IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/22288/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 November 2015	**On 12 May 2016**

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FRED KATO KIVUMBI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Kotas, Home Office Presenting Officer
For the Respondent: Miss A Van As, Legal Representative, Visa Inn

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the determination of Judge Drabu CBE promulgated on 23 July 2015 following a hearing at Taylor House on 25 June 2015. The Secretary of State appeals against the

determination of Judge Drabu who allowed the appeal of Mr Fred Kivumbi under the Immigration Rules. For the purposes of continuity I shall refer to Mr Kivumbi as the appellant as he was before the First-tier Tribunal.

2. The matter arose in this way. The appellant appealed against a decision of the respondent refusing him a variation of leave to remain in the United Kingdom as the victim of domestic violence and the giving of directions for removal under Section 47 of the 2006 Act. The refusal of the application was made in a letter dated 2 May 2014. The appellant is a national of Uganda. His date of birth is 22 February 1968. He stated that he came to the United Kingdom on 24 January 2005 and was subsequently granted leave to remain.

3. On 24 February 2012 he was granted leave to remain as a spouse of a person settled in the United Kingdom until 24 February 2014. It was on that date that he made a further application for indefinite leave to remain as a victim of domestic violence. The application had the effect of continuing his leave until it was finally determined pursuant to s. 3C of the Immigration Act 1971. The appeal was set down for hearing on 23 January 2015. The issue arises because the Secretary of State by her own volition had decided to serve a s. 120 notice. Section 120 of the Nationality, Immigration and Asylum Act 2002 requires an appellant when served with such a notice to state additional grounds or reasons for wishing to enter or remain in the United Kingdom. The appellant responded by seeking leave to remain under the long residence provisions (as they were then were) as he had by then accrued 10 years lawful residence. In such circumstances the application made under the umbrella of a s. 120 notice has to be determined by the Secretary of State as a result of the service of the notice.

4. The appellant argued that he had produced the relevant information in support of his claim of being granted indefinite leave to remain as a person who had lived continuously and lawfully in the United Kingdom for the last ten years. The application was the subject of a response by the Secretary of State in a letter written on 22 March 2015. It was written to the appellant's representative and the Secretary of State said:

> "Your client already has an outstanding appeal against the Secretary of State's decision to refuse your client's application for leave to remain as the victim of domestic violence. Your client is restricted from making a fresh application whilst his appeal is outstanding in accordance with Section 3C of the Immigration Act 1971. Your client may apply to the Asylum and Immigration Tribunal to have your client's application for leave to remain as the victim of domestic violence to be treated as a variation of your client's grounds of appeal* To this end your client's documents have been retained on the Home Office's files as they may be considered as part of your client's existing appeal." [*Should this be a reference to the long residence application?]

5. Section 3C provides for a person who has leave but makes an in-time application for a variation of his leave but whose leave expires before the

fresh application is decided by the respondent. Such a person's original leave is continued until the application is decided. However, a person is restricted to making a single application; he cannot keep making a further application as a means of permanently extending his leave. Thus, s. 3C(4) provides:

> 'A person may not make an application for variation of his leave to enter or remain in the United Kingdom whist that leave is extended by virtue of this section.'

6. In other words the decision that was made by the Secretary of State was that although notwithstanding the fact that the s. 120 notice had been served, s. 3C of the Immigration Act 1971 prevented the grounds raised in the s. 120 notice from being adjudicated upon. That to my mind is thoroughly inconsistent with the purpose of s. 120 which expressly requires the applicant to present what is, or may be, an application on a different basis from that which is advanced in the appeal before the Tribunal.

7. Judge Drabu was required therefore to deal with this appeal and that required him to deal with the application identified by the appellant in the s. 120 notice. There had been no response from the Secretary of State to say what view the Secretary of State took to the application on the basis of ten years continuous leave failed or why it should fail. It was open, indeed in my judgement it was a *requirement* of the s. 120 procedure, that the Secretary of State should provide a response. It was for the Secretary of State to say whether she accepted the applicant had lived continuously in the United Kingdom for a ten year period if there were matters, (for example, the appellant's misbehaviour during the period of ten years) or there were other reasons why the application should not succeed under the ten year route then that was a matter for the Secretary of State to raise. It was perfectly possible for the Secretary of State to raise it by way of a letter prior to the hearing.

