



IAC-HW-AM-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/49410/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 17th February 2016**

**Decision & Reasons
Promulgated
On 15th March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**M A A
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Ms Savage, Home Office Presenting Officer
For the Respondent: Ms Ofei-Kwatia, Counsel for JS Solicitors, London

DECISION AND REASONS

1. The Appellant in these proceedings is the Secretary of State, however for convenience I shall now refer to the parties as they were before the First-tier Tribunal.

2. The Appellant is a citizen of Pakistan born on 2nd September 1980. He appealed against the Respondent's decision of 21st November 2014 refusing to grant him indefinite leave to remain under the long residence provisions contained in the Immigration Rules and against his removal from the United Kingdom. His appeal was heard by Judge of the First-tier Tribunal Malone on 13th June 2015. He allowed the appeal but only to the extent that he remitted it back to the Respondent for her further proper consideration as he found that the Respondent's decision was not in accordance with the law.
3. An application for permission to appeal was submitted to the First-tier Tribunal and on 14th October 2015 permission was refused by Judge of the First-tier Tribunal Cox. An application for permission to appeal was lodged with the Upper Tribunal and permission was granted by Upper Tribunal Judge Smith on 2nd November 2015. The permission states that the judge arguably erred in failing to appreciate that even if the Appellant's former solicitors were to blame for not making a further application within 28 days of the refusal of the first, rather than lodging a judicial review, this incorrect step made no difference to the outcome of the Respondent's decision because the Appellant would still not have been in the United Kingdom lawfully after 23rd June 2014 so he could not complete ten years' continuous residence until 10th December 2014. Even if his application had been made within 28 days from when his last leave expired on 23rd June 2014 any period after 21st November 2014, which was the date the Respondent refused the Appellant's application, could not count towards a period of lawful residence, so the Appellant could not complete a period of ten years.
4. There is no Rule 24 response.
5. The Presenting Officer submitted that he is relying on the grounds. He submitted that he accepts that there are errors in the refusal letter but this Appellant's appeal rights were exhausted on 23rd June 2016 and his application for indefinite leave to remain was made in August 2014. He came to the United Kingdom on 10th December 2004 so the ten year period expires on 10th December 2014. In these circumstances the terms of the Immigration Rules cannot be satisfied for indefinite leave to remain.
6. The Presenting Officer submitted that the First-tier Judge's decision lacks coherence but he submitted that the reasons for refusal are made clear in the refusal letter at page 3 and there is no merit in a remittal to the Home Office. The Rules cannot be satisfied. He submitted that any discretion available has already been applied so the First-tier Judge's decision is flawed. He asked me to set it aside.
7. Counsel for the Appellant submitted that the judge did look at the claim correctly. She submitted that the judge was aware of the situation at 23rd June 2014 and I was referred to paragraphs 14 to 19, 20, 21 and 23 of the decision. She submitted that the judge considered everything and refers in particular to the errors in the refusal letter. She submitted that the

judge did not fail to consider the removal of the Appellant but found that the Respondent's decision could not stand because it lacks clarity and coherence. She submitted that the judge referred the matter back to the Respondent because of the Respondent's lack of anxious scrutiny when making her decision and so found that the decision was not in accordance with the law. She submitted that the fairest way to deal with this is for the Respondent to reconsider and provide a new refusal letter as there are matters which the Respondent has not considered.

8. She submitted that it is clear that the judge was aware of the problems the Appellant had because of errors made by his previous representatives.
9. Counsel referred me to page 3 of the refusal letter relating to discretion and submitted that matters were put to the First-tier Judge which were not dealt with in the refusal letter and because of the errors in the refusal letter discretion was not exercised properly.
10. She submitted that the Respondent cannot say that all relevant matters have been properly considered when the Respondent made her decision.
11. Counsel submitted that the judge has dealt with all of these matters and considered paragraph 276B of the Rules.
12. Counsel submitted that when Article 8 is considered these matters will weigh heavily in favour of the Appellant in any balancing exercise.
13. I was referred to paragraph 13 of the decision in which the refusal letter is referred to and whether the exercise of discretion was appropriate as the application could not demonstrate ten years' continuous lawful residence. She submitted that the decision shows exactly why the refusal letter was not in accordance with the law.
14. I was asked to find that there is no error of law in the First-tier Judge's decision and that the claim should be referred back to the Respondent for reconsideration. She also pointed out that the Respondent was unrepresented at the hearing.
15. She submitted that the permission granted by the Upper Tribunal concerns matters which were outwith the decision. The Upper Tier Judge focuses on the ten year timescale and the fact that the Appellant did not have 3C leave when he applied for settlement. She submitted that the matters referred to in the permission were outside the remit of the First-tier Judge and that there is no error of law in the First-tier Judge's decision.

Decision and Reasons

16. On 8th August 2014 the Appellant applied to the Respondent for indefinite leave to remain under the long residence provisions contained in the Immigration Rules. There are errors in the refusal letter and the Respondent refused the application but regardless of these errors the Appellant's appeal rights became exhausted on 23rd June 2014. His application of 7th August 2014 was therefore 45 days out of time. Paragraph 276B(v) cannot be satisfied. The Respondent dealt with discretion in her decision. She states that as Judicial Review does not extend 3c leave and the appellant did not submit any further applications within 28 days it is considered it is not appropriate to exercise discretion in the Appellant's application.
17. It is clear that the Appellant received wrong advice from the solicitors advising him at that time. It is also clear that the Appellant in this case is appealing against a removal decision and not an out of time long residency application. For a person's leave to continue under 3c while an application is pending the application for variation has to be submitted before the leave expires. That did not happen here. In this case the legal challenge cannot be overcome by the faults in the refusal letter. As the Appellant's leave ended on 23rd June 2014 the ILR application on 7th August 2014 was made by the Appellant as an overstayer.
18. The Appellant's solicitors are to blame for not making a further application within 28 days of refusal of the first application rather than lodging a judicial review but the incorrect advice made no difference to the outcome of the claim because the Appellant was not in the United Kingdom lawfully after 23rd June 2014. The ten years was up on 10th December 2014. The Respondent refused the Appellant's next application on 21st November 2014 so even if the application had been made within 28 days from the date when his last leave expired on 23rd June 2014 any period after 21st November 2014 could not count towards a period of lawful residence and he could not complete a period of ten years. In these circumstances the Respondent would not have exercised her discretion any differently.
19. The judge did not consider Article 8 in his decision but as the Appellant's leave was based on his studies while he has been in the United Kingdom the appeal could not have succeeded based on his private life. With regard to family life the Appellant's wife has no right to remain in the United Kingdom although she has not received a removal notice. The terms of Article 8 under the Rules cannot be satisfied under Paragraph 276ADE as he has not been in here for a sufficient period or under Appendix FM when public interest is considered. There is nothing compelling in this case which could lead to the claim being considered outside the Rules.
20. As this Appellant's application cannot succeed there is a material error of law in the First-tier Tribunal's decision.

Notice of Decision

21. As there is a material error of law in the First-tier Tribunal's decision promulgated on 23rd June 2015 it must be set aside.
22. Because of the facts of this case it is not possible for the Appellant to succeed in his application under the Rules and there is no good arguable case for considering the application outside the Rules.
23. I therefore dismiss the Appellant's appeal.
24. Anonymity has been directed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge I A M Murray