



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03661/2016

THE IMMIGRATION ACTS

Heard at Field House
On 30 May 2017

Decision & Reasons Promulgated
On 01 June 2017

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

GMB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Lee, counsel instructed by ATM Law
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Freer, promulgated on 21 December 2016. Permission to appeal was granted to the Respondent by First-tier Tribunal Judge Saffer on 13 February 2017.

Anonymity

2. A direction has been made previously, and is re-iterated below.

Background

3. The appellant entered the United Kingdom on 14 October 2005 with entry clearance as a student. He made a series of in-time applications for further leave to remain, the last of which was refused on 1 May 2013 with a right of appeal. He appealed unsuccessfully against that decision and his appeal rights were exhausted on 29 March 2014. On 23 April 2014, the appellant applied for further leave to remain under Tier 4. That application was treated as void by the respondent because the appellant subsequently made further applications, the critical one being a human rights application made 13 February 2015, which was refused with a right of appeal. The appellant lodged an appeal on 29 May 2015 but subsequently withdrew it following his application for indefinite leave to remain on long residency grounds, made on 24 September 2015. The refusal of that application on 25 January 2016 is the relevant decision in this appeal.
4. The decision of 25 January 2016 contended that the appellant had been without valid leave from 29 March 2014; had held lawful leave for just 8 years and 5 months and therefore had not acquired 10 years' continuous lawful residence in the United Kingdom. The respondent considered whether discretion ought to have been exercised in the appellant's favour but noted that he had failed to provide any exceptional reasons why his application of 23 April was made, out of time. Furthermore, the instant application was lodged one year and 5 months after his lawful leave ceased and thus it was said that the requirements of paragraph 276B(v) were unmet. Leave to remain was refused under Appendix FM because the appellant had failed to demonstrate that there were any insurmountable obstacles to family life continuing outside the United Kingdom with his British partner. Furthermore, no exceptional circumstances had been raised and therefore his application did not fall for a grant of leave outside the Rules. The appellant was granted a right of appeal on the sole ground that the decision was unlawful under section 6 of the Human Rights Act 1998, because the respondent had decided to refuse his human rights claim.

The hearing before the First-tier Tribunal

5. Following the hearing before the First-tier Tribunal, the judge found that the voided application of 23 April 2014 did not result in the appellant's leave lapsing because it was a duplicate application. Thus, the appellant's leave under section 3C of the Immigration Act 1971 was extended until beyond the 10-year point. The judge rejected the appellant's claims as to his medical condition amounting to very significant obstacles to integration under paragraph 276ADE(1)(vi) of the Rules and family life under Appendix FM. He allowed the appeal under the Immigration Rules, indicated that the appellant succeeded on human rights as the respondent's decision was not in accordance with the law, but ultimately dismissed the appeal on human rights grounds.

