IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18967/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2nd June 2015	**On 19th June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS GIMHANI LAVANYA KUMARI JAYASUNDERA JAYASUNDERA MUDIYANSELAGE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Brocklesby-Weller, Home Office Presenting Officer
For the Respondent: Mr A Jafar, Counsel instructed by Liyon Legal Ltd

DECISION AND REASONS

1. This is an extemporary decision and is therefore expressed in the present tense.

2. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge White, who decided to allow the appeal of Mrs Mudiyanselage against the refusal to grant her indefinite leave to remain and also to remove her from the United Kingdom.

3. By way of background, the application had originally been for further leave to remain as a work permit holder under the Immigration Rules. It is unnecessary to explain the reasons why Judge White found that she did not meet the particular requirements for leave to remain in that category. This is because Mrs Mudiyanselage (to whom I shall hereafter refer to as "the Appellant" in accordance with her status in the First-tier Tribunal) has not cross-appealed the finding that she did not meet the requirements of paragraph 134 of the Immigration Rules.

4. Having found that she did not meet the paragraph of the Immigration Rules under which she had originally applied, Judge White went on to consider, in the alternative, whether the appellant met the requirements of paragraph 276B of the Immigration Rules. The reason that he did so is because the Secretary of State served the Appellant with a notice under Section 120 of the Nationality, Immigration and Asylum Act 2002, requiring her to state any additional basis that she may have for remaining in the United Kingdom; that is to say, in addition to any reason why she said that the Secretary of State was wrong in the decision made under paragraph 134 of the Immigration Rules. So it was that the Appellant took the opportunity to raise paragraph 276B in her Notice of Appeal.

5. The threshold criteria for indefinite leave to remain under paragraph 276B(i) is residence for a continuous period of ten years which, by the time the matter came before Judge White, the Appellant had completed.

6. I now set out, because I regard it as instructive, what Judge White said about this alternative basis for remaining in the United Kingdom:-

> "18. It is clear from the decision in **MU** that where an Appellant accrues ten years' lawful leave while an appeal against another decision is pending, certainly where the initial decision has included, as this did, a Section 120 notice, the Appellant may seek to rely on the ten year Rule and the Tribunal may be asked to decide whether or not the Appellant qualifies. In such circumstances the Tribunal may become the primary decision maker but that is clearly an outcome which is contemplated and in appropriate cases it is acceptable.
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> 19. It is also clear, as a result of the provisions of Section 3C of the Immigration Act 1971, that a person who makes an application for further leave before the expiry of current leave will obtain a statutory extension of leave, and during that statutory extension may seek to vary the application made, at any time prior to a decision. Once a decision has been made the applicant may obtain an extension of leave by appealing that decision but may not, while an appeal is pending, make any new application for leave to remain. It is in fact not unknown for those who accrue ten years' residence pending an appeal to seek to lodge an application, but such applications are invalid, and the Respondent's practice is simply to add them to the file on the basis that this is a matter that will be raised at the appeal.
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> 20. In the light of those considerations I am satisfied that the Appellant has properly raised, prior to the hearing and in response to a Section 120 notice, her potential right to rely on paragraph 276B, and I am further satisfied that the failure to lodge a valid application form under that

Rule pending her appeal is of no significance and that the Tribunal is entitled to and should consider the matter.

21. In order to succeed under paragraph 276B the Appellant needs to show five things. The first is that she has had at least ten years' continuous lawful residence in the United Kingdom. The Respondent set out her immigration history in the refusal letter and it is clear that she has had ten years' continuous leave, and the suggestion that she has had the necessary continuous residence is not challenged. Since continuous residence will only be broken by quite lengthy periods of absence from the United Kingdom and the Appellant has retained her employment as a solicitor throughout that period, I see no reason to doubt that she has accrued ten years' continuous lawful residence.

