



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

Appeal Number: HU/01509/2019  
HU/01513/2019

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 14<sup>th</sup> January 2020**

**Decision & Reasons Promulgated  
On 16<sup>th</sup> January 2020**

**Before**

**UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

**JIGISHABAHEN KRUNALKUMAR VAGHELA (1)  
KRUNALKUMAR LAXMANDAS VAGHELA (2)  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms M Benitez, Counsel instructed by G Singh Solicitors

For the Respondent: Mr P Singh, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants are husband wife and are both nationals of India. They appealed against the respondent's decisions of 11<sup>th</sup> January 2019 and 15<sup>th</sup> January 2019 to refuse their applications for leave to remain in the UK. The first appellant claimed an entitlement to leave to remain on the basis of 10 years' lawful residence under paragraph 276B of the immigration rules and her husband applied as her dependant. Their

appeals were dismissed for the reasons set out in a decision of First-tier Tribunal Judge Herlihy promulgated on 23<sup>rd</sup> July 2019.

- 2.** The appellants immigration history is set out at paragraph [2] of the decision. The first appellant arrived in the UK on 8<sup>th</sup> July 2008 with leave to enter as a student valid until 30<sup>th</sup> April 2009. She was granted further leave to remain as a student until 30<sup>th</sup> September 2016. On 28<sup>th</sup> September 2016, the first appellant made an in-time application for further leave to remain outside the immigration rules. That application was refused by the respondent on 11<sup>th</sup> October 2017 with an out of country right of appeal. The first appellant did not leave the UK and exercise her right of appeal but instead, on 25<sup>th</sup> October 2017, applied for further leave to remain. That application was subsequently varied, on 30<sup>th</sup> January 2018, to an application for indefinite leave to remain. The application was refused for the reasons set out in the respondent's decision of 11<sup>th</sup> January 2019.
- 3.** The judge refers, at [3], to the reasons given by the respondent for refusing the application. The respondent concluded the first appellant's leave to remain in the UK ended on 11<sup>th</sup> October 2017 and as the applicant had not accrued 10 years continuous lawful residence in the UK, her application cannot succeed under paragraph 276B of the immigration rules.

#### The decision of FtT Judge Herlihy

- 4.** The background to the appeal and the appellant's immigration history is set out at paragraph [2] to [7] of the decision of the FtT Judge. The judge heard oral evidence from both appellants and that evidence is set out at paragraphs [13] to [18] of the decision. The findings and conclusions of the First-tier Tribunal Judge are set out at paragraphs [19] to [31] of the decision.
- 5.** The judge noted, at [20], it is accepted by the respondent that the appellant had lawful leave from 8<sup>th</sup> July 2008 until 30<sup>th</sup> September 2016. The judge noted that it is also accepted that the first appellant made a valid in-time application for further leave to remain on 28<sup>th</sup> September 2016, and that application was refused and certified as clearly unfounded under s94 of the 2002 Act, on 11<sup>th</sup> October 2017. The judge

referred, at [21], to the further application for leave to remain outside the immigration rules made on 25<sup>th</sup> October 2017, which was varied on 30<sup>th</sup> January 2018, to an application for indefinite leave to remain. The judge recorded the case advanced by the appellant at paragraph [22] of the decision. At paragraph [24], the judge stated:

“... I am not satisfied that the appellant can establish that she has 10 years lawful residence in the United Kingdom in part accrued by 3C leave. The appellant is effectively saying that after the refusal of her application on 11 October 2017 that her leave from that date until she submitted a further application on 25 October 2017 was again extended by 3C leave and thus she relies on paragraph 39E. However I find that paragraph 39E does not apply to the applicant or her husband as 3C leave cannot be used to grant a further extension of 3C which is effectively what the appellant is arguing,”

**6.** At paragraphs [26] and [27], the judge said:

“26. The appellant would need to establish that she can avail herself of section 3C leave in order to rely upon paragraph 39E and I find as stated by the respondent in the refusal letter that her 3C leave came to an end on the 11 October 2017 and could not extend beyond this period as she had not been granted any in country right of appeal and that she had no 3C leave when she made her further application on 25 October 2017 outside the immigration rules which was subsequently varied on 31 January 2018 and refused on 11 January 2019...”

