Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/11243/2014**

THE IMMIGRATION ACTS

Heard at Field House, London
On the 16th September 2015

Decision & Reasons Promulgated
On the 6th October 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

MR SANJIV JANKEE

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J. Gasparro (Counsel)
For the Respondent: Ms A. Brocklesby-Weller (Home Office Presenting Officer)

DECISION AND REASONS

1. For the purposes of clarity throughout this decision, the parties are referred to as they were referred to at the First-Tier Tribunal hearing such that Mr Jankee is referred to as the Appellant and the Secretary of State for the Home Department is referred to as the Respondent. In this case both the Appellant and the Respondent have sought to appeal the decision of First-Tier Tribunal Judge Pygott, who allowed the Appellant's appeal against curtailment of his leave, in a decision promulgated on the 16th March 2015.

Background

2. The Appellant is a citizen of Mauritius who was born on the 1st February 1980. He initially entered the UK on the 4th April 2004, having been granted entry clearance as a student on the 17th March 2004 which was valid until the 30th June 2005. He was then granted further extension of leave until the 31st March 2009, on the basis of him being a student. On the 9th September 2008 he married Miss Bhavna Bhoobdasur and in March 2009 it appears that he was then granted Leave to Remain as the dependent spouse of Miss Bhoobdasur, who was a Tier 4 (General) Student Migrant. He was subsequently granted further Leave to Remain as her dependent until the 30th April 2014. However, on the 8th May 2013 the Respondent was notified that the Appellant was no longer dependent of Miss Bhoobdasur as they were no longer in a spousal relationship so that his leave was curtailed. On the 23rd May 2013, the Appellant was charged with assault against Miss Bhoobdasur and pleaded guilty to battery, when he was given a conditional discharge of 12 months, together with an order to pay costs of £85 and a victim surcharge of £15.

3. The Appellant appealed against the decision of the Respondent on the 17th February 2014 to curtail his Leave to Remain in the United Kingdom as the dependent spouse of a points based migrant and to remove him from the UK by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006, under the Immigration Rules and on Human Rights grounds relying on Article 8 of the ECHR.

4. The case was originally listed for hearing before the First-Tier Tribunal on the 30th September 2014, but was adjourned and the Appellant was granted Leave to amend his Grounds of Appeal to include that the Respondent's decision was not in accordance with the Immigration Rules, specifically paragraph 276A (1) because he had been in the UK lawfully from more than 10 years. On the 30th September 2013 by Judge of the First-Tier Tribunal Owens ordered that "the Tribunal has granted permission to amend the grounds to include that the decision is not in accordance with the Immigration Rules and specifically paragraph 276A (1)."

5. Judge of the First-Tier Tribunal Pygott at [39] found specifically that "I am compelled to conclude that, as a grant of an extension of leave on the grounds of 10 years continuous lawful residence is a matter falling within the exercise of discretion by the Respondent under paragraph 276 A2 of the Immigration Rules, it is not open for me to exercise my discretion in relation to that issue."

6. Judge of the First-Tier Tribunal Pygott dismissed the appeal on the grounds that it was not in accordance with the Immigration Rules paragraph 232 (ii), dismissed the appeal under the Immigration Rules in respect of Appendix FM and paragraph 276 ADE and also on Human Rights grounds in reliance upon Article 8 of the ECHR outside of the Rules, but allowed the appeal to the limited extent that the decision was not in accordance with the law and it remained for the Respondent to consider the exercise of her discretion under paragraph 276 A2.

7. The Respondent appealed against that decision on the 18th March 2015, and in the Grounds of Appeal it is argued that the First-Tier Tribunal Judge materially misdirected herself in law and it was argued by the Respondent that the Appellant had not applied for indefinite Leave to Remain and therefore the provisions of paragraph 276 A1 and 276 A2 were not open to him and that following the Upper Tribunal case of MU (statement of additional grounds"; long residence; discretion) Bangladesh [2010] UKUT 442 (IAC) that "an application cannot be made under the long residence rule for only limited Leave to Remain. Two years leave may be granted under paragraph 276A1-4 but only to people who have applied for indefinite leave and who are ineligible for it, solely because their knowledge of English or of life in the UK is not good enough". The Respondent further sought to rely upon the Court of Appeal case of case of R (on the application of Weiss) v Secretary of State for the Home Department [2010] EWCA Civ 803, in arguing that an application for indefinite Leave to Remain had to be made on the prescribed forms, which the Appellant had not done in this case.

