Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33198/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 August 2017	**On 8 September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A.F.M GIASUDDIN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms N Willocks-Briscoe, Home Office Presenting Officer
For the Respondent: Mr A Slatter of Counsel instructed by Londonium Solicitors

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Barker promulgated on 22 December 2016 in which he allowed on human rights grounds the appeal of Mr Giasuddin against a decision of the Respondent dated 7 October 2015.

2. Although before me the Secretary of State for the Home Department is the Appellant and Mr Giasuddin is the Respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Mr Giasuddin as the Appellant and the Secretary of State as the Respondent.

3. The Appellant is a citizen of Bangladesh born on 20 December 1975. He entered the United Kingdom on 26 July 2004 with a visa as a student valid until 31 January 2006. Thereafter he made a number of successive in-time applications for variation of leave to remain up until October 2010. On 26 October 2010 he made an application for leave to remain as a Tier 4 Student Migrant which was refused on 26 November 2010; however, the Appellant successfully appealed to the IAC against this decision and in due course and in consequence he was granted further leave to remain until 31 May 2012. Towards the end of that period of leave he made a further application as a Tier 4 Student which was successful, and leave was granted until 31 July 2015. On 28 November 2013 the Respondent made a decision to curtail the Appellant's leave with effect from 27 January 2014. During the period between the notice of the curtailment and the curtailment taking effect the Appellant made a further application as a Tier 4 Student - on 22 January 2014. During the currency of this application the Appellant made an application to vary the application, seeking indefinite leave to remain on 30 June 2014. The application to vary was initially rejected, but the Appellant again made an application for indefinite leave to remain on 1 August 2014 on the grounds of 'long residence' with particular reference to paragraph 276B of the Immigration Rules - the so-called '10 year rule'. It may be recalled that the Appellant had entered the United Kingdom on 26 July 2004 and therefore by August 2014 he had completed ten years' residence in the UK; all such periods of his residence were pursuant to the grant of leave or the statutory variation of leave pending the resolution of an application or, in one instance, an appeal.

4. The Appellant's application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 7 October 2015.

5. In particular the Respondent, upon reviewing the history of the Appellant's various applications, identified a TOEIC test certificate issued by Synergy Business College in respect of an assessment conducted on 18 April 2012 and submitted in the context of the Appellant's variation application of May 2012. The Respondent determined that the Appellant had made use of a 'proxy tester' in order to secure the certificate. In such circumstances the Respondent invoked paragraphs 322(2) and 322(5) of the Immigration Rules and also determined that the Appellant failed to satisfy the requirements of paragraph 276B(ii) and (iii) by reason of the utilisation of deception in the course of an earlier application.

6. The RFRL also gave some consideration to the Appellant's case with respect to Appendix FM and, more particularly, paragraph 276ADE of the Immigration Rules. In respect of paragraph 276ADE it was decided that the Appellant could not satisfy sub-paragraph (i) because he did not meet the suitability criteria with reference to paragraph S-LTR 1.6 of Appendix FM. It was also determined by the Respondent that the Appellant did not

satisfy the requirements of paragraph 276ADE(vi), that is to say in respect of significant obstacles to integration in his country of nationality.

7. The Appellant appealed to the IAC. It is to be noted that the scope of his appeal was governed by section 82(1)(b) and section 84(2) of the Nationality, Immigration and Asylum Act 2002 - that is to say it was an appeal confined to human rights grounds with reference to section 84(2) and section 6 of the Human Rights Act 1998.

8. The particular factual issue that was at the core of the Respondent's decision and informed the unfavourable outcome on the Appellant's application in respect of both paragraph 276B and paragraph 276ADE(i) was in relation to the allegation that he had used deception in an earlier application by obtaining and utilising an English language certificate through a proxy tester. Inevitably that contentious factual issue dictated the core of the materials filed in support of the Appellant's appeal, and indeed much of the focus of the consideration of evidence and submissions before the First-tier Tribunal. Suffice to say for present purposes that the First-tier Tribunal Judge found in the Appellant's favour on this point. After lengthy and careful consideration of the evidence, including the generic evidence filed by the Respondent in cases such as this as well as the case specific evidence filed by both the Respondent and the Appellant, and consideration of the Appellant's oral evidence, the Judge reached a favourable conclusion at paragraph 36 of his Decision in these terms:

> *"On the basis of all the evidence presented to me I find that I am not satisfied that the Appellant used a proxy test taker to complete his test. I find that I am not satisfied to the required standard that the test was invalid and therefore that the Appellant had used fraud in making a previous application."*

9. The Judge went on, in light of this finding, to consider the Rules that had been invoked by the Respondent. His Decision states *"it follows that it has not been proved to the required standard that the Appellant fulfils the criteria in paragraph 322 for the refusal of his application on the grounds within paragraph 322(2) or 322(5) of the Immigration Rules."*

10. This, then, constituted clear - and on the face of it adequately reasoned – findings and conclusions in respect of the key contentious issue in the Appellant's application and appeal. It is to be noted that the Respondent in bringing the challenge to the Upper Tribunal has not sought to impugn this particular aspect of the Judge's decision.

11. The Judge went on to consider where this left the Appellant in terms of the appeal that was before him. Paragraphs 37 and 38 of the decision are in these terms

> *"37. The respondent refused the appellant's application for indefinite leave to remain on the basis that he could not fulfil paragraph 276B(ii) and (iii) of the Immigration Rules. These subsections were found not to be fulfilled on the basis of the use of a fraudulent document in a previous application. As stated above I was not satisfied that the Secretary of State had proved this matter having considered the Home Office evidence together with the appellant's evidence. It follows therefore that the issues raised in respect of subset subparagraph (ii) and (iii) are not made out. I find that the appellant fulfils the criteria in those two parts of section paragraph 276B. No other objections were raised in respect of the appellant's fulfilment of the requirements for indefinite leave to remain on the ground of long residence in the United Kingdom. I therefore conclude that the officer was satisfied that he fulfilled all other requirements. It follows, therefore, that I find that the Appellant has satisfied the Tribunal that he meets all the requirements for indefinite leave to remain.*
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> *38. However the grounds of appeal do not permit the Tribunal to look at the Immigration Rules and determine whether the appellant fulfils the Immigration Rules. The date of decision was after the change in the law and a finding that the decision is not in accordance with the Immigration Rules is no longer a valid ground of appeal. This can only be looked at on the basis of the appellant's human rights. However the Immigration Rules are considered to be in line with human rights. The fact that an appellant fulfils the relevant requirements of the Immigration Rules would diminish the public need to remove the appellant. In line with case law and the circumstances above I find that the refusal of the application and removal of the appellant would breach the appellant's human rights in respect of his rights under Article 8 of the ECHR. It follows that I find that the decision is unlawful under section 6 of the Human Rights Act 1998. In view of this finding I do not need to consider human rights any further under paragraph 276ADE or under any other heading."*

12. The Respondent has sought to challenge the Judge's conclusions in this regard. Permission to appeal was granted by First-tier Tribunal Judge Saffer on 5 July 2017. In particular Judge Saffer in brief reasons for the grant of permission states *"it is arguable that the Judge gave inadequate consideration to s117 NIAA 2002."* The Respondent's grounds in this regard are, in material part, in the following terms.

"It is respectfully submitted that the FTT has materially erred in law by failing to consider the mandatory public interest factors outlined in Section 117B of part 5A of the Nationality, Immigration and Asylum Act 2002 when considering the appellant's article 8 claim outside of the Immigration Rules. In particular there was no evidence that the appellant would be financially independent. It is asserted that the FTT's failure to correctly consider the public interest as stipulated in section 117B means that the proportionality balance had not been carried out correctly in line with statutory consideration. As such the finding that the decision to remove the appellant is disproportionate is flawed."

13. The Respondent also raised a further line of argument with reference to the case of **Patel and others [2013] UKSC 72** and in particular the observations therein at paragraph 57 that Article 8 *"is not a general dispensing power."* It was submitted in the grounds of challenge that the Judge appeared to have utilised Article 8 as if it were a 'dispensing power' in order to give effect to the favourable findings under paragraph 276B - which was not a congruent exercise with consideration of Article 8 as a freestanding basis of challenge.

14. This case brings into stark relief issues and conundrums in respect of the inter-relationship between paragraphs 276B and 276ADE, both generally and specifically in the context of an Article 8 appeal pursuant to section 84(2) of the 2002 Act.

