



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

Appeal Number: HU/04639/2019
HU/04644/2019
HU/04649/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 12th October 2020**

**Decision & Reasons Promulgated
On 22nd October 2020**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

**MD MIZANUR [R]
FATIMTATUZ [Z]
ZR
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N O'Brien, instructed by MRKS Solicitors
For the Respondent: Mr Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The First Appellant is a citizen of Bangladesh born on 4 April 1980. The Second and Third Appellants are his dependant wife and child (born on 12 September 2013). They appeal against the decision of First-tier Tribunal Judge T Lawrence, promulgated on 31 October 2019, dismissing their appeals against the refusal of leave to remain on human rights grounds.

2. The Second and Third Appellants' appeals are dependant on the First Appellant. I shall refer to the First Appellant as the Appellant in this decision.
3. The Appellant came to the UK on 3 March 2009 with leave to enter as a student valid until 18 April 2010. He applied for leave to remain as a student, which was granted until 30 March 2013 and further leave to remain as a Tier 1 (post study) work migrant which was granted until 14 August 2014. On 14 August 2014, he applied for further leave to remain as a Tier 1 (entrepreneur) migrant which was refused in November 2014 and his appeal dismissed on 15 August 2016. His subsequent applications for permission to appeal to the First-tier Tribunal and Upper Tribunal were refused and he became appeal rights exhausted on 11 April 2017.
4. On 13 April 2017, the Appellant applied for leave to remain on Article 8 grounds. He varied this application on 22 April 2018 to an application for leave to remain outside the Immigration Rules. He varied this application, on 13 February 2019, to an application for indefinite leave to remain on grounds of long residence. His application for indefinite leave to remain was refused on 5 March 2019 on the grounds that he could not satisfy paragraph 276B(i)(a) or (v) of the Immigration Rules and his removal to Bangladesh would be proportionate.
5. The Second and Third Appellants came to the UK on 3 May 2014 as dependants of the Appellant who held leave as a Tier 1 (post study) work migrant. Their subsequent applications for leave to remain as dependants of a Tier 1 (entrepreneur) were refused, in line the Appellant, and they became appeal rights exhausted on 11 April 2017. Their subsequent applications for leave to remain were as dependants of the Appellant. These were rendered void by their applications for leave to remain on Article 8 grounds on 11 October 2018. These applications were refused on 26 February 2019.
6. The Appellants' appeals came before First-tier Tribunal Judge Lawrence on 27 September 2019. The judge found that he was bound by the decisions of Juned Ahmed [2019] UKUT 00010 (IAC) and Masum Ahmed [2019] EWCA Civ 1070 and rejected the Appellant's argument that he was temporarily exempt from immigration control. The judge concluded that the Appellant could not satisfy paragraph 276B. The Appellants could not satisfy the Immigration Rules and the judge went on to consider Article 8 and the best interests of the Third Appellant. He concluded the Appellants' removal was justified in the public interest.
7. At paragraph 45.5, the judge rejected the Appellant's argument that he should be treated as having lawful residence until his application for indefinite leave to remain was decided and it was irrational and disproportionate to treat the Appellant as otherwise lawfully resident.

8. The grounds challenge this finding. The grounds did not advance the point that Juned Ahmed and Masum Ahmed were wrongly decided. There was no challenge to the judge's finding, at paragraph 34, that the Appellant was not temporarily exempt from immigration control.
9. Permission was granted by First-tier Tribunal Judge Fisher on 30 March 2020 for the following reasons: "It is arguable that the judge failed to fully engage with the argument raised on behalf of the principal Appellant, and his conclusions on proportionality were affected as a result. This is a matter which is not determined in [Juned Ahmed and Masum Ahmed]."

