Upper Tribunal

(Immigration and Asylum Chamber) **Appeal number: HU/03874/2020 (V)**

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC	**Sent to parties on**
On 1 June 2021	**On 11 June 2021**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SHEKIBA HAIDARY

(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (V)

For the appellant: Mr N Shah, instructed by NorthWest Solicitors

For the Respondent: Mr A McVeety, Senior Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote

hearing. At the conclusion of the hearing, I indicated my decision but reserved my full reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is an Afghan national with date of birth given as 9.4.80, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 5.1.21 (Judge Haidary), dismissing on all grounds her appeal against the decision of the Secretary of State, dated 27.2.20, to refuse her application made on 25.11.19 for leave to remain in the UK on family and private life grounds.

2. Permission to appeal was granted by Resident First-tier Tribunal Judge Zucker on 1.2.21, considering it arguable that the judge misconstrued section 3C and paragraph 39E of the Immigration Rules, had gone behind the respondent's concession regarding the financial requirements under the Rules, and made a flawed proportionality assessment.

3. The Upper Tribunal has received the respondent's Rule 24 reply, dated 5.2.21, and the appellant's skeleton argument, dated 27.5.21.

4. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal.

5. The first ground in the application to the Upper Tribunal is that the judge misconceived the application of paragraph 39E of the Immigration Rules. The respondent's position as set out in the refusal decision was that the appellant could not meet the immigration status requirements of the Rules as she had remained in the UK beyond valid leave to remain. In the grounds of appeal to the First-tier Tribunal, the appellant did not accept that she had overstayed. However, on her representative's advice that ground was withdrawn, and at the First-tier Tribunal appeal hearing both parties agreed that she had overstayed. However, the judge did not accept this.

6. I am satisfied that the judge was in error of law in finding at [27] of the decision that the appellant's leave expired on 11.12.19, the date 28 days following my refusal of permission to appeal to the Court of Appeal. As Mr McVeety pointed out and with which Mr Shah agreed, the failure to pursue my refusal further to the Court of Appeal meant that the appellant's 3C leave in fact expired on 13.11.19, the date of sending of the decision refusing permission to appeal to the Court of Appeal.

7. At [28] of the impugned decision, the judge appears to have considered that paragraph 39E applied but failed to realise that 39E only applies where leave has expired, so that on the judge's findings that leave had not expired by the date of

the most recent application made on 25.11.19, paragraph 39E should not have come into consideration.

8. Whilst the judge has made multiple errors in relation to s3C and 39E, it seems that 39E does in fact apply. I raised with both Mr McVeety and Mr Shah that if the appellant's 3C leave extended to 13.11.19, the date of my refusal of permission to appeal to the Court of Appeal, then the appellant's next application made on 25.11.19 was within the 14-day limit and, therefore, the period of overstaying should have been disregarded. This is not addressed in the respondent's refusal decision, nor the Rule 24 Reply, nor Mr Shah's further skeleton argument of 27.5.21.

9. After due consideration, both Mr Shah and Mr McVeety accepted that 39E applied so that the period of overstaying beyond 13.11.19 to her next application on 25.11.19 should have been disregarded by the respondent when considering her application for leave to remain within the Rules.

10. Regarding the judge's digression into the financial requirements of Appendix FM, Mr McVeety accepted that this was not an issue raised in the refusal decision. He also accepted that it was not a point of challenge by the Home Office representative at the First-tier Tribunal appeal hearing. Both parties also agreed that the judge appears to have confused the 2018 application, in respect of which it was conceded that the documentation failed to meet the evidential requirements of Appendix FM-SE, with the 2019 application in respect of which the evidential requirements were met, the documentation being in the appellant's bundle. The judge was in error to suggest that the appellant's skeleton argument submitted that the threshold of £18,600 was met but that the appellant "could not provide the specified evidence to substantiate such earnings." That related to the 2018 and not the 2019 application. It follows that the financial requirements were not in issue and the judge was in error to consider them so.

11. Although the judge erred in relation to 3C, 39E, and the financial requirements, the Rule 24 reply submits that these findings were wholly immaterial to the outcome of the appeal as the appellant accepted that the claim had to be resolved outside of the Rules. Despite that, Mr McVeety accepted, for the reasons set out above, that the appellant should have had the benefit of 39E so that the application should have succeeded under the Rules.

12. Although this is a human rights appeal, and despite the various assertions and concessions made at the First-tier Tribunal, I am satisfied that 39E did apply, although for different reasons than found by the First-tier Tribunal Judge, with the consequence that the application should have been granted and in a human rights appeal the public interest in the article 8 ECHR proportionality balancing exercise is and should be deemed to be satisfied, so that the appeal must be allowed.

13. In the circumstances and for the reasons set out above, I find such material error of law in the decision of the First-tier Tribunal so that it must be set aside and remade by allowing the appeal.

Decision

The appeal of the appellant to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside.

I remake the decision in the appeal by allowing it on human rights grounds pursuant to article 8 ECHR.

I make no order for costs.

I make no anonymity direction.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 1 June 2021