Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07990/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 October 2018	**On 6 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MRS FATEMA YASMEEN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Michael West, Counsel instructed by City Heights Solicitors
For the Respondent: Mr Laurence Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals from the decision of the First-tier Tribunal (Judge Ross sitting at Taylor House on 14 June 2018) dismissing her appeal against the decision of the respondent to refuse her human rights claim which she had principally pursued on the ground that she had accrued 10 years' continuous lawful residence in the United Kingdom. The first Tribunal Judge found that the appellant's lawful leave had ceased on 31 March 2017, whereas the tenth anniversary of her entering the United

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Kingdom was on 18 October 2017. After adopting the balance sheet approach recommended in **Hesham Ali [2016] UKSA 60,** the Judge held that the respondent had proved on the balance of probabilities that the need for effective immigration control outweighed the private life considerations in the appellant's favour.

The Reasons for the Grant of Permission to Appeal

2. On 22 August 2018 First-tier Tribunal Judge Andrew granted the appellant permission to appeal for the following reasons:

> "I was satisfied there is an arguable error of law in this decision in that the Judge may have been in error in his findings that the appellant's application for leave was not made within 14 days of her becoming an overstayer, given the date of the service of the decision on the appellant. I do not, however, find it was incumbent on the Judge to make findings in relation to the appellant's earlier applications as they were not the decision against which she was appealing. It is, however, arguable that the Judge should have considered the benefits brought by the appellant when considering Article 8. As the law stood as at the date of decision and indeed at present, the appellant's stay in the United Kingdom was precarious. The Judge cannot take note of the fact that the law may change at some unknown date in the future."

The Hearing in the Upper Tribunal

3. At the hearing before me to determine whether an error of law was made out, Mr West (who did not appear below) developed the case advanced in the permission application that the Judge was wrong in law to hold that the appellant had not accrued 10 years' continuous lawful residence so as to qualify for leave to remain under the Rules. In reply, Mr Tarlow submitted that the Judge had directed himself appropriately, and no error of law was made out.

Discussion

4. It is not in dispute that the appellant, a national of Bangladesh, resided in the UK lawfully from 18 October 2007, when she arrived in the UK with valid entry clearance as a student, until 31 March 2017, when a decision to refuse her leave to remain as a Tier 1 (Entrepreneur) migrant on 15 March 2016 was maintained following an administrative review, the outcome of which was that the decision to refuse was maintained, with no right of appeal. What happened next is also not factually in dispute. The dispute centres on the legal consequences.

5. Judge Ross accepted the appellant's case that the negative decision was not received by his solicitors until 2 May 2017, a delay of over a month since it was issued. He also accepted that on 10 May 2017 the appellant had made an application for leave to remain on the basis of family or private life established in the UK; and that on 9 August 2017 the application was varied to an application for ILR outside the Immigration Rules; and that on 26 September 2017 the application was varied for a

second time to an application for ILR on the basis of the appellant having accrued 10 years' continuous lawful residence.

6. Judge Ross accepted that the appellant was not an overstayer contrary to Rule 276B(v) at the time that she applied for leave to remain on 10 May 2017. This was because less than 14 days had elapsed between the date of the receipt of the refusal decision of 31 March 2017 and the date of the fresh application.

7. However, Judge Ross held that this did not avail the appellant in establishing lawful residence in the period leading up to the 10-year watershed or in the subsequent period preceding the refusal decision on 17 March 2018. His reasoning was that the appellant did not meet any of the requirements set out in Rule 276A(b), and also that the appellant did not enjoy section 3C leave under the 1971 Act because she was not awaiting the result of an appeal.

8. Permission to appeal was granted in this case on the mistaken understanding that everything pivoted on whether the appellant was an overstayer at the time of her application on 10 May 2017; and that, but for Judge Ross wrongly finding that she was an overstayer at this point, he would have or should have found that she had accrued 10 years' continuous lawful residence in accordance with the Rules.

9. However, as I have already indicated, the Judge accepted that the appellant was not an overstayer at the time when she made her application on 10 May 2017. The real issue is whether the Judge was wrong to find that this did not avail the appellant in terms of qualifying for ILR under Rule 276A. Mr West's submission is simple. He submits that if the appellant is not an overstayer, then it follows that she must be lawfully resident in the UK.

