Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/20146/2015**

IA/20147/2015

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons promulgated**
On 2 August 2017	**On 4 August 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

DR MUHAMMAD ASHRAF FARUK
MRS MARIA MSTARY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Bustani of Counsel.
For the Respondent: Mr A McVeety Senior Home Office Presenting Officer

ERROR OF LAW DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Cruthers, promulgated on 8 April 2016, in which the Judge dismissed the appellant's appeal under both the Immigration Rules and on human rights grounds.

Background

2. The appellants are both citizens of Bangladesh. The first appellant was born on 1 January 1978 and is the lead case in relation to this matter, the Judge noting at [2] that the second appellant is the spouse of the first appellant and that their representative accepted at the hearing that the appeals stood or fell together.
3. The Judge carries out a careful analysis of the factual matrix of the case, sets out the issues the tribunal was required to consider, and the arguments for the respective parties, before setting out findings of fact from [52] of the decision under challenge.
4. In relation to the respondent's allegation concerning the first appellant's English language test results of August 2013, the ETS issue, the Judge finds at [63] that the totality of the evidence from the respondent on the issue was not sufficient or specific enough to show that the appellants test results of August 2013 had been obtained improperly. There is no challenge to this aspect of the decision.
5. The Judge accepted the chronology/immigration history as a whole although records reservations regarding some aspects of the evidence.
6. In relation to the paragraph 276B argument, it being the appellant's case that he was entitled to leave to remain on the grounds of long residents having completed at least 10 year's continuous lawful residence in the United Kingdom, the Judge considered not only the factual matrix presented in the evidence but also the cases of *MU ('statement of additional grounds' -long residence - discretion) Bangladesh [2010] UKUT 442* and also the later decision of *AQ (Pakistan) [2011] EWCA Civ 833.* The Judge accepted that the issue relating to the 10-year rule was before the Secretary of State when she made the decision under appeal.
7. The Judge concluded that the appellant could not succeed on this ground as he was seeking to rely on the fact that he had attained the required 10 years' continuous residence in the UK after his index application was made. The Judge also, for reasons set out in the decision under challenge, considered the human rights aspects of the appeal but concluded that the decision was proportionate.
8. The appellant sought permission to appeal which was refused by a Designated Judge of the First-tier Tribunal but granted on a renewed application to the Upper Tribunal on the basis it was arguable that the Judge erred in law in calculating the period of the appellant's continuous lawful residence in the United Kingdom.
9. The Secretary of State in her Rule 24 reply of 28 June 2017 stated that the respondent did not oppose the appellant's application for permission to appeal and invited the Upper Tribunal to determine the appeal with a fresh oral continuance hearing to consider whether the first appellant can satisfy the relevant 10 years' continuous lawful residence requirement for the purpose of
paragraph 276B.

Discussion

10. In addition to the case law referred to by the Judge, the Secretary of State's Modernised Guidance: Long Residence, acknowledges that the ten years can be completed whilst an appeal is pending:

> "A person may complete 10 years continuous lawful residence whilst they are awaiting the outcome of an appeal and submit an application on this basis. Under sections 3C and 3D, it is not possible to submit a new application while an appeal is outstanding. However, the applicant can submit further grounds to be considered at appeal."

11. The renewed application for permission to appeal asserted that the First-tier was permitted to, and indeed ought to, have considered whether the First Appellant had accrued to 10 years' lawful residence by the date the respondent reached her decision (which it is asserted he clearly had).
12. In light of the Secretary of State's concession in the Rule 24 response the Upper Tribunal accepts the Judge erred in law in a manner material to the decision to dismiss the appeal relating to the assessment pursuant to paragraph 276B of the immigration rules and that element of the decision is set aside.
13. Mr McVeety accepted, taking into account the periods of leave granted to the first appellant and the effect of section 3C of the Immigration Act 1971 (as amended), that the first appellant had acquired the necessary 10 years' continuous lawful residence in the United Kingdom. On that basis, the Upper Tribunal remakes the decision by allowing the appeal under the Immigration Rules. The appeal of the second appellant succeeds in line.
14. In light of this there is no need to consider separately the challenge to the decision on human rights grounds.

Decision

15. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. The appeals are allowed.**

Anonymity

16. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……

Upper Tribunal Judge Hanson

Dated the 3 August 2017