Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11586/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16th November 2018	**On 03rd December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

B H
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Abbas of Imperium Group Immigration Specialists
For the Respondent: Miss Z Kiss, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Dineen (the judge) of the First-tier Tribunal (the FtT) promulgated on 28th August 2018.

2. The Appellant is a national of Pakistan born 22nd June 1986. On 2nd October 2017 the Appellant applied for indefinite leave to remain in the UK on the basis of ten years' continuous lawful residence. His application was refused on the same date that it was made.

3. The Respondent accepted that the Appellant had entered the UK on 27th October 2007 as a student with leave to remain until 31st December 2009. On 23rd December 2009 the Appellant submitted an application for further leave to remain as a student which was granted until 5th July 2011. On 7th June 2011 the Appellant applied for further leave to remain as a Tier 4 Student which was granted until 30th April 2013.

4. On 31st August 2012 the Appellant applied for leave to remain relying upon Article 8 of the 1950 European Convention. This application was refused on 23rd October 2013. The Appellant lodged an appeal against that decision on 20th January 2014.

5. The Respondent did not accept the Appellant had accrued ten years' continuous lawful residence. The Respondent accepted that the refusal letter of 23rd October 2013 was not received by the Appellant because it was returned to the Home Office by Royal Mail on 4th November 2013. It was then re-sent to the Appellant on that date. The Appellant did not lodge an appeal until 20th January 2014 and therefore the Respondent considered that he did not have valid leave to remain in the UK after 4th November 2013.

6. The Respondent considered Article 8. It was noted that the Appellant had a partner, but she was not British, and was not settled in the UK or in the UK with refugee or humanitarian protection leave. Therefore, the Article 8 claim was considered under the private life route only.

7. The Respondent did not accept that the Appellant satisfied any of the provisions contained in paragraph 276ADE(1) of the Immigration Rules.

8. The Respondent did not accept that there were any exceptional circumstances which would justify granting leave to remain pursuant to Article 8 outside the Immigration Rules.

9. The Respondent accepted that the Appellant had a right of appeal, as the application he had made was a human rights application, and therefore he had a right of appeal on human rights grounds.

10. The Appellant appealed, and his appeal was heard by the FtT on 29th June 2018. The judge found that there was no gap in the Appellant's continuous lawful residence between the refusal of the application for leave to remain on human rights grounds on 23rd October 2013 and the lodging of the appeal on 20th January 2014 because a Judge of the First-tier Tribunal had on 17th March 2014 extended time for the lodging of the appeal. The judge therefore found at paragraph 10 "there was no effective gap in residence to justify the refusal".

11. The judge described this as common ground, meaning that this was accepted by the parties at the appeal hearing.

12. The judge went on to note that on 18th July 2014 the Appellant had submitted an application for a residence card as the spouse of an EEA

national which had been granted until 24th July 2020. The judge then referred to paragraph 5 of the Immigration Rules setting out the following extract;

> "Save where expressly indicated, these rules do not apply to those persons who are entitled to enter or remain in the United Kingdom by virtue of the provisions of the 2006 EEA regulations".

13. The judge then found at paragraphs 15 and 16 of his decision;

> "15. The effect of paragraph 5 is that a person may rely on one regime or the other, that is the Immigration Rules or the EEA regulations, but not both.
>
> 16. That being the case, the Appellant's present appeal, which is based on the Immigration Rules, must fail".

14. Following dismissal of the appeal, the Appellant applied, through his representatives, for permission to appeal to the Upper Tribunal. It was contended that the judge had erred in law by failing to consider the Appellant's Article 8 human rights claim. It was pointed out that at the hearing the Home Office Presenting Officer and judge were satisfied that there had been no gap in the Appellant's continuous lawful residence, and the judge had described this as common ground.

15. It was pointed out that no issue had been taken by the Respondent in the refusal decision to the Appellant not being able to rely upon residence as the spouse of an EEA national. Reference was made to the Respondent's own guidance on long residence which was published on 3rd April 2017, which states that a Home Office caseworker must apply discretion and count time spent in the UK as lawful residence for an EU or EEA national or their family members exercising their treaty rights to reside in the UK. The guidance goes on to state that when granting a long residence application in which a person has relied on the period of leave in the UK exercising treaty rights as an EEA national of their family member, any grant of leave must be made outside the Immigration Rules.

16. Permission to appeal was granted by Judge Andrew of the FtT in the following terms;

> "1. The Appellant seeks permission to appeal, in time, against a decision of the First-tier Tribunal (Judge Dineen) who, in a determination promulgated on 28th August 2018 dismissed the Appellant's appeal against the Respondent's decision to refuse to grant leave to remain.
>
> 2. I am satisfied it is arguable that in view of human rights being the only ground of appeal the judge should have considered Article 8".

17. Following the grant of permission to appeal the Respondent submitted a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008, not opposing the application for permission to appeal, and inviting the Tribunal;

> "… to determine the appeal with a fresh oral (continuance) hearing to consider whether the Appellant satisfies the Immigration Rules for long residence (to establish public interest in removal); and if not, whether there is disproportionate interference with Article 8 rights".

