Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/13989/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20th May 2016	**On 6th June 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

MRS SARSA TAURAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMET

Respondent

Representation:

For the Appellant: Mr Subbarayan
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Mauritius whose date of birth is recorded as 8th October 1956. She arrived in the United Kingdom on 11th May 2003 with leave to remain as a visitor until 10th November 2003. Thereafter various applications were made to vary her leave until eventually she was granted discretionary leave until 31st March 2015 on the basis of marriage. On 3rd March 2015 an application for further leave to remain was made on the basis of private and family life which application was refused on 31st March 2015.

2. The Appellant appealed and her appeal was heard on 16th October 2015 by Judge of the First-tier Tribunal Obhi, sitting at Sheldon Court, Birmingham.

Judge Obhi considered the appeal having regard to Appendix FM and paragraph 276ADE but it was conceded that the only basis upon which the appeal could succeed, if it was to succeed at all, was by reference to the wider application of Article 8.

3. Judge Obhi considered the background and the nature of any relationships which the Appellant might still have in her home country and in that regard she did not find the Appellant a wholly reliable witness. Judge Obhi records that it was only a private life appeal under Article 8 that was pursued and she considered the appeal therefore on that basis. She came to the view that there were no unusual or compelling circumstances which would put the balance of interests in the Appellant's favour of being allowed to remain as opposed to the factors which were to be taken into account in considering the public interest though Judge Obhi was only able to point, at paragraph 20, to paragraph 117B(1) as the factor pointing to there being a public interest i.e. the maintenance of effective immigration controls.

4. Not content with the decision to dismiss the appeal, by Notice dated 8th November 2015 the Appellant made application for permission to appeal to the Upper Tribunal. Various grounds were relied upon; the grounds run to some ten paragraphs. The application was considered by Judge of the First-tier Tribunal Grant-Hutchison. She limited the basis upon which the matter could be brought before the Upper Tribunal to two issues. Firstly, whether the judge had erred in failing to take into account the fact that on the Appellant's case she had four sisters in the United Kingdom and secondly, and more importantly, for the purpose of the matter which is now before me, failing to consider Section 117 of the Nationality, Immigration and Asylum Act 2002. I am grateful to Mr Bramble for reminding me that the consideration of Section 117 was not confined only to Section (B) but in fact to consideration of the whole of that section.

5. Under cover of a letter of 25 April 2016, the Secretary of State filed a response pursuant to Rule 24 of the 2008 Procedure Rules. I do not need to deal with the issue in relation to the four sisters because that was not a matter which was pursued before me. The appeal was confined to Section 117. As to Section 117 the Secretary of State relied on the guidance in the case of **Dube (Sections 117A-117D) [2015] UKUT 00090 (IAC)** and on the basis that the judge found that there were no compelling circumstances which would outweigh the public interest with little weight being attached to private life at the time when her immigration status was precarious; it is contended that the judge made the right decision.

6. Although perhaps straining at the grant because the issue in relation to ten years was excluded specifically by Judge Grant-Hutchison I am persuaded that by reference to Section 117A the point which was put on behalf of the Appellant is one which comes before me and one which I ought properly to consider because it goes to the issue of whether there was sufficient consideration given all relevant factors in the article 8 ECHR assessment.

7. The original application made to the Secretary of State was made under cover of a letter of 3rd March 2015. It makes clear that part of the application was based upon the Appellant having lived in the United Kingdom, lawfully, since 2004 and would like, it was said, "to continue to live with her family here in the United Kingdom".

8. It is common ground that were the application made purely for indefinite leave following ten years' continuous residence in the United Kingdom she could not succeed under the Rules. That was because she did not demonstrate sufficient knowledge of life in the United Kingdom, as required by rule 276B(iv).

9. The application was considered by the Respondent and in a decision dated 31st March 2015 she looked at paragraph 276ADE and then to the wider application of Article 8 ECHR but focusing on the family and private life refused the application.

