IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004987

First-tier Tribunal No: HU/58717/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

1st March 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE BLACK

Between

Secretary of State for the Home Department

Appellant

and

MKRL
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr N Wain, a senior Home Office Presenting officer
For the Respondent: Mr H Malik, Counsel instructed by Diplock solicitors

Heard at Field House on 13 February 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant in this matter is the Secretary of State but for convenience I shall refer to the parties as they were ascribed in the First-tier Tribunal. The respondent/Secretary of State appeals the decision by First-tier Tribunal Judge Morgan ("the Judge") promulgated on 4 October 2023 which allowed the appellant's appeal on human rights grounds. The appellant, whose date of birth is

25.12.1979, is a citizen of Bangladesh. The Judge allowed his appeal on human rights grounds against the respondent's refusal that the appellant failed to show continuous lawful residence for 10 years and the absence of exceptional circumstances to justify engagement of Article 8 outside of the rules.

2. In the refusal letter the respondent considered paragraph 276B(i)(a) and set out the appellant's immigration history as follows. The appellant entered the UK in January 2007 with valid Entry Clearance as a spouse until 9/11/08. The appellant attempted to make an application on 4/11/08. This was rejected on 17/11/08 as the fee was not paid. The appellant attempted to make an application on 26/11/08. This was rejected on 8/1/09 as the form was not fully completed. The appellant made an out of time application for leave to remain as a spouse on 3/2/09. This was refused on 22/4/09. Subsequently the appellant was granted Discretionary Leave to Remain on 3/4/09 until 22/7/12. On 20/7/12 the appellant made an in time application for leave to remain on human rights grounds. The appellant was granted Discretionary leave on 26/11/13 until 26/11/16. On 25/10/16 the appellant made an application for Indefinite Leave to Remain Outside the Rules. This was refused on 5/1/18. The appellant appealed on 22/1/18. Before the First-tier Tribunal the appeal was dismissed on 16/7/18. Permission to appeal was refused on 5/9/18 and a renewed application to Upper Tier was refused on 27/11/18. On 27/12/18 the appellant made an out of time application for leave to remain on the 10 year route. On 10/9/19 the appellant was granted leave to remain outside the rules until 9/4/22.

3. Specifically the refusal letter stated "Your application for Indefinite Leave to Remain on the basis of 10 Years Long Residency falls to be refused under paragraph 276B(i)(a) of the Immigration Rules. This is because you have not accrued 10 Years Continuous Long Residency. You had lawful leave from your entry into the UK in January 2007 until your leave expired on 9/11/08. There is a gap in your leave until 23/7/09 when you were next granted leave to remain. You had lawful leave from this date until 27/11/18. This was when the appeal that you had made following the refusal of your application of 25/10/16 was declared appeal rights exhausted. There is a gap in your leave from this date until 10/9/19 when you were next granted leave to remain. The next application of 27/12/18 was made out of time as it was 30 days after you were appeal rights exhausted. So in summary, you have had continuous leave from 23/7/09 until 27/11/18. This is a period of 9 years and 4 months. You have not accrued 10 years long residency."

4. "Under paragraph R-LTRPT.1.1.(d)(ii), you do not meet the eligibility relationship requirement paragraphs E-LTRPT.2.2 to 2.4. E-LTRPT.2.4. is as follows: (a) The applicant must provide evidence that they have either- (i) sole parental responsibility for the child, or that the child normally lives with them; or (ii) direct access (in person) to the child, as agreed with the parent or carer with whom the child normally lives or as ordered by a court in the UK. You do not meet this requirement as you only have indirect access to your children SRR and HRS (as stated in your response to our letter dated 23 September 2022)."

5. (In a letter dated 8 September 2022 the appellant's solicitors notified the respondent that the appellant had indirect contact with his children but that he had completed 10 years continuous residence (page 144)).

6. The refusal continued, "We have considered whether there are exceptional circumstances in your case which would render refusal a breach of Article 8 of the ECHR because it would result in unjustifiably harsh consequences for you, a

relevant child or another family member. In so doing we have taken into account the best interests of any relevant child as a primary consideration. Based on the information you have provided we have decided that there are no such exceptional circumstances in your case that would warrant a grant of leave to remain outside the Immigration Rules. It is noted that your relationship with your children is indirect. It is considered that the best interests of your children are to remain in the family unit that they are currently living with. You leaving the UK would not affect this arrangement nor would cause serious hardship to the children. You would be able to continue with indirect access from Bangladesh. This would not cause any serious hardship to the children. In light of the above, your application is refused under paragraph 276ADE(1),(iii), (iv), (v), and (vi) of the Immigration Rules. Accordingly, you do not qualify for leave to remain under the 10-year private life route of Part 7 of the Immigration Rules, or for leave to remain outside the Immigration Rules on the basis of exceptional circumstances."

