



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

Appeal Number: IA/32488/2015

THE IMMIGRATION ACTS

Heard at Field House

On 5 July 2017

**Decision &
Promulgated
On 12 July 2017**

Reasons

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

**MONSUR ALAM
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Iqbal, instructed by Burney Legal Solicitors

For the Respondent: Mr D Clarke, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal brought by the appellant against the decision of First-tier Tribunal Judge Walters promulgated on 19 April 2017, dismissing the appellant's appeal against a decision of the Secretary of State of 23 June 2015 refusing to grant the appellant leave to remain (pursuant to the making of a human rights claim).

2. The appellant is a citizen of Bangladesh, born 15 October 1979. He arrived in the United Kingdom on 22 November 2004 with entry clearance as a student valid until 31 October 2005. He has remained here since that time.
3. On 30 January 2015, the appellant applied for indefinite leave to remain on the basis of ten years' continuous lawful residence in the United Kingdom. That application was refused in the decision under challenge, it being concluded therein that the appellant did not meet the requirements of the Immigration Rules as a consequence of falling foul of paragraph 322(1C) (iii) of those Rules.
4. Underpinning such conclusion was the uncontroversial fact that the applicant had been convicted of harassment/breach of restraining order and had received a suspended sentence of imprisonment of twelve weeks. In her decision letter (page 4 of 8) the Secretary of State identifies the relevant date of conviction as being 3 June 2013, although I note from a letter drawn up on 11 November 2014 by the National Probation Service it is said that the appellant pleaded guilty to the offence on the 4 January 2013. The outcome of the instant appeal is not dependent on which of these two dates is the correct date for the appellant's conviction, so I need not make a finding in this regard.

First-tier Tribunal's decision

5. The First-tier Tribunal concluded as follows in relation to the relevance of the conviction:
 - "11. Mr Iqbal submitted that the appellant's conviction on 3.6.13 was spent on 3.6.15. The respondent made her decision on 23.6.15. He submits, therefore, that at the date of decision the appellant's conviction had been spent.
 12. Unfortunately, Mr Iqbal did not produce the relevant legislation to demonstrate that the conviction of 3.6.13 was spent on 23.6.15. Even assuming that it was spent, he failed to produce any authority that spent convictions are not caught by paragraph 322(1C)(iii).
 13. Mr Iqbal continued his submissions by saying that Section 85(4) of the Nationality, Immigration and Asylum Act 2002 empowers the Tribunal to take into consideration evidence of any matter which is relevant to the substance of the decision even if it arrives after the date of decision. He submits that the Tribunal was invited to consider the fact that at the date of decision (23.6.15) the appellant's conviction had been spent and was no longer falling foul of 322(1C)(iii) of the Immigration Rules.
 14. I did not accept that submission for the reasons previously mentioned.
 15. Mr Iqbal goes on to submit that the relevant Immigration Rules refer to conviction within 24 months preceding the date of application. He

therefore submits that there is a direct conflict between the primary legislation i.e. Section 85(4) and the Immigration Rules.

16. I could not see such a conflict.”

Error of Law

6. It is difficult to ascertain whether the First-tier Tribunal was misled by the submissions made to it as to what the relevant issue was in the appeal, or whether it misunderstood the submissions such that it did not direct itself to the relevant issue. Either way it is clear that the relevant issue was not considered by the First-tier Tribunal, as both parties before me accept.
7. The relevant issue is best identified by setting out the pertinent provisions of Paragraph 322(1C) of the Immigration Rules:

“322 ... **Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom are to be refused;**

...

(1C) where the person is seeking indefinite leave to enter or remain:

...

- (iii) they have been convicted of an offence for which they have been sentenced to imprisonment for less than 12 months, unless a period of 7 years has passed since the end of the sentence; or
- (iv) they have, within the 24 months prior to the date on which the application is decided, been convicted of or admitted an offence for which they have received a non-custodial sentence or other out of court disposal that is recorded on their criminal record. ...”

8. There is no dispute that a suspended sentence of imprisonment is treated as a non-custodial sentence for the purposes of paragraph 322(1C) of the Rules. That being so, as accepted by Mr Clarke, paragraph 322(1C)(iii) of the Rules has no relevance to this appeal. I observe at this juncture that whilst the Secretary of State refers to paragraph 322(1C)(iii) in her refusal letter, its terms are incorrectly set out therein.
9. Moving on, the issue the First-tier Tribunal was required to decide is whether within the period of 24 months prior to the date on which the appellant’s application was decided (i.e. within 24 months prior to 23 June 2015) the appellant had been convicted of, or admitted, an offence for which he received a non-custodial sentence. This is not an issue that the First-tier engaged with, let alone decided. Accordingly, its decision must be set aside.

Re-making of decision

10. I have identified above the date of the SSHD’s decision, and the possible dates of the appellant’s conviction. It is clear that whichever of the dates is taken as the date of conviction, the appellant does not fall foul of the requirements of paragraph 322(1C)(iv) of the Rules. Mr Clarke accepted that this was so.

11. Mr Clarke also accepted that the appellant had demonstrated to the required standard that he had lived lawfully in the United Kingdom for a continuous period of ten years
12. As a consequence, the appellant *prima facie* falls within the confines of paragraph 276B of the Immigration Rules. Mr Clarke further indicated that the Secretary of State took no other issue with the requirements of that Rule. In these circumstances, I conclude that the appellant has spent ten continuous years lawfully resident in the United Kingdom, and that he meets all other of the requirements in paragraph 276B of the Immigration Rules.
13. This though is not determinative of the appeal because the appellant is only permitted to rely herein upon the ground that the Secretary of State's decision would lead to a breach of Section 6 of the Human Rights Act 1998. In this regard the appellant particularly relies upon Article 8 ECHR.
14. It is clear that the appellant has a private life in the United Kingdom and that interference with that private life would be of such severity so as to engage Article 8. The Secretary of State's view as to where the public interest lies in granting a person to enter or remain in the United Kingdom is set out in the Immigration Rules. Those Rules provide for inclusionary and exclusionary provisions. Given that the appellant meets the requirements of paragraph 276B of the Rules and does not fall foul of the exclusionary requirements within the Rules (in this case, paragraph 322(1C) is the only such provision relied upon), a consideration of the Rules dictates that the public interest lies in the appellant being allowed to remain in the United Kingdom.
15. There being no other relevant features of this case drawn to my attention by Mr Clarke and given what I have said about the public interest, I conclude that it is not proportionate to refuse to grant the appellant leave to remain. His appeal must accordingly be allowed. The Secretary of State's decision to refuse to grant leave to remain breaches section 6 of the Human Rights.

Notice of Decision

The decision of the First-tier Tribunal contains an error of law capable of affecting the outcome of the appeal and it is set aside.

Upon remaking the decision, I allow the appellant's appeal.

Signed:



Upper Tribunal Judge O'Connor
Written: 5 July 2017

