



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/10547/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 13 July 2018

Decision and Reasons Promulgated  
On 06 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

**BABAR AZIZ**  
(ANONYMITY ORDER NOT MADE)

Appellant

and

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Jaffarji (for Syeds Law Office Solicitors)

For the Respondent: Mr T Wilding (Senior Home Office Presenting Officer)

**DECISION AND REASONS**

1. This is the appeal of Babar Aziz, a citizen of Pakistan born 20 August 1979, against the decision of the First-tier Tribunal to dismiss his appeal on human rights grounds on 30 January 2018, itself brought against the decision of the Secretary of State of 11 September 2017 to refuse his claim to remain in the UK on family life grounds.
2. The Appellant arrived in the UK and was granted leave to enter as a student on 7 October 2007, that leave ultimately being granted until 31 October 2011, at which point

he successfully switched his immigration category to that of Tier 2 migrant; ultimately he was granted further leave until 20 October 2017, but on 15 April 2016 that leave was curtailed to end prior to its expressed expiry date, to a date of 19 June 2016. By that time he had made an in-time application for indefinite leave to remain.

3. His application was refused because the Secretary of State believed that the Appellant had used deception by relying on an English language test result that had been fraudulently obtained. He was interviewed on 17 August 2017 and his answers that day did not satisfy the Secretary of State that he had truly passed the test in question in person.
4. The evidence underlying the Respondent's decision was a "ETS Lookup Tool" recording that the Appellant's English speaking and writing tests were taken on 18 October 2011. The First-tier Tribunal was unimpressed by the Home Office's case on this point, as that date was different to the one given in a letter produced by the Appellant recording that the test was in fact taken the following day. His results that day were also in question, as the letter stated that ETS had been unable to authenticate them. However, in the light of the conflicting evidence, the First-tier Tribunal found that the Secretary of State had not discharged the burden of proof to put Appellant's integrity in issue in the first place.
5. The First-tier Tribunal then went on to determine the viability of the Appellant's human rights claim. His argument was that he had achieved a decade of lawful residence and that this represented an effectively indefeasible human rights claim, as it meant he satisfied the Immigration Rule on continuous lawful residence. The Judge looked at the Home Office guidance on this issue, noting that it countenanced the raising of a long residence argument of this nature on appeal, though only where further grounds of appeal to such effect were raised. It was not apparent that any such further grounds had been lodged. Accordingly the Judge concluded that there was no jurisdiction to consider the issue.
6. Once the appeal was assessed on conventional human rights grounds outside the Rules, long residence under the Rules aside, there was no evidence to show an exceptional case and the Appellant's precarious immigration status throughout his UK residence counted strongly against his departure being disproportionate. Accordingly his appeal was dismissed.
7. Grounds of appeal argued that the First-tier Tribunal had overlooked the statement of additional grounds which had been filed in the course of proceedings which had raised the matter of long residence. Counsel who had appeared below did not believe that the Secretary of State had raised any objection to this ground of appeal being raised: the Presenting Officer had merely submitted that judicial consideration of the issue would bypass the security checks that would normally accompany the assessment of a "ten year" application. The Secretary of State had in fact determined an application of this nature, as shown by the reference to his having resided in the UK for almost ten years

at the date of decision, and accordingly the matter was properly before the First-tier Tribunal for decision.

