



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/18107/2016

THE IMMIGRATION ACTS

Heard at Field House
On 2nd May 2018

Decision & Reasons Promulgated
On 23rd May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between
SMM

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M K Mustafa, Solicitor instructed by Kalam Solicitors
For the Respondent: Ms N Willocks-Briscoe, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Bangladesh, appealed on human rights grounds of appeal to the First-tier Tribunal against the decision of the Secretary of State of 21st July 2016 to refuse his application for indefinite leave to remain on the basis of ten years' lawful residence under paragraph 276B of the Immigration Rules. First-tier

Tribunal Judge Pears dismissed the appeal in a decision dated 16th December 2017. The Appellant now appeals to this Tribunal with permission granted by Upper Tribunal Judge Plimmer on 27th March 2018.

2. The version of paragraph 276B of the Immigration Rules in force at the time of the decision in this case provided as follows:-

“276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

(i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.

(ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:

(a) age; and

(b) strength of connections in the United Kingdom; and

(c) personal history, including character, conduct, associations and employment record; and

(d) domestic circumstances; and

(e) compassionate circumstances; and

(f) any representations received on the person’s behalf; and

(iii) the applicant does not fall for refusal under the general grounds for refusal.

(iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.

(v) the applicant must not be in the UK in breach of immigration laws, except that any period of overstaying for a period of 28 days or less will be disregarded, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period.”

3. The background to this appeal is that the Appellant entered the UK on 5th February 2006 with entry clearance as a student valid until 31st May 2009. His application for further leave to remain was refused but he appealed against that decision and was eventually granted leave to remain until 15th January 2014. He applied for further leave to remain as a student but that application was refused and an appeal against that decision was dismissed. The Appellant applied for indefinite leave to remain on the basis of ten years lawful residence on 14th January 2016.
4. In the reasons for refusal letter the Secretary of State decided that, following the refusal of his application for leave to remain as a Tier 4 (General) Student on 11th February 2014, the Appellant has not had valid leave in any capacity. The Secretary of State considered that, although he lodged an appeal on 27th February 2014, as it

had not been lodged within the required fourteen day period the Appellant did not have Section 3C leave to remain. Accordingly the Secretary of State concluded that his period of continuous lawful residence had been broken at that point. The application was further refused on the basis that the Appellant had failed to demonstrate sufficient knowledge of the English language and did not meet paragraph 276B(iv) of the Immigration Rules. The Secretary of State also considered the application in terms of the Appellant's family life taking into account that the Appellant is married and has two children but concluded that the Appellant's removal would not breach his right to family life.

5. In dealing with the appeal the First-tier Tribunal Judge considered the evidence in relation to the refusal of the Appellant's leave to remain as a student in February 2014. The judge noted that the Appellant relied on the reasons for refusal letter issued at that time which showed that the refusal was on 18th February 2014 and the Presenting Officer accepted, as did the judge, that the Appellant lodged the appeal within the required fourteen days and that there was therefore no break in his period of continuous lawful residence in February 2014 [9].
6. The judge considered the allegation that there was a second break in the Appellant's residence in 2015. The Appellant contended that he made an application for leave to remain on 30th August 2015, within 28 days of his becoming appeal rights exhausted on 5th August 2015. However the Respondent contended that the application was not made until 4th September 2018 meaning that there was a period of overstaying of more than 28 days (a period of 28 days or less would be disregarded under paragraph 276B(v)). The judge considered that matter at paragraph 25 where he said:

"Turning to whether an application was made on 30th August 2015 I find that the evidence on this point is wholly unconvincing and seems to me to be an attempt at a later date to manufacture evidence that an application was lodged earlier than it was. I conclude that the Appellant has not shown on the basis of probabilities [sic] that he made an application on 30th August 2015 but that it was made on 4th September 2015. There is thus a small break in the period of continuous lawful residence."

Error of Law

7. I hears submissions from the parties at the hearing before me and I reserved my decision.
8. It is contended in ground 1 of the Grounds of Appeal that the judge erred in his conclusion that there had been a break in residence in August/September 2015. This conclusion was based on a letter from the Appellant's former solicitors at page 19 of the Appellant's bundle which is a copy letter dated 5th October 2015 from SEB solicitors addressed to the Secretary of State. The judge considered the letter at paragraph 10 of the decision where he noted that there was no documentary evidence of an application or in support of an application nor was there any evidence of posting an application made on 30th August 2015. The judge noted that the letter was "a puzzling letter" from solicitors who were then acting for the Appellant as the

grammar was rather odd and it was in the first person and made no reference to acting on behalf of the Appellant. While the judge made a number of observations in relation to that letter at paragraph 10, he reached no conclusion in relation to that letter except where he said at paragraph 25 that the Appellant had made an attempt to manufacture evidence that an application was lodged earlier than it was. It is contended in the Grounds of Appeal that this is a very serious allegation and that that was not put to the Appellant or to SEB Solicitors and that this amounted to a procedural unfairness.

