



IAC-YW-LM-V3

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/12620/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 23 June 2015  
Prepared 23 June 2015**

**Decision & Reasons Promulgated  
On 22 July 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DAVEY**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**DR CHUNXIAO HOU  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr T Wilding, Senior Presenting Officer

For the Respondent: Ms G McCall, Counsel instructed by Richmond Chambers

**DECISION AND REASONS**

1. In this decision the Appellant is referred to as the Secretary of State and the Respondent as the Claimant.
2. The Claimant, a national of the People's Republic of China, date of birth 23 October 1967, appealed against the Respondent's decision to refuse an application made on 7 February 2013 for indefinite leave to remain as a Tier 1 (Highly Skilled) Migrant in the UK under the Points-Based System.

The appeal came to be heard before First-tier Tribunal Judge Telford (the Judge) who, on 9 February 2015, allowed the appeal under paragraph 276B of the Immigration Rules HC 395 (as amended) (the Rules).

3. The *gravamen* of the Secretary of State's complaint is that the Judge, having found as a fact that the Claimant had had at least ten years' continuous lawful residence in the United Kingdom, went on to carry out the exercise under paragraph 276ADE(b)(ii) of the Rules and following, to conclude that the appeal should be allowed outright. The Secretary of State asserted that what should have happened when the finding was made under paragraph 276B(i)(a) was to have remitted the matter to the Secretary of State to decide whether to exercise her discretion to grant leave which previously had not been exercised by the Secretary of State at all.
4. The position so far as the Claimant was concerned was that the Judge was entitled as a matter of law to exercise that discretion and there was no material error of law. The Secretary of State relied upon the case of Ukus (discretion: when reviewable) [2012] UKUT 307 (IAC). It seemed to me that reference could equally have been made to Irhmedu [2011] UKUT 340 wherein a similar approach was taken to that argued by the Secretary of State. Ms McCall had argued with reference to the cases of Lamichane [2012] EWCA Civ 260, Patel & Others [2013] UKSC 72, as well as AS (Afghanistan) [2009] EWCA Civ 1076, that it was open to the Tribunal, notwithstanding the terms of paragraph 276B(ii) of the Rules, to consider those matters. Indeed it was argued that the Tribunal was encouraged to do that same thing in order to resolve the issues in one decision.
5. I preferred the decision in Ukus for from a plain reading of the Rules it can be seen from the Notice of Immigration Decision and the Reasons for Refusal Letter, dated 10 January 2014, the Secretary of State had not actually addressed the issue of the exercise of discretion but rejected the application on what has been found in fact to be erroneous grounds in relation to other matters. On the findings of fact made by the Judge the Claimant did meet the primary requirement to succeed under paragraph 276B.
6. It seemed to me there is further force in the point that, since paragraph 276B of the Rules had never been considered by the Secretary of State, the public interest issues which arise under paragraph 276B(ii) need to be addressed by her.
7. It is clear that the Judge, for the reasons set out, may have reached a decision on limited issues on what he thought were relevant requirements of 276B(ii). The decision contained no reference to any assessment of the public interest or any other particular considerations. In doing so the decision revealed the difficulty that comes, absent of agreement between the parties, in a judge moving into that area, primarily one for the Secretary of State to make the first decision. I do not say there may not be cases where the discretion can be exercised. I do not find in relation to

a Tier 1 points based application that a First-tier Tribunal Judge has a general discretion to consider the exercise of discretion when that has not previously been carried out by the Secretary of State.

8. The fact that there may have been many months between the date when the Section 120 notice and its particulars were served on the Secretary of State was, if I may put it this way, a merits point rather than creating any time bar to the Secretary of State being entitled to exercise the primary discretion of which she was seized under the Rules. For these reasons I therefore find the Original Tribunal made an error of law and the following decision should be substituted:

**NOTICE OF DECISION**

9. The appeal of the Appellant with reference to paragraph 276B(i) of the Immigration Rules stands but the balance of the decision with reference to paragraph 276B(ii) and following is to be returned to the Secretary of State upon which she should consider the exercise of discretion in accordance with the law.
10. No anonymity order was previously made and none is evidently appropriate.

Signed

Date 21 July 2015

Deputy Upper Tribunal Judge Davey