Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: HU/16727/2019 (P)**

THE IMMIGRATION ACTS

Decided under rule 34 (P)	**Decision & Reasons Promulgated**
On 9 November 2020	**On 12 November 2020**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

MUHAMMAD USMAN KHURSHID

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation (by way of written submissions)

For the appellant: None received

For the respondent: Ms H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. This appeal comes before me following the grant of permission to appeal by Upper Tribunal Judge Pickup on 30 June 2020 (served on 11 August 2020) against the determination of First-tier Tribunal Judge Young-Harry, promulgated on 16 January 2020 following a hearing at Birmingham on 30 December 2019.

2. The appellant is a Pakistani national born on 3 September 1987. He appeals against the respondent's decision of 24 September 2019 to refuse his application for indefinite leave to remain on the basis of ten years of continuous, lawful residence made following his entry as a student in May 2009. The respondent was not satisfied that the appellant had completed ten years of continuous and lawful residence under paragraph 276B nor that he would face very significant obstacles with re-integration on return to Pakistan.

3. The appeal came before First-tier Tribunal Judge Young-Harry who heard oral evidence from the appellant and submissions from the appellant's representative. The respondent was not represented. The judge noted that the appellant's leave ended in either August 2017 (although the decision letter refers to July 2017) or, with 3C leave in May 2018. She found that he had not shown that he had resided lawfully in the UK for the required period and she found that he would not struggle on return to Pakistan as he claimed because he had a wife, child, parents and other family there. She found he retained familial, social and cultural ties and that he would not face very significant obstacles on return. She found that although he had a private life in the UK, it had been formed at a time when his stay was precarious and, further, his failure to meet the rules was a weighty factor against him in the balancing exercise. She considered s.117B and found that his ability to speak English was a neutral factor. Accordingly she dismissed the appeal.

4. The appellant sought permission to appeal. This was refused by First-tier Tribunal Judge Nightingale on 8 April 2020 (served on 27 May 2020) but granted on limited grounds upon renewal to the Upper Tribunal. Upper Tribunal Judge Pickup considered it arguable that the judge had made no finding on the key issue of how long the appellant had been lawfully resident. He considered that the period of residence was relevant to the proportionality argument.

Covid-19 crisis

5. Normally, the matter would have been listed for hearing after the grant of permission, but due to the Covid-19 pandemic and need to take

precautions against its spread, this did not happen. Instead, directions were included with the grant of permission and sent to the parties on 11 August 2020. They were asked to present any objections to the matter being dealt with on the papers and to make any further submissions on the error of law issue within certain time limits.

6. The respondent's submissions were received on 26 August 2020 But there has been no reply from the appellant. I note that Judge Pickup's decision was sent by first class post to both the appellant at his Reading address and to his representatives in Mitcham. Neither letter has been returned as undelivered. I consider it unlikely that both would have gone astray. I am, therefore, satisfied that the grant of permission and included directions were properly served.

7. I now consider whether it is appropriate to determine this matter on the papers. In doing so I have regard to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules), the judgment of Osborn v The Parole Board [2013] UKSC 61, the Presidential Guidance Note No 1 2020: Arrangements during the Covid-19 pandemic (PGN) and the Senior President's Pilot Practice Direction (PPD). I have regard to the overriding objective which is defined in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as being "*to enable the Upper Tribunal to deal with cases fairly and justly*". To this end I have considered that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues (Rule 2(2) UT rules and PGN:5).

8. I have had careful regard to the evidence, the determination, the grounds and the grant of permission. I consider that a full account of the facts are set out in the papers before the Tribunal, that the arguments for and against the appellant have been clearly set out in the grounds and that the issue to be decided is straightforward. There are no matters arising from the papers which would require clarification and so an oral hearing would not be needed for that purpose. I have regard to the importance of the matter to the appellant and consider that a speedy determination of this matter is in his best interests. I am satisfied that I am able to fairly and justly deal with this matter without a hearing and now proceed to do so.

Respondent's Submissions

9. For the respondent, Ms Aboni acknowledges that there was no Presenting Officer to assist the judge at the hearing but argues that the appellant's immigration history was set out in the decision letter. It is

agreed that the appellant's Counsel was correct to maintain the appellant had 3C leave until 4 May 2018 following the refusal of his application for leave on 26 March 2018 and whilst his administrative review was ongoing. It is submitted that his period of lawful leave commenced on 16 May 2009 and ended on 4 May 2018, a period of almost nine years. Ms Aboni submits that although the judge may have failed to make a finding on whether lawful leave ended in August 2017 or May 2018, the error is immaterial because, even taking the latter date, the appellant could not demonstrate that he had resided lawfully in the UK for a continuous period of at least ten years. It is pointed out that the judge properly concluded as such and that her decision should, therefore, be upheld.

Discussion and conclusions

10. I have taken account of the evidence, the determination, the grounds, the grant of permission and the submissions in reaching a decision.

11. The parties appear to now be in agreement that the appellant had lawful leave from 16 May 2009 when he arrived until 4 May 2018 when his 3C leave expired. That is a period of less than nine years and so plainly cannot meet the ten year requirement under paragraph 276B. The judge, therefore, reached the only conclusion possible when she found that the requirements of that rule could not be met (at 16). Indeed, the grounds acknowledge that (at paragraph 7 of the grounds) and it appears also to have been accepted by Counsel in his submissions at the hearing (at 15).

12. The issue taken with the decision is that the judge failed to make a finding on *when* the appellant's lawful leave had expired and it is argued that this is a material error because the period of residence impacts on the proportionality assessment.

13. At paragraph 14 the judge sets out the conflicting assertions of the appellant and the respondent. The appellant maintains that he has resided lawfully in the UK for ten years. It is plain from his witness statement that he includes in his calculation a fresh application made on 16 May 2018 after the expiry of his 3C leave on 4 May 2018, arguing that the later application was made within the 14 day grace period and so should have been counted. The respondent maintains in the decision letter that the appellant's last period of leave expired on 26 March 2018 when his application of 14 July 2017 was refused. Following that, he had 3C leave until 4 May 2018. The respondent thus concludes that ten years of lawful leave had not been established.

14. The judge then finds that she is unable to make a finding "without having all the details" as to whether the period of leave ended in 2017 or in 2018 (at 16) however she finds on either basis the ten year

requirement has not been met. The issue now is whether her failure to make a definitive finding on the period of residence is a material error.

15. I find it is not. The difference between the two dates is a matter of months. It does not alter the judge's finding that private life was established at a time when the appellant's leave was precarious. Nor does it alter her findings that he retains familial, social and cultural ties with his home country. It is significant that he has a wife, child and his parents living there and that he has continued to visit during his stay here. No very significant obstacles are identified. The starting point of the balancing exercise as undertaken by the judge was that the appellant did not meet the requirements of either paragraph 276B or 276ADE(1). His application for further leave as a Tier 1 entrepreneur was refused so he does not meet the requirements of the Tier 1 scheme either. He has no family here. No details of any friends have been provided and apart from his period of residence no specifics are provided as to why his private life cannot be enjoyed in Pakistan where he would be reunited with his wife, child and parents. No other outcome would have been possible in this appeal even if the judge had made a definitive finding on when the appellant's leave expired.

16. I, therefore, conclude that the judge did not err in law in her proportionality assessment on article 8. The decision to dismiss the appeal is upheld.

Decision

17. The decision of the First-tier Tribunal does not contain errors of law and it is upheld.

Anonymity

18. There has been no request for an anonymity order and I see no reason to make one.

Signed

R. Kekić
Upper Tribunal Judge

Date: 9 November 2020