9. At the hearing Ms Willocks-Briscoe submitted that the appeal went ahead on submissions only, the Appellant was not called to give evidence. In those circumstances, in her submission, it may not have been apparent to the judge that there were issues with the solicitors' letter. She further contended that this matter was put in issue in the reasons for refusal letter, therefore the Appellant should have been aware that this was a matter which would have to be addressed.
10. However the Reasons for Refusal letter only raised the issue of a gap in residence for the period in February 2014 (the judge accepted that there was no break in his lawful residence in February 2014). The Reasons for Refusal letter does not raise the issue of the alleged gap in residence in August/September 2015. However the Appellant did submit the letter from SEB solicitors to the First-tier Tribunal and it is clear from paragraph 2 that the issue of residence between 5th August 2015 and 4th September 2015 was an issue at the hearing. It has not been contended that any application was made for an adjournment to consider this issue so it is clear that the Appellant must have anticipated this argument or at least been content to deal with it at the hearing in the First-tier Tribunal.
11. However, even though it appears that the Appellant or his representatives did not object to this issue being considered at the hearing and the Appellant appears to have chosen not to give oral evidence (paragraph 15), I accept that it would not have been apparent to the Appellant that the judge may have had significant issues in relation to the letter from SEB Solicitors. Further, although the judge raised a number of concerns about that letter at paragraph 10, he has not given adequate reasons for a conclusion that the Appellant had made an attempt to manufacture evidence that an application was lodged earlier than it was.
12. I further find that the First-tier Tribunal judge erred in his approach to the English language certificate. At paragraph 27 the judge simply accepted the submission made by the Presenting Officer that the Appellant had not met the requirements of paragraph 276B (iv) but failed to give reasons why he accepted that submission and failed to engage with the submission made on behalf of the Appellant, noted at paragraph 24 of the decision, that on the basis of the test taken in January 2017 the Appellant now met the English language test.
13. In my view these amount to material errors of law. As these errors go to the heart of a significant issue to be resolved I set the decision of the First-tier Tribunal aside.

Remaking the decision

14. I have had the benefit of documents submitted on the basis of an application pursuant to Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 enclosing a copy of a letter dated 30th August 2015 from SEB Solicitors to the Secretary of State which states that an application for further leave to remain is enclosed. I have also been provided with a letter dated 2nd February 2018 from SEB Solicitors confirming that they applied to the Home Office for further leave to remain and posted the application on 30th August 2015, by recorded delivery. That letter also confirmed that the solicitors had issued the letter of 5th October 2015 and that the contents of that letter were correct.
15. I grant the application under Rule 15A to admit that evidence on the basis of my finding that there is an error of law in the judge's decision for the reasons set out above. In all of the circumstances I consider it appropriate under Rule 15A to admit the evidence.
16. At the hearing before me Ms Willocks-Briscoe contended that the evidence submitted did not in fact establish that the application had been made on 30th August 2015, as contended by the Appellant. This was because, in her submission, the covering letter submitted under the Rule 15A application showed only that a letter seeking leave to remain on the basis of private and family life had been submitted on 30th August 2015 but the application form said to have been included with that letter has not been provided. She referred to the Home Office computerised record which she checked at the hearing and which indicted (as stated in the reasons for refusal letter) that the application was made on 4th September 2015. The application form was not before me, in fact it appeared from freedom of information request made by the Appellant that the application form is said to have been returned to the Appellant or his representatives and is no longer retained by the Home Office.
17. I have considered all of the evidence before me in relation to this matter. Whilst it appears that the Home Office record indicates that the application was made on 4th September, I consider that the covering letter and recorded delivery evidence is sufficient on a balance of probabilities to demonstrate that the application was in fact made on 30th August 2015 as claimed. In these circumstances it is clear that in my view the Appellant could therefore meet the requirements of paragraph 276B(i)(a) in that he demonstrated ten years' continuous lawful residence in the United Kingdom and that any period of overstaying as a result of applications made did not fall foul of paragraph 276B(v).
18. Before me Ms Willocks-Briscoe accepted that, should I find that the Appellant had demonstrated ten years' continuous lawful residence, many of the other issues were resolved.
19. In the Reasons for Refusal letter the Secretary of State accepted that the Appellant had provided sufficient evidence of his knowledge of Life in the UK, but considered that the Appellant had not provided evidence to demonstrate sufficient evidence of knowledge of the English language and accordingly he did not meet the

requirements of paragraph 276B (iv) of the Immigration Rules. It is not in dispute that the Appellant passed the Life in the UK test on 30th December 2015, before he made the application on 14th January 2016, and the speaking and listening English language test on 4th January 2017 (after the date of the Reasons for Refusal letter but before the hearing in the First-tier Tribunal).

