



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/35125/2015

THE IMMIGRATION ACTS

Heard at Field House
On 24 January 2018

Decision & Reasons Promulgated
On 31 January 2018

Before

UPPER TRIBUNAL JUDGE BLUM

Between

MUHAMMAD MUDASSIR KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Hossain, of Liberty Legal Solicitors

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Anstis (the judge), promulgated on 13 March 2017, in which he dismissed the appellant's appeal against the Respondent's decision dated 11 December 2015 refusing his application for Indefinite Leave to remain (ILR) under the long residence provisions of the immigration rules (paragraph 276B).

Factual Background

2. The appellant is a national of Pakistan, date of birth 1 February 1977. He entered the United Kingdom on 31 July 2004 with entry clearance as a student. He was granted further periods of leave to remain following several applications that were made before the expiry of his leave, including an application made on 25 November 2010 for leave to remain as a Tier 4 (General) Student, which was granted until 11 February 2011.
3. Although the appellant attempted to lodge an application for further leave to remain on 7 February 2011, this application was rejected as being invalid on 21 February 2011. The appellant made a further application on 23 February 2011 but this was also rejected as invalid on 7 March 2011. A further application made on 20 June 2011 was refused on 4 August 2011, as was a further application made on 8 August 2011 (rejected on 27 September 2011). On 7 February 2012 the appellant lodged an application for leave to remain as a Tier 4 (General) Student and this was granted on 28 December 2012, valid until 8 May 2014.
4. On 27 September 2013 the appellant applied for a residence card pursuant to the Immigration (European Economic Area) Regulations 2006 (the 2006 regulations) based on his relationship with his unmarried EEA national partner. He was issued with a residence card valid from 3 February 2014 to 3 February 2019. On 22 September 2014 the appellant applied for ILR on the basis of his long residence.
5. It is important at this stage to note some characteristics of the respondent's decision that led to the appeal before the First-tier Tribunal. Page '1 of 10', in effect the covering letter accompanying the decision, stated,

We have considered your representations for indefinite leave to remain and have refused it. Your human rights claim has also been refused. If you believe we have made an error you can appeal to the First-tier Tribunal.
6. In her decision the respondent set out the requirements of paragraph 276B of the immigration rules, and the definition of 'continuous residence' contained in paragraph 276A. The respondent accepted that the appellant had lawful leave in the UK from 31 July 2004 until 11 February 2011. The respondent noted however that the application to vary the appellant's leave made on 7 February 2011 was rejected (by this I understand that the application was not accepted as having been validly made) because the requisite fee had not been paid. The respondent noted that the application made on 23 February 2011 was also rejected as the appellant had not completed mandatory sections of his application form. The respondent was of the view that the appellant had no leave from 21 February 2011 until 28 December 2012, a period of approximately 675 days. The respondent was not therefore satisfied that the appellant could demonstrate 10 years continuous lawful residence in the UK, a requirement of paragraph 276B(i)(a).

7. The respondent thereafter considered whether to exercise her discretion in respect of breaks in lawful residence and took into account the appellant's representations, which included an assertion that his passport was lost in January 2011 and that he had to wait a long time to obtain a new passport. The respondent was not however satisfied that it was appropriate to exercise discretion in the appellant's favour because his explanation bore no relationship to the reasons the applications were rejected. The respondent additionally noted that the appellant had not provided any evidence that his unmarried EEA national partner continued to be a qualified person.
8. The respondent went on to consider the application under paragraph 276ADE (relating to the appellant's private life) and under Appendix FM of the immigration rules, but concluded that he did not meet the requirements of these rules. The respondent finally considered whether there were any exceptional circumstances which, consistent with the right to respect for private and family life in article 8, might warrant a grant of leave to remain outside the immigration rules. In the absence of any evidence that such circumstances existed the respondent did not consider that the appellant was entitled to a grant of leave to remain outside the rules.

