IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002719
First-tier Tribunal No: HU/51137/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 19th of October 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
UPPER TRIBUNAL JUDGE SHERIDAN

Between

Muhammad Khairul Amin
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr S Gill, KC, instructed by City Heights Solicitors
For the Respondent: Mr Tufan, Senior Home Office Presenting Officer

Heard at Field House on 25 September 2023

DECISION AND REASONS

Introduction

1. Both members of the panel have contributed to this decision.

2. On 31 August 2020 the appellant applied for indefinite leave to remain (ILR) in the UK on the basis of long residence under paragraph 276B of the Immigration Rules. On 7 January 2021 the respondent refused his application, on the ground that there was a gap in his leave between 22 August 2014 and 29 November 2014 and therefore the condition in paragraph 276B(i)(a) (to have had at least ten years' continuous lawful residence in the UK) was not satisfied.

3. The appellant appealed to the First-tier Tribunal where his appeal came before Judge of the First-tier Tribunal Cary ("the judge"). The central issue before the judge was whether the appellant could benefit from the principal of *de minimis*

non curat lex (the law does not concern itself with trifling matters). The judge dismissed the appeal on the basis that:

(a) the *de minimis* principle has no part to play in interpreting paragraph 276B of the Immigration Rules;

(b) even if it does, the failure to comply with the Rules by the appellant was not *de minimis*.

4. The appellant appealed and was granted permission by the First-tier Tribunal.

5. For the reasons set out below, we have dismissed the appeal on the basis that the appellant's breach of the Rules was not *de minimis*. In the light of this conclusion, we have not needed to decide the question of whether, and if so to what extent, the *de minimis* principle is, in general, applicable in an assessment of long-residence under paragraph 276B of the Immigration Rules.

Immigration History

6. The appellant's immigration history is not in dispute. The parts of the history relevant to the issues before us are as follows:

(a) On 6 November 2010 the appellant entered the UK.

(b) In March 2012 the appellant applied for leave which was granted until 22 August 2014. The respondent accepts that the appellant had continuous leave for the purposes of paragraph 276B until 22 August 2014.

(c) On 23 August 2014 (at 10am) the appellant left the UK.

(d) On 13 November 2014 the appellant applied for leave. On 29 November 2014 the appellant entered the UK with leave.

(e) There is no dispute about the appellant's leave since entering the UK on 29 November 2014.

Decision of the First-tier Tribunal

7. The central argument advanced on behalf of the appellant in the First-tier Tribunal was that because he only overstayed by ten hours on 23 August 2014 the *de minimis* principle is applicable.

8. After considering several cases including, in particular, the Upper Tribunal decision in *Chau Le (Immigration Rules – de minimis principle)* [2016] UKUT 186 the judge concluded that the *de minimis* principle had no applicability in this context. The judge then found that, in any event, the breach of the Rules was significant (i.e. not *de minimis*) because after leaving the UK on 23 August 2014 the appellant did not apply for further leave until 13 November 2014.

9. The judge then briefly considered Article 8 ECHR outside the Immigration Rules. Before doing so, he stated (in paragraph 31) that the appellant's representative:

> "did not pursue a broader Article 8 argument at the hearing …".

Grounds of Appeal

10. The grounds focus on the question of whether the *de minimis* principle is applicable in a case concerning paragraph 276B of the Immigration Rules. It is submitted that the judge was wrong to follow *Chau Le* and to find that the *de minimis* principle was inapplicable.

11. The grounds also argue that the judge erred by not giving adequate consideration to the appellant's private life in the UK.

12. There is no discussion in the grounds about whether the judge was wrong to find that the breach of the Rules was not *de minimis.* This appears to have been assumed by the drafter the grounds, who at paragraph 10 stated:

> "In this appeal the relevant period of overstay was only 10 hours. It is clearly *de minimis*. This (sic) is no dispute about it."

