Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10280/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 April 2019	**On 10 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR USMAN MUNIR
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms D. Ofei-Kwata, Counsel instructed by M-R Solicitors
For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Pakistan, born on 27 August 1982. He arrived in the United Kingdom on 9 September 2006, in possession of entry clearance as a student, valid to 30 November 2007. He made an in time application to extend this leave, which was granted to 30 November 2008.The Appellant made an in time application for leave to remain as a Tier 1 Migrant, which was refused with the right of appeal on 27 January 2009. He appealed against this decision on 16 February 2009 but his appeal was dismissed on

consideration of the papers on 1 June 2010 and he became appeal rights exhausted on 11 June 2010.

2. The Appellant applied for a certificate of approval to marry on 17 December 2009, which was ultimately granted on 12 December 2010. Having obtained the return of his passport from the Respondent, he married his Hungarian national partner on 18 May 2011 and made an application for a residence card, which was granted valid to 2 September 2016. There seems to have been a further application for a residence card made on 16 December and a residence card was granted valid to 22 October 2007, although it is not clear from the papers why this was necessary.

3. The Appellant's marriage broke down in February 2015 and he was divorced on 24 March 2016. The Appellant's residence card was revoked on 1 November 2016. He appealed against this decision on 11 November 2016 but his appeal was dismissed on 26 February 2018 and he became appeal rights exhausted on 13 March 2018. It also appears that the Appellant applied for permanent residence on 28 April 2016 but this application was refused. He claimed asylum on 8 August 2017, but withdrew this claim on 5 January 2018.

4. On 20 October 2017, the Appellant applied for leave to remain in the United Kingdom on the basis of his human rights and private life. This application was refused in a decision dated 18 April 2018. Consideration was given to paragraph 276B of the Immigration Rules but it was noted that the Appellant had become appeal rights exhausted on 11 June 2010 and did not submit a further application until 26 May 2011 and there were no exceptional circumstances justifying the grant of leave outside the Rules.

5. The Appellant appealed against this decision and his appeal came before First tier Tribunal Judge Kimnell for hearing on 8 November 2018. In a decision and reasons promulgated on 4 December 2018, the appeal was dismissed.

6. An application for permission to appeal to the Upper Tribunal was made, in time, on the basis that the Judge had materially erred in that, whilst it was accepted that there was a gap in leave between June 2010 and May 2011, the Judge accepted that the process by which the Appellant had to apply for a certificate of approval on 17 December 2009 was subsequently found to be unlawful [24] thus there was a cogent explanation for the gap in the Appellant's lawful and continuous leave. Had it not been for the Respondent's unlawful policy in requiring the Appellant to apply for a certificate of approval to marry the Appellant would have been able to marry prior to his 3C leave coming to an end in June 2010. In light of these circumstances, the First tier Tribunal Judge failed to give reasons as to why the decision to refuse leave is proportionate at [35]. The decision and reasons is procedurally unfair in that the Respondent's representative applied for an adjournment to allow the Home Office to reconsider matters in light of the

documentation adduced at the hearing and the fact that the gap in the Appellant's leave was as a consequence of the Respondent's unlawful policy in 2009-2010.

7. Permission to appeal to the Upper Tribunal was granted by Deputy Upper Tribunal Judge Mailer in a decision dated 21 February 2019 on the basis that:

> *"It is arguable that the refusal of the application for an adjournment was unfair and prejudicial to the appellant in the circumstances, particularly given that the presenting officer had herself sought an adjournment to consider whether the gap in his continuous leave to remain was referable to the respondent's unlawful policy requiring the appellant to apply for a COA. There was also a letter produced from the Home Office, the veracity of which needed to be checked."*

Hearing

8. At the hearing before the Upper Tribunal, Ms Ofei-Kwata submitted that the Appellant's immigration history set out in the Respondent's refusal decision is wrong and is missing key facts such as the fact that the Appellant applied for a certificate of approval to marry on 17 December 2009 which was not granted for 1 year. She also made reference to the fact that the Appellant had made an FLR(O) application on 12 May 2010, on the basis of his relationship with his EEA national partner: AB 384-402, in respect of which no decision had been received nor had there been any acknowledgment of the application, despite proof of posting at page 384.