8. The Respondent further sought to argue that the only way in which paragraph 276 A-D were available to an Appellant is where they were not eligible for indefinite Leave to Remain on the sole ground of English language, which was not the present case and that

the Presenting Officer had relied upon a criminal offence going to the Appellant's character, such that the circumstances of this case were far removed from that envisaged by the Upper Tribunal in the case of MU.

9. The Appellant also sought to appeal with grounds of application dated the 24th March 2015, in which it was argued that the Judge should have found that the requirements of paragraph 276 B (i) (a) were satisfied and gone on to consider the factors set out in paragraph 276 B (ii). It is argued that the failure to consider the substantive grounds at paragraph 276 B (ii) stemmed from the Judge's misconception that the applicable rules conferred a discretion on the decision maker, It is argued that paragraph 276 A1 with reference to paragraph 276B does not confer a discretion and that the discretion appears in paragraph 276 A2 relating to the period of leave to be granted once the requirements of the substantive Rules are satisfied. It is argued that the decision of the Judge that it remained for the Respondent to consider exercising her discretion under paragraph 276 A2 was erroneous and that she should have decided herself as to whether or not the grounds of paragraph 276B (ii) were met.

10. Permission to appeal in this case was granted by First-Tier Tribunal Judge Nicholson on the 12th May 2015. He noted that there was an application by the Respondent for permission to appeal. He does not appear to have noticed that in fact there was also an application for permission to appeal by the Appellant, such that although Judge Nicholson has dealt with the application for permission to appeal by the Respondent, he has not dealt with the cross application for permission to appeal by the Appellant. Judge of the First-Tier Tribunal Nicholson granted permission to appeal on the point related to limited leave and as to whether or not following the case of MU, an application could be made for under the long residence rule for limited Leave to Remain as opposed to indefinite Leave to Remain and as to whether or not paragraph 322 (1c) (iv) applied. He pointed out that the case of MU had been partially overturned by the Court of Appeal in the case of AQ (Pakistan) v Secretary of State for the Home Department [2011] EWCA Civ 833, although not on that point.

11. To the extent that it is necessary to do so, given that Judge of the First-Tier Tribunal

Nicholson does not appear to have considered the Appellant's application for permission to appeal, given that permission to appeal was granted in respect of the Respondent's application, I consider that it is in the interest of justice that permission is also granted to the Appellant in respect of the cross-appeal, and that I deal with all of the matters relevant to this appeal at the same time. It would be wholly unjust to refuse the Appellant permission to raise the arguments that he wishes to raise in respect of the decision, given that it appears that the original application by him for permission to appeal was overlooked. It is clearly in the interest of justice that all of the arguments are dealt with, in order to be able to determine whether or not there was a material error of law in the decision of First-Tier Tribunal Judge Pygott. It was not argued before me that I did not have power to consider such arguments when Judge Nicholson had not considered the Appellant's Grounds of Appeal.

12. In her oral submissions before me, Miss Brocklesby-Weller sought to argue that the Appellant was entitled to raise paragraph 276 B in his Section 120 notice, but that he was not entitled to argue that he satisfied the requirements of paragraph 276 A1 in his Section 120 notice. She relied upon the case of MU in that regard. She agreed that time spent awaiting for the appeal decision can count as lawful residence for the purposes of calculating the 10 year period, as the Appellant still during that time had Section 3C leave. She argued that if the Appellant had applied under paragraph 276B for indefinite Leave to Remain on the ground of long residence in the United Kingdom, he would have fallen foul of the provision of paragraph 276 B (iii) in that the Appellant did fall for refusal under the general grounds for refusal under paragraph 322 (1C) (iv) in that he had, within the 24 months prior to the date on which the application was decided, been convicted or admitted an offence for which he had received a non-custodial sentence or other out-of-court disposal that was recorded on his criminal record. She argued that he would therefore have been refused under paragraph 322 (1C) had he applied for indefinite Leave to Remain on the basis of his long residence.
13. Miss Brocklesby-Weller sought to argue that the decision in the case of MU (statement of additional grounds-long residence-discretion) Bangladesh [2010] UKUT 442 (IAC), that "an application cannot be made under the long residence rule for only limited Leave to Remain. Two years leave may be granted under paragraph 276A1-4, but only to people

