Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-002533**
[HU/52890/2021]; IA/07646/2021

THE IMMIGRATION ACTS

Heard at Field House
On the 14th October 2022

Decision & Reasons Promulgated
On the 19th January 2023

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

NASREEN AKHTAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Alam, Counsel instructed by Pearl Valley Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born in 1974. She arrived in the UK in March 2012 as a domestic worker and was granted successive periods of leave until October 2020.

2. On 29 November 2020 she made an application for further leave to remain on human rights grounds, based on her private life. That application was

refused in a decision dated 10 June 2021, with reference to paragraph 276ADE of the Immigration Rules ("the Rules").

3. Her appeal against that decision came before First-tier Tribunal Judge Bart-Stewart ("the FtJ") at a hearing on 1 April 2022, following which the appeal was dismissed. The FtJ concluded that the appellant could not meet the requirements of the Rules and the decision was otherwise proportionate in Article 8 terms.

4. The short point that arises in the appeal before me is in terms of the FtJ's analysis and application of the Rules in the light of the appellant having by the time of the hearing before the FtJ accrued ten years' lawful residence. On that basis, it is argued that the FtJ should have allowed the appeal with reference to paragraph 276A1.

5. Before the FtJ it was accepted on behalf of the respondent that the appellant had accrued ten years' lawful residence in the UK by the time of the hearing. The decision in *OA and Others (human rights; 'new matter'; s.120) Nigeria* [2019] UKUT 00065 (IAC) was cited to the FtJ in terms of the proposition that the completion of ten years' residence should mean that the appeal fell to be allowed with reference to the Article 8 Rules.

6. At paragraph 16 of her decision the FtJ said that the appellant appeared to meet most of the requirements of paragraph 276B of the Rules and that there appeared to be no reasons why it would be undesirable for her to be given indefinite leave to remain on the ground of long residence, save that she had not demonstrated that she meets paragraph 276B(f)(iv) (knowledge of the English language and knowledge of life in the UK). The FtJ went on to consider the appellant's particular personal circumstances and concluded that she had failed to show that there would be very significant obstacles to her integration in Pakistan. Similarly, she found that in the light of her circumstances the decision was not disproportionate in Article 8 terms.

7. Paragraph 276A1 provides as follows:

> "The requirement to be met by a person seeking an extension of stay on the ground of long residence in the United Kingdom is that the applicant meets each of the requirements in paragraph 276B(i)-(ii) and (v)".

8. The point made on behalf of the appellant is that she only needs to meet paragraph 276B(i)–(ii) and (v). In other words, she does not need to meet subparagraph (iv) in terms of language and knowledge of life in the UK, contrary to what was decided by the FtJ. Reliance is also placed on the respondent's guidance entitled Long Residence dated 11 May 2021, indicating that leave should be granted in these circumstances.

9. A difficulty for the appellant in the appeal before me is the fact that at the hearing before the FtJ, as recorded at [9] of her decision, she noted that the Secretary of State did not consent to her considering the 'new matter' of the appellant's having acquired ten years' lawful residence by the time

of the hearing, a matter that her representatives had informed the Tribunal that it was intended to rely on in advance of the hearing. S.85(5) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") acts as a bar to a Tribunal (including the Upper Tribunal) considering a 'new matter' unless the Secretary of State gives consent for it to be considered.

10. The Upper Tribunal in *OA and Others* decided that the completion of ten years' continuous lawful residence during the course of a human rights appeal would "generally" constitute a new matter within the meaning of s.85 of the 2002 Act. In those circumstances, it is clear that the FtJ was not entitled to consider that fact in this appellant's case. She nevertheless went on to do so and dismissed the appeal for that and other reasons.

11. The question arises, therefore, as to whether what is accepted to have been the FtJ's failure to consider paragraph 276A1 of the Rules constitutes an error that is material, requiring her decision to be set aside, given her other reasons for dismissing the appeal. It was accepted on behalf of the respondent before me that the FtJ was wrong in her analysis of the Rules in this respect.

12. I indicated to the parties that my provisional view was that the FtJ had erred in law in considering the issue of the ten years' continuous lawful residence as part of her analysis, in circumstances where the Secretary of State did not consent to that new matter being considered and whereby the judge proceeded with that analysis notwithstanding the prohibition in s.85(5) of the 2002 Act. Both parties agreed with that provisional view.

13. The parties also agreed that the appropriate course was for the FtJ's decision to be set aside for that error of law. Ms Everett consented to the new matter of the ten years' lawful residence being considered in any re-making before me. Thus, it was agreed by both parties that in those circumstances the appeal should be allowed under Article 8 on the basis that the appellant meets the requirements of the Rules, with specific reference to paragraph 276A1 in that she has at least ten years' continuous lawful residence and meets the other relevant requirements of that Rule, namely paragraph 276B(i)–(ii) and (v). In particular, she does not need to meet the requirements of subparagraphs (iii) (general grounds for refusal) or (iv) (language and life in the UK).

14. Accordingly, the FtJ's decision is set aside for error of law and the decision is re-made allowing the appeal under Article 8 of the ECHR.

Decision

15. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the decision is re-made allowing the appeal

A.M. Kopieczek

Upper Tribunal Judge Kopieczek 12 November 2022