9. Ms Ofei-Kwata submitted that the FLR(O) application extended the Appellant's section 3C leave because it was made before he was appeal rights exhausted on 11 June 2010. She submitted that the reference by the Judge at [12] should be to a letter of May 2010 ie. this application and not May 2015. She submitted that counsel for the Respondent at the First tier Tribunal hearing recognized that an adjournment was necessary and that the purpose of the adjournment would be a reconsideration in light of the evidence submitted. The letters referred to stemmed from and related to the certificate of approval. Ms Ofei-Kwata sought to adduce copies of documents relating to the residence card application and certificate of approval to marry.

10. In her submissions, Ms Pal stated that she had checked the GCID notes. She stated that the notes on the Home Office file from Ms Dogra state that the Appellant's representative approached her and said there was a gap in the Respondent's chronology from June 2010 to May 2011, which corresponds with the period of time the certificate of approval was under consideration. Ms Dogra also spoke to a senior caseworker to check the position. Ms Pal confirmed, however, that there definitely is no application noted on GCID for January 2011, nor for May 2010.

11. At this point it became clear that the Appellant wished to speak to his representative and I gave her the opportunity to take his instructions by putting the matter back in the list. Upon her return, Ms Ofei-Kwata provided me with a chronology and copies of the correspondence in respect of the application for a certificate of approval to marry.

12. Ms Ofei-Kwata submitted the Judge ought to have acceded to the adjournment application request, given that the Respondent had made it clear that he would have sought to verify the Home Office documents submitted, which would have given him the opportunity to consider matters holistically. She submitted that it was a question of fairness. She further submitted that it appears as though the only reason the Judge declined the adjournment is that the Appellant had had sufficient time, but he did not explain why an adjournment was not an appropriate course of action. The adjournment was the only way to proceed because it would have enabled the Respondent to take a second look at matters and to consider it fairly. Consequently, no or no proper reasons as to why the adjournment was declined had been provided. Ms Ofei-Kwata submitted that the Judge had ignored all the documentary evidence; the FLR(O) application and piecing together the documentary material over that period. At [22] and [23] of the determination the judge refers to the case record sheet, but some of the evidence is missing and the Judge did not go far enough. She submitted that no findings had been made and no reasons given for not accepting the Appellant's account in relation to paragraph 276B of the Immigration Rules.

13. Ms Pal submitted that this was not an "old style" appeal where the Appellant can plug the gap for one year, but a human rights appeal. Unfortunately what was not addressed at the hearing is that the Appellant had leave in two categories, as a Tier 4 student, then a Tier 1 migrant until November 2008. His application for an extension was refused on 29 January 2009 and his appeal was dismissed and he became appeal rights exhausted in June 2010. In respect of the claimed FLR(O) application made on 12 May 2010, Ms Pal submitted that whilst this was made before the Appellant became appeal rights exhausted, he should have applied to vary his existing grounds of appeal and this application cannot give rise to an outstanding appeal. She submitted that no valid application had been made to the Respondent and there was no chasing letter to the Respondent from the Appellant or his solicitor.

14. Ms Pal submitted that the Respondent's position is that section 3c leave cannot run indefinitely and the Appellant could not vary his leave again whilst awaiting outcome of the appeal. But in any regard the Appellant simply cannot satisfy the requirements of paragraph 276B under the Rules because he subsequently went on to obtain an EEA residence card and time spent in the UK does not count as lawful residence for the purposes of the Rules. He obtained his EEA residence card in 2011. At that point he was residing under the EEA regulations, so he was not subject to immigration

control or the Rules. What he should have done is apply under the EEA Regulations for retained rights of residence and he cannot jump between the two sets of Rules.

