IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003079
UI-2023-003082

First-tier Tribunal No: HU/54407/2022
HU/50058/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

29th February 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

JISHO THOMAS
MEENU ANTHONY
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Gajjar instructed by Legend Solicitors.
For the Respondent: Ms Z Young, a Senior Home Office Presenting Officer

Heard at Phoenix House (Bradford) on 23 February 2024

DECISION AND REASONS

1. The appellants appeal with permission a decision of First-tier Tribunal Judge Caswell ('the Judge'), promulgated following a hearing at Newcastle on 27 February 2023, in which the Judge dismissed the appeal on human rights grounds.
2. The Judge notes the appellants are husband and wife. Mr Thomas was born on 20 April 1982 and Ms Anthony on 17 May 1990. It was accepted that Ms Antony's appeal was dependent on our husbands as a result of which the Judge focused upon the merits of Mr Thomas' appeal. I shall adopt a similar format.
3. It is important the chronology of this appeal is understood. At [2] –[3] the Judge wrote:

> 2. The Appellant arrived in the UK on the 18 July 2011 with a visa valid to the 10 July 2013. On the 10 July 2013 he applied for further leave to remain as a Tier 1 Entrepreneur, and was refused on the 6 February 2014. The Appellant's appeal against that decision was dismissed on the 8 April 2015. On the 5 May 2015 the

Appellant applied for further leave as a Tier 2 general migrant, and this was granted to the 14 April 2020. On the 18 August 2017 his visa was curtailed to the 24 October 2017. On the 24 October 2017 the Appellant applied for further leave to remain as a Tier 2 general student migrant, and this was granted to the 23 March 2019. The Appellant's wife entered the UK on the 18 January 2018, as the Appellant's dependant, with a visa valid to the 23 March 2019. On the 22 March 2019 both the Appellant and his wife applied for further leave to remain. They were refused on the 19 June 2019. According to the Appellant, an in-time appeal was filed against this decision on the 3 July 2019. However, the tribunal did not have a record of this, and so the Appellant was asked, through his solicitors, to re-submit the appeal. This was done on the 1 August 2019.

3. While this appeal was pending, the Appellant varied his application to one for indefinite leave to remain (ILR) on the basis of 10 years' lawful residence in the UK. The Appellant's wife (and their child born in February 2019) on the 14 December 2020 made an application to stay in the UK on Article 8 family and private life grounds. The Appellant's application was refused on the 22 July 2021. His wife's application was refused on the 23 December 2021. The Respondent on the 8 February 2022 then withdrew the Appellant's refusal decision, and made a fresh refusal decision dated the 6 July 2022.

4. The Secretary of State's case was that the appellant does not meet the requirement of paragraph 276B of the Immigration Rules as he did not have 10 years continuous lawful residence in the UK, there being no lawful residence between 8 April 2015 and 5 May 2015, or between 5 July 2019 and 1 August 2019 with regard to the first period. The Secretary of State's case is that that is a period of overstaying and stated paragraph 39E of the Rules operates to make the residence continuous, not to make it lawful, placing reliance upon the decision of the Court of Appeal in Afzal [2021] EWCA Civ 1909.
5. In relation to the second period the Judge notes the respondent's position being that the notice of appeal was not filed until 1 August 2019 at which point the appellant's section 3C(2)(c) leave as a result of a pending appeal began, meaning there was a gap in lawful residence from 5 July 2019 to 1 August 2019.
6. The Secretary of State also refused the applications relying on an earlier decision which found no significant obstacles to integration into India, that the Article 8 rights of both appellants and their child will not be breached by returning them to India, and that there was nothing to warrant departing from the findings set out in the decision and reasons of 2020.
7. The Judge's findings are set out from [18] of the decision under challenge. The Judge notes it was accepted by the appellant's counsel that his main argument was based upon the legal effect of the two periods referred to above.
8. The Judge records the appellant relying upon the judgement of the Court of Appeal in Hoque [2020] EWCA Civ 1357 and the wording of paragraph 276B(v) of the Rules which reads "*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…*" and at paragraph 39P which provides for a period of overstaying to be disregarded which includes it being disregarded for the purposes of calculating the length of lawful (as opposed to simply continuous) residence, a submission it was claimed was supported by the judgement in Hoque.
9. The Judge notes the Secretary of State's view that Hoque had been overtaken on the point by the judgement in Afzal which supported the Secretary of State's argument.