who applied for indefinite leave and who are ineligible for it, solely because their knowledge of English or of life in the UK is not good enough". However she did concede that the provisions of paragraph 276 A1 had changed since the decision in MU, such that it was no longer directly on point, but she did still seek to rely upon the same and in particular upon [9] of the decision in which it was stated that "although Rule 276 A1 refers to 'a person seeking an extension of stay on the ground of long residence', that does not mean that people can apply for a limited Leave to Remain solely on the ground of long residence. Applications under the long residency rules, paragraphs 276 A-D, are for indefinite leave. Paragraph 276 A1-4 had been introduced as a halfway house, to accommodate applicants who would otherwise fall for refusal because of paragraph 276 B (iii). The Appellant cannot therefore avoid the 'public interest proviso' by stating that he only wants to remain in the United Kingdom for two years at the most".

14. The old wording of paragraph 276 A1 is set out at [7] of the decision and it previously read "276 A1. 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 all the requirements of paragraph 276B of these Rules, except the requirement to have sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom contained in paragraph 276B (iii)".

15. Miss Brocklesby-Weller drew my attention to the new wording of paragraph 276 A1, which read "276 A1. The requirement to be met by a person seeking an extension of stay on the grounds of long residence in the United Kingdom is that the applicant meets each of requirements in paragraph 276B (i)-(ii) and (v)." This paragraph is headed in the Rules "Requirements for an extension of stay on the ground of long residence in the United Kingdom". She argued that the Judge should simply have found that the Appellant did not meet the requirements of paragraph 276 B because of his conviction, and that he was not entitled to consider the application under 276 A1 following the case of MU, and should have dismissed the Appellant's application on that basis.

16. Ms Gasparro argued that the Judge should have determined the application under paragraph 276B (ii) and that she should not simply have found that this was a matter of

discretion that should still be exercised by the Secretary of State. She argued the Appellant was entitled to apply under paragraph 276 A1, given its new wording and that there were now two caveats, rather than one as previously at the time of MU, and that it was therefore now envisaged that people could apply on the basis of paragraph 276 A1 applying on the basis of an extension of stay for grounds of long residence. She argued that the Appellant had specifically sought to amend his Grounds of Appeal to argue reliance upon paragraph 276 A1, rather than 276B and that the Judge did have jurisdiction to consider this point. She argued that the Respondent had not either when the Appellant had applied for permission to amend his Grounds of Appeal or at the original appeal hearing before First-Tier Tribunal Judge Pygott sought to argue that the Judge could not rely upon paragraph 276 A1. She argued that the Judge had materially erred in not considering the Appellant's application based upon his long residence under paragraph 276 A1 as sought, and should not have remitted the case back to the Secretary of State for the exercise of her discretion in that regard.

My Findings on Error of Law and Materiality

17. Although reliance is placed by the Secretary of State upon the case of R (on the application advice) v Secretary of State for the Home Department [2010] EWCA Civ 803, as authority for the proposition that the Secretary of State for the Home Department was entitled to require an individual to make a formal application under the Immigration Rules rule 276 B for indefinite Leave to Remain in the United Kingdom notwithstanding that both an Immigration Judge and the Secretary of State had indicated that such application was likely to be successful, that case was simply dealing with whether or not it was unreasonable and unlawful to require a formal application to be made in circumstances where the Judge and Respondent at the appeal hearing indicated that such an application was likely be successful, and did not involve a case where there had been a submission in response to Section 120 notice that the Appellant was entitled to either an extension of his leave or indefinite Leave to Remain on the basis of long residence. The situation of this Appellant, Mr Jankee, is entirely different in that the original Refusal Notice by the Respondent on the 17th February 2014, and "one-stop warning-statement of additional grounds" required the Appellant to state any reasons

why he should be allowed to stay in the United Kingdom under Section 120 of the Nationality, Immigration and Asylum Act 2002.