22. The second matter is that there are no reasons in the public interest which would make it undesirable for her to be given indefinite leave to remain. There is certainly no suggestion of any such grounds and it seems to me that the Respondent has had some time to consider the matter, the Appellant's bundle, which included her witness statement and her 'Life in the UK' pass notification having been lodged with a letter dated 23rd October 2014. It is also of some significance in this respect that she is employed as a solicitor, because that is a profession which itself requires good character for the continued renewal of practising certificates and members of the profession are subject to disciplinary requirements for a wide variety of misbehaviours. I am satisfied that this requirement is also met.

23. The third requirement is that the applicant should not fall for refusal under the general Grounds for Refusal in Part 9 of the Immigration Rules. If the Appellant were guilty of conduct bringing her within any of the general grounds that would have been raised as a ground for refusing the application she in fact made and I am satisfied that she does not fall for such refusal.

24. The fourth matter is that she should have demonstrated sufficient knowledge of the English language and life in the United Kingdom. She has produced an appropriate test pass and I have no doubt that this requirement is satisfied.

25. The final requirement is that she must not be in the United Kingdom in breach of immigration law, subject to a period of 28 days which may be disregarded. Since she clearly currently has statutorily extended leave by virtue of Section 3C this requirement is also met.

26. Accordingly, I am satisfied that the Appellant's appeal is entitled to succeed by reference to paragraph 276B."

7. The judge then went on to explain that in view of his decision concerning paragraph 276B, it was unnecessary to consider the third ground of appeal, which was based on Article 8 of the European Convention on Human Rights and Fundamental Freedoms, and he made it clear in his notice of decision that the appeal was allowed under the Immigration Rules with reference to paragraph 276B.

8. The challenge that is raised by the Secretary of State to that decision is that the judge erred in law by deciding to exercise what she characterises

as 'a discretion' under paragraph 276B(ii). It is said that this was a discretion that should in the first instance have been exercised by the Secretary of State, rather than by the Tribunal as a primary decision maker. It is further argued that, at most, the judge should have held that the decision was 'not in accordance with the law' by reason of a failure to exercise discretion under paragraph 276B(ii), thereby giving the Secretary of State the first opportunity to exercise that discretion.

9. It is accepted by Ms Brocklesby-Weller, on behalf of the Secretary of State, that if that discretion were subsequently to be exercised against the Appellant - that is to say, by refusing the application – then the exercise of that discretion would be fully reviewable by the Tribunal on appeal on the ground that a discretion conferred by immigration rules ought to have been exercised differently.

10. In support of this argument, the Secretary of State relies upon a decision of this Tribunal in **Ukus (discretion: when reviewable)** [2012] UKUT 00307 (IAC)**,** the headnote of which reads as follows:-

> "1. If a decision maker in the purported exercise of a discretion vested in him noted his function and what was required to be done when fulfilling it, and then proceeded to reach a decision on that basis, the decision is a lawful one and the Tribunal cannot intervene in the absence of a statutory power to decide that the discretion should have been exercised differently (see Section 86(3)(b) of the Nationality, Immigration and Asylum Act 2002).
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> 2. Where the decision maker has failed to exercise a discretion vested in him, the Tribunal's jurisdiction on appeal is limited to a decision that the failure renders the decision 'not in accordance with the law' (Section 86(3)(a))." [I interpose at this point in order to mention that this is the ground upon which the Secretary of State argues that this appeal should have been allowed]. Because the discretion is vested in the Executive, the appropriate course will be for the Tribunal to require the decision maker to complete his task by reaching a lawful decision on the outstanding application, along the lines set out in **SSHD v Abdi [1996] Imm AR 148**. In such a case, it makes no difference whether there is such a statutory power as is mentioned in paragraph 1 above.
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> 3. If the decision maker has lawfully exercised his discretion and the Tribunal has such a statutory power, the Tribunal must either (i) uphold the decision maker's decision (if the Tribunal is unpersuaded that the decision maker's discretion should have been exercised differently); or (ii) reach a different decision in the exercise of its own discretion."

