IAC-FH-AR-V3

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/19754/2013
IA/26086/2013

THE IMMIGRATION ACTS

Heard at Belfast
On 14 January 2015

Decision & Reasons Promulgated
On 19 February 2015

Before

UPPER TRIBUNAL JUDGE KING TD

Between

PANKAJKUMAR GIRDHARIBHAI VANISHNAU
TRUSHA DAHYABHAI PATEL

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S McQuitty, McLaughlin & Co Solicitors
For the Respondent: Mr M Shilliday, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are husband and wife born on 10 September 1980 and 11 January 1980 respectively. Both are nationals of India. They have a son, Jaimail, who was born on 25 September 2012 at Belfast.

2. The first appellant came to the United Kingdom on 14 July 2007 under the work permit scheme. His leave was valid until 10 July 2012.

© CROWN COPYRIGHT 2015

3. On 28 June 2012 he applied for indefinite leave to remain, which was refused on 9 August 2012 because the application fee had not been paid.

4. On 30 August 2012 he reapplied. That was refused by the respondent on 10 May 2013.

5. The refusal was for two reasons. The first reason being that it was contended that the application was out of time. The second being as follows:-

> "You have confirmed on your application form that, on 10 January 2012, you were convicted of driving as an unaccompanied learner driver not displaying L plates. You were fined £100. Under the Rehabilitation of Offenders Act 1974 , the fine is spent for a period of five years. You therefore have an unspent conviction and do not meet the requirements of paragraph 134(vii).

6. The appellant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Farrelly on 12 June 2014.

7. The Judge having heard the evidence accepted that the non-payment of the fee was as a result of bank error rather than insufficient funds within the bank. Paragraph 134(viii) was however applied, it being the finding of the Judge that the second application was made within 28 days of the notification of decision in respect of the first application. It was therefore the finding of the Immigration Judge, which has not been challenged by the respondent, that the application of 30 August 2012 was an in- time application.

8. The Judge, however, upheld the refusal, not on the basis that was set out in the Reasons for Refusal Letter but on the basis that the Rehabilitation of Offenders Act 1974 did not apply in Northern Ireland, the relevant statute in effect in Northern Ireland being the Rehabilitation of Offenders (Northern Ireland) Order 1978 which retains five years as the operative period in respect of the time taken for a fine to become an unspent conviction. The Judge read the Immigration Rule in the light of that consideration and found, therefore, that the appellant did not have an unspent conviction as at the time of the application or indeed at the time of the decision or hearing and therefore dismissed the appeal.

9. Grounds of appeal have been submitted in relation to that finding.

10. Thus the matter comes before me in pursuance of the grant of permission.

11. The relevant Immigration Rule which was in existence at the time of the decision was paragraphs 134(vii) which provided that:-

> "Indefinite leave may be granted providing that 'he does not have one or more unspent convictions within the meaning of the Rehabilitation of Offenders Act 1974'."

12. The appellant was convicted on 10 January 2012 for driving as an unaccompanied learner driver and not displaying L plates. He was fined £100. Under the Rehabilitation of Offenders Act 1974, a fine is not spent for a period of five years.

13. Section 139 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 provided that the rehabilitation period for fines under the 1974 Rehabilitation of Offenders Act was to be twelve months.

14. By virtue of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement Number 9, Saving Provision and Specification of Commencement Date) Order 2014 provided that Section 139 of the 2012 Act came into force on 10 March 2014.

15. Thus at the time of the hearing of the appeal, not at the time of the decision of 10 May 2013, the appellant's conviction would have been spent if the Rehabilitation of Offenders Act 1974 applied to him.

16. Although an argument was directed in the course of the hearing as to whether the situation at the time of application or decision or hearing should apply, that is in my view largely academic so far as the Rehabilitation of Offenders Act 1974 is concerned, because of the provisions of Section 141 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which also came into force under the Order 2014 on 10 March 2014. In effect that section gives effect to a retrospective application of Section 139. Thus the situation at the time of decision as well as of hearing would be that Section 139 was deemed to have operated to reduce the period from five years to twelve months. At the time of decision, as well as of hearing, the appellant would have met the requirements of Section 139 having a spent conviction at the time of his application so as to meet the Rule.

17. The difficulty, as was recognised by the Judge, was that by virtue of Section 152 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 Section 139 of the 2012 Act extended only to England and Wales. The Rehabilitation of Offenders Act 1974 did not in fact apply in Northern Ireland. The operative legislation was the Rehabilitation of Offenders (Northern Ireland) Order 1974 which at the time of application, decision and hearing retained five years as the operative period.

18. The Judge recognised the anomaly but nevertheless considered himself bound by that legislation to the extent of finding that the appellant could not benefit neither from section 139 nor from the Rehabilitation of Offenders Act 1974. The Judge therefore found that the appellant had an unspent conviction and therefore that his appeal be dismissed.

19. Mr Shilliday, who represents the respondent, invited me to find that the Judge was entitled to apply the Northern Ireland legislation to the appellant in the circumstances. He fairly conceded that the difference of approach as between appellants in England and Wales and those in the Northern Ireland was not intended but nevertheless it was the inevitably consequence of the difference in legislation.

20. Paragraph 134(vii) of the Immigration Rules has now been amended making the requirement that an application should not have any convictions within 24 months of the application. Given that situation, Mr Shilliday submits that the appellant should make a fresh application, which is likely to succeed, given that he now meets the requirement.

