



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15827/2016

THE IMMIGRATION ACTS

Heard at Field House
On 25 June 2018

Decision & Reasons Promulgated
On 10 July 2018

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR MD SIRAZUL HOQUE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Turner, Counsel, instructed by Imperium Chambers
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Bangladesh came to the UK as a student in February 2007 which was extended until December 2013: a subsequent application he made under Tier 1 was unsuccessful. On 11 November 2015 he filed an application for leave to remain on the basis of long residence. This was refused by the respondent on 11 November 2015. The appellant's appeal was heard in December 2017 by Judge Lingam of the First-tier Tribunal. Judge Lingam found that the respondent had not discharged the burden of proof on her to prove deception on the part of the appellant in taking TOEIC/ETS tests in 2011, but concluded that he had not met the substantive

requirements of the Immigration Rules under paragraph 276B and had not shown that the consequences of the decision would cause very substantial difficulties or exceptional circumstances or unjustified harshness for the appellant.

2. The appellant's grounds of appeal were fourfold, it being submitted that the judge erred in law in
 - (1) failing to take proper account of the fact that at the date of the hearing it was accepted that the appellant met the requirements of the Rules;
 - (2) wrongly concluding that the appellant failed to qualify for leave under paragraph 276ADE;
 - (3) failing to take into account the appellant's Article 8 circumstances;
 - (4) failing to properly take into consideration the best interests of the appellant's child.
3. I heard concise submissions from both representatives.
4. It is convenient if I take grounds (4) and (2) first.
5. I see no real force in ground (4). It is true the judge did at one point state that she was "unable to determine the best interest of the appellant's child" due to "scant information" even though it was her responsibility to ensure she had sufficient evidence before her to make such an assessment. However, any error in this connection was not material as the judge went on to assess the child's best interests in the alternative, based on the child's very young age (2 years), meaning that she was likely to be reliant on her mother for her care. There was no evidence produced by the appellant contradicting such an assessment and it was one that was consonant with Tribunal authority (the judge cited Azimi-Moayed [2013] UKUT 00197 (IAC); Mr Bramble cited a recent decision to similar effect: MT and ET [2018] UKUT 00088 (IAC)).
6. As regards ground (2), the judge recorded at paragraph 48 that this was not pursued by the appellant at the hearing and the argumentation in support of it is markedly weak.
7. I turn to consider grounds (1) and (3) which are interconnected.
8. In relation to ground (1), it is common ground between the parties that whilst at the date of the respondent's decision the appellant did not have ten years' long residence (he only had nine years, four months) by the date of the appeal hearing he did. When his appeal came to be heard in December 2017 he had continually resided in the UK for ten years ten months.
9. Accordingly, insofar as the appellant's appeal lay against refusal by the respondent under paragraph 276B, the judge was clearly right to find that it could not succeed.

10. However, the appellant's appeal was brought on human rights grounds and in deciding whether there was a violation of Article 8 it was incumbent on the judge to consider
 - (a) whether the appellant met the requirements of the Rules, paragraph 276B in particular, at the date of hearing; and
 - (b) if the appellant did meet these requirements, the consequences for the weighing in the balance of the appellant's Article 8 rights against the public interest in immigration control.
11. In relation to (a), the judge could not have been clearer, stating at para 44 that "[his appeal fails for the only reason that at [the SSHD] decision date he was not able to show at least ten years' continuous lawful residence" but at para 41, "when his appeal was heard he had continuously resided in the UK for ten years ten months".
12. The judge also made clear that he was satisfied that the appellant did not fall foul of the suitability requirements of paragraph 276B (para 38).
13. Given the judge's findings as regards (a) above, the judge should have accepted that at the date of hearing there was no longer any significant public interest to be weighed against the appellant as he now met the requirements of paragraph 276B in full (Mr Bramble accepted that this was so).
14. It is clear from para 60 that the judge erroneously considered that the appellant's present ability to meet the requirements of the Rules had no public interest implications.
15. At paragraph 60 the judge stated:
 60. I am satisfied that the appellant has established a significantly long presence of 14 years in the UK but this has to be weighed in balance against the public interest factor mentioned above.
16. This was a material error necessitating that I set aside the decision of the FtT Judge. It is sufficient to satisfy me that ground (3) is made out.
17. I am able to proceed to re-make the decision without further ado. Given that the appellant has now continuously resided in the UK for over ten years and that there are no suitability or English language requirements to be applied against him, he is entitled to succeed in his appeal on the basis that there is no longer any public interest in resisting his application for ILR.
18. To conclude:

The FtT Judge's decision is set aside for material error of law.

The decision I re-make is to allow the appellant's appeal on Article 8 grounds.

No anonymity direction is made.

Signed:

Date: 6 July 2018

A handwritten signature in black ink that reads "H H Storey". The signature is written in a cursive style with a large, looping 'S' at the end.

Dr H H Storey
Judge of the Upper Tribunal