The grounds of appeal

6. The respondent's application, made out-of-time, argued that the judge materially misdirected himself in allowing the appeal under the Immigration Rules when the appellant had a limited right of appeal under section 84(1)(b) of the Nationality, Immigration and Asylum Act 2002 as amended by the 2014 Immigration Act. There were said to be clear findings that the appellant did not succeed on human rights grounds.
7. The appellant's grounds, submitted 13 days' late, sought to preserve his should permission be granted to the respondent. It was maintained that the judge's findings as to the accrual of 10 years' lawful residence was legally and factually correct. The first of the two grounds argued that the judge's conclusion that the appellant did not succeed outside the Rules was flawed because he did not engage with all the arguments put forward on his behalf and his conclusions on the threshold test were arguably inconsistent with decision in Paposhvili v Belgium. The second ground argues that the judge construed paragraph 276ADE(1)(vi) too narrowly regarding the evidence that the appellant's life expectancy would be significantly shortened.
8. Permission to appeal was granted to the respondent on the basis that it was plainly arguable that the judge did not "*have the right to grant an appeal under the Immigration Rules.*" The appellant's application was refused, the judge finding no error in the reasons provided for dismissing the human rights appeal.
9. The appellant renewed his application for permission on 29 March 2017 on the same grounds. The appellant's Rule 24 response was also submitted on that date, in which it was said that any error was immaterial, that the findings in respect of 10 years' lawful residence was determinative of the human rights aspect and the respondent's appeal was academic. It was further said that the fact the judge states that he is allowing the appeal under the Immigration Rules was no more than a misstatement. Furthermore, an application on 10 years' residence grounds was described in Home Office Guidance as a human rights' claim in any event.
10. On 6 April 2017, the Deputy-President directed that the appellant's outstanding application for permission to appeal be listed for an oral hearing to be decided at the hearing of the appeal by the respondent.
11. The Secretary of State forwarded a skeleton argument on 26 May 2017, in which it was maintained that the judge had no jurisdiction to allow the appeal under the Rules; it was accepted that the respondent had materially misunderstood the Rules and which conceded that the appellant could show the requisite 10 years' lawful residence. An assertion was made that it was unlawful for a judge to seek to allow an appeal with reference to paragraph 276B in a human rights appeal where the respondent had not first considered and sought to exercise her discretion under 276B(ii) in respect of public interest issues and that the other elements of 276B must also be shown, such as 276B(iv).

12. In the skeleton argument it was further conceded that the respondent's CID did not reveal any objections under 276B(ii) and that the appellant had produced a valid Knowledge of Life in the United Kingdom certificate and therefore the judge's failure to engage with these aspects had no material adverse effect. Nonetheless, it was argued that if the judge was to allow the human rights appeal with reference to the Rules, he was obliged to apply the relevant Rule at the date of the hearing. Referring to 276B(iii) of the Rules and cross-referencing paragraph 322(12), it was contended that the respondent was notified on 9 May 2016 that the appellant had an outstanding debt to Barking, Havering & Redbridge University Hospitals NHS Trust of £20,945.32. It was argued that these subsequent events could not have been decided by the judge as the primary decision maker. Furthermore, the appellant must have known that he owed money to the NHS when his appeal was heard.
13. The respondent invited the Upper Tribunal to set aside the First-tier Tribunal decision and proceed to remake the appeal with the outcome that it is not in accordance with the law because the respondent has yet to consider her discretion. That approach would allow the respondent to look at the ILR application again on the basis that he had 10 years' continuous lawful residence and taking a view as to whether to invoke paragraph 276B(iii). Alternatively, the issue of the appellant's debt to the NHS would be relevant to any rehearing of Article 8 issues in the event the appellant was granted an extension of time and identifying material errors.

The hearing

14. Mr Lee handed up a short written submission addressing the issue of NHS entitlement, in which it was contended that the appellant was entitled to NHS treatment because he was both ordinarily resident and lawfully present in the United Kingdom. He argued that the appeal should be allowed on human rights grounds.
15. I drew the representatives' attention to [58] of the First-tier Tribunal decision, where under the heading '*Human Rights*' the judge said as follows;

"I find that no proportionality exercise is needed as he succeeds on human rights, as the decision was not in accordance with the law. However, I may be overturned on long residence and that would nullify this argument. So, as a fall-back position, I should go over the holistic approach to private and family life."
16. Mr Jarvis did not accept that this was sufficient to rescue the decision and that the judge ought to have considered the long residence issue as part of his Razgar analysis. On the NHS issue, Mr Jarvis said that it may well be that the appellant was not required to pay the sums said to be outstanding. He drew my attention to the fact that the appellant had addressed the issue in his witness statement before the First-tier Tribunal. Nonetheless, he asked me to find that judge was wrong, set his decision aside and to re-make the decision so that the ILR application remains outstanding before the Secretary of State. He added that were I to uphold the decision or to allow the appeal on human rights grounds, this might lead to a lesser grant of leave.