15. It may readily be appreciated that the provisions of 276B and 276ADE are very different in their requirements. Paragraph 276B, relating to ten years' lawful residence, essentially sets out a series of criteria to be considered in the event that an individual is able to establish ten years' continuous lawful residence - and if those matters do not reveal anything adverse in nature then an applicant is ordinarily granted indefinite leave to remain. Paragraph 276ADE sets out a number of different criteria depending upon age and length of residence in the UK: for somebody who has not yet been present in the UK for 20 years – and who does not otherwise meet the criteria of subparagraph (v) - it is necessary to demonstrate "*very significant obstacles*" to reintegration into the country to which they are likely to be removed (which in the ordinary course of events will be the country of nationality). An individual who can bring him or herself within the requirements of paragraph 276B might yet not satisfy the requirements of 276ADE. For example, a person who is well settled in the United Kingdom after 10 years lawful residence but has nonetheless maintained strong links with family in his or her country of nationality - and is perhaps a frequent visitor thereto - could not easily plead obstacles to reintegration into their country of nationality; moreover such a person - who cannot satisfy 276ADE - is entitled to a more secure grant of leave to

remain (indefinite leave to remain) than a person who could satisfy 276ADE.

16. Further, I note the following. Paragraph 276B in a form approximate to how it currently appears pre-dates the Human Rights Act 1998. Notwithstanding the existence of the so-called '10 year rule', when the Rules were amended with the declared intention of giving effect to obligations under Article 8 in respect of both family life and private life, this was done by the inclusion of Appendix FM and paragraph 276ADE. To that extent 276ADE was expressly introduced as a measure of proportionality in respect of Article 8 private life. And, as matters now stand, the jurisdiction of the Tribunal is in respect of 'human rights' grounds rather than 'not in accordance with the Rules' grounds. This might suggest that the 'yardstick' for a Tribunal Judge is 276ADE rather than 276B when considering 'private life' cases based in significant part on length of residence. On such a basis there would appear to be scope for argument that because 10 years lawful residence does not inevitably satisfy paragraph 276ADE, 10 years lawful residence does not inevitably render a decision to remove disproportionate absent very significant obstacles to reintegration.
17. I invited some guidance or clarification from the Respondent today as to the nature of the relationship between these two provisions in the Rules and how they were to be reconciled either generally or in the context of an Article 8 appeal before the Tribunal. Ms Willocks-Briscoe emphasised that these were indeed different provisions and identified in particular that paragraph 276B was one in respect of long residence and compliance with the Rules, whilst suggesting that paragraph 276ADE was more by way of a 'catch-all' focussed in particular on ties that may have been established in the UK and the ability to reintegrate - that is, in other words, the ability to establish a private life in the country to which the applicant might be removed. Consideration of reintegration is relevant to an evaluation of the extent and gravity of any interference with private life – which may inform the second and fifth **Razgar** questions. In this way Ms Willocks-Briscoe emphasised that the Rules focussed on different elements. Nonetheless she acknowledged that an individual who was able to demonstrate that they met the requirements of paragraph 276B would thereby have established a very favourable set of circumstances that would very significantly inform the wider consideration of Article 8 under the jurisdiction of the Tribunal - irrespective of the position under paragraph 276ADE. Even so, she argued that in the context of proceedings before the Tribunal it was necessary for the Tribunal to recognise that it was indeed embarked upon a freestanding assessment under Article 8 and to conduct such an assessment with reference to the usual jurisprudence and principles and to evaluate the particular case on its own facts accordingly.

18. In respect of paragraph 276B itself, Ms Willocks-Briscoe acknowledged that an individual who is able to demonstrate a continuous period of ten years'

continuous lawful residence and otherwise meets the requirements of paragraph 276B, may take advantage of that circumstance at any point at which he is present with leave in the United Kingdom - it is not necessary to have made the relevant application immediately upon completion of the period of leave. It is to be recognised in such circumstances, and perhaps in any event, that the findings of the Judge at paragraphs 36 and 37 necessarily are findings to the effect that the Appellant should indeed have the advantage of paragraph 276B - not within the confines of the Tribunal's jurisdiction but outside those confines, such that he would be able to present himself now to the Respondent on the basis of those findings and assert that in accordance with the Rules he should now be formally granted indefinite leave to remain. Ms Willocks-Briscoe does not deny this scenario – although, of course, this is not the particular issue before me. Be that as it may, and in recognition of this scenario – i.e. that on the Judge's findings the Appellant has demonstrated an entitlement to indefinite leave to remain pursuant to paragraph 276B (the paragraph upon which he relied in his application) - I cannot help but observe that it is thereby unclear as to why the Respondent considered it appropriate to pursue this appeal to the Upper Tribunal rather than acting on the facts found (which are not themselves the subject of challenge). Nonetheless, the Respondent persists in advancing the appeal and I consider it accordingly.