8. Permission to appeal was granted on 31 May 2018 by the First-tier Tribunal, on the basis that it was arguable that the appeal on human rights grounds should have been considered on the basis that the ten year route had been adequately raised before the Judge, and its requirements shown to be satisfied. That might have had a material impact on the assessment of proportionality.
9. Mr Jaffarji contended that the application had been refused by reference to Rule 276B of the Rules, which was clearly cited in the refusal letter. He stressed that it was clear that the only issue in play on the appeal was the long residence route, as otherwise the Appellant would have given evidence regarding his private life ties to the UK and his ability to integrate on his country of origin were he required to return there. Indeed, were the Appellant to be shut out from arguing broader private life points, his case would be amenable to the application of the fresh claim test were he to seek to press it before the Secretary of State in the future. The long residence route should not be viewed as a "new matter" given that it involved no new facts than those originally before the Home Office decision maker. Thus there had been no necessity for the Secretary of State's consent and the First-tier Tribunal had erred in law in failing to consider the Appellant's ability to meet this route.
10. Mr Wilding argued that, applying *Mahmud*, the Appellant's case as argued at the appeal hearing fell to be treated as a new matter, as it had not formed part of his application and had not been addressed in the refusal letter. It was readily apparent from the Presenting Officer's stance on the appeal that consent had not been given. Accordingly the First-tier Tribunal lacked jurisdiction to consider the issue, and it had been entitled (indeed bound) to consider the claim on conventional private life grounds, inside and outside the Immigration Rules having regard to the factors identified in section 117B of the Nationality Immigration and Asylum Act 2002. Thus the First-tier Tribunal had come to the right conclusion, albeit he acknowledged that its express reasoning might not have been perfect.

## Findings and reasons

11. Part V of the Nationality Immigration and Asylum Act 2002 makes provision for appeals in respect of protection and human rights claims and so far as relevant to this appeal provides as follows:

### **"82. Right of appeal to the Tribunal**

(1) A person "P" may appeal to the Tribunal where -

- (a) the Secretary of State has decided to refuse a protection claim made by P,
- (b) the Secretary of State has decided to refuse the human rights claim made by P, or
- (c) the Secretary of State has decided to revoke P's protection status.

### **84. Grounds of appeal**

- (1) An appeal under section 82(1)(a) (refusal of protection claim) must be brought on one or more of the following grounds -
- (a) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention;
  - (b) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;
  - (c) that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).
- (2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the grounds that the decision is unlawful under section 6 of the Human Rights Act 1998.

### **85. Matters to be considered**

- (1) An appeal under section 82(1) against the decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).
- (2) If an appellant under section 82(1) makes a statement under section 120, the Tribunal shall consider any matter raised in a statement which constitutes a ground of appeal of a kind listed in section 84 the decision appealed against.
- (3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.
- (4) On an appeal under section 82(1) ... against a decision the Tribunal may consider... any matter which it thinks relevant to the substance of the decision, including... a matter arising after the date of decision.
- (5) But the Tribunal must not consider a new matter unless the Secretary of Status has given the Tribunal consent to do so.
- (6) A matter is a "new matter" if -
- (a) it constitutes a ground of appeal of a kind listed in section 84, and
  - (b) the Secretary of State has not previously considered the matter in the context of -
    - (i) the decision mentioned in section 82(1), or
    - (ii) a statement made by the appellant under section 120."

12. The Upper Tribunal has considered the proper interpretation of sub-sections 85(5)-(6) in *Mahmud* [2017] UKUT 488 (IAC). The headnote states:

"2. A 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal.

3. In practice, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be

factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive.”

13. The Immigration Rules provide:

**“Requirements for indefinite leave to remain on the ground of long residence in the United Kingdom**

**276B.** 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.
  - (ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:
    - (a) age; and
    - (b) strength of connections in the United Kingdom; and
    - (c) personal history, including character, conduct, associations and employment record; and
    - (d) domestic circumstances; and
    - (e) compassionate circumstances; and
    - (f) any representations received on the person’s behalf; and
  - (iii) the applicant does not fall for refusal under the general grounds for refusal.
  - (iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.
  - (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 previous 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 Secretary of State’s *Long residence* Guidance (Version 15.0; 03 April 2017) states:

**“Applications being considered 28 days or less before the required qualifying period is completed**

You can grant an application if it is considered 28 days or less before the applicant completes the required qualifying period, provided they meet all the other rules for long residence.

...

**Time awaiting a decision on an application or appeal**

This page tells you when time spent in the UK awaiting a decision on an application or an appeal counts as lawful residence for long residence applications.

...

A person may complete 10 years continuous lawful residence whilst they are awaiting the outcome of an appeal and submit an application on this basis. Under sections 3C and 3D, it is not possible to submit a new application while an appeal is outstanding. However, the applicant can submit further grounds to be considered at appeal.