21. Mr McQuitty, on behalf of the appellant, submits that it was not properly open to the Judge to in effect rewrite the Immigration Rule.

22. Paragraph 134(vii) of the Immigration Rules had application to the whole of the United Kingdom, including Northern Ireland. As such it was setting out the policy and intention of the Secretary of State towards applications that were made within the jurisdiction for indefinite leave to remain. He submitted that the operative words within that paragraph were the words "within the meaning of" and the requirements under the Rehabilitation of Offenders Act 1974 were to be the benchmark against which such applications were to be considered. It would be wholly divisive if certain areas of the United Kingdom had a greater benefit than others. He submitted that that was not intended and relied indeed on the concession made by Mr Shilliday that that had not been the intention of the Secretary of State in the drafting of the legislation.

23. Indeed before the application of Section 139 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the provisions of the Rehabilitation of Offenders Act 1974 and the Rehabilitation of Offenders (Northern Ireland) Order) Act 1978 were to the same effect.

24. It was Section 139 which reduced the rehabilitation period of fines under the 1974 Act. Section 141 stated that Section 139 will apply to conviction before the commencement date "As if the amendments and repeals made by section 139 always had effect".

25. A matter of fundamental importance, which it seems to me, is that paragraph 134(vii) of the Immigration Rules had application to the whole of the United Kingdom, including Northern Ireland. As such it was setting out the policy and intention of the Secretary of State towards applications that were made within the jurisdiction for ILR. The operative words within that paragraph were the words "within the meaning of". The requirements under the Rehabilitation of Offenders Act 1974 were to be the benchmark against which such applications were to be considered. It would be wholly divisive if certain areas of the United Kingdom had a greater benefit than others. That result was not intended. Indeed there is the concession made by Mr Shilliday that that had not been the intention of the Secretary of State in the drafting of the legislation.

26. Indeed before the application of section 139 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement Number 9, Saving Provision and Specification of Commencement Date) Order 2014 the provisions of the

Rehabilitation of Offenders Act 1974 and the Rehabilitation of Offenders (Northern Ireland) Order 1978 were to the same effect.

27. It was Section 139 which reduces the rehabilitation periods of fines under the 1974 Act. Section 141 stated that section 139 will apply to convictions before the commencement date "as if the amendments and repeals made by section 139 always had effect."

28. I find that paragraph 134(vii) of the Immigration Rules had application for the United Kingdom including Northern Ireland. It set out the indication of the Secretary of State that in considering whether or not an appellant has one or more unspent convictions, such a issue would be determined within the meaning of the Rehabilitation of Offenders Act 1974. That was to be the benchmark for such considerations.

29. It seems to me and I so find that that should have been the starting point of the Judge in the circumstances of this case. What the Judge has effectively done is to rewrite the Rule to add effectively to the words to the Rule "or the Rehabilitation of Offenders (Northern Ireland) Order 1978". It seems to me it is the task of the legislature and not of the Judge, particularly as the Judge recognised the anomaly which would thereby be created.

30. I find, therefore, that the Judge has erred in law in taking that approach to the wording of the Immigration Rule.

31. In those circumstances the appeal is allowed to the extent that the decision is set aide to be remade.

32. I find, therefore, that the purposive approach is the one that should be taken in all the circumstances, particularly as indeed Mr Shilliday had indicated, there had been no overt intention to create a distinction between citizens of Northern Ireland and of the United Kingdom in the application of the Immigration Rules.

33. The situation is that by virtue of the combination of Sections 139 and 141 at the time of application, decision and hearing the conviction would have been spent as at all occasions. Given the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement Number 9, Saving Provision and Specification of Commencement Date) Order 2014 it would have been apparent to the Judge at the hearing of 12 June 2014 that Section 139 and Section 141 had been in operation and had been so since 10 March 2014.

34. I find, therefore, that within the meaning of the Rehabilitation of Offenders Act 1974 the appeal should have been allowed on the basis of the law and Immigration Rules that were applicable at the time of application and decision.

35. I note, indeed that whatever may be the interpretation of that older version of the Immigration Rules, the Immigration Rules have now changed such that it is immaterial whether the conviction was spent or unspent. As Mr Shilliday fairly

indicated it would seem that under the new version of the Immigration Rules the appellant would succeed on that issue in any event.

36. It would seem that on the basis of the Immigration Rule as at the time of decision or the Immigration Rules at the time of this hearing the appellant would be entitled to succeed on that issue.

37. In the circumstances therefore the appeal is allowed under the Immigration Rules.

38. Given that the appellant satisfies the rule it is perhaps unnecessary in the circumstances to go on to consider the issue of Article 8 outside of those Rules. It is not entirely clear whether the Judge did in fact consider Article 8 on its merits given the indication that was made that an Article 8 application could have been made on the payment of an appropriate fee. Although the First-tier Tribunal Judge highlighted **Gulshan** no clear findings were made upon that issue of whether or not there were compelling circumstances outside of the rules. In those circumstances I do not find that the Judge adequately considered Article 8 and so that finding shall be set aside to be remade if need be. I do not deal with it as I have indicated because I find that it does not strictly arise given the fact that the appellants now meet the Rules.

Decision

39. The decisions of the First-tier Tribunal are to be set aside. The decision in respect of the Immigration Rules is remade to the extent that the appeal is allowed.

Signed Date **19 February 2015**

Upper Tribunal Judge King TD