Relevant Law

13. The provisions of the Immigration Rules relevant to the issues in dispute are 276A(a) and 276B(i)(a) and 276B(v). These provide:

> 276A(a)
>
> 'Continuous residence' means residence in the United Kingdom for an unbroken period, and for these purposes a period shall not be considered to have been broken where an applicant is absent from the United Kingdom for a period of six months or less at any one time, provided that the applicant in question has existing limited leave to enter or remain upon their departure and return …"
>
> 276B(i)(a)
>
> The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that: (i)(a) he has had at least 10 years continuous lawful residence in the United Kingdom."
>
> 276B(v)
>
> ….(v) the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where –
>
> (a) the further application was made before 24 November 2016 and within 28 days of the expiry of leave; or
>
> (b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied."

14. The respondent's long residence policy (both at the time of the respondent's decision and currently) states the following:

> You can overlook a period of unlawful residence if the applicant leaves the UK after their valid leave has expired but before 24 November 2016, and:
>
> • applies for entry clearance within 28 days of their original leave expiring
>
> • returns to the UK with valid leave within 6 months of their original departure

15. Considering these provisions together, the following is apparent:

(a) If, by operation of the *de minimis* principle, the appellant is treated as having leave when he left the UK on 23 August 2014 then he would have been able to remain outside the UK for up to six months and the continuity of his residence would not be broken so long as he had leave on return.

(b) If the appellant did not have when he left the UK on 23 August 2014 his overstaying would be overlooked so long as he applied for entry clearance within 28 days of leaving the UK and he returned to the UK (with leave) within 6 months.

The Breach of the Immigration Rules was not *De Minimis*

16. The focus of Mr Gill KC's submissions was on why, in his view, the *de minimis* principle is applicable in a case turning on 276B of the Immigration Rules and why, in the light of Court of Appeal and other Upper Tribunal authorities, *Chau Le* was wrongly decided.

17. However, it only becomes necessary to consider these submissions if the breach of the Immigration Rules by the appellant was in fact *de minimis*.

18. Mr Gill QC argued that it was plainly *de minimis* because it involved a period of only ten hours. He also argued that as many of those ten hours would have been spent preparing for (or in the process of) leaving the UK these ten hours did not have the quality of residing in the UK. He argued that ten hours in the context of a claim of ten years' continuous residence is a trivial amount of time and therefore it is *de minimis*. The appellant should have been treated as though he departed at midnight, upon the expiry of his leave.

19. In our judgment, determining the correct characterisation of the appellant's immigration status on 23 August 2014 (whether as overstayer or present with leave) is not the correct point in the chronology of the appellant's immigration history at which to apply the *de minimis* rule, if indeed it is applicable at all in this context. That is because the long residence rules themselves make provision to cater for the distinction between a person who stayed beyond the expiry of their leave, on the one hand (see para. 276B(v)(a)), and a person who leaves while not in breach of the immigration laws, on the other (see para. 276A(a)). The immigration status of the appellant at the point of his departure determined the potential routes available to him to return to the UK with a lawful immigration status.

20. The correct characterisation of the appellant's immigration status on 23 August 2014 determined whether he had to apply for a further grant of leave and return to the UK with six months of his absence (para. 276A(a)), or whether he had to re-apply for further leave within 28 days of the expiry of his leave (para. 276B(v)(a)) in order to maintain continuity of residence for the purpose of a grant of leave under para. 276B. The principle of *de minimis*, if it applies in this context, would be engaged *at the expiry of those time limits*, not at the earlier stage of the appellant's immigration chronology, on 23 August 2014, when the appellant's immigration status determined which of those time limits would later apply to the appellant.

21. Accordingly, whether or not the appellant held leave when he left the UK on 23 August 2014 did not have the hard-edged effect for which Mr Gill contends it did. His immigration status at that time simply determined which of the two available routes to return to the UK in a manner which maintained continuity of the appellant's residence applied.

22. The appellant left the UK after his leave expired (albeit by only 10 hours). He therefore needed to apply for entry within 28 days of leaving the UK (ie by 21 September 2014) in order for this period of overstaying to be disregarded. However, the appellant did not apply until 13 November 2014.

