IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001832

First-tier Tribunal No: HU/55728/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

15th September 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SAJJAD ALI
(no anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Shea, instructed by K & A Solicitors
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 7 September 2023

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born on 17 September 1981. He appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse his application for indefinite leave to remain on the basis of long residence and his human rights claim.

2. The appellant arrived in the UK on 24 August 2012 and was granted leave to enter until 20 January 2014. He was subsequently granted leave to remain until 31 July 2015 and further leave until 29 May 2016. He then submitted an out of time application for further leave on 6 June 2016 which he varied on 21 September 2016. On 7 November

2016 he was granted leave to remain until 7 November 2017, and further leave until 29 December 2018. He made an application for further leave on 19 December 2018 but his application was refused on 13 May 2019 with a right to administrative review. The refusal decision was maintained on 17 June 2019, following the administrative review. On 28 June 2018 the appellant submitted another application for further leave, out of time, and he varied his application on 3 August 2019. On 20 November 2019 he was granted leave to remain until 20 November 2022. The appellant then applied on 1 August 2022 for indefinite leave to remain on the basis of ten years continuous lawful residence in the UK.

3. The respondent refused the appellant's application in a decision of 16 August 2022, concluding that he had failed to demonstrate 10 years of continuous lawful residence for the purposes of paragraph 276B(i)(a) of the immigration rules. The respondent noted that the appellant had made his application of 6 June 2016 out of time and that, whilst the application had been made within 28 days of his leave expiring on 29 May 2016 and would therefore not be treated as overstaying, the period of 160 days from 30 May 2016 until the next grant of leave on 7 November 2016 could not be counted towards establishing 10 years continuous lawful residence. Likewise, the respondent noted that the appellant had made an application of 28 June 2019 out of time and that, whilst the application had been made within 28 days of his leave expiring on 17 June 2019 and would therefore not be treated as overstaying, the period of 154 days from 18 June 2019 until the next grant of leave on 20 November 2019 could not be counted towards establishing 10 years continuous lawful residence. As such, 314 days could not be counted towards the 10 year period and the appellant could not, therefore, demonstrate 10 years continuous lawful residence from his arrival on 24 August 2012, despite having had continuous residence from that time.

4. With regard to Article 8, the respondent noted that the appellant was not eligible to apply as a partner or parent under Appendix FM because his partner was not British or settled in the UK and because he lived as a family unit with his children, and considered that he could not meet the requirements of paragraph 276ADE(1) of the immigration rules on the basis of his private life or demonstrate any exceptional circumstances outside the rules. The respondent noted that the appellant had three children, of whom only the youngest was born in the UK, in early 2019, and that his wife and children had only been in the UK since 1 October 2021, having previously lived in the UK from 8 February 2017 until 4 July 2019 before returning to Pakistan. The respondent considered that it was reasonable to expect the appellant and his wife and children to continue their family life in Pakistan.

5. The appellant appealed against that decision to the First-tier Tribunal and his appeal was heard by First-tier Tribunal Judge Lewis on 24 April 2023. The judge heard oral evidence from the appellant. Relying on the case of Afzal, R (On the Application Of) v Secretary of State for the Home Department [2021] EWCA Civ 1909, as followed in Iyieke, R (On the Application Of) v Secretary of State for the Home Department [2022] EWCA Civ 1147, the judge concluded that the respondent had properly construed the immigration rules and had properly found that the two relevant periods of gaps in lawful residence could not be included in the calculation of the 10 year residence, albeit that they were disregarded for the purposes of considering whether the appellant had overstayed. The judge found there to be no very significant obstacles to the appellant's return to Pakistan and he accordingly dismissed the appeal on Article 8 human rights grounds.

6. The appellant sought permission to appeal against the judge's decision on three grounds: firstly, that the judge's approach to the proper construction of paragraph

276B(v)(a) was inconsistent with the respondent's current long residence policy and the guidance given in Hoque & Ors v The Secretary of State for the Home Department [2020] EWCA Civ 1357 and Asif (Paragraph 276B, disregard, previous overstaying) Pakistan [2021] UKUT 96; secondly, that the judge failed to follow the five-stage approach in Razgar v Secretary of State for the Home Department [2004] UKHL 27 in considering Article 8; and thirdly, that the judge failed to take into account the best interests of the appellant's children under section 55 of the Borders, Citizenship and Immigration Act 2009.