10. The Appellant appealed to the First-tier Tribunal. At paragraph 3 of her grounds the Appellant stated:

> *"The Appellant also satisfies paragraph 276A(1) of the Immigration Rules; she entered the United Kingdom since 2004 legally and has since been renewing her visa in time."*

The Secretary of State was therefore on notice, as was the judge, of the issues which were for consideration.

11. Paragraph 276A(1) of the Immigration Rules, which deals with an extension of stay, rather than indefinite leave, provides:

> *"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 each of the requirements in paragraph 276B(i) to (ii) and (v)".*

12. Paragraph 276A(2) provides:

> *"An extension of stay on the ground of long residence in the United Kingdom may be granted for a period not exceeding two years provided that the Secretary of State is satisfied that the requirement in paragraph 276A(1) is met and the person granted such an extension of stay following an application made before 9th July 2012 will remain subject to the Rules in force on 8th July 2012."*

13. Rule 276A(2) clearly provides a discretion for the Secretary of State. It is the Secretary of State who is to be satisfied and if she is satisfied she then *may* grant an extension of stay not exceeding two years. When one looks at the Immigration Rules the purpose, it would seem, is to provide time, in the Respondent's discretion, for the very test which the Appellant did not have.

14. The issue for me is whether the judge made a material error of law. In my judgment, the judge failed adequately to have regard to the case being advanced.

15. I have to be careful in approaching this appeal to remind myself that the wider application of Article 8 ECHR is not a general dispensing power. There are Immigration Rules which meet various mischiefs and it is only where there is a sufficient gap between the Immigration Rules and the wider application of Article 8 that it is appropriate to look outside. In my judgment given the opportunity given to the Secretary of State to consider whether or not there had been ten years' lawful residence, which opportunity was not taken by the Secretary of State notwithstanding the fact that she was, I find, put on clear notice that the point was being taken and therefore the judge also failed to have regard to that. There was a significant oversight in the proportionality balancing exercise to which Section 117 relates.

16. Article 8 was engaged and no one has sought to suggest to me that it was not. Where a person meets the requirements of an Immigration Rule that is a significant factor to be taken into account in weighing up the public interest considerations against the competing interests. The only factor in this case which the judge was able to point to was the maintenance of effective immigration control being in the public interest. The other factors of 117B all weighed either in the Appellant's favour or more particularly did not count against her. I exclude from that any consideration of Section 117B(6).

17. There was therefore in my judgment a material error of law. Whether that error is identified as a failure by the judge to recognise in the proportionality assessment that the Respondent had failed to turn her mind to her discretion, or that it would be disproportionate to require the Appellant to leave the United Kingdom whilst the Respondent decided whether or not to exercise her discretion, matters not because the result is the same.

18. I am assisted in my approach to this matter by the guidance in the case of Ukus (discretion: when reviewable) [2012] UKUT 00307(IAC):

    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 s 86(3)(b) of the Nationality, Immigration and Asylum Act 2002).*

    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' (s 86(3)(a)). 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.

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.

19. The second paragraph the headnote is apposite. It is important to note the date of the decision in this appeal, being before the coming into force of the "new regime".

20. I set aside the decision and re-make it. In re-making the decision I put into the mix the fact that there is a discretion in the Secretary of State to give to the Appellant a limited period of leave in order that she might take the test. In this case it appears the Secretary of State has not considered that possibility and in my judgment it would be disproportionate to require the Appellant to leave the United Kingdom until the Secretary of State has considered her discretion which she retains.

21. It follows that I allow the appeal on the basis that the decision of the Secretary of State was unlawful.

22. Though I indicated to the parties at the hearing what my decision would be, I also informed them that it may be that I might revisit the reasoning on the basis that it might have been better expressed. I have done that but the effect of this decision is the same as indicated to the parties.

Notice of Decision

The decision of the First-tier Tribunal is set aside. The Decision of the First-tier Tribunal is remade such that the appeal is allowed to the limited extent that the decision was not in accordance with the law and is to be remitted to the Respondent.

Signed **Date 6th June 2016**

Deputy Upper Tribunal Judge Zucker