



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number: HU/10446/2019 (A)

THE IMMIGRATION ACTS

**On the papers
on 3 August 2020**

**Decision & Reasons Promulgated
On 11 August 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**N K M
(anonymity direction made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ERROR OF LAW FINDING AND REASONS

- 1.** On 6 November 2019 First-tier Tribunal Judge Ross ('the Judge') dismissed the appellant's appeal on human rights grounds. Permission to appeal was initially refused by Upper Tribunal Judge Martin sitting as a judge of the First-tier Tribunal on 4 March 2020 but granted on a renewed application by Upper Tribunal Judge Owens on 20 April 2020, on the basis it is said to be arguable that the Judge erred in failing to give adequate reasons in respect of the appellant's arguments in relation to his historic 3C leave and erred by failing to explain what weight if any he gave to this factor in the Article 8 ECHR proportionality assessment.
- 2.** In light of the Covid-19 pandemic directions were sent to the parties indicating a provisional view that the question of whether the Judge had made an error of law material to the decision to dismiss the appeal and

whether the appeal should be set aside could be determined on the papers without a hearing, seeking their observations upon the same and providing the opportunity for further submissions to be made within specified time periods. Both parties have responded.

3. The Overriding Objective is contained in the Upper Tribunal Procedure Rules. Rule 2(2) explains that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues.
4. Rule 2(4) puts a duty on the parties to help the Upper Tribunal to further the overriding objective; and to cooperate with the Upper Tribunal generally.
5. Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008 provides:

‘34.—

 - (1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.
 - (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing.
 - (3) In immigration judicial review proceedings, the Upper Tribunal must hold a hearing before making a decision which disposes of proceedings.
 - (4) Paragraph (3) does not affect the power of the Upper Tribunal to—
 - (a) strike out a party’s case, pursuant to rule 8(1)(b) or 8(2);
 - (b) consent to withdrawal, pursuant to rule 17;
 - (c) determine an application for permission to bring judicial review proceedings, pursuant to rule 30; or
 - (d) make a consent order disposing of proceedings, pursuant to rule 39, without a hearing.’
6. I find it appropriate in all the circumstances to exercise the discretionary case management powers found in rule 34 to allow me to determine to question of whether the Judge has made material legal error in the decision to dismiss the appeal on the papers, in light of there being no objection and no evidence of prejudice to either party in proceeding in this manner.

Background

7. The appellant was born on 29 June 1982 and is a citizen of India. The Judge clearly considered the evidence with the required degree of anxious scrutiny before setting out findings of fact from [12] the decision under challenge in the following terms:

- “12. I note that in respect of the refusal decision dated 29 March 2017, the appellant has already challenged by way of Judicial Review. Upper Tribunal Judge Lindsley refused permission on 18 April 2018. In her refusal decision she stated that it was not arguable that permission for JR should be granted, given that when he applied for LTR as a Tier 5 Charity worker, he had last been granted leave to remain as a Tier 4 student migrant at a College which was not a recognised body as required.
13. Moreover, when the appellant’s appeal was allowed on 6 May 2016, the Respondent did make a decision, which granted the appellant 60 days leave to vary his leave. He chose to do that and he made a Tier 5 Charity Worker application which had no prospect of success. That was the matter which was unsuccessful by the JR. I cannot revisit the JR matter.
14. The appellant’s human rights claim is based solely on his length of residence in the United Kingdom. As matters stand, the appellant has remained in the UK unlawfully since 12 May 2017. The appellant has no partner or children in the UK and has not advanced any reasons as to why he cannot return to India and gain employment there.”
- 8.** The appellant relied on grounds of appeal asserting the Judge failed to consider the material evidence relating to the purported break in his continuous leave/failure to give reasons asserting the Judge overlooked a legislative provision which could have had a material effect on the decision namely that the old version of section 82(2)(d) of the Nationality, Immigration and Asylum Act 2002 applied. The grounds also assert the decision of 9 March 2017 failed to contain notice of a right of appeal, was therefore not valid, and that the appellants section 3C leave continued until he lodges a notice of appeal wavering said procedural irregularity. The Judge’s findings that the appellant leave had been unlawful since 12 May 2017 is therefore said to be perverse. The appellant asserts he satisfies paragraph 276 on the basis of his continual lawful residence. Ground 2 asserts the Judge placed excessive weight upon the previous judicial review proceedings when the issue before the judge in those proceedings was whether the appellant met switching requirements from Tier 4 to Tier 5. The availability or otherwise of a statutory right of appeal was not an issue. Ground 3 argues the Judge applied excessive weight to the appellant’s variation application from Tier 4 (General) Migrant to a Tier 5 (Charity worker) and reached an irrational conclusion. The grounds assert the Judge erred in law in failing to engage with the core of the appellant’s arguments including submissions on the issue of whether a statutory right of appeal was denied. The appellant was denied the opportunity to widen his grounds of appeal as permitted the old regime. Ground 4 asserts the Judge erred in failing to grapple with a concession made on behalf of the Secretary of State during the course of the appeal for reasons set out in the appellants grounds. Ground 5 asserts the Judge failed to consider the evidence from the appellant’s solicitors which is said to highlighted the respondent’s errors in denying the statutory right of appeal on the earlier occasion and referring to a Senior Presenting

