



Case No: UI-2023-001797

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

First-tier Tribunal No: HU/57856/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 8 September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EFIGINIA PJETRAJ
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr M Sowerby of Counsel

Heard at Field House on 18 August 2023

DECISION AND REASONS

1. This is an appeal against a decision of First Tier Tribunal Judge O'Garro signed on 28 April 2023 allowing the appeal of Ms Efiginia Pjetraj against a decision dated 13 October 2022 to refuse leave to remain in the United Kingdom.
2. Although before me the appellant is the Secretary of State and the respondent is Ms Pjetraj for the sake of consistency with the proceedings before the First-tier I shall continue to refer to Ms Pjetraj as the Appellant and the Secretary of State as the Respondent.

3. The issue in the appeal is narrow and in the circumstances I do not propose to set out all of the background details, which in any event are a matter of record on file, are summarised in the decision of Judge O'Garro, and are known to the parties.
4. The decision that is the subject of these proceedings was made pursuant to an application dated 26 September 2022 for leave to remain in the United Kingdom as a partner.
5. The application failed under the Immigration Rules for the sole reason that the Respondent was not satisfied that the Appellant met the 'Eligibility Immigration Status Requirement'. The Respondent's decision-maker found that the Appellant was present in the UK in breach of immigration laws and did not have the benefit of paragraph 39E of the Immigration Rules, and otherwise paragraph EX.1 of Appendix FM was not satisfied.
6. The First-tier Tribunal Judge rejected the Respondent's reasoning and found that paragraph 39E did apply. In the circumstances the Appellant met all of the requirements of the Immigration Rules; as such it would not be proportionate to remove the Appellant from the UK because the public interest was met by the fact the Appellant satisfied the requirement of immigration control (**TZ (Pakistan) [2018] EWCA Civ 1109**). The appeal was allowed accordingly.
7. The Respondent in applying for permission to appeal has contended that the Judge was in error in concluding that paragraph 39E applied.
8. However, before me Mr Avery declined to develop the Grounds of Appeal and acknowledged that the approach of the Judge had been correct. Although he did not formally withdraw the Respondent's appeal, he did not seek to pursue it and accepted that it should be dismissed.
9. I am grateful to Mr Avery for his sensible and realistic approach: in my judgement it is plain that the First-tier Tribunal Judge correctly interpreted and applied paragraph 39E to the facts of the case.
10. In respect of the facts, it is to be noted that the relevant findings of the Judge are essentially identical to those that were contended by the Respondent; there is in any event no challenge to the Judge's findings of primary fact.
11. The relevant history is:

(i) The Appellant having entered the United Kingdom as a student with leave until 28 July 2021, made an 'in-time' application for further leave to remain under the so-called '10 year family route' on 27 July 2021.

(ii) In due course the application was refused on 10 September 2022.

(iii) There was before the First-tier Tribunal a dispute as to whether the decision of 10 September had ever been served on the Appellant. The Judge found against the Appellant in this regard, concluding that the Respondent had demonstrated on a balance of probabilities that the decision had been duly served. (See paragraphs 24-31 of the First-tier Tribunal's 'Decision and Reasons'.)

(iv) Be that as it may, the Appellant made her application for leave to remain as a partner on 26 September 2022.

12. The Respondent's decision-maker concluded that the application of 26 September 2022 was "*16 days Out of Time*". Moreover, it was asserted that paragraph 39E did not apply – but without any reasoning being stated for this view.
13. The Appellant argued before the First-tier Tribunal in the first instance that the decision of 10 September 2022 had never been served – (an argument that was rejected as identified above); in the alternative, that she had the benefit of paragraph 39E. The Appellant's position in this regard was articulated in the Grounds of Appeal (see paragraph 8). The Appellant's Skeleton Argument did not expand upon this, focusing instead on the issue of whether or not the decision of 10 September 2022 been served. However, the matter was further articulated in a reply to the Respondent's Review.
14. The Respondent's Review in substance reasserted the position stated in the decision letter (see paragraphs 6 and 7). It was said again that the Appellant's application was 16 days out of time, but there is no express engagement with the wording of paragraph 39E of the Rules.
15. In a 'Reply to Review' it was submitted on the Appellant's behalf that if the decision of 10 September 2022 had been duly served, the Appellant's statutorily extended leave would be further continued for the period in which an appeal could be lodged (14 days), pursuant to section 3C(2)(b) of the Immigration Act 1971, and that the application made on 26 September 2022 would have been made only 2 days into the further 14 day period afforded under paragraph 39E: (see 'Reply to Review' at paragraph 7.

16. In my judgement that position is manifestly correct, with reference to paragraph 39E(2)(b)(ii) of the Immigration Rules:

“39E. This paragraph applies where:

...

(2) the application was made:

(a) following the refusal or rejection of a previous application for leave which was made in-time; and

(b) within 14 days of:

...

(ii) the expiry of any leave extended by section 3C of the Immigration Act 1971”.

17. It would also appear that the Appellant enjoyed the benefit of paragraph 39E by virtue of 39E(2)(b)(iii), which adds the following alternative: *“(iii) the expiry of the time-limit for making an in-time application for administrative review or appeal in relation to the previous application (where applicable)”.*

18. This is the conclusion that Judge O’Garro reached: see paragraphs 32-34. I consider it unimpugnable. And, now, so does the Respondent - albeit belatedly.

19. I have noted above that the Respondent did not offer any reasoned articulation of how the facts of the Appellant’s case were to be considered against the wording of paragraph 39E in either the decision letter or the Review. Nor is it apparent from the decision of the First-tier Tribunal what, if any, submissions the Respondent’s Presenting Officer made at the hearing.

20. Moreover, the Respondent’s Grounds of Appeal are in part misconceived, and in part (as is now acknowledged) based on a mis-reading of paragraph 39E.

(i) The Grounds in part submitted that the Judge misdirected herself in finding that the Appellant’s application of 26 September 2022 *“was made in time”*. However, that was not the Judge’s finding. Paragraph 39E is not limited to applications made ‘in time’: indeed, to the contrary, its purpose is to provide some leeway when applications are made after the expiry of leave. The Judge’s finding that paragraph 39E applied was not a finding that the application been made ‘in time’. This aspect of the Grounds is misconceived.

(ii) The core submission is this: *“It is asserted that to find that an applicant is allowed a period of 14 days 3C leave following any*

refusal, followed by a further period of 14 days in which to make any application or appeal, is a mistake as to a material fact as detailed in rule 39E itself". Ignoring the inaccuracy that there is nothing inherent in the Judge's decision that would suggest that the effect of paragraph 39E is to extend the period for lodging an appeal ("a further period of 14 days in which to ... appeal"), the fundamental difficulty with this submission is that it runs contrary to the plain wording of paragraph 39E, which on its face does indeed apply where an application is made within 14 days of the expiry of the period of 14 days permitted to lodge an appeal. It is unhelpful and unfortunate that the drafter of the Grounds has not cited the relevant parts of paragraph 39E - 39E(2)(b)(ii) and (iii) - but has instead only cited 39E(2)(b)(i).

21. In all the circumstances it is now common ground that there is no error of law on the part of the First-tier Tribunal: her Decision must stand accordingly.

Notice of Decision

22. The decision of the First-tier Tribunal contained no material error of law and stands.
23. Ms Efiginia Pjetraj's appeal remains allowed.

Ian Lewis

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

19 August 2023