18. It was stated by the Upper Tribunal in the case of Jaff (section 120 notice; statement of "additional grounds") [2012] UKUT 396 that the legislative scheme provided no particular form in which a statement of additional grounds must be set out, but at a minimum must set out to some level of particularity the ground relied upon by the Appellant as a foundation for remaining in the United Kingdom. Here, in response to the Section 120 notice the Appellant had specifically sought and been granted leave to amend his Grounds of Appeal to include the submission that the Respondent's decision was not in accordance with the Immigration Rules specifically paragraph 276A (1) because he had been in the UK lawfully for more than 10 years. In that regard the Appellant had fully complied with the requirement in Jaff to set out the ground relied upon, both in substance and in form, he having given both the Rule relied upon and the reasons why it was said that he satisfied that Rule. Indeed, Miss Brocklesby-Weller on behalf of the Respondent did not in fact seek to argue that the Appellant could not have applied for indefinite Leave to Remain by means of his Section 120 notice under paragraph 276 B, her argument was that following the case of MU, the Appellant was not able to apply by means of a Section 120 notice under the long residence rule for only limited Leave to Remain under paragraph 261A, following the case of MU (statement of additional grounds-long residence-discretion) Bangladesh [2010] UKUT 442 (IAC).

19. However, the decision of the Upper Tribunal in the case of MU was based upon the old wording of paragraph 276 A1 of the Immigration Rules. The old wording read:

"276 A1. The requirements to be met by a person seeking an extension of stay on the grounds of long residence in the United Kingdom is that the applicant meets all of the requirement of paragraph 276 B of the Rules, except the requirement to have sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom contained in paragraph 276 B (iii)". It was on this basis that Senior Immigration Judge McKee sitting in the Upper Tribunal found at [9] that people could not apply for a limited Leave to Remain on the grounds of long residence and that

applications under the long residence rule were for indefinite leave. He found that the old paragraph 276 A1-4 had been introduced as a halfway house to accommodate applicants who would otherwise fall for refusal because of paragraph 276B (iii) and that an Appellant could not thereby avoid the "public interest proviso" by asserting that he wanted to remain in the United Kingdom for two years at the most.

20. However, the wording of paragraph 276 A1 has since changed, such that the wording now and as at the date of the decision before Judge of the First-tier Tribunal Pygott on the 12th December 2014 read:

"276 A1. The requirement to be met by a person seeking the extension of stay on the ground of long residence in the United Kingdom if the applicant meets each of the requirements of paragraph 276B (i)-(ii) and (v) under this paragraph."

21. An applicant under paragraph 276 A1 now would not have to meet the provisions of paragraph 276 B (iii) or (iv). Whereas senior Immigration Judge McKee was of the opinion that the previous wording of paragraph 276 A1 was simply a method as a halfway house to accommodate applicants who would otherwise fall for refusal on the basis of their English language or knowledge about life in the UK, the new wording of paragraph 276 A1 specifically allows for someone to be granted an extension of stay on ground of long residence, even if they would otherwise fall for refusal under the general grounds for refusal had they applied for indefinite Leave to Remain under paragraph 276B (iii). Further, given that paragraph 276 A1 is under the heading "Requirements for an extension of stay on ground of long residence in the United Kingdom" and actually refers to a person "seeking an extension of stay on the ground of long residence" rather than applying for indefinite Leave to Remain under 276 B, I find that a person can now under paragraph 276 A1 seek an extension of stay on grounds of long residence, in circumstances where they would have otherwise fallen for refusal under the general grounds for refusal under 276B (iii).