27. I find that the appellant cannot satisfy the requirements of the immigration rules for the grant of leave based on 10 years lawful residence as her lawful leave expired on 11/10/2017 at which date she had been in the United Kingdom nine years and three months.

**7.** Having concluded the appellants cannot satisfy the requirements of paragraph 276B of the immigration rules, the judge considered the Article 8 claim by reference to the requirements set out in Appendix FM and paragraph 276ADE of the immigration rules. The judge found that neither of the appellants are British citizens and that the appellants and their child, who was born in the UK in 2017, are all nationals of India. The judge found the appellants have strong family and cultural links to India where they both spent their formative years, were educated, and where they both worked. The judge referred to the public interest considerations set out in s117B of the 2002 Act and dismissed the appeal on human rights grounds.

The appeal before me

- 8.** The appellants claim the application made on 25<sup>th</sup> October 2017 was made within 14 days of the respondent refusing their previous application on 11<sup>th</sup> October 2017, and they are therefore entitled to rely upon paragraph 39E of the immigration rules. It is said that paragraph 39E(2) operates such that the first appellant's application was in-time and she should not be considered to be an overstayer. The appellants also claim the judge failed to apply the principles set out in the authorities relevant to a consideration of the Article 8 claim and taking into account the evidence before the Tribunal, the judge should have allowed the Article 8 appeal.
- 9.** Permission to appeal was granted by First-tier Tribunal Judge Povey on 28<sup>th</sup> of November 2019. In doing so, he considered it arguable that the judge failed to consider whether the appellants were able to rely upon paragraph 39E(2)(b)(i) of the immigration rules such that any period of overstaying from 11 October 2017 to 25 October 2017 was disregarded, when calculating whether they had accrued 10 years continuous lawful residence as required by paragraph 276B of the immigration rules.
- 10.** At the hearing before me, Ms Benitez, acknowledged the difficulty that the grounds of appeal present, in light of the decision of the Court of Appeal in Ahmed -v- SSHD [2019] EWCA Civ 1070, handed down on 21<sup>st</sup> June 2019, but which did not feature in the decision of the First-tier Tribunal judge or the Grounds of Appeal. She, rightly in my judgement, acknowledges that the Court of Appeal held that paragraph 276B(v) of the immigration rules does not operate so as to cure short "gaps" between periods of lawful temporary residence which would entitle persons to claim "10 years continuous lawful residence" under paragraph 276B(i)(a).
- 11.** Ms Benitez submits that in reaching a decision on the Article 8 appeal, the judge failed to consider the fact that the appellants regulated their conduct because they understood, at the time, that the 14 days between 11<sup>th</sup> October 2017 and 25<sup>th</sup> October 2017 would be disregarded, and that was relevant to the consideration of the application outside the immigration rules and was capable of amounting to an 'exceptional circumstance'. She referred to the respondent's

'Long residence' Guidance (*version 15.0*); 3<sup>rd</sup> April 2017, which states at page 19 of 43; "Where an out of time application is submitted on or after 24 November 2016, you should must consider whether to exercise discretion in line with paragraph 39E of the immigration rules. This must be authorised by a senior caseworker at senior executive officer (SEA) grade....". She submits that here, the application was made within 14 days of 11<sup>th</sup> October 2017 and a short single gap should not lead to a refusal. That was a relevant factor that should have been considered but was not considered by the judge.

- 12.** Mr Singh relies upon the decision of the Court of Appeal in Ahmed -v- SSHD and submits the decision of the judge that the appellant cannot satisfy the requirements of the immigration rules because she is unable to establish 10 years continuous lawful residence in the UK, is one that was open to the Judge on the evidence. He submits the claim now advanced that the appellant had relied upon the matters set out in the 'Long Residence' guidance in conducting their affairs, was not a claim advanced before the First-tier Tribunal or the Upper Tribunal previously.

### Discussion

- 13.** The only ground of appeal available to the appellants was that the respondent's decision is unlawful under s6 of the Human Rights Act 1998. The appellant's ability to satisfy the immigration rules was therefore not the question to be determined by the Tribunal, but was capable of being a weighty, though not determinative factor, when deciding whether the refusal of the application for indefinite leave to remain is proportionate to the legitimate aim of enforcing immigration control.
- 14.** Paragraph 276B(i)(a) of the immigration rules requires an applicant to establish they have had at least 10 years continuous lawful residence in the United Kingdom. Paragraph 276A(a) of the immigration rules provides that "*continuous residence*" means residence in the UK for an unbroken period. The rule sets out a number of circumstances in which a period shall not be considered to have been broken. Paragraph 276A(b) provides that "*lawful residence*" means residence which is continuous residence pursuant to, *inter alia*, existing leave to enter or remain.