18. Directions were issued making provision for there to be a hearing before the Upper Tribunal to ascertain whether the FtT decision contained an error of law such that it should be set aside.

The Upper Tribunal Hearing

19. At the commencement of the hearing Miss Kiss confirmed that the Respondent accepted that the judge had materially erred in law in failing to consider Article 8, which had been raised as a Ground of Appeal by the Appellant.

20. In my view the concession was rightly made, and I set aside the decision of the FtT.

21. Both representatives submitted that it was appropriate for me to re-make the decision without a further hearing. Mr Abbas submitted that the finding made by the judge that there was no gap in the continuous lawful residence of the Appellant should be preserved. Miss Kiss agreed, conceding that there had been no gap in the Appellant's continuous lawful residence.

22. Miss Kiss conceded that the appeal should be allowed. It was accepted that the Appellant had accrued in excess of ten years' continuous lawful residence since his arrival in the UK on 27th October 2007. There was no public interest in refusing his application. Miss Kiss submitted a copy of the Home Office guidance on long residence issued on 3rd April 2017, pointing out that because the Appellant had relied on a period of leave in the UK exercising treaty rights as the family member of an EEA national, any grant of leave must be made outside the Immigration Rules. Mr Abbas did not disagree.

23. As it was conceded that the appeal should be allowed, I re-made the decision by allowing the appeal and indicated that I would issue a written decision confirming this.

My Conclusions and Reasons

24. I firstly set out my reasons for finding a material error of law.

25. It is common ground that the Appellant had a right of appeal against the Respondent's decision dated 2nd October 2017. His previous solicitors submitted Grounds of Appeal, contending that the Respondent's decision was not in accordance with the law and Immigration Rules, and that the Respondent had failed to exercise discretion properly. Those are not valid Grounds of Appeal. The Appellant's right of appeal to the Tribunal is set out in section 82 of the Nationality, Immigration and Asylum Act 2002.

The application that he made for indefinite leave was treated as a human rights application, and therefore his right of appeal arises from section 82(b) because the Secretary of State refused a human rights claim. The Ground of Appeal is set out in section 84(1)(c) being that removal of the Appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

26. Section 84(2) confirms that an appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.

27. The Grounds of Appeal entered on behalf of the Appellant did at paragraph 6 specifically rely upon Article 8 of the 1950 European Convention, and therefore it is clear that human rights were raised as a Ground of Appeal.

28. The FtT should have considered Article 8 and did not do so, which is a material error of law. For that reason the decision was set aside.

29. I re-made the decision at the request of the representatives without a further hearing which I found to be appropriate. I accepted the concession made on behalf of the Respondent. Miss Kiss did not seek to go behind the concession that had been made before the FtT, to the effect that there was no gap in the lawful continuous residence of the Appellant. It was specifically conceded and accepted that he had accrued in excess of ten years' continuous lawful residence.

30. It was not suggested that there were any factors in relation to the public interest, that would justify refusing the application.

31. Article 8 is engaged on the basis of the Appellant's family life with his spouse and his private life. In considering the public interest I must have regard to the considerations listed in section 117B of the 2002 Act.

32. Subsection (1) confirms that the maintenance of effective immigration controls is in the public interest and I attach very significant weight to this.

33. Subsection (2) confirms that it is in the public interest that a person seeking to remain in the UK can speak English. The Appellant can speak English. This is therefore a neutral factor in the balancing exercise.

34. Subsection (3) confirms that it is in the public interest that a person seeking to remain in the UK is financially independent. The Appellant is financially independent, and again this is a neutral factor in the balancing exercise.

35. Subsection (4) confirms that little weight should be given to a private life or a relationship formed with a qualifying partner established by a person at a time when the person is in the UK unlawfully. The Appellant has not established a private life or a relationship while in the UK unlawfully.

36. Subsection (5) confirms that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. I find this is relevant, as the Appellant's immigration status has been precarious in that he has only ever had limited leave to remain.

37. Subsection (6) is not applicable to this appeal.

38. This is not a case where it can be said that the Appellant has a poor immigration history. It is not a case where it is alleged that he has any criminal convictions. The Appellant has resided in the UK lawfully since October 2007. The Respondent concedes that the appeal should be allowed, and I find no public interest factors to indicate otherwise. The issue of the type of leave to be granted is a matter for the Respondent as accepted by Mr Abbas, as the Appellant does rely upon a period of leave as the spouse of an EEA national. In fact he already has a residence card as the spouse of an EEA national which is valid until 24th July 2020.

Notice of Decision

The decision of the FtT involved the making of an error of law such that it is set aside.

I re-make the decision. The appeal is allowed on human rights grounds with reference to Article 8 of the 1950 European Convention.

Anonymity

The FtT made no anonymity direction. There has been no request for anonymity and I see no need to make an anonymity order.

Signed Date 17th November 2018

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

Because I have allowed the appeal I have considered whether to make a fee award. I make no fee award. The appeal has been allowed because of submissions and evidence presented to the Tribunal that was not before the initial decision maker.

Signed Date 17th November 2018

Deputy Upper Tribunal Judge M A Hall