Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05301/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 December 2018	**On 14 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MOHAMMAD SADEQUR RAHMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Saini, Counsel, instructed by E1 Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge Cohen (the judge), promulgated on 29 October 2018, in which he dismissed the Appellant's appeal against the Respondent's refusal of his human rights claim made on 7 March 2017 (although the precise basis of this claim was varied on 14 September 2017).

2. The essential thrust of the Appellant's case was that he had accrued, at least by the time of the Respondent's decision, ten years' continuous lawful residence in the United Kingdom. This was highly relevant to his

Article 8 claim. In refusing the claim, the Respondent accepted that he had had continuous lawful residence from the point of his entry into this country on 7 October 2007 until 21 January 2015. The lawful residence ceased as this stage, so the Respondent asserted, because an appeal against the refusal of the relevant application (that being on 21 January 2015) had been made out of time. Therefore, the Appellant had become an overstayer. As a result of this, the Appellant had not accrued the necessary period of continuous lawful residence and was unable to satisfy the requirements of paragraph 276B of the Immigration Rules.

3. Other matters were considered, but overall it was concluded that the Appellant's claim had to fail.

Paragraph 276B of the Rules

4. Paragraph 276B provides as follows:

> 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.

5. Paragraph 276A provides, insofar as is relevant here:

276A. For the purposes of paragraphs 276B to 276D and 276ADE(1).

(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 6 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, but shall be considered to have been broken if the applicant:

(i) has been removed under Schedule 2 of the 1971 Act, section 10 of the 1999 Act, has been deported or has left the United Kingdom having been refused leave to enter or remain here; or

(ii) has left the United Kingdom and, on doing so, evidenced a clear intention not to return; or

(iii) left the United Kingdom in circumstances in which he could have had no reasonable expectation at the time of leaving that he would lawfully be able to return; or

(iv) has been convicted of an offence and was sentenced to a period of imprisonment or was directed to be detained in an institution other than a prison (including, in particular, a hospital or an institution for young offenders), provided that the sentence in question was not a suspended sentence; or

(v) has spent a total of more than 18 months absent from the United Kingdom during the period in question.

(b) "lawful residence" means residence which is continuous residence pursuant to:

(i) existing leave to enter or remain; or

(ii) temporary admission within section 11 of the 1971 Act (as previously in force), or immigration bail within section 11 of the 1971 Act, where leave to enter or remain is subsequently granted; or

(iii) an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain.

The judge's decision

6. It is of some relevance that the Respondent was not represented at the hearing before the judge. Having set out a chronology of relevant events in the Appellant's immigration history at [2], the judge goes on in [4] to summarise the Respondent's decision. This included the acceptance the Appellant had had lawful residence between his entry into this country and 21 January 2015. Notwithstanding this, at [16] the judge goes on to find that the Appellant's departure from the United Kingdom in March 2012 (an absence from this country which lasted until his re-entry on 6 September of that year) had broken the lawful residence. This finding effectively put pay to the Appellant's ability to rely on paragraph 276B of the Rules.

7. The judge goes on and deals with Article 8 in the context of paragraph 276ADE and in the wider context, but finds that there was nothing to avail the Appellant.

8. The appeal was duly dismissed.

The grounds of appeal and grant of permission

9. There are two grounds put forward. The first argues that the judge was wrong to have found that the Appellant's departure from the United Kingdom in 2012 broke his continuous lawful residence. Reliance is placed on paragraph 276A of the Rules and the Respondent's own policy guidance. Ground 2 asserts that the judge failed to make any finding as to whether or not the Appellant's leave to remain continued after 21 January 2015.

10. Permission to appeal was granted by First-tier Tribunal Judge Baker on 13 November 2018.

The hearing before me

11. It is fair to say that there was a certain amount of fluctuation on the part of the representatives as to the nature of the real issues in this appeal. That is no criticism of either, but a reflection of a combination of somewhat unclear approach by the judge, the absence of a Presenting Officer at the hearing below, the grounds (which might possibly have been more tightly drafted), and the need to address materiality of certain potential errors.