10. Having reviewed (a) the 1971 Act, (b) the relevant Rules and (c) the relevant Policy Guidance, I am satisfied that the Judge's analysis of the law was correct and that Mr West's argument is fallacious.

11. Under the 1971 Act, the appellant did not have any form of lawful leave in the United Kingdom after the issue and/or receipt of the negative administrative review decision. The appellant's last grant of leave had expired some years ago, and she did not have section 3C leave as she had no right of appeal from the administrative review decision.

12. Rule 276A(b) defines lawful residence. The definition includes continuous residence pursuant to existing leave to enter or remain. It does not include residence while an out-of-time application is pending.

13. Accordingly, consistent with the 1971 Act, the appellant was not lawfully resident in the UK when she made a fresh application for leave to remain on 10 May 2017, and she was also not lawfully resident in the UK in the

period leading up to the 10-year anniversary of her lawful entry into the UK.

14. Rule 276B sets out the requirements for indefinite leave to remain on the ground of long residence in the UK. The first requirement is that the applicant has had at least 10 years' continuous lawful residence in the UK. The second requirement is that, having regard to the public interest, there are no reasons why it would be undesirable for the person to be given indefinite leave to remain on the ground of long residence. The third requirement is that the applicant does not fall for refusal under the general grounds of refusal; the fourth requirement is that the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom; and the fifth requirement is that the applicant has not been in the UK in breach of the Immigration Laws, except that, where paragraph 39E of the Rules applies, any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where, the case of an application made on or after 24 November 2016, paragraph 39E of the Rules applied.

15. The fallacy of Mr West's argument is that it fails to recognise that the fifth requirement is distinct from the first requirement. It is possible to satisfy the first requirement, but not to satisfy the fifth requirement. Equally, it is possible to satisfy the fifth requirement, but not satisfy the first requirement. An example of the former would be a person who had accrued 10 years' continuous lawful residence in the UK, but who then delayed making an application for ILR for more than 14 days after the expiry of his last grant of leave.

16. Judge Ross correctly directed himself that the appellant did not fall foul of Rule 276B(v) in that the appellant had made a further application for leave to remain within 8 days of the receipt of the negative administrative review decision.

17. Judge Ross also correctly directed himself that this did not, however, determine the question as to whether the appellant had complied with the first requirement, which was whether she had accrued at least 10 years' continuous lawful residence in the UK as defined in Rule 276A.

18. Mr West helpfully directed my attention to the Home Office's Policy Guidance of 2017 at page 15, which provides as follows: "***'Gaps in Lawful Residence'*** *- You may grant the application if an applicant: > has short gaps in lawful residence through making previous applications out of time by no more than 28 calendar days where those gaps end before 24 November 2016 > has short gaps in lawful residence on or after November 2016 but leave was granted in accordance with paragraph 39E of the Immigration Rules > Meets all the other requirements for lawful residence."*

19. As one would expect, the appellant's position under the Policy Guidance is no different from her position under the Rules. The appellant did not meet all the relevant requirements for the grant of ILR under the Rules, and there is nothing in the Policy Guidance that salvages her position.

20. Mr West submits in the alternative that the Tribunal erred in failing to consider properly the appellant's Article 8 claim outside the Rules. He submits that the appellant's case was a near miss case under the Rules, and that this should have been taken into account in the proportionality exercise. Since the appellant has invested tens of thousands of pounds in the UK, both as an Entrepreneur and as a student, she is, he submits, fully integrated into UK society.

21. The error of law challenge overlooks the fact that the appellant only came close to accruing 10 years' lawful residence through pursuing a lengthy administrative review process which was ultimately unsuccessful, culminating in a negative decision which robustly maintained the earlier immigration decision that the appellant was not a genuine entrepreneur, and that she had not set up a viable business.

22. I consider that the Judge gave adequate reasons for finding that the refusal decision was proportionate to the legitimate public aim of effective immigration control, and that Mr West's error of law challenge is no more than an expression of disagreement with findings and conclusions that were reasonably open to the Judge on evidence.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed Date 17 October 2018

Deputy Upper Tribunal Judge Monson