19. Mr Slatter argues that an application under paragraph 276B is indeed in itself a human rights application, and that success under 276B is in substance success under Article 8 of the ECHR, and that that should really be determinative of any Article 8 appeal. In any event, further or alternatively he argues that on the facts of this particular case it was abundantly clear that private life was engaged with reference to the relatively low threshold under the first two **Razgar** questions, and that the public interest in maintaining effective immigration control would in no way be offended against by permitting an individual who qualifies for indefinite leave to remain under the Rules to take advantage of that circumstance by placing reliance upon it within an Article 8 application or appeal. Indeed, it is submitted that this was exactly what the Judge did in stating at paragraph 38 that "*The fact that an appellant fulfils the relevant requirements under the Immigration Rules would diminish the public need to remove the appellant*".

20. In respect of the Respondent's ground that the Judge failed to have regard to section 117B, Mr Slatter highlights the nature of the requirements of paragraph 276B and submits that to a substantial extent the public interest considerations under section 117B are subsumed within the considerations required under paragraph 276B:

    (i) The public interest in the maintenance of effective immigration control (s.117B(1)) is necessarily subsumed by a consideration of the case by

reference to the Rules: this in substance was the observation of the First-tier Tribunal Judge.

(ii) The ability to speak English (s.117B(2)) is subsumed by the requirement of paragraph 276B(iv) which requires demonstration of sufficient knowledge of the English language as well as knowledge about life in the United Kingdom. On the facts of the Appellant's case, the Respondent raised no issue.

(iii) The 'continuous lawful residence' requirement under 276B meets the public interest concern expressed in s.117B(4).

(iv) Whilst up until the grant of indefinite leave to remain immigration status is to be characterised as 'precarious' (s.117B(5)), this is substantially ameliorated by the fact of a sustained period of continuous lawful residence, and by regard to the non-exhaustive list of considerations at 276B(ii) and the requirement of 276B(iii).

21. In short, save in one respect, the 'public interest' considerations applicable by virtue of section 117A are in substance addressed and met by the favourable finding in respect of paragraph 276B.

22. It is nonetheless acknowledged that there is no express requirement to demonstrate financial self-sufficiency under paragraph 276B, and to that extent the provision of section 117B(3) is not echoed or replicated directly in paragraph 276B. However, it is argued that if the Rules themselves do not recognise a requirement to demonstrate financial independence, then the maintenance of effective immigration control does not accord significant weight to that particular public interest in the context of a person who has a lawful extended presence in the United Kingdom; to that extent, it is submitted, at the very least section 117B(3) becomes substantially marginalised in an overall balance.

23. I am not at all unsympathetic to the Respondent's position as articulated by Ms Willocks-Briscoe before me today as to the nature of the different considerations at paragraph 276B and paragraph 276ADE. I am persuaded that paragraph 276B is not inevitably congruent with Article 8; more particularly paragraph 276B is plainly not congruent with paragraph 276ADE which expressly seeks to give effect to Article 8 under the Immigration Rules. In particular there is the distinction with regard to the reintegration issue. I also acknowledge the force of Ms Willocks-Briscoe's submission that a Tribunal decision maker is required to give close and careful consideration to Article 8 in accordance with the established jurisprudence, and insofar as this involves taking the Rules as a 'starting point', the relevant rule is indeed 276ADE. However, in my judgement 276ADE is not to be considered determinative *one way or the other* of an

Article 8 claim, given the freestanding nature of the analysis now to be conducted by the Tribunal pursuant to the change in the appeal regime introduced by the Immigration Act 2014. It nonetheless is an important aspect for consideration. Consideration must also encompass the statutorily identified public interest considerations.

24. The Judge's consideration of the Article 8 issues is really confined to paragraph 38, which I have set out in its entirety above. On its face it does not appear to follow the careful approach that jurisprudence requires. It might also be noted that there is no express finding in respect of private life - whether as to its existence or its quality. To that extent I understand the concerns expressed by the Respondent in the grounds of challenge further articulated before me today by the Presenting Officer. However I also consider that there is much force to the submissions made by Mr Slatter.