12. In essence, Mr Saini submitted that the judge was wrong to have taken a point about the break in residence as a result of the Appellant's departure in 2012. This was contrary to the Respondent's own concession in the reasons for refusal letter and there was nothing to show that the judge had canvassed the point at the hearing. In any event he submitted that

paragraph 276A(a)(iii) alone or in conjunction with the Respondent's relevant guidance showed that the circumstances of the Appellant's absence from the United Kingdom did not break the continuous lawful residence.

13. In respect of ground 2, Mr Saini submitted that the real question here was about whether or not the Appellant's appeal against a previous decision had been lodged in time or not. The Respondent had said that it was not, whereas all of the evidence before the First-tier Tribunal judge indicated that it had been. The judge had failed to deal with this issue at all. If the appeal had been lodged in time the Appellant's leave was extended by virtue of section 3C of the 1971 Act until 23 February 2017. Thereafter the Appellant made a fresh application to the Respondent within the fourteen days' grace period. This application was subsequently varied on two occasions and this was permissible. In light of paragraph 276B(v) of the Rules, the grace period had the effect of disregarding that short period of overstaying and therefore the Appellant was able to show that he had accrued the necessary ten years' lawful residence.

14. Mr Saini's fall-back position was that even if the paragraph 276B point could not assist the Appellant, the judge had erred in his overall approach to Article 8 in its wider context.

15. Mr Lindsay submitted that there was no evidence of procedural unfairness by the judge in terms of him taking the point about the 2012 absence. In addition, the Appellant had failed to show that he had a realistic expectation of being able to return to the United Kingdom when he left in March 2012.

16. In respect of ground 2, Mr Lindsay acknowledged the existence of evidence relating to the lodging of the appeal in 2015. He had a concern as to whether section 3C leave could have benefited the Appellant up until the point that he became "appeals right exhausted" in February 2017, or whether his leave to remain had ceased at the time of the Respondent's refusal of the application that had been appealed.

17. At the end of the hearing I gave Mr Lindsay permission to take further instructions on this last point and to provide any written submissions he wished to no later than 24th December 2018 at 5 p.m. No such submissions were forthcoming.

Post-hearing directions

18. Following the hearing before me and having considered the recent decision of the Upper Tribunal in R (on the application of Ahmed) v Secretary of State for the Home Department (para 276B – ten years lawful residence) [2019] UKUT 00010 (IAC), published on 11 January 2019, I deemed it appropriate to issue directions to the parties, inviting further written submissions on the question of whether the Appellant could be said to have accrued the requisite ten years' lawful residence in the United

Kingdom, notwithstanding any errors made by the judge. The directions are annexed to this decision.

19. Both parties duly complied with my directions and I am grateful to Mr Lindsay and Mr Singer (who had drafted the original grounds of appeal) for their assistance.

20. In summary, Mr Lindsay asserts that because the Appellant had not accrued the requisite ten years' lawful residence prior to becoming appeal rights exhausted in February 2017, and because he was not subsequently granted leave, he cannot satisfy paragraph 276(B)(i)(a).

21. Mr Singer candidly, and in my view entirely correctly, conceeded that in light of Ahmed the Appellant cannot show ten years' lawful residence in this country.

22. However, it is still asserted that the judge materially erred in respect of both of the grounds of appeal as originally put forward and that the grounds should be amended to include a wider attack on the judge's approach to Article 8. In essence, the judge failed to assess the Appellant's private life in the correct context of him having had continuous lawful residence between 2007 and early 2017, with regard also to other factors.

Decision on Error of Law

Errors identified

23. I conclude that there is an error of law in relation to ground 1 and the Appellant's departure from the United Kingdom in 2012.

24. First, it is quite clear from the reasons for refusal letter and indeed the judge's own summary of that at [4] of his decision that the Respondent expressly accepted that there had been no break by virtue of the short absence from this country in 2012. There is nothing in the papers before me to indicate that the judge informed the Appellant's representative at the hearing that he was going to take this point in any event. I am satisfied that there was procedural unfairness in this regard.

