IAC-FH-CK-V1

Upper Tribunal
Immigration and Asylum Chamber

JR/5723/2018

Field House,
Breams Buildings
London
EC4A 1WR

Heard on: 13th December 2019

BEFORE

UPPER TRIBUNAL JUDGE KEITH

Between

The Queen (on the application of Mr Arifuzzaman Rana)
Applicant

v

Secretary of State for the Home Department
Respondent

Mr M West, instructed by Liberty Legal Solicitors, appeared on behalf of the Applicant.
Mr Z Malik, instructed by the Government Legal Department, appeared on behalf of the Respondent.

- - - - - - - - - - - - - -

APPLICATION FOR JUDICIAL REVIEW
JUDGMENT

- - - - - - - - - - - - - -

This is the approved written record of the judgment which was given orally at the end of the hearing on 13 December 2019.

The application

The applicant applied on 24 August 2018 for judicial review of, and relief from, the respondent's decision of 22 June 2018 (the 'Decision'), to refuse to treat the applicant's application for

© CROWN COPYRIGHT MMXX

leave to remain on the basis of his long residence as a fresh claim, for the purposes of paragraph 353 of the Immigration Rules.

The applicant claimed that he should have been granted an in-country right of appeal in respect of his application, as it included a human rights appeal; and that the respondent's conclusion that he did not have the required period of continuous lawful residence was irrational.

On 7 March 2019, Upper Tribunal Judge Hanson refused permission on the papers for the application to proceed, but the applicant renewed his application and at an oral renewal hearing, on 4 June 2019, Upper Tribunal Judge Kamara granted permission for review of the Decision to proceed to full judicial review. She regarded it as arguable that the appellant's circumstances could be distinguished from those in the Upper Tribunal case of R (Ahmed) v SSHD (para 276B – ten years lawful residence) [2019] UKUT 00010 (IAC) (at the time of the permission hearing, the Court of Appeal had not given its decision in R (Ahmed) v SSHD [2019] EWCA Civ 1070), in light of what she regarded as 'concessions' in the Decision, the nature of which are unclear. She regarded it as arguable that the applicant had resided lawfully in the UK for at least 10 continuous years, apart from a period of 20 days immediately prior to his application of 20 October 2016. She concluded that it was at least arguable that a First-tier Tribunal could legitimately allow his appeal on human rights grounds, on the basis that he met the requirements of paragraph 276B of the Immigration Rules at the time that the respondent considered his application.

Previous Orders and Judgments

Upper Tribunal Judge Kamara had, when granting permission, issued directions for the respondent to file detailed grounds of defence, but as the applicant failed to pay the continuation fee, his application was automatically struck out on 25 June 2019. His application was reinstated by Upper Tribunal Lawyer Lewenstein in an order sent to the parties on 16 July 2019 and the respondent was granted a further extension of time to file detailed grounds of defence.

Grounds

The applicant challenged the Decision, on the following grounds, which I summarise below:

Ground (1): whilst the applicant made his application seven months and 13 days prior to completion of 10 years residence, the respondent's policy indicated that an

earlier application should be granted if, when it was considered, within 20 days, the applicant would complete the required qualifying period for continuous lawful residence, provided that he met all of the other Immigration Rules relating to long residence. The respondent had made the Decision on 22 June 2018, by which time the applicant had been resident in the UK for over 11 years and had never breached any immigration laws except for a period of overstaying from 1 October 2016 to 20 October 2016. The applicant asserted that this should be disregarded as a result of paragraph 39E of the Immigration Rules, as confirmed by the respondent's policy, which instructed her caseworkers to disregard the absence, pursuant to paragraph 39E.

Ground (2): whilst the respondent had refused the applicant's application, to the extent that it related to his human rights, she had erred in refusing to provide a statutory right of appeal.

Ground (3): because the respondent had failed to refer to a previous certification of an earlier human rights application being 'maintained' in the Decision, the respondent erred in refusing to treat the subsequent application as a fresh claim.

The hearing before me

The challenge on the basis that the appellant should have been given the right of appeal

The representatives agreed that I should deal with the second ground, as if it succeeded, I would have to quash the Decision. The ground was based on a decision of the Upper Tribunal, Sheidu (Further submissions; appealable decision) [2016] UKUT 00412 (IAC), which related to a statutory appeal, but which also dealt with fresh claims under paragraph 353 of the Immigration Rules. What was said was that the respondent may, in reaching a decision, decide a human rights application afresh, even if the decision then goes on to consider and purport to apply paragraph 353 of the Immigration Rules and refuse to treat the application as amounting to a fresh claim. In that case, reliance on paragraph 353 is without effect and the appellant should be granted a right of appeal.