- 15.** The core issue in the appeal was whether the appellant can satisfy the requirement in paragraph 276B of the immigration rules that she has had at least 10 years continuous lawful residence in the UK.
- 16.** Paragraph 276B(v) of the rules provides that the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of the rules applies, any current period of overstaying will be disregarded. That is not to say that the period of overstaying is to be treated as a period of lawful residence. The rules simply makes provision for a short period of overstaying to be disregarded. An individual that has ‘overstayed’ in the UK cannot in my judgment be regarded as an individual that is exercising continuous lawful residence in the UK, whilst he or she remains in the UK as an ‘overstayer’.
- 17.** In Ahmed -v- SSHD [2019] EWCA Civ 1070, Lord Justice Floyd and Lord Justice Haddon-Cave confirmed that paragraph 276B(v) of the immigration rules does not operate so as to cure short "gaps" between periods of lawful temporary residence which would entitle persons to claim "10 years continuous lawful residence" under para.276B(i)(a). On any proper view of the chronology, the first appellant cannot establish at least 10 years continuous lawful residence in the UK. There was a gap in the first appellant’s lawful residence in the UK following the refusal of her application, made on 28<sup>th</sup> September 2016, on 11<sup>th</sup> October 2017.
- 18.** The judge referred to paragraph 39E of the rules at paragraph [23] and found, at [24], the first appellant has not established that she has 10 years lawful residence in the United Kingdom. The first appellant had continuous lawful residence between 8<sup>th</sup> July 2008 and 11<sup>th</sup> October 2017. She could not therefore in my judgment, satisfy the requirement of paragraph 276B(i)(a) the rules and it was open to the judge to conclude, at [27]:

“I find that the appellant cannot satisfy the requirements of the immigration rules for the grant of leave based on 10 years lawful residence as her lawful leave expired on 11/10/2017 at which date she had been in the United Kingdom for nine years and three months.”
- 19.** As the Court of Appeal said in Ahmed -v- SSHD, at [15(8)], the respondent’s ‘Long residence’ Guidance (*version 15.0*); 3<sup>rd</sup> April 2017 does not accord with the true construction of paragraph 276B, although

it may reflect a policy adopted by the SSHD. However, it is axiomatic that the intention of the Rules is to be discerned "objectively from the language used" not from e.g. guidance documents.

- 20.** Having found that the requirements of the immigration rules cannot be met, the judge had regard to the length of time the appellants have spent in the UK and their ties to India. The judge was satisfied that the appellant and her husband have strong family ties and cultural links to India where they both spent their formative lives, were educated and where they both worked and have close family members. There was evidence that the appellants have returned to India since their arrival in the UK. The judge noted the family would be returning as a family unit to India and it is clearly in the best interests of their son that he remains in the care of his parents. The judge noted the appellant's son is under three years of age. The Judge found that both the appellants are well-educated, and the judge saw no reason why they cannot re-establish themselves in India with the support of their close family. The judge noted the appellants have developed their family and private life in the United Kingdom at a time when they knew that the development and continuance of the same was dependent upon meeting the requirements of the immigration rules. The judge had regard to the factors set out in s117B of the 2002 Act and dismissed the appeal on rights grounds.
- 21.** It was in my judgement open to the Judge to find, for the reasons set out at paragraphs [28] to [30] of the decision, that the removal of the appellants from the UK would not be in breach of Article 8 and to dismiss the appeal.
- 22.** It follows that in my judgement, the decision of the First-tier Tribunal Judge is not tainted by a material error of law and the appeal before me is dismissed.

### **Notice of Decision**

- 23.** The appeal is dismissed, and the decision of FtT Judge Herlihy shall stand.

Signed

Date

14<sup>th</sup> January 2020

Upper Tribunal Judge Mandalia

**FEE AWARD**

I have dismissed the appeal and there can be no fee award

Signed

Date

14<sup>th</sup> January 2020

Upper Tribunal Judge Mandalia