22. Paragraph 276A04 states that "where a person who has made an application for indefinite Leave to Remain under this part does not meet the requirements for indefinite Leave to Remain but falls to be granted limited Leave to Remain under this part on the

basis of long residence of private life in the UK outside of the Rules on Article 8 grounds:

(a) the Secretary of State will treat that application for indefinite leave to remain as an application for limited leave to remain;"

23. The fact that there is a separate provision for a person who does not meet the requirements of paragraph 276B to be considered by the Respondent under paragraph 276 A1, does not preclude an actual application being made under paragraph 276 A1. The fact that there is in this regard reinforces the point that an application for an extension of stay on ground of long residence in the United Kingdom can be made. Otherwise the wording of paragraph 276A1 would be otiose. The case of MU clearly does not apply to the new wording of the Rule. I therefore find that the Appellant was entitled to argue in his response to the Section 120 notice that he was entitled to an extension of stay on the grounds of long residence.

24. In determining whether or not the Appellant met the requirements for the extension of his stay on the grounds of long residence in the United Kingdom under paragraph 276 A1, the Appellant simply needed to meet, as at the date of the First-Tier Tribunal Judge's decision, the requirements in paragraph 276B (i)-(ii) and (v). The fact that under paragraph 276 A2, an extension of stay on the ground of long residence in the United Kingdom may be granted for a period not exceeding two years, such that the Respondent under paragraph 276 A2 has some element of discretion, does not mean that the provisions of paragraph 276 A1 and the conditions therein that an applicant has to meet the requirements of paragraph 276B (i)-(ii) and (v) are discretionary. The matter having been properly raised by the Appellant within his reply to the Section 120 notice, First-tier Tribunal Judge Pygott should have gone on to consider whether or not the Appellant did satisfy the provisions in paragraph 276 A1, in terms of meeting the requirements in paragraph 276B (i)-(ii) and (v). She should not simply have allowed the appeal to the limited extent of finding that the decision made was not in accordance with the law and should not have found that it remained for the Respondent to consider exercising her discretion under paragraph 276 A2.

25. The Judge materially erred at [39] when finding that "on reflection, I am compelled to conclude that, as the grant of an extension of leave on the grounds of 10 years continuous lawful residence is a matter within the exercise of discretion by the Respondent under paragraph 276 A2 of the Immigration Rules. It is not open to me to exercise my discretion in relation to that issue." She should have herself considered the issue as to whether or not the Appellant was entitled to an extension of leave on the basis of 10 years continuous lawful residence in the UK having regard to paragraph 276 A1 and paragraph 276 B (i)-(ii) and (v). Had this been established, then she could have found that the Appellant having satisfied that Rule was entitled to leave under paragraph 276 A2, but at that point it would then have been for the Respondent to have exercised her discretion as to the period of any such leave, had the entitlement to leave been established.

26. The First-Tier Tribunal Judge Pygott having materially erred in this regard, I set aside her decision to allow the appeal on the basis that the decision made was not in accordance with the Law and that it remained for the Respondent to consider exercising discretion under paragraph 276 A2.

27. Both legal representatives before me, indicated that if I were to find a material error in the First-Tier Tribunal Judge's decision in this regard, it would be appropriate to remit the case back to the First-Tier Tribunal for consideration as to whether or not the Appellant did meet the requirements of paragraph 276 A1 in light of the factors set out in paragraph 276B (i)-(ii) and (v). I therefore allow the appeal on the basis that there was a material error of law, and set aside the decision of First-Tier Tribunal Judge Pygott and remit the case back to the First-Tier Tribunal for consideration of the appeal in respect of this issue. It is appropriate that this matter be considered by the First-Tier Tribunal, given that no consideration has been given to this issue by the First-Tier Tribunal, and given that there would be a substantial amount of fact-finding required in order to determine whether or not in fact the Appellant did meet the requirements for an extension of leave on the basis of long residence.

Notice of Decision

The decision of First-Tier Tribunal Judge Pygott containing a material error of law, I set aside her decision;

I remit the case back to the First-Tier Tribunal, to be heard by any Judge other than Judge of the First-Tier Tribunal Pygott;

The First-Tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and no application for an anonymity order was made before me. No such order is made.

Signed Dated 16th September 2015

Deputy Upper Tribunal Judge McGinty