In developing the submissions before me, Mr West relied also on the substantive judicial review decision of R (Mohammad Kamrul Islam) v SSHD JR/8109/2018, which although not reported formally, was nevertheless a substantive decision of the Upper Tribunal (a panel of Upper Tribunal Judges

Kopieczek and Sheridan) and said to be of persuasive authority, in the absence of any other reported authority. Mr West asserted that the facts of the case in Islam, were 'on all fours' or 'virtually identical' to the facts in this application, and the Upper Tribunal in that case had quashed the decision refusing to treat as a fresh claim the application in that case. I should similarly quash the Decision. There should be a declaration to the effect that the applicant had an in-country right of appeal to the First-tier Tribunal.

I accepted that the wording of the Decision appears to be similar to that in Islam and it was unnecessary for Mr West to address me in detail on a line-by-line comparison of the two decisions.

Mr Malik submitted, on behalf of the respondent, that setting aside, for one moment, the issue of whether the Islam decision was wrongly decided in light of the Supreme Court's decision in Robinson v SSHD [2019] UKSC 11, and the asserted ratio in the later case that the respondent must accept an application as a fresh claim under paragraph 353 of the Immigration Rules, before it generates a right of appeal (see [64] of Robinson), on a more practical note, in this case, the applicant had an alternative remedy which he had not sought to exercise, specifically to present a statutory appeal to the First-tier Tribunal, to allow them to decide whether to accept that appeal.

In the case of R (Khan) v SSHD [2017] EWCA Civ 424, the Court of Appeal, in endorsing the Upper Tribunal decision of Principal Resident Judge O'Connor, emphasised that where there were alternative remedies available, specifically the presentation of a statutory appeal to the First-tier Tribunal, it would not be appropriate for the Upper Tribunal to grant judicial review. Mr Malik emphasised that it was far from clear that the Upper Tribunal in Islam were ever referred to Khan. Even if it were appropriate for me to consider Islam, which Mr Malik disputed as it was not a reported authority, it could be distinguished on the basis of Khan.

Discussion and conclusions

I accept Mr Malik's submissions that this is a case which falls squarely within Khan. The arguments raised by Mr West (such as the possibility that the First-tier Tribunal might reject a statutory appeal, which would then necessitate a further judicial review application, with additional cost, and that it was more convenient for me to decide the issue, given its complexity) were precisely those considered and rejected by the Upper Tribunal and Court of Appeal in Khan. Mr West has raised no practical reason why the applicant in this case could

not seek to present a statutory appeal to the First-tier Tribunal (for example, any point that an appeal would be out of time, which will be for the First-tier Tribunal to consider). My conclusion is fortified by [19] and [23] of Khan, where the Court of Appeal stated:

> *"19. My starting-point is that it is both natural and more convenient that where an issue arises as to the jurisdiction of a statutory tribunal that issue should be determined in the first instance by the tribunal itself, which can then proceed to consider the substantive issues if it decides that it has jurisdiction. It is inherently more wasteful for proceedings to have to be brought in different courts or tribunals. I do not see the force of Mr Pennington-Benton's suggested distinction between cases where jurisdiction is in issue and other "alternative remedy" cases. Once it is accepted, as he does accept, that the tribunal is in principle entitled to determine whether it has jurisdiction, I see no reason, in this context, for treating that question differently from any other question which it is empowered to decide. I accept that if one or other party is dissatisfied with the FTT's decision on jurisdiction it may then have to be decided by the UT, whether on appeal (where there was a hearing in the FTT) or by way of judicial review (where there was not), in which case the parties will have been put to the additional time and trouble of arguing the case twice rather than once. But that is not peculiar to cases of the present kind. It is an inevitable consequence of the application of the alternative remedy principle in the tribunal field and has not been treated in other cases as a sufficient reason for allowing the statutory jurisdiction to be undermined.*
>
> *23. Before us Mr Pennington-Benton repeated the submission that denying him access to the judicial review route forced the Appellant to waive his right to a valid decision notice, which is an important right. I do not agree. If he proceeds with an appeal to the FTT he loses nothing of value. All that he will be waiving is the right to object to the jurisdiction of the FTT on the basis that the absence of a notice rendered the decision appealed against a nullity. If he succeeds in showing that he had a right of appeal, the FTT will enjoy its full powers under section 84 of the 2002 Act (as it then stood). That would include the power, as Mr Malik expressly conceded, to allow the appeal on the basis that the decision was not "in accordance with the law", within the meaning of section 84 (1) (e), because the notice was invalid. The Appellant might, however, as Mr Malik pointed out, seek a*

> *decision on any substantive grounds also, in order (if he were successful) to preclude the possibility of the Respondent simply making the same decision again and accompanying it with a valid notice."*

In summary, on the basis that the appellant has, in this particular case, an alternative remedy available, it is unnecessary for me to decide on the applicability of Sheidu to applications for judicial review. The application is therefore dismissed on this ground.

