IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/41941/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 February 2015	**On 16 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

SHERBER PETER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Rana, Counsel instructed by SS Basi & Co, Solicitors
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant is a citizen of St Lucia, born on 7 September 1976 and she appealed against the decision of the respondent dated 30 September 2013 to refuse to vary her leave to remain in the UK and the decision to remove her under Section 47 of the Immigration, Asylum and Nationality Act 2006. The appellant made her application on human rights grounds.

2. The appellant made a further application on 11 December 2013 on the basis that she had been continually resident in the UK for a period of ten years following her entry to the United Kingdom on 14 June 2003. The Secretary of State asserted that the later application was void.

3. First-tier Tribunal Judge Petherbridge dismissed the appellant's appeal. At paragraph 11 the judge recorded that if an application was varied before a decision was made the appellant would be required to complete the necessary prescribed form to vary her application. If the application was varied post-decision it would be open to the appellant to submit further grounds to be considered at appeal. Once an application had been decided it ceased to be an application and there was no longer any application to vary under Section 3C(5) of the Immigration Act 1971.

4. The judge stated at paragraph 12 that the appellant's representatives *conceded* that there was no appeal before him in respect of the decision of 8 April 2014 and that the appellant's appeal fell to be determined only under paragraph 276ADE of HC 395 as amended.

5. The judge at paragraph 41 stated that he accepted that –

> "She had formed a private life and had been resident in the UK for over ten years. She has throughout that time been lawfully in this country, but at no time could she have had any other expectation than that she was here as a student with limited leave to remain. Notwithstanding that the appellant has been here for over ten years, she has obtained little in the way of academic qualifications, such as to encourage the thought that if she were allowed further leave to remain she would achieve more than that which she has in the ten years that she has been here already".

6. An application for permission to appeal was made on the basis that it was clear from paragraphs 9 to 12 of the determination of the judge that the issue of whether he had jurisdiction to deal with the application dated 22 November 2013 was raised by counsel and dealt with him as a preliminary issue. It was clear from paragraph 22 of the determination Judge Petherbridge was referred by counsel to the Supreme Court decision in **Patel and others [2013] UKSC 72**. This decision which approved the Court of Appeal case **AS (Afghanistan) v Secretary of State for the Home Department [2009] EWCA Civ 1076** was that if a One-Stop Notice was served by the Home Office the Tribunal was required to consider and determine all issues raised by the appellant. Thus from the skeleton argument it was clear that counsel had not conceded the point and the Tribunal was required to consider the appellant's application made on form SET(O) in respect of the long residence.

7. The application for permission to appeal was granted by First Tier Tribunal Judge Landes who determined that there was force in the argument that the judge had not considered the appellant's ground in relation to long residence.

8. The matter came before me.

9. At the hearing Mr Rana submitted that the appellant's barrister had submitted a statement to the Upper Tribunal confirming that she could not recall making a concession on the basis of the ten years' continuous residence point and indeed paragraphs 22 and 24 of the determination referred to **Patel**. The whole point of citing **Patel** was the question in relation to the Section 120 notice. As Mr Rana pointed out **Patel** confirms **AS (Afghanistan)** and **NV (Sri Lanka) [2010] EWCA**. Indeed I note that there is no time limit on serving a Statement of Additional Grounds in response to a Section 120 notice or indeed any particular form in which it is to be served. The claim of 10 years residence was an additional ground which needed to be decided.

10. The judge also recorded that the appellant's representative relied on her skeleton argument and submitted that the appellant had been in the United Kingdom since 2003 and had been actively studying. She had passed the Life in the UK test in August 2012 and said that the appellant was supported by a number of friends and her pastor in respect of her application. She had been a law abiding citizen and the judge recorded "she had never been unlawfully in the United Kingdom" (paragraph 24).

Conclusions

11. As Mr Rana pointed out paragraph 95 of **AS (Afghanistan)** confirmed that once grounds have been raised in response to a Section 120 notice the Tribunal must deal with those grounds. There was a S120 notice served in this particular case. It is clear to me that the appellant raised the Grounds of Appeal in relation to the long residence and this was not dealt with by Judge Petherbridge. Mr Nath submitted that the appellant was correct in respect of his submissions on the 120 Notice but the decision had not been decided by the Home Office. It was for the Home Office to be the primary decision maker.

12. Mr Nath's argument was that the application before the Secretary of State was not that of a ten year's long residence and therefore it was only considered under paragraph 276ADE.

13. However, as stated at paragraph 86 of **AS (Afghanistan)** if the Secretary of State chooses to serve a notice under Section 120 and he invites and requires the appellant to put forward *any* additional grounds that may be available to him and is not therefore restricted to the scope of his original application.

14. In this instance I find that Judge Petherbridge failed to consider that he had jurisdiction despite the issue of the concession as raised and had he gone on to consider the impact of the One-Stop Notice he had the ability to consider the appellant's appeal on the grounds of long residence.

15. It is clear from a reading of the decision that **Patel UKSC 72** and **AS (Afghanistan)** were relied on by counsel. Notwithstanding that, a concession can be made only in fact and not in law.

16. **Patel** identifies that "the initial application for leave to remain if made in time can later be varied to include wholly unrelated grounds without turning it into a new application prejudicing the temporary right to remain given by the section".

As stated by Sullivan LJ in **AS**

> "The appellants would have good reason to question the coherence of the statutory scheme if they were then to be told by the AIT that it had no jurisdiction to consider the additional ground that they had been ordered by both the Secretary of State and the AIT to put forward" [paragraph 99].

17. The appellant entered the UK on 14 June 2003 with entry clearance as a student valid until 14 December 2003 and she was subsequently granted leave to remain as a student until her last leave to remain as a Tier 4 (General) Student, valid until 4 September 2012, expired.

18. The appellant made a further application on Article 8 grounds on 31 August 2012 which was refused on 30 September 2013. However, when the Home Office made the decision on 30 September 2013 the appellant had ten years' continual lawful residence in the United Kingdom.

19. I find that the objections of Mr Nath to the fact that the appellants did not make an application for ten years' residence is answered by the decisions of **Patel** and further **MU (Statement of Additional Grounds - long residence - discretion (Bangladesh) [2010] UKUT 442**.

20. I was initially urged by Mr Rana to allow the appeal outright until I pointed out that paragraph 276B has a discretionary element not least that the appellant must satisfy paragraphs 276B(2) to (5).

21. The appellant submitted that she had submitted sufficient knowledge of the English language and sufficient knowledge about life in the UK in accordance with Appendix KoLL. The appellant stated that she had submitted this evidence to the Secretary of State although there was nothing on file and it was not produced to me at court.

22. For the reasons given above I find that there was an error of law and I set aside the decision of Judge Petherbridge and remake the decision. I find that the appellant has had at least ten years' continuous lawful residence in the United Kingdom and there did not appear to be any public interest reasons why it would be undesirable for her to be given indefinite leave to remain on the ground of long residence. Bearing in mind the discretionary element both the appellant's representative and Mr Nath agreed that the matter should be returned to the Secretary of State for determination and I allow the appeal to this extent.

Notice of Decision

The decision is allowed to the extent outlined above.

Signed Date 14th March 2015

Deputy Upper Tribunal Judge Rimington