25. Second, and in any event, even if the matter had been raised by the judge at the hearing, there are no reasons provided in [16] of the decision to indicate on what basis the judge was concluding that the lawful residence had been broken by the absence. There is no reference to paragraph 276A or the Respondent's guidance. In my view it is simply impossible to tell from the face of the decision on what basis the judge was concluding as he did.

26. Third, on the face of the evidence the Appellant left the United Kingdom in March 2012 with valid leave. Once in Bangladesh he applied for and was granted leave to enter in a different category, something which is contemplated by the Respondent's own guidance. Whilst there would of course be no guarantee to an individual who applied for fresh leave to

enter whilst outside of the United Kingdom that they would obtain this, the fact that the Respondent's guidance indicates that a change in the category of leave is permissible, combined with the Appellant's good immigration history, would have shown a strong arguable case that the Appellant did have a reasonable expectation of being able to return to the United Kingdom.

27. I turn to ground 2 and the issue of whether the Appellant could rely on periods after 21 January 2015. The judge has not engaged with this issue at all. This is despite the fact that there was clearly a good deal of evidence before him, particularly relating to the lodging of the appeal in 2015. In that regard I have been referred to pages 40 and 41 of the Appellant's bundle and a witness statement provided by the Appellant's solicitors (which I am satisfied was before the judge) dated the day before the hearing. There is an error here as the judge has failed to deal with an aspect of the Appellant's case.

Materiality

28. The question then arises as to whether the errors identified above were material to the outcome of the appeal.

29. I am satisfied that the Appellant's appeal against the Respondent's decision of 21 January 2015 was in fact lodged in time, contrary to the Respondent's assertion.

30. Page 40 of the Appellant's bundle is a fax transmission receipt. It is dated 31 January 2015, records the correct Tribunal fax number, and also confirms the successful transmission of 30 pages. At page 41 there is a cover letter for the notice of appeal, dated 30 January 2015. In addition to this evidence, there is the unchallenged witness statement from the Appellant's solicitor relating to the same issue and confirming that the notice of appeal was lodged within the relevant period.

31. Whilst there certainly does appear to have been some confusion and delay on the Tribunal's side in respect of processing the appeal, it is more likely than not that the appeal itself was made in time.

32. As a result of this, the Appellant would have enjoyed the protection of section 3C leave until he became 'appeals right exhausted' on 23 February 2017. With reference to section 104 of the Nationality, Immigration and Asylum Act 2002, that is when his appeal became finally determined.

33. I do not accept Mr Lindsay's suggestion that once the Upper Tribunal refused permission to appeal the Appellant's leave was to be treated as ending on 21 January 2015. Provided that an appeal is lodged in time (as I have found it to have been), section 3C leave operates until the appeal is finally determined one way or another. The legal position on this is clear: the whole point of section 3C leave is to protect the status of individuals whilst in-time applications or appeals await decisions.

34. I accept that once his appeal rights were exhausted, the Appellant then made a fresh application to the Respondent within the 14 day 'grace' period allowed for by paragraph 276B(v) of the Rules. Once he did that he was fully entitled to vary that fresh application, as he did on two occasions, the first on 20 June 2017 and the second on 14 September 2017.

35. Notwithstanding the matters in the Appellant's favour set out above, he could not have satisfied paragraph 276B(i)(a) in any event, as has now been recognised by Mr Singer in his written response to my post-hearing directions. The concession is correct for the following reasons.

36. I respectfully agree with the relevant conclusions reached by Sweeney J at paragraph 75 of Ahmed. The sub-paragraphs of paragraph 276B are all separate from one another. The Appellant had to show that he had accrued the ten years' lawful residence *before* being able to rely on any disregard of limited overstaying under sub-paragraph (v).

37. The Appellant had clearly not accrued the necessary ten years' lawful residence as at the exhaustion of his appeal rights and the cessation of his section 3C leave on 23 February 2017: he was some eight months' short. Nor had he subsequently been granted further leave to remain as a result of the new application made on 7 March 2017.

38. Therefore, the Appellant simply could not have met all the requirements of paragraph 276B(i)(a). In turn, the judge's errors were not material to the outcome of the appeal insofar as the Rules were relevant to the overall Article 8 claim.