If the applicant has an outstanding appeal against a decision to refuse leave to remain or indefinite leave to remain, and submits an application for long residence, you must void the long residence application and refund the fee. You must create a file or sub-file and mark it 'PRIORITY'. You must send the file or sub-file to the presenting officers unit (POU) dealing with the appeal. You must send a letter to the applicant or their representative informing them their application has been linked with their outstanding appeal. You must use Doc Gen letter ICD.3207 for this purpose."

15. The *Rights of appeal* Guidance (Version 6.0; 9 October 2017):

"All the facts and circumstances of the case and the appellant should be considered when reaching a decision on consent.

Unless there are exceptional circumstances, consent should be refused if:

- it is necessary to verify facts or documents that are submitted in support of the new matter and these checks are material to the new matter
- the new matter is a protection claim and it has not already been confirmed that the UK is the responsible state for determining the claim
- it is necessary to conduct additional checks such as a person's criminal conviction history or the status of a criminal prosecution."

16. It is clear that the First-tier Tribunal determined the issue of its jurisdiction without regard to the appropriate legal framework. It treated the issue as governed wholly by the Guidance of the Secretary of State. That Guidance may have been relevant case prior to the amendments to the NIAA 2002 made by the Immigration Act 2014, at which time the statutory framework lent in favour of a "one-stop" process. However, the legislative regime has now changed, and in any event, Home Office policy cannot determine the Tribunal's jurisdiction. One must have reference to the statutory provisions.

17. The First-tier Tribunal clearly erred in law in its approach: the governing framework was clearly that found in sub-sections 85(5)-(6) of NIAA 2002. However, it may nevertheless have reached the right outcome albeit by the wrong process of reasoning. That is the primary question that falls to be determined on the appeal before me.

18. Notably, even on its own analysis, the approach of the First-tier Tribunal was mistaken, because it had overlooked a material document. A statement of additional grounds of 22 December 2017 set out that the Appellant had accumulated 10 lawful years of residency in October 2017, had only taken one short holiday in 2012 spending around a month in Pakistan, and had otherwise not left the country. His conduct and associations

were said to be good, subject to the allegation regarding English language cheating that he contested. He had strong work and educational connections here and strong links with friends and family, and he had the appropriate proficiency in the English language and had passed the Life in the UK test. So there was clearly a section 120 statement before the Tribunal. As already indicated, this however is not a conclusive answer to the question of jurisdiction.

19. The legislation essentially posits two questions. The first is whether the issue sought to be argued constitutes a “new matter”. If it is not a new matter, then the general entitlement to consider post-decision evidence bites (section 85(4)). However, it is a new matter, then the second question arises: has the Secretary of State consented to its introduction on the appeal?
20. Here, the matter sought to be raised on appeal was the Appellant's asserted qualification for leave under the long lawful residence route. I accept that that is a tenable ground of appeal having regard to the Human Rights Convention ground identified in section 85(2) of the NIAA 2002. The fact that a person has reached the period of time earmarked by the Immigration Rules as appropriate to found a settlement application, subject to good character etc, is a legitimate ground of appeal, involving their private life.
21. It is instructive to look at the history of how the Appellant put his application to the Secretary of State. The application was made on 16 June 2016, supported by references to various authorities in relation to Article 8 of the ECHR; the facts given regarding the Appellant's actual private life ties in the UK were vague in the extreme, simply referencing unidentified “friends” to whom he was said to be close. The application was stated as seeking “Indefinite leave to remain” based on private life grounds: though not directly relevant to the issues on this appeal, it is not obvious on what basis any such application could have been granted, given that the Rules state that successful private life applications result in a grant of leave not exceeding 30 months, whether made inside or outside the Rules (276BE(1)-(2)).
22. On 5 September 2016, a statement of additional grounds was provided, arguing that the Appellant could demonstrate “continuous lawful long residence in UK” and stressing (though not identifying) the strength of ties with the UK. There was no reference to Rule 276B at this stage.
23. The application was determined on 11 September 2017, before the Appellant had acquired the relevant decade of lawful residence (having entered the country on 7 October 2007). The decision letter notes that the Appellant had “been legally resident in the UK for almost 10 years” and introduces the requirements of the long residence route thus: “Paragraph 276B of the Immigration Rules states that the requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the UK”. It then mentions the general refusal reasons and the requirement for English language proficiency, noting that the asserted dishonesty in a past application meant the Appellant did not meet the relevant requirements. It concludes, on this issue, “if you