Remaining Grounds

Ground (3) – the relevance of certification

I deal first with grounds which Mr West did not formally abandon, but following Mr Malik's response, indicated that he could make no further submissions. The first was ground (3) and the assertion that because an earlier certification under section 94 of the Nationality, Immigration and Asylum Act 2002 had not been expressly referred to and 'maintained' in the Decision, that the respondent could not then refuse to treat later further submissions as a fresh claim under paragraph 353. I accept Mr Malik's submission that this was a paradigm of the case considered in Z T (Kosovo) v SSHD [2009] UKHL, where the House of Lords specifically endorsed the approach of refusing to treat fresh submissions as a fresh claim under paragraph 353. The Supreme Court confirmed in Robinson that certification and refusal to treat as a fresh claim operate at different stages of a response to a purported renewed application (see [46] of Robinson) and paragraph 353 continues to have a role independent from certification (see [47]).

Paragraph 353B of the Immigration Rules – a new ground

Mr West sought to rely on a new ground in respect of which no permission to proceed had been granted and no application to amend the grounds had previously been made, namely that the respondent had failed to refer expressly in the Decision to the factors set out paragraph 353B of the Immigration Rules. Again, while Mr West did not abandon his application to amend the grounds to add this as a challenge, he accepted that he had no answer to Mr Malik's response that such a ground would have been bound to fail as a result of the Court of Appeal authority of Qongwane [2014] EWCA Civ 957 and in particular the point made at [32] by Sir Stanley Burnton as follows:

"32. Furthermore, if a decision is lawfully made to remove at the

same time as a decision to refuse leave claimed on Article 8 grounds, there is likely to be no sensible reason for a review to be carried out separately from the consideration of the claim for leave. In such circumstances, paragraph 353B will not apply. In any event, the factors referred to in that paragraph are likely to have been considered in the rejection of the Article 8 claim. It would be unnecessary for the decision maker to refer to those factors again, other than the statement that there are no exceptional circumstances justifying a decision that removal is not appropriate."

Lord Justice Underhill at [40] also noted:

"*Para. 353B is not very well drafted, but it seems to me clear, reading it as a whole, that its essential purpose is indeed to identify specific points which will weigh in the balance against the exercise of the discretion not to remove a migrant, or to qualify the effect of factors that might otherwise weigh in its favour. Thus the point of heads (i) and (ii) is to make clear that (in short) bad character/conduct and non-compliance with conditions must always count against the exercise of the discretion. As for head (iii), the point surely being made is that time spent in the UK after the adverse immigration decision ought (at least generally) only to count in the migrant's favour if his or her reasons for not leaving were beyond their control. I think this point worth making because I have observed a tendency for migrants or their advisers to treat the facts that they have committed no criminal offences or have complied with all conditions as if that created some kind of presumption in favour of non-removal "under para. 353B". That is not the right approach. Para. 353B is not a kind of mandatory check-list of the same character as (albeit less comprehensive than) the old para. 395C. I do not say that good character or compliance with conditions are wholly irrelevant to an exercise of the discretion in question. But it is not the purpose of para. 353B to ensure that they are considered; and they are hardly likely to be significant factors by themselves given the exceptional nature of the discretion as explained by Sir Stanley Burnton at para. 24 of his judgment."*

The Decision referred expressly to the consideration of exceptional circumstances. The absence of express reference to the factors in paragraph 353 cannot result in any error in the Decision, in light of Qongwane and even had I admitted the application to add this as a ground, which I do not, I would have dismissed it.

Ground (1)

Ground (1), as argued by Mr West, included two connected

elements. The first was whether the applicant had a free-standing right, regardless of the impact of R (Ahmed) v SSHD [2019] EWCA Civ 1070, to indefinite leave to remain as a result of the respondent's guidance dated 3 April 2017, which it was claimed gave clear instructions to decision makers to grant periods of indefinite leave to remain based on lawful continuous residence, even where there were breaks in continuous lawful residence. Even if the examples given at page [377] of the appellant's bundle, internal page [16] of [43] of the guidance, contradicted the law as now understood in Ahmed, they bound the respondent at the time of the Decision.

The second element in relation to continuous lawful residence related to an inconsistency in the respondent's refusal to treat as counting towards continuous lawful residence the later period of 20 days immediately prior to his application of 20 October 2016, but to count an earlier break of six days between 15 and 22 March 2012. Mr West referred to this earlier period as the 'concession' referred to by Upper Tribunal Judge Kamara and asserted that the inconsistency was irrational.

On the point of the free-standing right as a result of the respondent's 2017 policy, I accept Mr Malik's submissions that the examples given by Mr West and referred to above are taken out of context and cannot be fairly said to result in continuous lawful residence, as opposed to a break being 'disregarded' (the distinction highlighted by the Court of appeal in R (Ahmed) v SSHD (para 276B – ten years lawful residence) [2019] UKUT 00010 (IAC), referred to above. The examples given state:

"Example 1

An applicant has a single gap in their lawful residence due to submitting an application 17 days out of time. All other applications have been submitted in time, throughout the 10 years period.

