



IAC-AH-SAR-V1

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

Appeal Number: IA/14194/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 30th November 2015**

**Decision & Reasons Promulgated
21st December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ABU ZAKI MUHAMMAD MOSHIUR RAHAMAN
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer

For the Respondent: Mr A Miah of Counsel instructed by VMD Solicitors

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a decision of Judge Farmer of the First-tier Tribunal (the FtT) promulgated on 23rd April 2015.
2. The Respondent before the Upper Tribunal was the Appellant before the FtT and I will refer to him as the claimant.

3. The claimant is a national of Bangladesh born 17th February 1978 who applied for leave to remain in the UK on the basis of long residence under the Immigration Rules.
4. The application was refused on 27th February 2014. The Secretary of State did not accept that the Appellant had proved that he had at least ten years' continuous lawful residence in the United Kingdom as required by paragraph 276B(i)(a) of the Immigration Rules. It was contended that the Appellant had no leave to remain between 20th April 2010 and 15th December 2010.
5. The Appellant appealed and his appeal was heard by the FtT on 21st April 2015. The FtT found that the Appellant was in the UK unlawfully between 10th May 2010 and 18th August 2010. Notwithstanding this finding, the FtT allowed the appeal under the Immigration Rules with reference to paragraph 276B, finding that the Respondent should have exercised discretion to disregard the period in excess of 28 days when the Appellant was in the UK without permission or leave.
6. As the FtT allowed the appeal under the Immigration Rules, it did not go on to consider Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention), although that had been raised as a Ground of Appeal.
7. The Secretary of State applied for permission to appeal to the Upper Tribunal. In summary it was contended that the FtT was wrong in law to allow the appeal under the Immigration Rules as paragraph 276B(v) stated;

'... the applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period.'
8. The Secretary of State contended in the grounds that the Appellant had in fact remained in the United Kingdom without leave between 31st March 2010 and 15th December 2010 which was a period in excess of 28 days. Therefore the FtT had no power in law to allow the appeal under the Immigration Rules.
9. Permission to appeal was granted by Judge Pooler of the FtT who stated;

"It is the Respondent's case that the Appellant was in the UK without leave between 31st March 2010 and 15th December 2010. The judge has arguably misdirected herself and/or failed to give adequate reasons in her assessment at [10] of the chronology of the Appellant's applications for leave to remain, in which she found that the Appellant had been in the UK unlawfully in excess of 28 days only between 7th June 2010 and 18th August 2010; and in finding at [14] that the Respondent should have exercised discretion to disregard the period over 28 days".

10. Following the grant of permission to appeal, the Tribunal issued directions that there should be a hearing before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

11. Mr Miah confirmed that there had been no written response on behalf of the claimant pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 but that the application was opposed.
12. In making oral submissions Mr Duffy relied upon the grounds contained within the application for permission to appeal. I was asked to note that the FtT had found that the claimant had been in the UK without leave for a period in excess of 28 days, and therefore the application could not be allowed under the Immigration Rules. There is no discretion contained within paragraph 276B to allow an appeal if there has been a period without leave in excess of 28 days.
13. if the FtT found the Secretary of State had not properly considered her own guidance, then the correct course would have been to find the decision not in accordance with the law, so that it remained outstanding before the Secretary of State for a lawful decision to be made. I was asked to set aside the decision of the FtT so that it could be heard afresh.
14. Mr Miah submitted that the FtT decision disclosed no material error of law. I was referred to paragraph 6 of the decision in which the FtT set out the Respondent's case, which indicated that the discretion the FtT had was limited to periods under 28 days, or exceptionally very short periods over this time. Mr Miah submitted that the FtT was entitled to apply discretion if appropriate. I was asked to conclude that the FtT had found the circumstances of this case to be exceptional.
15. By way of response, Mr Duffy argued that the Secretary of State's guidance was not prescriptive, and only if the guidance was prescriptive could the FtT give direct effect to it, as indicated in AG (Kosovo) [2008] UKAIT 00082. Mr Duffy pointed out that in this case, the Secretary of State's refusal letter at page 4 indicated that the Secretary of State had in fact considered not only the Immigration Rules, but considered whether it would be appropriate to allow the claimant to remain in the UK exceptionally outside the rules, and concluded that there were no sufficiently compelling or compassionate circumstances to justify that course of action.

My Conclusions and Reasons

16. I announced at the hearing that the FtT had erred in law and the decision must be set aside. This is because the FtT found that the Appellant had been in the UK unlawfully for a period in excess of 28 days. Therefore the

FtT did not have the power to allow this appeal under the Immigration Rules.

17. There is no discretion contained within paragraph 276B to allow an appeal under that paragraph, if there has been a period in excess of 28 days, during which an individual has been in the UK without leave.
18. The Secretary of State has issued guidance to caseworkers when considering applications under paragraph 276B but this is not 'a discretion conferred by the Immigration Rules'. It is not possible to allow this appeal on the basis that a discretion conferred by the rules ought to have been exercised differently.
19. Guidance given to caseworkers by the Secretary of State may be considered as a 'concession', and if that had not been exercised properly or at all, then the only available Ground of Appeal is that the decision is not in accordance with the law, and the decision would then remain outstanding before the Secretary of State for a lawful decision to be made.
20. I am not satisfied that that is the position here. The FtT was under the impression that notwithstanding that continuous lawful residence had been broken for a period in excess of 28 days, it had the power to allow the appeal under the Immigration Rules, and that is wrong in law.
21. The decision of the FtT is set aside. The FtT did not consider Article 8 which had been raised as a Ground of Appeal and that is also an error of law.
22. Both representatives submitted that it would be appropriate to remit this appeal back to the FtT to be heard afresh. I have considered the Senior President's Practice Statement 7.2 and find it appropriate to remit the appeal to the FtT. This is because judicial fact-finding is required, and the Article 8 aspect of the appeal has not been considered by the FtT. No findings are preserved.
23. The appeal before the FtT will take place at the Hatton Cross Hearing Centre and the parties will be advised in writing of the date. The appeal is to be heard by an FtT Judge other than Judge Farmer.

Notice of Decision

The decision of the FtT involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the First-tier Tribunal.

Anonymity

No anonymity order was made by the First-tier Tribunal. There has been no request to the Upper Tribunal for anonymity and therefore no anonymity order is made.

Signed

Date 4th December 2015

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

No fee award is made by the Upper Tribunal. This must be considered by the First-tier Tribunal when the appeal is heard again.

Signed

Date 4th December 2015

Deputy Upper Tribunal Judge M A Hall