Submissions

10. Mr O'Brien accepted the Third Appellant was not a qualifying child and the Appellants' leave expired on 11 April 2017. The subsequent application for leave to remain on Article 8 grounds was made on 13 April 2017. This was the first 'gap' in the Appellants' leave.
11. Mr O'Brien submitted that, pursuant to section 3C (4) Immigration Act 1971, the Appellant was unable to make a new application before 11 April 2017 because his appeal was pending. He could not avoid becoming an overstayer. Once the Appellant made an application he was permitted to remain in the UK until it was decided. If he left the UK his application would lapse and there was no 'out of country' right of appeal. He was therefore encouraged to remain in the UK to maintain his application. The Respondent's policy appears to favour remaining in the UK while an application is outstanding and to pursue an appeal.
12. Mr O'Brien submitted the public interest does not support the departure or removal of the Appellant. This was a specific right conferred by Parliament and public policy could not frustrate the exercise of it. It therefore followed that the Appellant's presence in the UK could not be categorised as unlawful. Even if the Appellant's residence was 'technically unlawful' because of the application of law, he should be treated as if he was lawfully present. He should not suffer the statutory disabilities of being an overstayer and he should not be disadvantaged from obtaining rights under the Immigration Rules.
13. Mr O'Brien submitted there was a tension between section 3C 1971 Act and the appeal rights under the Nationality, Immigration and Asylum 2002 Act. The Respondent could use her rule making power or discretion to overcome these shortcomings. The Rules should be interpreted in compliance with Article 8. The Appellant should be treated as if he had leave to remain. Paragraph 276B(v) provided for this by treating a period of overstaying as a period of leave.
14. Mr O'Brien submitted that the case of Masum Ahmed endorsed what was said in Juned Ahmed. It did not 'bite' on this case. Masum Ahmed was concerned with previous periods of overstaying and it was a permission

decision not a final appeal. It was persuasive but not binding. He submitted the arguments were interconnected and he made an application for permission to appeal on the ground that Juned Ahmed was wrongly decided.

15. Mr O'Brien submitted there was no public interest in requiring the Appellant to leave the UK when his application or subsequent appeal was pending. It was wrong to treat him as unlawfully present during this time. The Respondent should treat the Appellant as having lawful residence throughout. There was a very short period between becoming appeal rights exhausted and making a new application which was well within the 14 days permitted. The Appellant was encouraged to remain to pursue his application and the public interest did not require his removal. The judge should have found that the Appellant's removal was disproportionate.
16. Mr O'Brien submitted there was no public interest in treating the Appellant as if he did not meet the Immigration Rules. The provisions should be interpreted in accordance with Article 8. The Appellant's overstaying should be disregarded and he should be treated as if he had leave. This was not a vexatious application because the Appellant was afforded a right of appeal on his human rights claim. It was not certified as clearly unfounded.
17. Mr O'Brien submitted the Immigration Rules should be interpreted so that the 14 day 'overstaying provision' extended leave by 14 days. Alternatively, the Appellant was caught by a wider interpretation of exemption because he could not be removed while his appeal was pending. The Respondent should have exercised her discretion in the Appellant's favour. Juned Ahmed was wrong because the only proper interpretation of paragraph 276B is that leave continues. Paragraph 276A could be relied on to avoid the situation where public policy did not favour the Appellants' removal and the interference with his Article 8 rights was not justified or proportionate. The matter should be reheard.
18. Mr Tufan submitted the judge was obliged to follow the decision of Juned Ahmed which was endorsed by the Court of Appeal. There was no error of law in following those cases. The Appellant should not be permitted to challenge this finding because permission to appeal was not granted on this basis.
19. Mr Tufan submitted the Appellant was trying to introduce words into the Immigration Rules which were not there. The fact that an application is tolerated did not mean the Appellant should be treated as having leave to remain. The Appellant could not satisfy paragraph 276B(i) because he did not have 10 years' continuous lawful residence. His appeal was dismissed in 2016 because he made an unmeritorious application. If the Appellant's submission was followed then an applicant could make several applications just for the purposes of extending his leave.

20. Mr O'Brien submitted the judge had erred in law in failing to engage with the Appellant's argument at paragraph 45.5. He failed to properly assess the public interest factors, in particular the lack of public interest in removing the Appellant while his appeal was pending. The Respondent had a residual discretion which she failed to exercise resulting in a breach of Article 8. The judge had erred in law in his assessment of proportionality.

Relevant legislation

21. The relevant parts of section 3C 1971 Act are as follows:

- (1) This section applies if—
- (a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,
 - (b) the application for variation is made before the leave expires, and
 - (c) the leave expires without the application for variation having been decided.

- (2) The leave is extended by virtue of this section during any period when—

- (a) the application for variation is neither decided nor withdrawn,
- (b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought while the appellant is in the United Kingdom against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission),
- (c) an appeal under that section against that decision, brought while the appellant is in the United Kingdom, is pending (within the meaning of section 104 of that Act).

