



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: HU/16983/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 12th October 2023

Before
MR C M G OCKELTON, VICE-PRESIDENT
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

SAGAR GAUTAM
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. Z Jafferji, Counsel, instructed by Jein Solicitors

For the Respondent: Mr. T Lindsay, Senior Home Office Presenting Officer

Heard at Field House on 22 November 2022

DECISION AND REASONS

Introduction

1. The appellant is a national of Nepal and currently aged 34. He sought leave to remain in this country on long residence grounds and was refused.

2. He now appeals against the refusal of his human rights (Article 8 ECHR) appeal by the First-tier Tribunal (Judge Howorth), sent to the parties on 3 January 2020.
3. He was initially refused permission to appeal to this Tribunal by Upper Tribunal Judge Jackson on 12 July 2020. He challenged that decision by means of a *Cart* Review (CPR 54.7A). The application was initially refused by a decision of Knowles J, dated 2 November 2020. Andrews LJ granted permission to appeal by an order sealed on 13 May 2021. The decision of the Upper Tribunal refusing permission to appeal was quashed in the High Court by an order of Master Gidden, dated 7 February 2022.
4. The Vice-President granted permission to appeal to this Tribunal by a decision dated 14 February 2022.

Relevant Facts

5. The appellant was granted entry clearance as a student on 21 August 2009. Upon entering the United Kingdom on 29 August 2009, he was granted leave to enter until 22 June 2013. He applied to vary his leave and was subsequently granted leave to remain valid until 19 April 2015.
6. On 17 April 2015 the appellant applied for an EEA residence card as an extended family member of an EEA national. The card was issued on 7 March 2016, and later revoked by the respondent on 25 January 2019. He asserts that he did not receive notice of the revocation and so believed that he continued to benefit from a right of residence.
7. On 8 September 2019, the appellant applied for indefinite leave to remain based upon ten years long residency. By a decision dated 1 October 2019, the respondent refused the application under paragraph 276D of the Immigration Rules as the appellant could not demonstrate ten years' continuous residence in the United Kingdom. The respondent identified the appellant's durable relationship as having broken down on 1 October 2016, and so appellant was considered to have only accrued seven years and one-month lawful leave. The appellant contends that the relationship broke down in September 2017.
8. The respondent did not consider that exceptional circumstances arose requiring her to grant leave on Article 8 grounds outside of the Rules.

First-tier Tribunal Decision

9. The appellant's primary contention before the First-tier Tribunal was that as the respondent did not serve a revocation notice in respect of his EEA residence card, he acquired ten years lawful leave and so succeeded under paragraph 276B of the Rules. Additionally, he relied upon paragraph 276ADE(1)(vi) of the Rules or failing that on Article 8 outside the Rules.
10. The Judge observed that whilst the appellant's relationship with his former EU citizen partner continued, he enjoyed lawful residence in this country. However, upon the durable relationship ceasing to exist, the appellant was no longer lawfully resident, and there was no requirement that a notice of revocation be served. Whichever date of the break-up was correct, neither permitted the appellant to accrue the required ten-years continuous lawful residence required by paragraph 276B(i)(a).
11. The appeal under paragraph 276ADE(1)(vi) was dismissed, with the Judge reasoning that there were no very significant obstacles to the appellant's integration on return to Nepal, as he had returned on occasion and stayed with his grandmother for several months.
12. As to Article 8 outside of the Rules, the Judge placed several factors on the appellant's side of the balancing exercise but concluded that they were insufficient to outweigh the public interest in his removal from this country.

Submissions

13. Mr Jafferji identified two points as being advanced on behalf of the appellant:
 - (1) When carrying out the proportionality assessment, the First-tier Tribunal failed to consider the proper matrix; and
 - (2) The First-tier Tribunal erred by failing to consider all relevant matters.
14. Mr Jafferji accepted that the appellant could not meet the requirements of paragraphs 276A and 276B of the Rules. However, this was not determinative of the Article 8 appeal, as the Rules are not a complete code: *Hesham Ali v. Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 W.L.R. 4799, at paras. 51 - 53, 80. The Judge was therefore bound to carry out an independent assessment of Article 8 outside of the Rules and so was required to consider the respondent's relevant policy guidance, 'Long Residence' (version 16.0) (28 October 2019), which was in force at the date of the hearing, though post-dates the respondent's decision. He described the policy

- as providing generous treatment to those on temporary admission, with large areas of discretion contained within it. The failure by the Judge to consider it resulted in the balancing exercise being fundamentally flawed.
15. He submitted that the assessment of proportionality under Article 8 is a fact-sensitive exercise, requiring a fair balance to be struck between competing public and private interests. The proportionality test is to be applied on the circumstances of the individual case. An error in the weighing of relevant factors, or if relevant factors are simply not considered, undermines the proportionality balance: *GM (Sri Lanka) v. Secretary of State for the Home Department* [2019] EWCA Civ 1630, [2020] I.N.L.R. 32, at [55].
 16. The grounds of appeal identified various discretionary provisions within the policy as being relevant considerations in the proportionality balance, though Mr Jafferji expressly relied upon only two provisions in oral submissions:
 - i. There is discretion to depart from the requirements of continuous lawful residence, and grant leave for the specific purpose of enabling those on temporary admission to qualify for indefinite leave to remain under paragraph 276B, at page 6 of the document
 - ii. Discretion must be applied, and time spent in the United Kingdom as lawful residence counted, for an EU or EEA national or their family members exercising their Treaty rights to reside in this country, at page 25.
 17. Mr Jafferji accepted that the points now taken on appeal were not raised before the First-tier Tribunal. The crux of his submission was that in combination the respondent, the appellant's former legal representative and Judge Howarth were wrong in law.
 18. Mr Lindsay identified a substantial overlap between the two grounds of appeal advanced.
 19. There was nothing presented to establish that the appellant's case had not been advanced competently before the First-tier Tribunal. The Judge had not been asked to consider the policy, and on the facts arising it was irrelevant. Neither of the two provisions of the policy relied upon made a difference to the proportionality assessment in respect of time spent in this country, whether lawfully or unlawfully. He has no family life, and his private life must be given little weight.