10. At [21] Judge finds that given the most recent Court of Appeal authority supports the respondent's interpretation of the period of overstaying but was not satisfied the appellant can show he had a continuous period of lawful residence which includes the first period. The Judge found no good reason to adopt the submission made by the appellant's counsel that Afzal only related to post-November 2016 gaps whereas Hoque relates to pre-November 2016 gaps, the relevant period in relation to this appeal, on the basis no good reason to adopt such a distinction had been made out.
11. In relation to the second period the Judge was satisfied the appellant had shown that his appeal had been submitted on 3 July 2019 as he claimed, at which point he had a pending appeal under the terms of section 3C(2)(c) of the Immigration Act 1971, and therefore was not an overstaying in the period from 3 July 2019 to the 1 August 2019 [22].
12. The Judge conclude the appellants did not establish they had a period of 10 years continuous lawful residence in the UK, as his most recent period of lawful residence started on 5 May 2015, that he could not meet the requirements of paragraph 276B, was not entitled to Indefinite Leave to Remain, and neither were his wife or child [24].
13. In relation to paragraph 276ADE(1)(vi) the Judge accepted that, in accordance with the Devaseelan principle, the previous decision of 2020 was the starting point. The Judge notes the position had not changed materially since then and that the evidence had not establish there were very significant obstacles to their integration into India [25].
14. In relation to Article 8 generally, the Judge considers family and private life issues and concludes any interference caused by removal to India in their private lives will be lawful, justified and proportionate. As the family will be returned together there will be no disruption to their family life. [26].
15. The appellant sought permission to appeal asserting the Judge erred in the assessment of the one gap in the appellant's immigration history.
16. Permission to appeal was refused by another judge of the First-tier Tribunal but granted by Upper Tribunal Judge Reeds on 17 September 2023, the operative part of the grant being in the following terms:

> 1. The appellants (who are husband and wife) seek to appeal the decision of FtTJ Caswell, who, in a decision promulgated on 3 March 2023 dismissed their appeals on human rights grounds which relied on the main appellant demonstrating 10 years lawful continuous residence in the UK. The 2 periods in issue were identified in 2015 and 2019; however the 2nd period in 2019 was resolved in favour of the appellant.
> 2. It is arguable as the grounds set out the conclusions reached on the 1st period (2015), did not properly construe the decision in Afzal[2021]EWCA Civ 1909. In particular, paragraph 11 and 14 when read together that paragraph 276B could be satisfied by adding together a period of lawful residence with a 2nd period whilst disregarding overstaying falling within paragraph 39E and not counting the intervening periods towards the calculation. On that assessment it is arguable that the appellant a total period in excess of 10 years.
> 3. Ground 2 challenges the broader article 8 assessment. Even if the particular facts as set out in the grounds were not taken into account, the appellants would still have to demonstrate the materiality of any such error. Nonetheless I do not restrict the grant of permission. All grounds are arguable.
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> DIRECTIONS
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> 1. As the appeal relies in part on the analysis set out in Afzal [2021] EWCA Civ 1909, and an appeal against that decision has been heard by the Supreme

Court in June 2023 and is awaiting the decision, this appeal shall be stayed pending that decision.

2. Within 14 days of the judgement of the Supreme Court being handed down, the appellant shall confirm in writing the intention to continue with the appeal and file and serve on the tribunal and the other party any amended grounds relied upon in light of the decision of the Supreme Court.
3. The respondent shall file and serve on the tribunal and the other party skeleton argument in response no later than 7 days before the hearing.
4. If either party seeks an extension of time, the Upper Tribunal must be informed why an extension of time is necessary with reasons provided.
5. Documents or submissions filed in response to these directions may be sent by, or attached to, an email to FieldHouseCorrespondence@Justice.gov.uk using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB.
6. Service on the Secretary of State may be to UTdirections@homeoffice.gov.uk and in the absence of any contrary instruction, by use of any address apparent from the service of these directions.