15. Consequently, Ms Pal submitted that the failure by the Judge to adjourn was immaterial. The Judge finds the requirements under the long residence rule are not met and dealt with it under article 8 from [19] onwards as he was bound to do and notes that an application was made in 2011 as a family member of the EEA national, that marriage broke down in February 2015 and the divorce took place on 24 March 2016, within 5 years of the marriage. She submitted that the Judge considered the Appellant's private life in the UK at [30] and [31] and concluded that the decision was proportionate and the Appellant could return to Pakistan as he had made several return trips there and there was a family home. Ms Pal concluded that there is no material error of law in the decision of the First tier Tribunal.

16. In reply, Ms Ofei-Kwata submitted that, with regard to paragraph 276B of the Rules, the guidance on Long Residence 15.0, dated 13 April 2017 at page 24 provides that, whilst time spent in the United Kingdom under the EEA regulations does not count, discretion must be applied. In the refusal decision the Respondent did not raise any issues as to qualifying periods apart from the period between 11 June 2010 and May 2011. So in view of the fact that the Respondent has already exercised his discretion and that ultimately there were very clear matters that would have needed to be settled in the material period there would have been a huge difference in the outcome of the appeal. Ms Ofei-Kwata acknowledged that whilst it was a human rights application, if one meets the requirements of the Rules that affects the proportionality of the decision. Consequently, an adjournment was needed for the Respondent to confirm the Appellant's immigration history. In respect of the operation of section 3C, Ms Ofei-Kwata submitted that if a fresh application had been made it was treated as extending section 3C leave because it was before the change in the law on this.

17. I reserved my decision, which I now give with my reasons.

Findings and reasons

18. Whilst the primary issue that I need to decide is whether or not it was procedurally unfair of the First tier Tribunal Judge to refuse to adjourn the appeal at the request of counsel for the Respondent, this application also raises a number of other issues which require determining because they go to the question of materiality.

19. The first issue is whether the Appellant made an application to vary his leave, whilst his extant leave was pending pursuant to section 3C of the Immigration Act 1971 whilst awaiting for his appeal to be determined and if so, the effect of this variation. On 18 November 2008, the Appellant applied for leave to remain as a Tier 1 Migrant, which application was refused in a

decision dated 27 January 2009. The Appellant appealed, in time, on 16 February 2009 and thus his leave was extended by virtue of section 3C. It is now claimed that the Appellant made an FLR(O) application on 15 May 2010, whilst his appeal was pending and that application has never been determined. Whilst a copy of that application is contained in the Appellant's bundle at 384-402 along with a copy of evidence of postage, there is no reference in the GCID Home Office file notes in respect of the Appellant to receipt of this application.

20. In any event, it is clear from the terms of section 3C(3) of the 1971 Act, inserted by the Immigration & Asylum Act 1999, that an application for variation of a person's leave to enter or remain in the United Kingdom may not be made while that leave is treated as continuing as a result of this section. This is also reflected in the first version of the relevant Home Office guidance, albeit it postdates the period in question, in respect of section 3C and 3D leave, version 1.0 valid from 13 March 2014 at page 15 that:

> "*While the person's leave is extended by section 3C or 3D, they cannot make a new application to extend leave. Section 3C does, however, allow the person to vary the grounds of their application at any time before it is decided by the Secretary of State. This is as a result of the Court of Appeal's decision in 'JH (Zimbabwe) [2009] EWCA Civ 78'*.

This was also the submission of Ms Pal and I find that it is correct. It was not asserted that the Appellant sought to amend the grounds of appeal against the decision to refuse him leave to remain as a Tier 1 Migrant to include a challenge based on his relationship with his then fiancée and I find that even if the Home Office received his FLR(O) application made on 12 May 2010 that, in light of the terms of section 3(c)(3) and the guidance that they were not required to decide that application pending the outcome of the Appellant's appeal.