The decision of the First-tier Tribunal

9. At the outset of the appeal before the First-tier Tribunal there was a discussion relating to the scope of the appellant's rights of appeal. At one stage his representative accepted that the appellant was bound by the new appeal regime brought into force by the Immigration Act 2014, although in his closing submissions the representative asserted that the appeal was governed by the regime in place prior to the amendments as the appellant's application was made before April 2015 (it was in fact made on 22 September 2014).
10. Under the heading 'Right of Appeal' the judge considered the transitional provisions governing the appropriate appeal regime. He made reference to the complex saving provisions in the Immigration Act 2014 (Commencement No.3, Transitional and Saving Provisions) Order 2014, as amended by the Immigration Act 2014 (Commencement No.4, Transitional and Saving Provisions and Amendment) Order 2015. The judge noted that the Commencement No.4 Order preserved the previous rights of appeal where there is, "*a decision made on or after 6 April 2015... to refuse an application made before 6 April 2015, where that decision is... to refuse to vary a person's leave to enter or remain and where the result of that decision is that the person has no leave to enter or remain; unless that decision is also a refusal of an asylum, protection or human rights claim.*"
11. The judge considered that the EEA residents card did not amount to "leave to remain" under the Immigration Act 1971 because rights accruing under European free movement law was a separate regime.

12. At paragraph 10 the judge stated,

The Appellant's only right to be in the United Kingdom at the time of the application was on the basis of his EEA rights - so if they did not amount to leave to remain then the decision under appeal is not a refusal to vary leave to remain, since the Appellant did not have leave to remain in the first place. If his EEA rights do amount to leave to remain, then the decision under appeal does not leave him without leave to remain. Either way, his case is not one where there is a "*decision... to refuse to vary a person's leave to enter or remain*", and so it falls to be dealt with under the restricted appeal rights introduced by the Immigration Act 2014.

13. The judge summarised the evidence given by the appellant from [11] to [14]. The judge noted the appellant's assertion that his passport and application papers relating to his application made on 23 February 2011 were lost in the post when returned by the respondent, and that he had to obtain fresh copies of his educational certificates from Pakistan and a new passport. Submissions made on behalf of the appellant centred on whether the respondent had acted unlawfully in rejecting the February 2011 applications as invalid. The legal representative claimed to have seen the appellant's bank statement from around the time the application was declined for non-payment of fee. The bank account was said to show that the appellant had more than enough to cover any fee and, with reference to *Basnet (validity of application - respondent)* [2012] UKUT 00113 (IAC), it was submitted that it was for the respondent to show that the application was properly rejected as invalid. It was submitted that the judge could deal with the exercise of discretion by the respondent in accordance with her guidance under the immigration rules.

14. The judge's reasoning is contained in a very brief section headed 'Discussion and Conclusions'. It consists of little more than 2 paragraphs, which I set out below.

21. The fundamental problem for the Appellant is that, as set out above, this appeal falls to be dealt with under the new appeals regime. A finding that, for instance, the decision is not in accordance with the immigration rules, or not in accordance with law, is simply not open to me. The appeal can only be brought on human rights grounds.

22. The difficulty that follows is that there is nothing in this appeal which engages human rights grounds for the Appellant. He continues to have a full right to reside and work in the United Kingdom under the EEA Regs. It may well be, as Mr Chowdhury suggests, that indefinite leave to remain is a preferable status for the Appellant, but the fact that there may be a better status available for an Appellant as a result of an appeal is not something which of itself engages human rights.

23. Since the appellant's Appeal does not engage human rights grounds, it cannot be considered further and must be dismissed.

15. The appeal was consequently dismissed.

The grounds of appeal and the error of law hearing

16. The Grounds essentially contend that the judge failed to appreciate that an application for ILR is a human rights claim and his consequential failure to assess the appeal with reference to paragraph 276B constituted a material legal error. Nor was there any engagement with paragraph 276ADE or Appendix FM, despite these having been relied on by the respondent in her Reasons For Refusal Letter. The failure to consider the appeal under paragraph 276B also meant that there were no factual findings in respect of the appellant's contention that his application dated 7 February 2011 was wrongly rejected as being invalid.
17. In granting permission to appeal the Upper Tribunal noted that there was some uncertainty as to the effect of the appellant's concurrent right to remain (if any) pursuant to the Immigration (European Economic Area) Regulations 2006 and it was essential to know the nature of the appeal before the First-tier Tribunal.
18. At the 'error of law' hearing there was substantial agreement between the parties. Mr Clarke, representing the respondent, conceded that the decision contained material legal errors. He accepted that an application pursuant to paragraph 276B constituted a human rights claim and that the judge should have considered whether the appellant met the requirements of that paragraph, with reference to paragraph 276A.
19. I indicated that I was of the same view and, having heard some further submissions as to the appropriate course of action, I indicated that, as there were no primary factual findings at all, including any findings in respect of the *Basnet* point, it was appropriate for the matter to be remitted for an entirely fresh hearing.