17. The Supreme Court's decision was handed down on 28 November 2023 with neutral citation Afzal and another v Secretary of State for the Home Department [2023] UKSC 46.
18. The appellant's supplementary submissions, in accordance with Judge Reeds directions, dated 13 December 2023, are out of time but time is extended in light of the explanation provided, lack of prejudice to either party, and the benefit in enabling a proper decision to be reached having had access to all relevant up-to-date submissions.
19. The key section of the further submissions reads:

5. It is the Appellants' case that the Supreme Court's judgment does not alter their position but, instead, strengthens it. The first argument of the originally pleaded grounds contended that the First-Tier Tribunal erred by failing / refusing to add two distinct periods of leave together.
6. These arguments have been fleshed out in the Supreme Court with the Secretary of State taking the position that whilst book-ended overstaying caught by paragraph 39E does not break the continuity of residence, that period of overstaying does not count towards an applicant's accumulation under paragraph 276B.
7. Lord Sales summarised the arguments in Afzal at paragraphs [67-68] of his judgment:

"67. The question that remains, however, is what the word "disregarded" means in para 276B(v). Mr Afzal submits that it means that the book-ended period of overstaying in his case should be treated as if it were a period when he was lawfully present in the United Kingdom with leave to be here, and so should be added on to the other periods of residence with leave before and after it for the purpose of calculating whether he satisfies the 10 year period of continuous lawful residence required by para 276B(i)(a). The Secretary of State submits that the Court of Appeal was correct to interpret the word "disregarded" to mean only that a book-ended period of overstaying does not break continuity between the periods of residence with leave before and after it, so that they may be added together in calculating the 10 year period, but without that period of overstaying being counted as an addition for the purposes of that calculation.

68. In my view, the Court of Appeal's interpretation is correct."

8. The Supreme Court continued its analysis of paragraph 276B and the Appellants draw attention to the following paragraphs:

"77. For similar reasons, and again giving the word "disregarded" its natural meaning, the second limb of para 276B(v) has the effect that a book-ended

period of overstaying which is covered by that provision will be ignored and as a result will not break the continuity of the periods of lawful residence (ie with leave) on either side of it. This means that an applicant is entitled to add together those book-end periods of leave in order to establish that they have the requisite 10 years of continuous lawful residence.

78. As Sir Patrick Elias explains, the disregard under each limb of para 276B(v) operates as a shield for the applicant, not a sword. It prevents the Secretary of State from dismissing an application because the applicant is present in the UK in breach of immigration laws (first limb) or because there has been a break in the continuous lawful residence required by para 276B(i)(a) (second limb).”

9. Despite the Supreme Court dismissing the appeals in Afzal, its judgment is one that assists the Appellants in the present appeals. Mr Afzal was seeking to argue that book-ended overstaying should count towards the totality of one’s lawful residence. Mr Afzal failed in that pursuit but it is not one that the Appellants are reliant upon.
10. The short point is that the gap in this case was between 8 April 2015 (when they became appeal rights exhausted) and 5 May 2015 (the application that was successful on the same day). That period between 8 April and 5 May must be disregarded but the lawful periods surrounding those dates must be added together and, had the First-Tier Tribunal done this, would have amounted to 10 years’ lawful residence.

Conclusion

11. In light of the above, the Appellants continue to invite the Tribunal to find that the FirstTier Tribunal materially erred in law and, if the Tribunal is persuaded on this point, to remake the determination allowing these appeals.

20. At the hearing Ms Young confirmed that in light of the judgement of the Supreme Court she agreed with the analysis contained above and that accordingly the appropriate way to proceed was to add together the two periods of lawful leave which she accepted meant the appellant had required 10 year period of lawful residence even after dispute regarding the period when he was in overstay.
21. On that basis I find the Judge materially erred in law in dismissing the appeal on this ground for the reasons set out above.
22. The larger level in only one outcome available I substitute decision to allow the appeal.

Notice of Decision

22. Appeal allowed.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 February 2024