Officer's appeal review which is said to have conceded that the dispute surrounding the section 3C leave is a matter that will form part of the article 8 assessment. Ground 6 asserts the Judge failed to conduct an adequate proportionality exercise in failing to give proper weight to the fact the appellant had been in the United Kingdom in excess of 10 years without a criminal record and with lawful leave and failed to consider the full breadth of what is said to be relevant matters. It is also asserted the Judge failed have regard to the explanation provided by the appellant regarding his immigration history.

Error of law

- 9.** The appellants further submissions received following the directions referred to above open with the following comment:

“As a starting point we wish to highlight the decision of UTJ Rebecca Owens in which she accepted the Appellant's legal position on his historic 3C leave. The UTJ Owens went on to find that this was a factor that needed to be taken into consideration in an Art 8 proportionality assessment which FTJ Ross in the first instance failed to achieve was material to the outcome which could have been materially different but for this failure. There was nothing to show that the judge had canvassed this point in his determination. The FTJ Ross failed to deal with this issue all and consequently therefore his conclusions are untenable in law.

- 10.** Upper Tribunal Judge Owens did not accept the appellant's legal position in relation to any historic section 3C leave was correct. Judge Owens granted permission to appeal to the Upper Tribunal on the basis that in her opinion it was arguable the Judge failed to give adequate reasons in respect of the appellant's arguments in relation to his historic 3C leave as set out above, no more. This is not a finding that there is any merit in the submissions made but rather that there were worthy of further investigation.
- 11.** In the written submissions the appellant states that the Judge was wrong to have taken a point about the breaking of his lawful residence in 2017 claiming this to be contrary to the respondent's own concession in an appeal review by a Senior Presenting Officer at Leeds. The respondent's position on this point taken in a Rule 24 reply received on 24 June 2020 is that it is not accepted that any concession was made in the review capable of revealing exceptional circumstances that are needed in order for any Article 8 appeal to succeed. A reading of the material relied upon at pages 102 - 108 of the appellant's appeal bundle which he claims was a concession by a Senior Presenting Officer does not read as such. The last email of 30 August 2019 states “The appellant is unable to meet the Rules because section 3C leave cannot be reinstated respectively, therefore the Tribunal will need to consider the issue under Article 8”. The appellant claimed to have met the requirements of the Rules in an email dated 21 August 2019. Arguments put by the appellant's representative were rejected by the Senior Presenting Officer who clearly did not make the suggested concession or anything that created legitimate expectation or reasonable belief that this was the case.