23. Taking over two months to make an application that needed to be made within 28 days is not *de minimis*. This is not, therefore, a case where there has been only a *de minimis* breach of the Rules. Rather, it is a case where there has been a breach (the ten hour delay in leaving the UK), the only significance of which is in the determination of the applicable time limits available to the appellant to effect his lawful return, namely those specified in paragraphs 276A(a) or 276B(v)(a) respectively. The appellant's breach of the rules on his departure on 23 August 2014 was followed by a significant breach (the substantial delay in making the application to re-enter the UK). In these circumstances, we are satisfied that the *de minimis* principle could not assist the appellant. It is therefore not necessary for us to consider Mr Gill's remaining submissions about whether, as a general matter, the *de minimis* principle can be applied in this context.

24. Mr Gill made submissions concerning the appellant's claimed inability to make a further application within 28 days of leaving the UK due to his health conditions at the time. In our view, that cannot assist the appellant. First, the judge was plainly not persuaded by the appellant's evidence on that issue (see para. 30, "no medical evidence on that has been produced…"). Secondly, and more significantly, as the judge correctly noted in the same paragraph, "the rules are straightforward and if an applicant cannot comply with them for any reason[,] he cannot expect to be granted the right to settle in the United Kingdom." The appellant did not meet the requirements of the Immigration Rules. Consequently, the judge did not err by dismissing the appeal under Article 8 on that basis.

As a "Broader Article 8 Argument" was not Pursued the Judge did not Need to Consider the Issue

25. We now turn to the appellant's argument that the judge erred by not adequately considering his private life in the UK.

26. The difficulty with this argument is that it does not appear that the appellant advanced an argument about his private life in the UK in the First-tier Tribunal. The otherwise detailed skeleton argument is silent on this issue and the judge stated in paragraph 31 of the decision that the appellant's representative did not "pursue a broader Article 8 argument at the hearing".

27. As the "broader Article 8" issue was not raised before the First-tier Tribunal, it was not legally erroneous to not consider it. This is made clear in *Lata (FtT: principal controversial issues)* [2023] UKUT 00163 (IAC), where it is stated in paragraph 28:

> It follows that unless a point was one which was Robinson obvious, a judge's decision cannot be alleged to contain an error of law on the basis that a judge failed to take account of a point that was never raised for their consideration as an issue in an appeal. Such an approach would undermine the principles clearly laid out in the Procedure Rules.

28. The appellant's case before the First-tier Tribunal was that by operation of the *de minimis* principle he satisfied (or should be treated as satisfying) paragraph 276B. It was in no way obvious – and certainly not *Robinson* obvious – that the appellant had a viable case under Article 8 ECHR in the event that the conditions of 276B were not (and were treated as not being) met. For this reason alone, we reject Mr Gill KC's argument that the judge erred by not considering in more detail the appellant's private life in the UK.

29. In any event, we do not agree that the judge's (brief) consideration of Article 8 was inadequate. The judge correctly identified that section 117B(5) of the 2002 Act was applicable. This provides that only little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. The Supreme Court has recognised (in *Rhuppiah v SSHD* [2018] UKSC 58) that in exceptional circumstances this can be overridden, but there was no evidence before the judge that, on any view, could be considered exceptional in the sense identified in *Rhuppiah*, and in any event no such argument was advanced in the First tier Tribunal. The appellant's ability to speak English and his financial independence (which must be considered under sections 117B(2) and (3) of the 2002 Act) are only neutral factors (see *Rhuppiah*); and there was very little evidence, beyond the appellant's academic achievements, to establish a significant private life in the UK. On the other hand, the public interest in the maintenance of effective immigration controls clearly weighs against the appellant because, as explained above, the delay in applying for entry until 13 November 2014 was substantial. In our view, it was clearly open to the judge to find, for the reasons he gave, that the appellant's removal from the UK would not be disproportionate under Article 8 ECHR.

Notice of Decision

30. The decision of the First-tier Tribunal did not involve the making of an error of law and stands.

D. Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

12 October 2023