Question	*Would you grant the application in this case?*

Answer	*Grant the application as the rules allow for a period of overstaying of 28 days or less when that period ends before 24 November 2016.*

Example 2

An applicant has 3 gaps in their lawful residence due to submitting 3 separate applications out of time. These were nine, 17 and 24 days out of time.

Question	*Would you grant the application in this case?*
Answer	*Yes. Grant the application as the rules allow for periods of overstaying of 28 days or less when that period ends before 24 November 2016.*

As Mr Malik pointed out, both examples follow, and are in the context of, the earlier guidance, at page [376] of the appellant's bundle, internal page [15], which states:

"*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 of residence on or after 24 November 2016 but leave was granted in accordance with paragraph 39E of the Immigration Rules*

- *meets all the other requirements for residence*."

It is perfectly possible, as Mr Malik submitted, that somebody may have gaps in lawful residence of no more than 28 days before 24 November 2016 or otherwise which fall to be disregarded under paragraph 39E of the Immigration Rules on or after 24 November 2016, where those gaps are sufficiently in the past that they might be disregarded and the applicant also has a sufficient period of continuous leave. Put another way, the examples given are not inconsistent with the authority of Ahmed, and the respondent did not err in failing to grant indefinite leave to remain based on a freestanding right under the respondent's policy.

Dealing with the second issue of the gap in lawful residence of 6 days from 15 March 2012 and 21 March 2012, I do not regard the respondent's failure to treat this in the Decision as breaking continuous lawful residence, as meaning that the respondent erred in law in treating the later period, in 2016, as breaking continuous lawful residence.

Reading the reference in the Decision to the earlier break in context, at internal page [2] of [20], there is a recitation of a lengthy immigration history beginning with lawful entry in May 2007.

The Decision refers to the fact that on 15 March 2012, the applicant withdrew his appeal and his appeal rights were exhausted on 21 March 2012, followed by further events in a chronology, and a reference later in the Decision at internal page [4] of [10] to the appellant having only 9 years, 4 months and 17 days' residence which was considered to have been lawful and continuous. In making that later statement, there was no reference to the earlier 2012 break being 'conceded' as not breaking continuity of lawful residence. What had occurred was that the respondent had discounted the earlier 2012 break in error, which had a knock-on effect in calculating the period of continuous lawful residence, which the respondent has since accepted was an error. That was not as the result of a positive decision to waive the earlier break. In making the earlier error, the respondent did not err in law, on the basis of irrationality, in considering correctly the more recent break of 20 days in 2016. By analogy with example of mistake and whether mistakes may lead to a legitimate expectation, all the circumstances must be considered (see: R (Begbie) v Department Of Education & Employment [1999] EWCA Civ 2100). It is not the case that a mistaken promise will never have legal consequences. It may be that a mistaken statement will, even if subsequently sought to be corrected, give rise to a legitimate expectation, whether in the person to whom the statement is made or in others who learnt of it, for example where there has been detrimental reliance on the statement before it was corrected. But, as in Begbie, that is not this case. The respondent has never accepted that the applicant has had a sufficient period of continuous lawful residence, and an initial error as to the earlier break in lawful residence does not mean that the respondent should repeat the error a second time.

For the above reasons, judicial review on ground (1) is also refused.

In summary, the application for judicial review is refused on all grounds.

Application for Permission to appeal to the Court of Appeal

There is not any application for permission to appeal to the Court of Appeal, but in the event, I have considered it and I refuse it for the reasons I have already refused the application for judicial review.

Costs

The applicant is ordered to pay the respondent's reasonable costs, to be assessed, if not agreed.

J Keith

Signed:

Upper Tribunal Judge Keith

Dated: **19 December 2019**

UTIJR6

JR/5723/2018

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen (on the application of Mr Arifuzzaman Rana)

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Keith

Having considered all documents lodged and having heard *Mr M West*, instructed by Liberty Legal Solicitors, on behalf of the applicant and *Mr Z Malik*, instructed by the Government Legal Department on behalf of the respondent at a hearing at Field House, London on 13th December 2019

It is ordered that

(1) The judicial review application is dismissed in accordance with the judgment attached.

Permission to appeal to the Court of Appeal

(2) There is not any application for permission to appeal to the Court of Appeal, but in the event, I have considered it and I refuse it for the reasons I have already refused the application for judicial review.

Costs

(3) The applicant shall pay the respondent's reasonable costs, to be assessed if not agreed.

J Keith

Signed: ____________________

Upper Tribunal Judge Keith

Dated: **19 December 2019**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an applicant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).