8. During the course of the First-tier Tribunal hearing where the Secretary of State was represented by Miss Pountney the respondent put forward no positive case that the requirements of the Rules had not been met. The best that we have is this passage in the determination of Judge Drabu:

> "I find that the appellant has lived lawfully in the UK for a continuous period of ten years. I am also satisfied that he has produced relevant evidence relating to the requirements on life skills and language. I have given due regard to the argument made by Miss Pountney that the decision on the claim on lawful long residence should be made by the respondent and not the Tribunal but I fear that in the circumstances of this case, I must reject it. Firstly because it would make a mockery of s. 120 and secondly the respondent has had more than enough time to meet the claim made under the relevant Immigration Rule. It would also be against the interests of justice to put this appellant through further expense. And finally no public interest would be served by not making a substantive decision on the claim lawfully and properly raised by the appellant."

9. In those circumstances he allowed the appeal.

10. It is said on behalf of the Secretary of State in the grounds of appeal that that is quite wrong and that what should have happened was that the Judge should have gone through all of the requirements of leave to remain and made appropriate findings of fact upon it. It seems to me that is an entirely unreal suggestion to make in the circumstances of this case. Miss Pountney made no assertions that the requirements of the Rules had not been met. The appellant was not cross-examined as to whether he had been continuously in the United Kingdom for ten years; nor was it suggested that the evidence that he had produced was lacking or that there are holes in the evidence or that there were matters which required further evidence which the appellant had failed to provide.

11. In those circumstances it does not seem to me that there was any option but for the judge to find that that there was no basis upon which the Secretary of State should be permitted to make another decision at a different time.

12. It is to be borne in mind that there may be cases where there is a discretionary element that can only be determined by the Secretary of State. However, looking at the requirements of paragraph 276B and the requirements to be met by an applicant for indefinite leave to remain on the grounds of long residence in the United Kingdom, the issues that are required to be raised are whether the appellant has had ten years' continuous lawful residence in the United Kingdom, a matter upon which the Judge made a positive finding of fact and, 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 various factors.

13. In relation to the public interest, no reasons were advanced by the Secretary of State either in a letter which predated this application or in response to the s. 120 notice or at the hearing why the public interest made it undesirable for indefinite leave to remain on the ground of long residence. Nothing was said about the appellant's age which might give any cause for concern or the strength of his connections in the United Kingdom or his personal circumstances or his domestic circumstances or compassionate circumstances. There was no reason at all from those listed in paragraph 276B why the application should not be granted. It was a requirement that the appellant demonstrated sufficient knowledge of English language but he did so and that was a positive finding of fact made by the judge and there is no suggestion made by Miss Pountney that the appellant was in breach of the Immigration Rules (except for any period of overstaying for a period of 28 days or less which could properly be disregarded). In those circumstances I see no reason whatever for the judge not to make up his mind there and then as he was required to do.

14. It seems to be that there is a general point principle involved in these cases where a s. 120 notice is concerned as to what is the proper

procedure to be adopted by the Secretary of State when dealing with such a claim. First, it is the Secretary of State's sole decision to serve a s. 120 notice. Nobody requires her to do so but, if she does so, then there is an obligation imposed upon the appellant with which he must comply. This occurred in this case. Consequently it was then for the respondent, if there was an objection to the fresh claim raised in response to the s. 120 notice, to make clear what those objections were. If that required further time to make further enquiries that would be a legitimate reason why the appeal might be adjourned but no application was made to that effect.

15. Furthermore, in the circumstances of this case, the Secretary of State's objection s to the s. 120 claim (if I may call it that) were, apparently, waived by the letter of 22 March 2015 which in effect told the Tribunal that it was to get on with it, something which the Tribunal felt it had to do. It was not helpful to say that the Secretary of State could not make a decision under s. 3 of the Immigration Act 1971. In my judgement that is simply not arguable bearing in mind the fact that s. 120 was operated at the option of the respondent. It was she who set the hare running and it was not therefore open to her to respond by saying s. 3C prevents such an application being made.

16. In those circumstances the Secretary of State has to be bound by the procedure that she herself as adopted in this case. No positive case was advanced at the hearing before the judge and he was not required to do any more than deal with the issues that were before him. There was only one live issue about which he heard evidence. He reached a sustainable finding of fact in relation to that. It is said that the decision of *MU (Statement of additional grounds – long residence discretion)* was binding upon the judge in this case and that it was for him to accede to the request by Miss Poutney that the matter should go back to the Secretary of State to decide the issue.

17. In my judgement that simply is not an available option where the Secretary of State effectively ambushes the appellant at the date of the hearing who does not know what case he has to meet. There as to be a principle of fairness in this case where each side sets out what their respective responses are to the application which is before the Tribunal. The Secretary of State failed to do it in this case and accordingly I find no error in the way Judge Drabu approached this appeal.

NOTICE OF DECISION

The appeal of the Secretary of State is dismissed with effect that the decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL

9 December 2015