FTT decision and reasons

7. In his decision the Judge accepted that the appellant had established 9 years and 4 months continuous lawful residence, which was not disputed. The Judge found the appellant to be a credible witness and accepted his immigration history and the arguments put in the ASA that the appellant was able to show continuous residence of 10 years. The Judge found that the appellant, who was granted leave to enter the UK as a spouse in January 2007 until 9 November 2008 was thereafter granted periods of discretionary leave and was appeal rights exhausted (ARE) on 27 November 2018. Following an application made on 27 December 2018 he was granted leave outside the Rules from 10 September 2019 until 9 April 2022. The Judge accepted that the period of 9 years and 4 months was "*bookended by the respondent's subsequent grant of leave*" and that "*the subsequent grant of leave 'bookended' and extended the lawful period of leave and that consequently the appellant has accrued in excess of 10 years lawful residence*."[11] In the alternative, the Judge then considered that on each occasion the respondent referred to a break in continuity between grants of lawful leave, the respondent thereafter granted a period of discretionary leave which was treated as an extension of pre-existing leave [12]. In the proportionality assessment the Judge placed weight on the 10 years continuous residence.

8. The Judge further (and in the alternative) considered Part 5A of section 19 Immigration Act 2014 and the factors under section 117A-C [15]. The Judge found that the appellant had "retained parental responsibility" for his two British citizen children and allowed the appeal with reference to section 117B(6) Nationality, Immigration and Asylum Act 2002 as amended ("the 2002 Act") [7] & [12]. The Judge placed weight on the fact that the respondent granted discretionary leave in September 2019 and there was no change in circumstances to justify that it would now be proportionate to expect the appellant to leave the UK, thus curtailing his contact with his children [19]. The appeal was allowed on human rights grounds having found that there was continuous residence under the long residence rules and in the alternative on family life under section 117B(6) on human rights grounds [20].

Grounds of appeal

9. The Judge made a material misdirection in law by failing to take into account the fact of a gap in lawful residence between 27 November 2018 and 01 September 2019. At [11-12] the Judge used the term "booked-ended" in respect of the period of leave which commenced on 10 September 2019 as though this

addressed the issue of the gap between one period of leave and the next. The appellant cannot benefit from continuing leave as defined under Section 3C Immigration Act 1971. The gap of 10 months is not insignificant such as to be disregarded.

10. The Judge's findings as to paragraph 276B have infected his consideration of proportionality in allowing the appeal under section 117B(6) 2002 Act.

11. **Permission was granted** on renewal by UJT Macleman who stated that "the grounds show arguably the FtT has gone wrong on the length of the continuous lawful residence (Afzal & Iyieke [2023] UKSC 46). The UTJ observed that the anonymity order warranted reconsideration.

The Immigration rules

12. Paragraph 276B provides that the requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that: (i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom. (ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his: (a) age; and (b) strength of connections in the United Kingdom; and (c) personal history, including character, conduct, associations and employment record; and (d) domestic circumstances; and (e) compassionate circumstances; and (f) any representations received on the person's behalf; and (iii) the applicant does not fall for refusal under the general grounds for refusal. (iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix K. (v) the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where (a) the previous application was made before 24 November 2016 and within 28 days of the expiry of leave; or (b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied.

Discussion and decision

13. In order to understand the decision and reasons I have read the ASA to which the decision specifically refers. The ASA at paragraph 31 submits that the appellant's leave came to an end on 27.11.2018 but that this leave was automatically extended under section 3C Immigration Act 1971. The ASA then states that "*As a matter of law, the appellant's leave to remain did not expire until 27 November 2018 when his appeal rights were actually exhausted*." The ASA at paragraph 33 submits that thereafter the appellant came within the scope of paragraph 39E(2) and concluded that paragraph 276B(v) was met in that "*the current period of overstaying will be disregarded*". At paragraph 39 ASA the appellant suggests that the analysis of Underhill LJ in **Hoque** is determinative rather than that in **Afzal** in respect of which the UKSC gave permission to appeal on 3 October 2022. This relates to the question of "book ending" which the Judge found applied to periods between grants of leave which could be included in the calculation of continuous leave. Although post this decision the UKSC in R (on the application) of Afzal & Iyieke v SSHD 2023 UKSC 46 has since upheld the decision as to the meaning of "disregarded" in paragraph 276B(v) at (70).

14. The bulk of the decision considers the issue of continuous residence under the Rules. In the introductory paragraphs of the decision the Judge cites **Mostafa** (Article 8) at [6] which sets out the interrelationship between the Rules and their impact in a proportionality assessment. Although no clear findings are made ,the Judge concluded that Article 8 is engaged on private and family life as between the appellant and his British children following EB (Kosovo) [7], finding that that the first 4 Razgar stages are met. That apparently established the remainder of the decision discusses the factors relating to the proportionality assessment.

