeded, as I have noted, on the basis that the appellant had applied for further leave to remain within 14 days of the expiry of his leave to remain, as extended by section 3C of the Immigration Act 1971. The judge thought that because the appellant had made that application within 14 days, the intervening period of overstaying fell to be disregarded in accordance with paragraph 39E of the Immigration Rules. It is clear from the judgment of the majority (Underhill and Dingemans LJ) in Hoque v SSHD, however, that the judge was in error in concluding that paragraph 39E of the Immigration Rules had the effect of qualifying the requirement of continuous lawful residence in paragraph 276B(1)(a) of the Immigration Rules. As Mr Malik accepted, therefore, the reality is that the appellant has been an 'open-ended' overstayer since his application for administrative review was refused in May 2019 and he is unable to satisfy the requirement of ten years' continuous lawful residence.
19. The error into which the judge fell (without, I should observe, the benefit of what was said in Hoque v SSHD, which came a number of months after his decision) caused him to allow the appeal on an erroneous basis. He gave no other reason for allowing the appeal other than that he considered the appellant to meet all of the requirements

for Indefinite Leave to Remain. There was no wider consideration of Article 8 ECHR rights. The appellant is entitled to that consideration, not least because he has adduced new evidence before the Upper Tribunal in relation to his relationship with his wife and his medical conditions.

20. Given that the appellant's wife's appeal is currently pending before the FtT (albeit as yet unlisted), I agree with the advocates that the proper course is for the appeal to be remitted so that it may be linked with the appellant's wife's appeal. I am grateful to Mr Malik's instructing solicitor for confirming that her appeal reference is [HU/06378/2020](#). It is not for me to direct that the appeals be listed together; that is a matter for the FtT but it would clearly be appropriate, in my view. The appellant's solicitors should write to the FtT, enclosing a copy of this decision, in order to invite that Tribunal to link the two matters when this case returns to Taylor House, as I will direct.

Notice of Decision

The Secretary of State's appeal is allowed. The FtT's decision to allow the appeal is hereby set aside. The appeal is remitted to the FtT to be heard afresh.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 January 2021