- (3) Leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom.

- (4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.

- (5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).

22. Section 78 2002 Act provides as follows:

- (1) While a person's appeal under section 82(1) is pending he may not be—

- (a) removed from the United Kingdom in accordance with a provision of the Immigration Acts, or
 - (b) required to leave the United Kingdom in accordance with a provision of the Immigration Acts.
- (2) In this section “pending” has the meaning given by section 104.
- (3) Nothing in this section shall prevent any of the following while an appeal is pending—
- (a) the giving of a direction for the appellant’s removal from the United Kingdom,
 - (b) the making of a deportation order in respect of the appellant (subject to section 79), or
 - (c) the taking of any other interim or preparatory action.
- (4) This section applies only to an appeal brought while the appellant is in the United Kingdom in accordance with section 92.

Conclusions and reasons

23. It is not in dispute that the Appellant came to the UK on 3 March 2009 as a student and his leave to remain ended on 11 April 2017. The Appellant’s leave to remain as a Tier 1 (post study) work migrant expired on 14 August 2014. On the same day, he applied for leave to remain as a Tier 1 (entrepreneur) migrant. His leave was extended by virtue of section 3C and ended when his application for permission to appeal was refused by the Upper Tribunal and he became appeal rights exhausted on 11 April 2017.
24. The Appellant’s leave was brought to an end by operation of statute. It cannot be revived or extended under the Immigration Rules. Section 3C(4) prevents the Appellant from varying his application whilst he has an appeal pending. There is no provision to extend leave once section 3C leave comes to an end. There was no tension between section 3C and appeal rights under the 2002 Act.
25. In this case the Appellant made an application for leave to remain on Article 8 grounds on 13 April 2017. Leave is not extended under section 78 of the 2002. The fact that the Appellant cannot be removed whilst his appeal is pending does not operate so as to grant a period of leave nor does it make this period of residence lawful if his application is subsequently refused as it was in this case.
26. I am not persuaded by Mr O’Brien’s argument that, because the Appellant cannot be removed and he cannot pursue his application if he leaves the country, he should be considered to be lawfully resident. Paragraph 276A does not assist the Appellant. There is no notional form of lawful residence capable of affecting the proportionality assessment.

27. The Appellant is not exempt from immigration control. This point was argued before the First-tier Tribunal and rejected. There was no application for permission to appeal on this issue. Permission was granted on a single ground. I refuse permission to amend the grounds to argue that Juned Ahmed was wrongly decided. The application is significantly out of time and there was no good reason for the delay. The grounds specifically state that this point was not relied on. In any event, the First-tier Tribunal was bound by Juned Ahmed endorsed by Masum Ahmed and no error of law flows from its application.
28. This is a human rights appeal. It is not an appeal under the Immigration Rules. The issue is whether the refusal of indefinite leave to remain breached the Appellants' Article 8 rights.
29. The Appellant does not have 10 years' continuous lawful residence. He cannot satisfy paragraph 276B, Appendix FM or paragraph 276ADE of the Immigration Rules. The judge properly directed himself under Article 8 and section 117B.
30. The Appellant came to the UK in 2009 and his wife and child joined him in 2014. They have remained in the UK without leave since 11 April 2017. There will be no interference with the Appellants' family life because they will return to Bangladesh as a family unit. The best interests of the Third Appellant are to remain with her family. Any private life has been established when the Appellants were in the UK on a temporary basis. Under section 117B of the 2002 Act, little weight should be attached to the Appellants' private life. The Appellants cannot satisfy the Article 8 requirements of the Immigration Rules and there were no unjustifiable harsh consequences identified. On the facts, the public interest outweighs the Appellants' Article 8 rights.
31. The judge engaged with the Appellant's argument at paragraph 45.5 and gave cogent reasons for why he rejected it. There was no error of law in the judge's assessment of proportionality.
32. There was no error of law in the decision promulgated on 31 October 2019. The Appellants' appeals are dismissed.

Notice of Decision

Appeal dismissed

J Frances

Signed
Upper Tribunal Judge Frances

Date: 16 October 2020

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed
Upper Tribunal Judge Frances

Date: 16 October 2020