



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/13352/2019 (V)

THE IMMIGRATION ACTS

Remote hearing via Skype at Field House
On 12 May 2020

Decision & Reasons Promulgated
On 05 June 2020

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

XIANGQIN CHEN (V)
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Richardson, instructed by QC Immigration
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS
(Decision given orally on 12 May 2020)

Introduction

1. This is an appeal brought against the decision of First-tier Tribunal Judge Swinnerton promulgated on 9 December 2019, permission of appeal having been granted by First-tier Tribunal judge Foudy on 20 April 2020.
2. Underlying the appeal, and the focus of the First-tier Tribunal's consideration, is a decision of the Secretary of State dated 17 July 2019 refusing the appellant's human rights claim. In substance, the appellant's application for leave to remain was

founded on paragraph 276B of the Immigration Rules – it being asserted that the appellant had lived continuously and lawfully in the United Kingdom for a period in excess of ten years and that she is, as a consequence, entitled to Indefinite Leave to Remain.

3. At the hearing before the Upper Tribunal Ms Cunha accepted that the paucity of reasoning and the failure to the First-tier Tribunal take account of, what on the face of it are, material matters leads to the First-tier Tribunal's conclusion of Article 8 being flawed by legal error. In light of such concession, and my concurrence, I need only deal briefly with the grounds of challenge.

Decision and Reasons

4. The challenge to the First-tier Tribunal's decision is threefold.
5. The first ground raises a procedural fairness challenge - it being said that neither the appellant nor the appellant's legal representative received notice of the hearing of 6 December 2019 and that, as a consequence, neither attended that hearing. It is asserted that the First-tier Tribunal acted unfairly in proceeding in their absence.
6. On a procedural fairness ground, the question for the Upper Tribunal is not whether the First-tier Tribunal acted reasonably in proceeding with the hearing on the information that it had available to it, but whether there has been a deprivation of a right to a fair hearing (See SH (Afghanistan) v SSHD [2011] EWCA Civ 1284).
7. Good practice dictates that factual assertions made in the grounds of challenge should be supported by a witness statement. For reasons which have not been explained, the Tribunal has not been provided with such a statement in the instant case. There is though other evidence before me which supports the contentions made.
8. The Tribunal's file demonstrates to my satisfaction that a hearing notice was sent to the appellant's legal representatives. It was not sent to the appellant directly because the legal representatives failed to provide an address for the appellant (other than a care of address), even after being directed to do so. The Tribunal's file also discloses that both the appellant's legal representative and the appellant attended before the First-tier Tribunal on 11 November 2019. On that date, the appeal was on the float list but was not reached and so it was adjourned to be heard on a later date.
9. There is evidence before me in the form of an email written directly to the Tribunal on 12 December 2019 (i.e. 3 days after the First-tier Tribunal's decision was promulgated), by a person who appears to be in the employ of (or at least writing on behalf of) QC Immigration – the email having emanated from an address which ends “@qc-immigration.com”. This email asserts that the hearing notice for the hearing of 6th December was not received.
10. Looking at this evidence as a whole, and despite the absence of witness statements supporting such evidence, I am prepared to accept that neither the appellant nor her legal representatives received notice of the hearing of 6 December. This finding leads inexorably to the conclusion that there has been procedural unfairness, although not through any fault of the First-tier Tribunal.

11. There are two further grounds of challenge which I will also deal with briefly. The second ground relates to the First-tier Tribunal's application of paragraph 276B of the Immigration Rules. It was the appellant's case before the First-tier Tribunal that the requirements of the Rules had been met. This is explicitly said to be so in more than one place in the documentation produced by the appellant. This submission is, however, doomed to failure because the appellant accepts there was a gap in her continuous lawful residence in the United Kingdom. Following the reasoning set out in the decision of the Court of Appeal in Masum Ahmed [2019] EWCA Civ 1070 and of Mr Justice Sweeney in this Tribunal in R (on the application of Ahmed) v Secretary of State for the Home Department (para 276B - ten years lawful residence) [2019] UKUT 10 (IAC), continuity of lawful residence is a self-standing limb of paragraph 276B and if there is a gap in such residence then the requirements of that Immigration Rule cannot be met.
12. The final ground of appeal revolves around the application of Article 8.
13. The First-tier Tribunal concluded as follows in relation to Article 8: *"I do not find that the appellant has had at least 10 years continuous lawful residence on the UK and I do not find that the decision of the Appellant [sic] is disproportionate"*. When looked as a whole, the First-tier Tribunal's Article 8 consideration falls woefully short of being adequate. It is clear that when a Tribunal is considering the application of Article 8 it must initially consider the extent of an appellant's private and family life. In this case the First-tier Tribunal proceeded straight to the assessment of proportionality without making any findings as to the extent of the appellant's private life in the United Kingdom - a matter upon which the appellant provided evidence. In addition, given that the substance of the appellant's case on the issue of proportionality revolved around an allegation that the gap in continuous residence was contributed to or caused by Home Office delay, one would have expected to see clear findings on this issue. The decision is, however, silent on this submission and the evidence relating thereto.
14. The consequence of all of the above is that the First-tier Tribunal's decision is set aside in its entirety. This appeal has to be determined afresh. As the appellant has not yet had a lawful and fair hearing before the First-tier Tribunal the appropriate, and unusual, course is for this matter to be remitted back to the First-tier Tribunal to be heard afresh before a judge other than Judge Swinnerton.

Notice of Decision

The decision of the First-tier Tribunal is set aside, and the appeal is remitted to the First-tier Tribunal to determine afresh.

Signed *Mark O'Connor*

Upper Tribunal Judge O'Connor
Date 13 May 2020