20. The judge dealt with the issue of the English language test at paragraph 26 of the decision where he accepted the submission made by the Presenting Officer that the Appellant had not met the requirements of paragraph 276B(iv) of the Immigration Rules. The judge gave no reasons for this finding.
21. It is contended in the Grounds of Appeal that there is no requirement for the English language certificate to have been obtained prior to the application.
22. Paragraph 276B(iv) of the Immigration Rules states that one of the requirements to be met by an applicant for indefinite leave to remain on the grounds of long residence in the UK is that the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom in accordance with Appendix KOLL.
23. Ms Willocks-Briscoe submitted a copy of Appendix KOLL which states that the purpose of that Appendix is to set out how an applicant for indefinite leave to enter or remain must demonstrate sufficient knowledge of the English language and about life in the United Kingdom where it is a requirement of the Rules to demonstrate this for the purposes of an application for indefinite leave to enter or remain. She submitted that the relevant provision was 2.2(c) which states:

“The online verification system operated by an approved English language test provider, as specified in Appendix O to these Rules, confirms that the applicant has passed an English language test in speaking and listening, at a minimum level B1 of the common European framework of reference for languages, which is approved by the Secretary of State, as specified in Appendix O, and taken at a test centre approved by the Secretary of State as a secure English language test centre no more than two years before the date of application.”
24. Ms Willocks-Briscoe submitted that this demonstrates that it is a requirement of the Rules that the English language test should be submitted with the application.
25. Mr Mustafa submitted that 276B does not mandate that evidence of passing English language should be submitted at the date of application. He contrasted that with the requirements of Appendix FM which does have such a requirement. He submitted that Appendix KOLL 2.2(c) does not state clearly that a certificate must be submitted with the application. It says that a test must not have been taken more than two years before the application. He submitted that an interpretation that this requires that a certificate must be submitted with the application inserts words in that section which do not exist.

26. I agree that paragraph 276B (iv) read with Appendix KOLL does not require that the Appellant provides evidence that he passed the English language test with the application. I contrast this with the wording of other provisions of the Immigration Rules, in particular Appendix FM. The appeal before the judge was under section 82 of the Nationality, Immigration and Asylum Act 2002 and was on human rights grounds of appeal. The judge was therefore considering the Immigration Rules in the context of the human rights appeal. Section 85 (4) of the 2002 Act provides that the Tribunal may consider any matter which it thinks relevant to the decision including a matter arising after the date of the decision. Accordingly the judge should have taken into account the English language test evidence before him when considering section 276B (iv).
27. Given my findings about the breaks in lawful residence and the undisputed evidence that the Appellant passed the English language test on 4th January 2017, I find that the Appellant meets the requirements of paragraph 276B.
28. As this appeal is a human rights appeal I consider the appeal in accordance with the steps set out in **R v SSHD ex parte Razgar [2004] UKHL 27**. The Appellant has a family life in the UK with his wife and two children. On the basis of the evidence before me, given their birth in the UK and length of residence here with their parents I find that it is in the best interests of the Appellant's children to remain in the UK with their parents. I accept that the Appellant's removal would interfere with his private and family life established in the UK over a period of more than 10 years. I accept that removal would interfere with the private life of the Appellant's children, his daughters were born in the UK on 28th February 2010 and 8th June 2011. In considering proportionality, I attach very significant weight to the fact that the Appellant meets the requirements of paragraph 276B of the Immigration Rules. I consider section 117B of the 2002 Act. The Appellant can speak English; there is no evidence before me as to whether he is financially independent; and, although his status was precarious when he established private life in the UK, on the basis of my findings, his family life was developed when he was lawfully here. In considering section 117B (6) I note that it is not in dispute that the Appellant has a genuine and subsisting family life with his children and that his elder daughter has now been in the UK for 8 years so she is a qualifying child. As the Appellant meets the requirements of the Immigration Rules and the qualifying child is in school and is part of the school community, I find in the circumstances that it would not be reasonable for her to leave the UK. Accordingly I find that the decision to refuse the Appellant's application is not proportionate to the Respondent's legitimate aim.

Notice of Decision

29. The decision of the First-tier Tribunal contained a material error of law. I set that decision aside.
30. I remake the decision by allowing the appeal on human rights grounds.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 20th May 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award because one of the reasons I allowed the appeal was the fact that the Appellant now has an English language certificate and he did not have the certificate at the time of his application or the Secretary of State's decision.

Signed

Date: 20th May 2018

Deputy Upper Tribunal Judge Grimes