15. In considering the issue of continuous residence the Judge does not adequately explain how the decision was reached in terms of the period of continuous residence nor is it clear which period or periods are identified as being capable of being "disregarded "and /or book-ended. Mr Wain submitted that the Judge erred in reaching a conclusion that implied paragraph 39E applied. The Judge whilst referencing the ASA [11] does not consider paragraph 39E in the decision at all. Paragraph 39E (Exceptions for overstayers) applies in cases where

"(1) *the application is made within 14 days of the applicant's leave expiring and the secretary of state considers that there was a good reason beyond the control of the applicant or their representative, provided in or with the application, why the application could not be made in time; or*

(2*) the application was made :*
(a) following the refusal of a previous application for leave which was made in time or to which paragraph sub-paragraph (1) applied, and
(b) within 14 days of:
(i) the refusal of the previous application for leave
(ii)the expiry of any leave extended by section 3C Immigration Act 1971; or
(iii) the expiry of the time limit for making an in time application for administrative review or appeal (where applicable); or

(iv) any administrative review or appeal being concluded, withdrawn, or abandoned or lapsing."

16. The respondent identified a gap in leave between 9.11.2008 and 23.7.2009 and accepted that thereafter the appellant had lawful leave until he was appeal rights exhausted on 27.11.2018. The next application was made some 30 days later on 27.12.2018. This fails to come with the scope of paragraph 39E which requires that an application is to be made within 14 days. It was accepted that the appellant's leave to remain came to an end on 27.11.2018 with the refusal of permission to appeal by the UT. The ASA makes no reference to the 14 day time limit as per paragraph 39E which apply to leave extended by 3C. Furthermore, the Judge focusses on the period of lawful leave between 2008 – 2018 and ignores the 10 month gap between 27.12.2018 and 10.9.2019 at which date leave was granted. It is unclear whether in referring to book ended periods the judge was referring to that 10 months gap or to the period after the expiry of the 3C leave. Even with reference to the ASA at paragraph 33 it is not clear how it is suggested that paragraph 39E(2) applies. As was pointed out in the Review the appellant acknowledged in his witness statement (paragraph 11 page 16 A/B) that his application was made out of time. Mr Malik acknowledged the out of time application after 30 days. I am satisfied that this amounts to an error of law by way of a misdirection and misapplication of the law. The Judge erred in finding continuous residence of 10 years. And that the Immigration rules were met. The 10 month period was not insignificant. Further in allowing the human rights

appeal, it is clear from the decision that the Judge took into account the period of continuous residence as a relevant factor in the proportionality assessment and found it to be a weighty factor to be balanced in the appellant's favour [14]. The Judge found that the Immigration Rules were met and weighed this in the proportionality assessment. Accordingly, I am satisfied that the proportionality assessment was infected by the Judge's error as to continuous residence. I am satisfied that this amounted to a material error in law.

17. I now turn to the Judge's application of section 117B(6) 2002 Act which appears at [20]. It is of note that neither the ASA nor the Review made reference to section 117B(6) or to any claimed family life. The refusal is premised on the appellant's failure to meet the Eligibility requirements as he has indirect access only (see paragraph 4 above). There had been a previous human rights appeal concerning the circumstances as between the appellant and his children. FTJ Holmes dismissed the appeal in a decision promulgated on 16.7.2018 in which he considered the issues of the best interests of the children, 10 years lawful leave under the Rules and the discretionary leave policy (see paragraph 2 above).

18. Mr Malik submitted that the error (if any) as to continuity of residence was not material to the proportionality assessment. The decision could stand in view of the Judge's alternative conclusion that section 117B(6) applied. Mr Malik submitted that the Judge separately considered family life at [7] [13] [15] and allowed the appeal on that basis. My reading of those paragraphs of the decision is that at [7] the Judge found that Article 8(1) was engaged and considered the Razgar stages save for proportionality. There are no findings or reasoning at this stage. At [13] the Judge's focus was on the issue of long residence. It is only at [15] that the Judge stated, "*However for the sake of completeness I will briefly consider the merits of the appeal had the appellant not been able to satisfy the continuous 10 year lawful residence requirement.* He goes on to apply factors under section 117B 2022 Act. At [19] the Judge stated "*However even if I had found that he had not [met the Immigration Rules in respect of long residence] I would nevertheless have allowed his appeal for the following reasons."* The Judge then set out his brief reasons for allowing the appeal on family life grounds under Article 8. In the grounds of appeal the respondent has not raised any specific challenge to the Judge's alternative consideration of family life and /or the application of section 117B(6). The only reference made in the grounds to section 117B(6) was that the consideration was infected by the continuous longer residence finding. There was no application to amend the grounds of appeal either before or at the hearing. As it stands the decision under Article 8 family life shall stand.

19. In conclusion the grounds are made out and the Judge erred in concluding that the appellant met the long residence rules in terms of continuous residence, as a result of a misdirection in law. In so far as this was a weighty factor in the proportionality assessment the error was material as it infected the Judge's assessment under Article 8. The decision is set aside in so far as the continuous residence issue is determinative of the human rights appeal. However given that the Judge made an alternative decision to allow the appeal on family life under Article 8, for which there has been no challenge, that part of the decision shall stand and the appellant's appeal remains allowed.

Notice of Decision

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The error was not material in light of the Judge's

alternative decision to allow the human rights appeal on family life. That part of the decision shall stand.

GA Black

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

24.2.2024