Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17351/2018

THE IMMIGRATION ACTS

Heard at FIELD HOUSE
On 6th March 2019

Decision & Reasons Promulgated
On 3rd April 2019

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL
G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ASIF AHMED BAIG
NO ANONYMITY ORDER MADE

Claimant

Representation:
For the Appellant: Mr S Whitwell (Home Office Presenting Officer)
For the Respondent: Mr J Gajjar (Counsel)

ERROR OF LAW DECISION AND REASONS

1. This is an error of law hearing. The SSHD is the appellant in this matter and Mr Baig is the Claimant. The SSHD appeals against the decision of the First-tier Tribunal (Judge Fox) (FtT) promulgated on 9th January 2019 in which the Claimant's human rights appeal was allowed under Article 8 outside of the rules.

Background

2. The appellant is a citizen of Pakistan and entered the UK as a student. On 9.2.2018 he applied for ILR on the grounds that he had lived in the UK for a continuous period of 10 years lawful residence (under paragraph 276B(i-v)). In the refusal letter the SSHD contended that the Claimant failed to establish the period of residence. His leave expired on 6.4.2016 and thereafter he submitted a number of further in time applications which had not resulted in leave being granted. He became appeal rights exhausted on 31.1.2018. There was a gap of 8 days from 1.2.2018 until 9.2.2018 when the application for leave was submitted. The SSHD accepted that the Claimant's application was submitted within 14 days of being appeal rights exhausted on 31st January 2018 and that the requirements of paragraph 39E were met. The Claimant met 276B(v) and was not treated as being in breach of the Immigration rules. However, the SSHD refused the application because it was made out of time and there was no 3C leave applicable. The Claimant failed to establish 10 years continuous residence, only 9 years 10 months and 29 days. Paragraph 276B(i)(a) was not met.

Consideration by the FtT

3. The FtT determined as a preliminary issue that Rule 39E applied and stated that "*it was agreed that Rule 29E (sic) of the Immigration rules applies in relation to the respondent's discretion to disregard a break in leave of less than 28 days.*" [10] The FtT then found that the Claimant had made a valid application for settlement 8 days after he was appeal rights exhausted and further that the application had been made within the period of 28 (sic) 14 days prior to his residence qualification under the Rules [17]. The FtT was aware that it had no power to allow an appeal on the basis that the SSHD ought to have exercised a discretion differently. The FtT found that the Claimant established exceptional circumstances by reason of the fact that he met the substance of the immigration rules under paragraph 276B[22]. The FtT further found that the SSHD failed to exercise his discretion in terms of a flexible approach [23]. The FtT recognised that there was no near miss principle [21] and allowed the appeal under Article 8 ECHR. Although the Claimant's representative made the submission that the Claimant had not received notice of being appeal rights exhausted, the FtT was unaware of any jurisprudence on this point and did not consider the submission was relevant to the decision.

Grounds of appeal

4. In grounds of appeal the SSHD argued that the FtT erred by determining that the claimant had 10 years continuous residence relying on the clarification in **R (on the application of Ahmed)** v SSHD (paragraph 276B – ten years lawful residence) [2019] UKUT 000010. The Claimant had no lawful leave after 31.1.2018. The fact that the Claimant had made the application within the 28 day period (coming under para 267B(v)) did not bestow any form of leave. The SSHD argued that the FtT further erred in concluding that the fact that the Rules were met was a significant factor

under Article 8 and given that the assessment was fundamentally wrong, the Article 8 decision was flawed. There was a material misdirection in law and failure to give adequate reasons. There was no consideration of exceptional circumstances and the factors under section 117B were not properly considered.

Permission to appeal

5. Permission to appeal to the Upper Tribunal (UT) was granted by FTJ Haria on 29.1.2019. In granting permission the FTJ considered it arguable that the FtT erred in determining that the Claimant had 10 years continuous lawful residence.

Submissions

6. At the hearing before me Mr Gajjar produced a copy of the Respondent's guidance on long residence published 3.4.2017 which confirmed that early applications for settlement could be made 28 days prior to the required qualifying period being met, provided that all the other rules for long residence were met. The guidance at page 15 covered breaks in lawful residence and confirmed that an application may be granted if an applicant "*has short gaps in lawful residence on or after 24 November 2016 but leave was granted in accordance with paragraph 39E of the Immigration rules.*"

7. Mr Whitwell relied on the grounds of appeal and argued that the FtT erred by placing weight on the degree to which the Claimant had met the Immigration rules in terms of his long residence and that the Article 8 decision was in effect a "near miss" under the Rules and that the judgment in **Patel & 0rs v SSHD [2013] UKSC 72** applied. The Claimant needed to satisfy paragraph 276B(i) following paragraphs 47-48 of **Ahmed**.

8. Mr Gajjar contended that the facts in this appeal were entirely distinct from **Ahmed** where the Claimant was an over stayer and there was a significant gap in leave. In any event **Ahmed** was published some 2 days after the FtT decision was promulgated. The FtT was entitled to find that the Claimant met the rules given that the application had come within paragraph 39E and the application was made within the 28 day period prior to the qualification of leave. As this was a human rights appeal the FtT was entitled to take into account that the immigration rules had been met when considering Article 8. The FtT was correct in its approach at [17] and so there was no near miss argument as the Claimant met the rules. To that extent the section 117B factors were not relevant.