21. The second issue was that the Appellant applied for a certificate of approval to marry on 17 December 2009, which was ultimately granted on 12 December 2010. The argument put forward is that the Respondent at that time had in place a policy, which was subsequently found to be unlawful. This is reflected in the GCID notes dated 12 December 2010, which provides *inter alia* "*due to the outcome of the May 07 Court of Appeal ruling we are to consider the COA application on the basis of the genuine nature of the claimed relationship*." The Appellant was duly provided with a certificate of approval which enabled him to marry his EEA national fiancée. Consequently, the argument goes, were it not for the unlawful policy, the Appellant would have been granted a certificate of approval in a timely manner and could then have married and applied for a residence card without becoming an overstayer.

22. There are a number of difficulties with this argument. Firstly, it is speculative to assume that either the certificate of approval would have been issued or that the Appellant could have married and obtained a residence

card prior to the date his appeal against the refusal his application for leave to remain as a Tier 1 Migrant was dismissed. Secondly, whilst the Appellant's leave was extended by virtue of section 3C , as is clear from [20] above, the Respondent was not obliged to consider any application to vary his leave, unless the Appellant withdrew his appeal, which would have rendered him an overstayer in any event. Thirdly, any application for a residence card is made pursuant to the Immigration (EEA) Regulations 2006 and not under the Immigration Rules. As a matter of law, time spent in the United Kingdom with a right of residence under the EEA Regulations does not count as lawful residence pursuant to paragraph 276A of the Immigration Rules.

23. Ms Ofei-Kwata sought to rely upon the Home Office guidance on Long Residence, Version 15 dated 3 April 2017 which provides *inter alia* at page 24:

> *This page tells you how to consider a long residence application when a person has spent time in the UK with a right to reside under the European Economic Area (EEA) regulations.*
>
> *Time spent in the UK does not count as lawful residence under paragraph 276A of the Immigration Rules for third country nationals who have spent time in the UK as:*
>
> - *the spouse, civil partner or other family member of a European Union (EU) national*
> - *an EEA national exercising their treaty rights to live in the UK but have not qualified for permanent residence*
> - *former family members who have retained a right of residence*
>
> *During the time spent in the UK under the provisions of the EEA regulations, the individuals are not subject to immigration control, and would not be required to have leave to enter or leave to remain. See EEA Nationals guidance for further information.* ***However, you must apply discretion and count time spent in the UK as lawful residence for an EU or EEA national or their family members exercising their treaty rights to reside in the UK. Sufficient evidence must be provided to demonstrate that the applicant has been exercising treaty rights throughout any period that they are seeking to rely on for the purposes of meeting the long residence rules****…*
>
> *When granting a Long Residence application in which a person has relied on a period of leave in the UK exercising treaty rights as an EEA national or their family member, any grant of leave must be made outside the Immigration Rules."*

24. It is apparent from the terms of the refusal decision dated 18 April 2018 that no consideration to the exercise of discretion was given by the Respondent nor was the time spent by the Appellant as a residence card holder pursuant to his marriage to an EEA national counted as lawful residence.

25. Whilst the two issues I have addressed at [18]-[21] above were raised before the First tier Tribunal, in particular the fact that the delay in providing the Appellant with a certificate of approval was a consequence of a policy by the Respondent which was subsequently accepted to be unlawful, the Judge failed to factor in these arguments to his consideration of the proportionality of the decision.

26. Consequently, I have concluded that the failure by the First tier Tribunal Judge to adjourn the appeal in order for the Respondent to reconsider his decision in light of the guidance set out above was procedurally unfair as it could have made a material difference to the outcome of the appeal. I further find that the Judge's proportionality assessment was materially flawed by his failure to consider the reason(s) the Appellant became an overstayer and that the majority of his leave in the United Kingdom is or should be considered as lawful.

Decision

27. The decision of First tier Tribunal Judge Kimnell contains material errors of law. I set that decision aside and remit the appeal for a hearing *de novo* before the First tier Tribunal.

Directions

28. The parties should use their best endeavours to obtain a full copy of the Appellant's Home Office file notes and copies of all the applications he made to the Respondent, along with any ensuing correspondence and decisions of the Tribunals. This evidence should be submitted to the First tier Tribunal and the opposing party 5 working days before the hearing. A full chronology of the Appellant's immigration history would also be of assistance.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman 7 April 2019