7. Permission was granted in the First-tier Tribunal on all grounds, although with specific reference to the second and third grounds. The respondent filed a rule 24 response opposing the appeal.

8. The matter then came before me for a hearing. Both parties made submissions and those are addressed in the discussion below.

Discussion

9. It is the appellant's case, as asserted in the first ground and as submitted by Mr Shea, that the respondent and the judge both failed to follow the Home Office Long Residence Policy Guidance when calculating the length of his continuous lawful residence in the UK. Mr Shea submitted that the Guidance had been reviewed and updated by the time of the hearing before the judge and that the relevant guidance at that time was no longer Version 17 of the Guidance of 11 May 2021, but was Version 18, published on 13 April 2023, which post-dated the case of Afzal relied upon by the judge. However, as Mr Tan submitted, the specific extract of the Guidance relied upon by the appellant was the same in Versions 17 and 18. Indeed the appellant's own skeleton argument set out, at [8], the extract from Version 17 whereas the grounds of appeal, at [5], set out the extract from Version 18, both of which are identical. As such it is clear that the updated version did not make any material change to the relevant matter relied upon by the appellant.

10. As Mr Tan submitted, the Court of Appeal, in Afzal, addressed the Guidance at [71] to [77] and made it absolutely clear that the appellant could not succeed in demonstrating that the gaps in his residence counted as lawful residence so as to contribute to the relevant 10 year period and that the Guidance did not assist him in doing so. It is helpful to set out in full the comments and findings made by the Court of Appeal in that respect, from [71] to [76]:

> *"Does the guidance dictate a different construction?*
>
> **71.** The appellant also relied upon a decision of the Upper Tribunal, *Muneeb Asif v Secretary of State for the Home Department* [2021] UKUT 00096, where UT Judge Blum, in a carefully reasoned decision, agreed with the analysis of the majority in *Hoque* and therefore concluded that the book-ended period of overstaying counted towards the ten year period.
>
> **72.** However, in addition to the authorities, the judge also put weight on the version of the Long Residence Guidance published in October 2019 in support of his conclusion that para.39E periods of overstaying count. He construed the guidance as showing that the Secretary of State was in practice treating para.39E book-ended periods as periods which should count towards calculating the ten year period. He held that in so far as para.276B was ambiguous about the impact of para.39E periods of overstaying, the practice could properly be taken into account to favour a construction which was more favourable to the applicant, following the principle in *Pokhriyal*.

73. I do not in fact accept that, when properly analysed, there is any genuine ambiguity as to the proper construction of para.276B when read with para.39E. I do not, therefore, consider that it is legitimate to have regard to the guidance when construing the Immigration Rules. But even if I am wrong about that, and there is genuine ambiguity, I am not persuaded that the guidance itself does support the proposition that para.39E periods of overstaying should be treated as counting towards the period of long residence. I will shortly state my reasons.

74. At page 9 of the Guidance it states that the time spent in the UK in accordance with section 3C leave should count, but says nothing about time spent as a para.39E overstayer also counting. If such periods were to count, in a similar way to section 3C, one might have expected this fact to have been identified in that section of the Guidance. Later, in a section headed "Gaps in Lawful Residence", the Guidance again refers to periods of overstaying where the conditions of para.39E are met. It is in my view pertinent to note that it does not refer to these as periods of lawful residence; on the contrary, they are described as gaps in lawful residence. As Underhill LJ observed, the Guidance does strongly support the conclusion that the second sentence of para.276B(v) must have been intended to qualify the calculation of lawful residence in para.276B(i). I entirely agree with that; but the issue is in what way it does so. **As I have said, I think it requires the Secretary of State to ignore what would otherwise be gaps in lawful residence, which gaps would compel the clock assessing continuous residence to start again. I do not accept that it also means that the period should positively count as a period of lawful residence.**

75. UT Judge Blum relied in favour of the latter approach on two examples given in the Guidance of situations where there are gaps in lawful residence but the Guidance states that the application for ILR should nonetheless be granted. The examples are in similar form and I will just cite the first of them:

> "An applicant has a single gap in their lawful residence due to submitting an application 17 days out of time. All other cases have been submitted in time throughout the ten year period.
> Question: Would you grant the application in this case?
> Answer: Grant the application as the rules allow for a period of overstaying of 28 days or less when the period ends before 24 November 2016".