Discussion

20. The judge was unarguably correct in holding, at [10], that the appeal fell to be considered under the new appeals regime introduced by the Immigration Act 2014. The Immigration Act 2014 (Commencement No. 4, Transitional and Saving Provisions and Amendment) Order 2015, 2015 No. 371 (C. 18) relates to the amendments coming into force on 6th April 2015. It amends the earlier Commencement Order (No.3). At 8(2) it reads, in material part,

For article 9 substitute –

“9.–(1) Notwithstanding the commencement of the relevant provisions, the saved provisions continue to have effect and the relevant provisions do not have effect so far as they relate to the following decisions of the Secretary of State –

...

(c) a decision made on or after 6th April 2015 (so far as that is not a decision mentioned in sub-paragraph (a) or (b)) to refuse an application made before 6th April 2015, where that decision is—

- (i) to refuse leave to enter;
- (ii) to refuse entry clearance;
- (iii) to refuse a certificate of entitlement under section 10 of the 2002 Act;
- (iv) to refuse to vary a person's leave to enter or remain and where the result of that decision is that the person has no leave to enter or remain;

unless that decision is also a refusal of an asylum, protection or human rights claim.

21. The appellant's previously issued leave to remain as a Tier 4 (General) Student expired on 8 May 2014. At that stage he no longer had leave to remain (his right to reside flowed from his relationship with an EEA national, not as a result of a grant of leave to enter or remain). The respondent's refusal was not a refusal to vary the appellant's leave and did not therefore fall within the savings provisions. In any event, the application for ILR under paragraph 276B was a human rights claim and would have been subject to the new regime. The judge was therefore correct in concluding that the appellant was subject to the new appeals regime and that he could only appeal on human rights grounds.
22. The respondent's Policy guidance on the appeals process from the Immigration Act 2014 includes a policy document entitled 'Rights of Appeal'. This states that it is, "*Guidance on when there is a right of appeal against decisions in immigration cases, including mechanisms to prevent repeat rights of appeal and prevent delay from appeals against unfounded claims.*" It indicates that a human rights claim includes an application made under paragraph 276B of the immigration rules. This is not surprising given that an application under the 10-year long residence rule reflects the likelihood that a person who has lawfully resided in the UK for a continuous period of 10 years would have established a significant private life.
23. Having found that the appeal is governed by the amendments wrought by the Immigration Act 2014, and having properly concluded that the appeal could only be brought on human rights grounds, the judge failed to appreciate that an application made pursuant to paragraph 276B of the immigration rules is a human rights claim and that the refusal of such an application constitutes a refusal of a human rights claim. This much is clear from the Reasons For Refusal Letter itself which indicated that it was a refusal of a human rights claim. The judge was therefore obliged to consider whether the appellant met the requirements of paragraph 276B. The failure by the judge to engage with the appeal under paragraph 276B constitutes a material error of law. Under s.86 of the 2002 Act the tribunal must determine any matter raised as a ground of appeal. The appellant legitimately raised his alleged compliance with paragraph 276B in his grounds of appeal and the judge was obliged to deal with this and consider the *Basnet* argument utilised on the appellant's behalf.

24. Nor did the judge consider the appeal under paragraph 276ADE or engage in any article 8 assessment outside the immigration rules. In his statement the appellant maintained that he was “married” to an EEA national and that their relationship was subsisting, and he claimed to have integrated into British society and had developed good friendships. The judge was obliged to consider whether the respondent’s decision was unlawful under section 6 of the Human Rights Act 1998 in light of these assertions.
25. In the absence of any such consideration it is appropriate to remit the matter back to the First-tier Tribunal for a complete fresh hearing before a judge other than judge of the First-tier Tribunal Anstis.

Notice of Decision

The First-tier Tribunal decision is vitiated by material errors of law. The case is remitted to the First-tier Tribunal for a fresh (de novo) hearing, all issues open, to be heard by a judge other than Judge of the First-tier Tribunal Anstis.



Signed

30 January 2018

Date

Upper Tribunal Judge Blum