*were to make an application on the grounds of your length of residence, such an application would fall for refusal” (emphasis added).*

24. The next step that the Appellant took to update the Secretary of State as to his circumstances was via the section 120 notice of 22 December 2017, the details of which have been summarised already.
25. Was, then, the case on meeting the long lawful residence Rule a “new matter”? I note from the Home Office Guidance that a decision maker would be entitled to consider an application made by reference to Rule 276B notwithstanding that it was made up to 28 days before the necessary decade of residence had been established; here the residence period fell 26 days short. So had the application been voiced with reference to the long residence Rule, the fact it was premature would not have defeated it.
26. However, it seems to me that no application under Rule 276B had been put to the Secretary of State by the date of decision. The September 2016 grounds are most naturally read as emphasising long residence in the context of the Appellant’s integration in the UK. The Secretary of State’s refusal letter did not consider that a long residence application had been made: hence its reference to the potential for making one (which would, on the decision maker’s thinking at that time, have fallen for refusal because of the dishonesty allegation). Practitioners commonly vary their client’s applications to ones based on long residence, as permitted by the Immigration Rules; but there was no such variation here.
27. As Lane J recently pointed out in *Saeed* [2018] EWHC 1707 (Admin), the Secretary of State is under no obligation to second guess any possible alternative basis for an application: a decision maker is entitled to take the material at face value. The original application was voiced in terms of private life ties with the UK, and the September 2016 statement did not reference the Rule now said to have been the entire focus of the Appellant's claim. Mr Zafferji emphasised that there were no new material facts, distinguishing the case from a human rights claim where family life, or the existence of children, entered the equation only post-decision. However it seems to me that there was a vital new fact in play, given the relevant period of residence had not been acquired at the date of decision. Its acquisition was a post-decision development.
28. In these circumstances I consider that the long residence application was indeed a “new matter.” It had not been put to the Secretary of State and the decision maker had not decided it. It had been raised via a section 120 statement before the appeal was heard; but the Secretary of State had not “previously considered” it in the context of that section 120 statement. Accordingly it required consent to be raised as a ground of appeal.
29. Moving onto the second question, it is clear that the Presenting Officer was effectively refusing consent at the hearing. The reference to the long residence application having bypassed the need for criminal record checks is commensurate with the Guidance cited above, which indicates that exceptional circumstances would have to be present to justify consent being given where such checks had not previously been made. It would



seem that the requirements for written reasons, required to be given by that Guidance, were not followed. However, *Mahmud* §40 holds that a failure to follow the published policy on the giving of consent is amenable only to judicial review, and is not a matter falling within the Tribunal's own jurisdiction.

30. Mr Zafferji argued that the Appellant would have had more to say regarding issues such as his private life ties had he been aware that matters beyond long residence were potentially in issue at the appeal; but his application had already been put, in June 2016 and September 2016, on the basis of those very ties, albeit that the opportunity to particularise them had never been taken. Any Appellant before the First-tier Tribunal who is properly advised will be aware of the necessity to carefully specify the evidence on which their claim is based; there had been every opportunity to put together a case for the hearing.
31. I accordingly find that whilst there was an error of law in the decision of the First-tier Tribunal, that error was not material. It reached the right outcome, albeit for the wrong reasons. No challenge was made to its approach to the Appellant's private life claim, the details of which had never been particularised beyond the vague references to friends mentioned above. Its failure was therefore inevitable.

Decision:

The decision of the First-tier Tribunal contains no material error of law.



Signed:  
Deputy Upper Tribunal Judge Symes

Date: 17 July 2018