Discussion and conclusion

9. The head note in **Ahmed** states "*if there is no ten years continuous lawful residence for the purpose of para 276B(i)(a) of the Immigration rules, an applicant cannot rely on para 276B(v) to argue that any period of overstaying (for the purposes of 276B (i)(a)) should be disregarded. Para 276B(v) involves a freestanding and additional requirement over and above 276B(i)(a).*"

10. I find that the decision in **Ahmed** is applicable as it clarifies the existing law and in any event the points raised therein were set out in the refusal letter. The FtT proceeded erroneously by misapplying paragraph 39E. It concluded that had it been applied this meant that the Claimant could be treated as having leave because he would not be regarded as an over stayer. What **Ahmed** makes clear is that the provisions under paragraph 276B are entirely separate and that paragraph 276B(v) is a freestanding and additional requirement over and above 2276B(i)(a). So the Claimant to whom 39E was applied by the SSHD would not to be treated as having breached of the Immigration Rules but the period of time could not be treated as part of the period of continuous lawful residence. The definition of lawful residence is set out in paragraph 276A(b). In this instance the Claimant made his application after he was appeal rights exhausted. There was no difficulty in terms of his making his application prior to meeting the required period but the proviso to that is that all the other requirements of the rules are met. I am satisfied that the FtT erred in law in misapplying paragraph 39E [23] and taking the view that the SSHD failed to apply any discretion. The SSHD applied paragraph 39E but nevertheless concluded that paragraph 276B(i) was not met in terms of continuous lawful residence which amounted to a misdirection of law.

11. Having regard to the Article 8 assessment I am satisfied that the FtT 's approach was wrong. The FtT ought to have made findings as to how Article 8(1) and (2) were engaged. The FtT found that there was private life by reason of the length of residence [19] and because the substance of the immigration rules were met. The FtT did in effect treat the matter as a "near miss". There were no other grounds relied on or evidence adduced by the Claimant under Article 8 family or private life [26]. The FtT made no decision under paragraph 276ADE(1)(vi) nor did it fully consider section 117B factors such as the Claimants' precarious status.

12. There is a material error of law in the decision which shall be set aside.

Future disposal

13. Mr Gaffar submitted that in the event of an error in law there was an unresolved issue on the facts as to whether or not the appellant received the notice informing him that he was appeal rights exhausted. Mr Whitwell submitted that the Claimant's appeal ought to be dismissed.

14. I have set aside the decision and concluded that the FtT erred by way of a misdirection in law. On the evidence before me it is clear that the Claimant cannot meet the 10 year continuous lawful residence period under paragraph 276B(i)(a) even though paragraph 276B(v) is met. Given that there was no other argument or evidence relied on in support of Article 8(1), I see no merit in any further hearing of the Article 8 claim. The Claimant's failure under the rules, in the absence of any other evidence to show private and family life, fails under Article 8 on the grounds that it would be "a near miss" to which **Patel** applies.

> *56. Although the context of the rules may be relevant to the consideration of proportionality, I agree with Burnton LJ that this*

> *cannot be equated with a formalised "near-miss" or "sliding scale" principle, as argued for by Mr Malik. That approach is unsupported by Strasbourg authority, or by a proper reading of Lord Bingham's words. Mrs Huang's case for favourable treatment outside the rules did not turn on how close she had come to compliance with rule 317, but on the application of the family values which underlie that rule and are at the heart also of article 8. Conversely, a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit.*
>
> *57. It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the rules are not reviewable on appeal: section 86(6). One may sympathise with Sedley LJ's call in Pankina for "common sense" in the application of the rules to graduates who have been studying in the UK for some years (see para 47 above). However, such considerations do not by themselves provide grounds of appeal under article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8.*

15. Even if Article 8 was engaged and the length of residence did amount to an exceptional circumstance, then the decision was not in accordance with the law. In terms of proportionality section 117B(5) (2002 Act as amended) provides that little weight is given to a private life developed while immigration status is precarious.

16. I acknowledge that the FtT made no findings in respect of the service of the notice that the Claimant was appeal rights exhausted as indicated by Mr Gaffar. Whilst this may be the case I consider that this is not a material issue. The Claimant has not raised this or any other issues by way of cross appeal. The FtT failed to determine paragraph 276ADE but that was not a material error given that the appellant was pursued on Article 8 outside of the rules.

17. I remake the decision by substituting a decision to dismiss the appeal under Article 8.

Decision

18. The appeal of the SSHD is allowed. The Claimant’s appeal is dismissed on human rights grounds.

Signed Date 28.3.2019

GA Black

Deputy Judge of the Upper Tribunal

NO ANONYMITY ORDER

NO FEE AWARD

Signed Date 28.3.2019

GA Black
Deputy Judge of the Upper Tribunal