11. By way of reply, Mr Jafar argues that Judge White was correct in holding that **MU** is authority for the proposition that the Tribunal may act as a primary decision maker in deciding whether or not it is in the public interest to grant indefinite leave to remain under paragraph 276B. He points out that the assumption that underlies a long line of cases, including those at a Court of Appeal level, has been that the Tribunal may act as a primary decision maker in those circumstances. He cites, by way of example only, the decision of the Court of Appeal in **ZH (Bangladesh)**

v Secretary of State for the Home Department [2009] EWCA Civ 8, as well as the decision in this Tribunal in **MU ('Statement of Additional Grounds'; long residence; discretion) Bangladesh [2010] UKUT 442 (IAC)**.

12. I agree that the assumption made in those cases, and others, is that the Tribunal may act as primary decision maker in situations where (amongst others) a Section 120 notice has been served and the Appellant thereafter - and for the first time - raises the question of whether he or she qualifies for leave to remain under paragraph 276B. What I do not accept is that this assumption has thus far been judicially analysed or explained. The mere fact that a party did not seek to challenge a legal assumption that was made in a previous reported decision, at whatever level, does not mean that that the decision is authority for the proposition in question, the correctness of which was assumed rather than judicially determined. At best, the fact that this assumption has been made may be a pointer to the correct legal position. The Secretary of State having now raised this argument, I have to decide what appears to me to be a novel point of law.

13. The problem with the Secretary of States's argument, however, is that it is predicated upon an analysis that assumes that what is called for by paragraph 276B(ii) is the exercise of 'discretion'. In my judgment it is no such thing. It is right to say that Judge McKee in **MU** does at one point appear to have referred to it as such. Nevertheless, the requirement for there to be no countervailing public interest against the grant of indefinite leave to remain is one that I consider calls for an exercise of judgement rather than discretion. This may be a fine distinction, but it is in my judgement an important one for the following reasons.

14. The Immigration Rules contain many provisions for the exercise of discretion, properly so-called. Examples can be found in paragraphs 320 to 322 of the Immigration Rules, in which it is made very clear that what is called for is an exercise of discretion. This is because the various circumstances that are predicated by these paragraphs are preceded by words such as "grounds upon which leave to enter and/or leave to remain should *normally* be refused", in which case there is a discretion to grant or refuse the application. Otherwise, the circumstances are preceded by the words such as "grounds upon which leave to enter and/or leave to remain *shall* be refused", in which case there is no discretion to grant the application. There is however no such rubric in paragraph 276B(ii). Rather, the sub-paragraph is expressed in the following way:-

> "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:
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> (a) age; and
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> (b) strength of connections in the United Kingdom; and
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> (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."

[Emphasis added]

15. The question of whether it would be "undesirable" for a person to be granted leave to remain is plainly a matter calling for an exercise of judgement rather than discretion. It is right to say that the requirements of an immigration rule usually contain a requirement for an applicant to prove the existence of a particular hard-edged fact. Paragraph 276B(ii) is thus unusual in that it calls for neither a finding of fact nor an exercise of discretion. An exercise of judgement has this much in common an exercise of discretion: they may each result in conclusions about which two people can reasonably disagree. On the other hand, the exercise of judgement under paragraph 275B(ii) is more akin to a finding of fact in that the granting of an application for leave to remain will either be 'desirable' or 'undesirable' by reference to the public interest. The distinction between an exercise of discretion and an exercise of judgement can be seen within the context of the Immigration Rules in other ways. Thus a discretion to refuse an application is generally conferred where the applicant is found to be guilty of some particular and individual form of misconduct, whereas paragraph 276B(ii) calls for a more rounded assessment of the desirability of granting the application by reference to a number of public policy considerations.

16. I therefore hold that the Grounds of Appeal are misconceived because paragraph 276B(ii) does not provide the Secretary of State with any discretion at all.

Notice of Decision

The appeal is dismissed

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Kelly