25. Starting with the issue of private life itself, as I have said earlier in this decision the primary focus before the First-tier Tribunal Judge was very much on the issue of the 'proxy tester' and the manner in which the Appellant had acquired the certificate presented in support of his application in May 2012. Nonetheless my attention has been drawn to his appeal bundle and witness statement before the First-tier Tribunal. The appeal bundle itself contains a number of supporting documents, but they are also focussed on the English language ability and the 'proxy tester' issue. The witness statement, however, does make a number of observations and assertions in respect of private life. From paragraph 23 through to paragraph 28 the Appellant makes comment as to the time that he has been in the United Kingdom, and expresses the view that he feels fully adapted to the way of life in the UK and accustomed to the norms and values of British society. He talks about having gained valuable experience and qualities and educational attainment which would be of use in the UK and would allow him to make a contribution to the UK economy. He also talks about having been fortunate to meet many people and to establish many friendships in the UK and to have accustomed himself to life in the UK by building many new bonds with friends.

26. To a certain extent those matters set out in the witness statement are matters with which most members of the Tribunal will be familiar from exposure to many similar cases. There is a degree of rote in asserting a sense of being 'accustomed to the norms and values of British society' and so on, such that it takes on the appearance of empty platitude in the absence of concrete illustrations. It is also to be noted that the Appellant did not produce any supporting evidence of any of the friendships or acquaintanceships that he claims to have established. It is also be noted that the Judge found that the Appellant had produced very little by way of

supporting evidence of educational qualifications actually obtained whilst in the UK (paragraph 35).

27. However, the Appellant did make clear assertions as to the establishment of private life in the United Kingdom, and it is to be recalled - and in no way in my judgment can it be significantly diminished - that he had been lawfully resident in the UK for over ten years by the time of the decision before the First-tier Tribunal. I accept, as Mr Slatter urges upon me, that it is not a difficult inference to draw that an individual resident in the United Kingdom for a period of more than ten years will more than likely have established something of a private life - and enough of a private life to overcome the low threshold of the first two **Razgar** questions. Indeed whilst it seems to me that the Judge has made no explicit finding in respect of private life it cannot reasonably be inferred that the Judge in some way when turning his mind to the specific issue of Article 8 overlooked this vital component of the exercise. It seems to me that the Judge has not made any express reference to it almost because it was a matter that was so obvious it barely needed to be stated. Whilst that is not necessarily the most satisfactory way of proceeding with decision making, I am not persuaded that the Judge in someway fell into the error of overlooking the issue of private life; rather I infer from the overall context of the decision and the circumstances of the Appellant, that the Judge did indeed consider that the length of residence in the UK was such that the Appellant had established a private life in the United Kingdom that that demanded a degree of protection and needed to be considered in the context of proportionality. In this regard I accept, pursuant to Mr Slatter's submissions rehearsed above, that although the Judge does not seem to have explicitly embarked upon the exercise, in substance the finding in respect of paragraph 276B - and in particular the favourable findings in respects of sub-paragraphs (ii) and (iv) - were such as to meet the substance of the public interest considerations identified in section 117B with the single exception of the financial requirements.

28. As regards the financial requirements, I am sympathetic to the Secretary of State's position that the Judge does not appear to have expressly taken this into account. But again it seems to me that there must be considerable weight accorded to Mr Slatter's counter-argument that this is largely immaterial in circumstances where the Rules under paragraph 276B do not consider it in the public interest to demand an applicant who has been lawfully resident in the UK for ten years or more to demonstrate financial sufficiency. Moreover the purpose of demonstrating financial sufficiency so far as section 117B is concerned is in significant part to demonstrate a 'better ability' to integration into society in the UK. A person who has been present in the UK for ten years may be properly considered to be well past the point of needing to embark upon the process of integration. In those circumstances it seems to me that the failure to make express reference to section 117B(3) was not a material error on the very particular facts of this case.

29. In those circumstances whilst I accept that the Respondent has correctly highlighted that there is a departure from the usual and recommended approach to a human rights case in the Judge's analysis at paragraph 38, I am not ultimately persuaded that the Judge has thereby fallen into any material error of law such that the decision should be set aside.

Notice of Decision

30. The decision of the First-tier Tribunal contained no material error of law and is to stand.

31. The Appellant's appeal remains allowed on human rights grounds.

32. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed: Date: **6 September 2017**

Deputy Upper Tribunal Judge I A Lewis