The second example was of three gaps, each less than 28 days, when this was the grace period. Again, it was said that the application should be granted.

76. UT Judge Blum says that these examples demonstrate that the gaps were being counted. I do not accept that they do show that to be the case, and certainly not unambiguously so. These examples seem to me to be consistent with the notion that these gaps should not defeat the claim for ILR on the grounds that they broke the period of continuous residence so that it must start again. In order to show that the gaps were treated as periods of lawful residence, it would have to be clear that but for the gaps, the ten year period of lawful residence would not have been achieved. But the examples do not expressly say that and I do not think it is implicit in their description. The statement that the rules "allow for" these periods of overstaying is again ambiguous; it could mean that they "allow for them to be counted", or it could mean that they "allow for them to be disregarded" so as not to break the continuous period. In the context of the other parts of the Guidance which I have identified, I think the latter is in fact the more likely meaning."

11. The section I have highlighted at [74] provides an unequivocal response to the appellant's submission and makes it clear, as Mr Tan submitted, that the appellant's interpretation of the Guidance is misconceived. As such, Judge Lewis made no error in his conclusion on the proper construction of the relevant Immigration Rules. His decision, that the appellant could not demonstrate ten years of continuous lawful residence for the purposes of paragraph 276B, was one which was properly made.

12.As for the second and third grounds, Mr Shea submitted that the judge failed to give full consideration to Article 8 and to the best interests of the appellant's children under section 55, despite those being matters raised in the skeleton argument before the First-tier Tribunal. At [9] of the grounds, it is asserted that the judge's statement, at [10] of his decision, that "*Mr. Shea did not develop any submission to suggest that there would be a disproportionate interference with the appellant's article 8 rights if this appeal were refused*", was perverse, since proportionality was a matter raised by Mr Shea. However, as Mr Tan submitted, the point made by Judge Lewis at [10] was that there was nothing of substance argued in that respect and, clearly, there is no evidence to support the claim that there was. The skeleton argument focussed upon the long residence argument and it is clear that that was the main focus of the appeal. The limited evidence of private life established by the appellant in the UK was considered by the judge at [24] and [25], in the context of whether very significant obstacles to integration in Pakistan had been demonstrated, and the judge properly found that there were none. There was nothing of substance by way of evidence to support a claim that the appellant's removal from the UK would be disproportionate either on the basis of a family or private life established in the UK. Although the judge did not make any specific reference to the best interests of the appellant's children, there was clearly no basis for him to succeed in a proportionality assessment in that regard given that the children were not British nationals and had only entered the UK recently with their mother in October 2021. On the very limited evidence before the judge the appellant could not possibly have succeeded in an Article 8 claim and accordingly nothing material arises from any arguable failure by the judge to engage in a lengthy proportionality assessment or from any arguable failure specifically to address the best interests of the children.

13.Mr Shea relied upon a Rule 15(2A) application made shortly before the hearing for consideration to be given to the fact that the appellant had now completed 314 days to contribute to the ten years of continuous lawful residence. However, as Mr Tan submitted, that was not a matter before Judge Lewis and indeed was not the position at the time of the hearing before him. As such it is of no relevance in determining whether or not the judge erred in law. As the Court of Appeal said at [87] in Afzal, that is not a matter for this court.

14.For all these reasons the grounds fail to identify any errors of law in the judge's decision. The judge considered all relevant and material matters and reached a decision which was fully and properly open to him on the evidence before him. I uphold his decision.

Notice of Decision

15.The making of the decision of the First-tier Tribunal did not involve a material error on a point of law requiring it to be set aside. The decision to dismiss the appeal stands.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 September 2023