20. Ultimately, the reliance placed upon the policy was ineffective, as the public interest in immigration control is not reduced by the appellant not meeting the requirements of the Rules.
21. A decision letter concerned with the revocation of the EEA residence card had been served to file because the respondent did not have an address for the appellant, and it was not the appellant's case that there was no power to take such step. The respondent properly treated the time the appellant enjoyed residing as a durable partner under EU law as akin to lawful residence, but that time was insufficient to meet the ten-year requirement of the long-residence rule.
22. In reply, Mr Jafferji submitted that the policy establishes circumstances where leave can be granted outside of the Rules to correct injustice. The policy is capable of leading to a fair balance being struck in favour of the appellant.

Discussion

23. The respondent's 'Long Residence' policy guidance has had various evolutions. Version 16 confirmed that it was directed towards the consideration of settlement and leave to remain applications from people relying on long residence in this country. It provides guidance to decision-makers in respect of several technical matters that may arise when undertaking consideration, including breaks in continuous residence, breaks in lawful residence, early applications, and out of time applications as well as the consideration of the public interest.
24. Mr Jafferji's case was, in essence, that the permitted exercise of discretion in the policy establishes that less weight may be placed on the respondent's side of the Article 8 balancing exercise where a person had complied with and been respectful to immigration control, even though they could not meet the relevant ten years continuous residence requirement.
25. There was no express reliance upon this policy before the Judge. It is not said that the previous representatives acted negligently in failing to bring it to the attention of the Judge, nor have we seen any correspondence requesting the previous representatives to explain why the policy document was not filed with the First-tier Tribunal. It must in principle be right, in determining whether there was an error of law by the Judge, to consider what the Judge was asked by the parties to determine and on what basis.
26. Turning to the first provision of the policy on which Mr Jafferji purported to rely, the actual wording is as follows:

'If an applicant with temporary admission meets all the other requirements of rule 276B, discretion can be exercised by Border Force to grant them 6 months' code 1 outside the Immigration Rules, so they can make an application in the UK'. [emphasis added]

27. Prior to the repeal of paragraph 21 of Schedule 2 of the Immigration Act 1971 on 14 January 2018, temporary admission was a status which allowed a person to be lawfully in the United Kingdom without being detained at time when they had not been granted leave to remain. It had to be given under the written authority of an immigration officer. The appellant has not sought to establish that he was granted temporary admission consequent to the break-up of his relationship with his EU citizen partner. Rather, his position is that he never received formal notice that his EEA residence card was revoked. We note the decision letter of 1 October 2019 makes no reference to the appellant enjoying temporary admission. On its face, this provision of the policy does not aid the appellant. It has no relevance to his appeal.
28. The second provision of the policy concerns 'time spent in the United Kingdom with a right to reside under the EEA Regulations'. The policy details:

'Time spent in the UK does not count as lawful residence under paragraph 276A of the Immigration Rules for third country nationals who have spent time in the UK as:

- the spouse, civil partner or other family member of a European Union (EU) national,

...

During the time spent in the UK under the provisions of the EEA regulations, the individuals are not subject to immigration control, and would not be required to have leave to enter or remain

However, you must apply discretion and count time spent in the UK as lawful residence for an EU or EEA national or their family members exercising their treaty rights in the UK.'

29. In other words, time spent in the United Kingdom in this (and other specified) categories is not lawful within the terms of the Rules: that is because of the definition in the Rules. But time spent is to be calculated in the way set out in the policy and can therefore contribute to a decision that leave should be granted outside the Rules as the analogy of paragraph 276A. The Judge made no error under this head. She accepted that residence under the relevant EEA Regulations could properly count as lawful residence in this way. But the passage of the policy cited above does not begin to suggest that time spent in this

country under the provisions of the EEA Regulations diminishes the public interest requirement that there be ten years continuous lawful residence. The appellant accepts that the Judge was correct in her calculation that he has spent less than ten years lawfully in this country.

30. Nothing that we have been shown suggests that any policy provided for a person who has less than ten years lawful residence is to be granted leave on the basis advanced. The appellant has therefore not identified that he properly falls to be considered under any of the provisions of the respondent's Long Residence policy. No doubt his previous legal representatives were aware of this fact, and properly did not rely upon the policy before the Judge.
31. Despite not being informed as to the respondent's long residence policy, the Judge placed all matters favourable to the appellant on one side of the balancing exercise: his lawful residence in this country whilst in a relationship with his former EU national partner, his establishment of a private life in this country by virtue of his residence here initially as a student, and later as an extended family member, his employment in this country, his friendships and that much of his residence was lawful. The Judge gave lawful reasons for concluding that such matters considered together did not outweigh the public interest in his leaving this country.

Notice of Decision

32. The decision of the First-tier Tribunal sent to the parties on 3 January 2020 does not disclose an error of law. The appeal is accordingly dismissed.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber
6 October 2023