39. Finally, I turn to the wider Article 8 point, this now being the focus of the Appellant's case following the concession made in the written response.

40. The judge's consideration is not perhaps as full as it might have been and I note that section 117B is not mentioned at all. However, and notwithstanding the best efforts of Mr Singer in his written response, in my view what the judge has said is sufficient to have properly disposed of this aspect of the case.

41. The first point to make is the wider Article 8 conclusions are not in fact challenged in the grounds of appeal at all. Mr Singer has sought to amend the grounds of appeal, but I conclude that it is inappropriate to permit this at such a late stage. An attack on the wider Article 8 assessment could, and should, have been put forward at the permission stage.

42. In any event, the judge dealt adequately with the substance of the claim. Paragraph 276ADE(1)(vi) is properly addressed at [18] and, when this is combined with the inability of the Appellant to have satisfied paragraph 276B as well, the public interest in removal was strong, with reference to section 117B(1) and (5) and Agyarko [2017] UKSC 11, at paragraphs 47-48.

43. There was no “near miss” argument available to the Appellant, but in any event he was eight months short of the required ten years, and the length of residence in the United Kingdom was not in and of itself going to act as a compelling circumstance.

44. It is apparent from the face of [20] and [21] that the judge took the Appellant's significant lawful residence in this country into account, together with familial and social ties here. Nothing material was left out of account on the “plus” side of the balance sheet. Equally, factors counting against the Appellant (i.e. matters going to his ability to reintegrate into Bangladeshi society for example) were, in effect, listed in the “negative” side.

45. It is clear that there were no other compelling or exceptional factors in play here despite the contrary suggestion by Mr Singer (see paragraphs 9-10 of the written response).

46. The failure to have specifically gone through the section 117B factors is immaterial in this case. Even taking Rhuppiah [2018] UKSC 58 into account, there was nothing here which could even arguably have led to any conclusion other than a material reduction in weight attributable to the private life because of the precarious nature of the lawful residence. No other factors were capable of enhancing the Article 8 claim.

47. The Appellant's challenge to the decision of the First-tier Tribunal must fail.

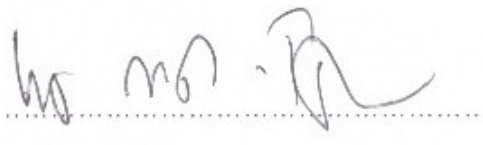
Notice of Decision

The decision of the First-tier Tribunal does not contain material errors of law.

That decision shall stand.

The Appellant's appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed  Date: 31 January 2019

Deputy Upper Tribunal Judge Norton-Taylor

ANNEX: POST-HEARING DIRECTIONS

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05301/2018

THE IMMIGRATION ACTS

MOHAMMAD SADEQUR RAHMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DIRECTIONS NOTICE

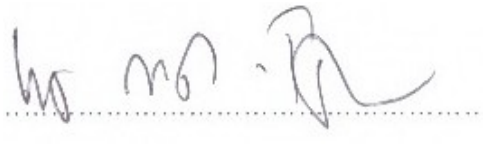
1. Following a hearing on 19 December 2018, I reserved my decision on whether the First-tier Tribunal had materially erred in law.

2. Having considered the evidence and arguments further, and in light of the recent decision of the Upper Tribunal in R (on the application of Ahmed) v Secretary of State for the Home Department (para 276B – ten years lawful residence) [2019] UKUT 00010 (IAC), an issue arises in this appeal which the parties should have the opportunity to address by way of written submissions.

3. I am satisfied that the Appellant had leave (including section 3C leave) until 23 February 2017. This was short of the required 10 years' continuous lawful residence in the United Kingdom. Although the Appellant put in a further application for leave within the 'grace' period set out in paragraph 276A(v), he was not subsequently granted leave to remain. In light of this and the Ahmed decision, can it be said that he nonetheless accrued the necessary period of lawful residence?

DIRECTIONS

1. **Both parties are invited to make any further written submissions on this question;**
2. **Any submissions must be served on the other party and filed with the Upper Tribunal by 5pm on 29 January 2019.**

Signed  Date: 17 January 2019

Deputy Upper Tribunal Judge Norton-Taylor