17. Mr Lee stated that the appellant's cross-appeal was unlikely to add much. He argued that the judge's decision was clear, except for his use of language as to the outcome of the appeal. There was no doubt that the appellant met the requirements of the Rules and that the respondent was wrong to refuse to grant him ILR. Either the judge made no error or it was not one in substance. He suggested that an explanatory determination might assist. He invited me to find that the judge made no material error of law as a fair interpretation of the decision was that the judge concluded that the respondent's decision was not in accordance with the law. If there was an error as to form, it was not material because the appellant would inevitably succeed on the findings made by the judge. Today, the respondent was not able to say that the NHS point would have made a difference to the outcome of the appeal. He clarified that he was not pressing the appellant's application for permission unless I disagreed with the parties on the 10-year rule issue (which I did not).

Decision on appellant's application for permission to appeal

18. The appeal was brought out of time and only after the respondent sought permission to appeal. I nonetheless extend time given the explanation set out in the grounds and in the interests of justice. Ultimately, Mr Lee did not seek to rely on the grounds, preferring to concentrate on opposing the respondent's application. Given the lack of continued reliance on the grounds, I find that no material error of law was identified and refuse permission to appeal.

Decision on error of law

19. At [57] of his decision, the judge allowed the appeal under the Immigration Rules, having been satisfied that the appellant met the requirement of paragraph 276B(i) that is, he had established that he had continuous lawful residence for a period of at least 10 years. As accepted by the parties, the judge had no jurisdiction to allow the appeal under the Immigration Rules because this appeal concerned an application for further leave to remain made after 6 April 2015. This amounted to a material error of law.
20. While the judge initially indicated that the appellant succeeded on human rights grounds [58], he ended his decision by stating at [77], "*The freestanding aspect of the appeal fails on both private and family life.*" Clearly, those findings were contradictory.
21. The judge's notice of decision stated that the appeal was allowed under the Rules and dismissed on human rights grounds, whereas there was no appeal under the Rules available to the appellant and the judge had stated both that the human rights appeal succeeded and failed in the same decision. These erroneous and contradictory findings cannot stand and are set aside, albeit with all the judge's findings of fact preserved.
22. I therefore proceed to remake the decision.

Remaking of decision

23. In view of the respondent's belated acceptance that the appellant had in fact resided lawfully and continuously in the United Kingdom for at least 10 years by the time of the decision of 25 January 2016, the claims in the said notice were plainly wrong. Indeed, Mr Jarvis invited me to find that the decision was not in accordance with the law.
24. There is the matter of the appellant's NHS entitlement. At paragraph 20 of his witness statement, the appellant explained that it was only owing to the Secretary of State informing the NHS that he was an overstayer that they were seeking to recover the cost of his medical treatment and had already sent him an invoice for that treatment. Evidently, the information supplied to the NHS by the respondent was incorrect because the appellant's leave to remain in the United Kingdom had been extended by section 3C of the 1971 Act and he was not, therefore, an overstayer. Mr Jarvis conceded that Mr Lee's argument that the appellant was entitled to receive NHS treatment free of charge may well be correct given that the appellant's leave never lapsed. However, the respondent has yet to consider the exercise of her discretion in relation to this issue.
25. In view of the respondent's error as to the appellant's leave as well as failing to exercise discretion in relation to paragraph 276B(iii) of the Rules, with reference to paragraph 322(12), this appeal is allowed on the basis that the respondent's decision is not in accordance with the law and therefore, the appellant's application for settlement remains outstanding, awaiting a lawful decision by the Secretary of State.

Conclusions

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

I set aside the decision to be re-made.

I substitute a decision allowing the appeal on the basis that the Secretary of State's decision was not in accordance with the law.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: *T Kamara*

Date 21 July 2017

Upper Tribunal Judge Kamara

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of any fee which has been paid or may be payable because the respondent has acknowledged that the decision-maker materially misunderstood the immigration rules when the decision was made.

Signed *T Kamara*

Date: 21 July 2017

Upper Tribunal Judge Kamara