- 12.** The appellant repeats the contention that an application made on 29 April 2014 was refused on 29 March 2017 against which an appeal was lodged on 16 June 2019. As a result the decision of 12 May 2017 which maintained the earlier refusal did not bring the appellants 3C leave to an end. The appellant claims that he is entitled to Section 3C leave to the point he became appeal rights exhausted which he claims extended beyond 12 May 2017.
- 13.** The respondent in her Rule 24 reply notes that the position has always been that it was for the appellant to show he had 10 years unbroken lawful leave to remain in the United Kingdom and that since he arrived on 21 February 2009 he had leave to 2 February 2017 but since then he has made numerous applications, including a judicial review application, all of which failed.
- 14.** The decision in Ahmed [2019] EWCA Civ 1070 is relied upon by the respondent.
- 15.** The appellant's immigration history reads:
- 21/02/09 arrived in the UK with EC as student valid 15/12/08 to 31/01/11.
 - 14/01/11 applied in time for LTR as a Tier 4 student, refused on 14/02/11 with right of appeal.
 - 01/03/11 appeal lodged. 09/03/11 appeal allowed. 14/02/12. LTR granted until 30/04/14.
 - 21/01/14 applied for LTR as a Tier 4 student. Rejected due to no biometrics.
 - 29/04/14 applied for LTR as Tier 4 student. 02/03/15 refused with right of appeal. 17/03/15 appeal lodged. 06/05/16 appeal allowed. 60 days granted leave expired on 02/02/17.
 - 29/04/14 applied for LTR outside the immigration rules. Voided due to variation.
 - 25/01/17 applied for LTR as A Tier 5 migrant. Refused with right of Administrative Review 20/04/17.
 - 12/05/17 decision maintained and Administrative Review completed.
 - 01/05/18 applied less than 14 days out of time for LTR on the basis of Article 8 private life. 11/01/19 refused with out of country right of appeal.
 - 25/01/19 applied less than 14 days out of time for LTR on the basis of long residence. 23/04/19 voided due to variation.
 - 06/04/19 current out of time application for LTR on the basis of long residence.
- 16.** The applicant claims that the 29 April 2014 application was refused but the refusal notice failed to advise the appellant he had a right of appeal. The chronology suggests on 17 March 2015 an appeal was lodged against that decision, hence waiving the defect, and allowed on 6 May 2016 resulting in the grant of a short period of leave of 60 days to enable the appellant to find a Tier 4 sponsor. That leave expired on 2 February 2017. An in-time application issued on 25 January 2017 for

leave as a Tier 5 migrant was made which conferred upon the appellant a right of Administrative Review.

- 17.** Decisions eligible for Administrative Review are those made on: (a) in country Tier 4 applications made on or after 20 October 2014 by either a main applicant or dependant (b) in country Tiers 1, 2 or 5 applications made on or after 2 March 2015 by either a main applicant or dependant, including indefinite leave to remain applications under those routes (c) in country applications where the decision was made on or after 6 April, unless the applicant applied as a visitor or made a protection or human rights claim and for which the outcome is that the application is either: refused, approved and a review is requested of the period or conditions of leave granted.
- 18.** The appellant's Tier 5 application having been made on 25 January 2017 falls within this period. It is accepted that Administrative Review is not available for decisions made on: (a) applications under the points-based system made before the date on which administrative review commenced for that route (20 October 2014 for Tier 4 and 2 March 2015 for Tiers 1, 2 and 5) (b) applications under Appendix EU (Family Permit) (c) applications as a visitor (d) protection claims (e) human rights claims (f) applications for leave to remain outside the Immigration Rules (g) transfer of conditions(TOC), no time limit(NTL) or replacement biometric immigration document applications, but none of these are arguably applicable to the appellant's case. It is also not made out there was any challenge to any failure to grant a right of appeal in the proceedings that came before the Upper Tribunal by way of judicial review. It is not made out the Judge erred in failing to go behind and reopen such proceedings.
- 19.** Any leave extended by virtue of section 3C ended at the completion of the Administrative Review process on the 12 May 2017. Applications made thereafter did not have the effect of retrospectively extended 3C leave as found by the Court of Appeal in Ahmed. By 12 May 2017, the applicant had not attained 10 years continuous lawful residence in the United Kingdom.
- 20.** The reason the refusal of 2017 did not mention a right of appeal is because the respondent's case is that no right of appeal existed in relation to that decision which was only challengeable by way of Administrative Review. That right was granted to the appellant which he exercised.
- 21.** The appellant fails to establish legal error in the Judges finding that there was a break in the appellant's lawful residence such as he did not have 10 years continuous lawful residence. Such finding has not been shown to be infected by arguable legal error.
- 22.** In relation to the article 8 proportionality exercise; there is no arguable merit in the assertion the Judge failed to consider all the evidence or undertake the required assessment. The Judge was clearly aware of the period of time the appellant had been in the United Kingdom carefully noting the appellant's immigration history. At [14] the Judge specifically notes that the appellant's human rights claim is based solely on his length of residence in the United Kingdom. It is not made out the

appellant relied upon any other factor that the Judge failed to consider. The Judge also notes that the appellant has remained unlawfully since 12 May 2017 when the Administrative Review was completed, and it is also relevant to the weight to be given to any private life that the appellant's status in the United Kingdom has always been precarious. The Judge notes the appellant has no partner or children in the UK and had not advanced any reason as to why he could not return to India and gain employment there.

- 23.** Whilst the appellant disagrees with the Judge's conclusions the Judge clearly considered the "historic injustice" submissions and rejected the same. The grounds fail to establish the Judges findings are outside the range of those reasonably available to the Judge on the evidence.

Decision

- 24. There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

- 25.** The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 3 August 2020