Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/30274/2015
IA/30279/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18th July 2017	**On 3rd August 2017**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHAMAYAL [K]
[K K]

Respondents/Claimants

Representation:

For the Appellant: Mr D Clarke, Home Office Presenting Officer
For the Respondents/Claimants: Mr M Biggs, Counsel instructed by JKR Solicitors

DECISION AND REASONS

1. The first claimant is a citizen of Bangladesh and is the mother of the second claimant, her daughter, born on [ ] 2011.

2. The first claimant arrived in the United Kingdom in 2004 as a student and had leave in that capacity until 12th April 2015.

3. On 19th September 2014 she applied for indefinite leave to remain in the United Kingdom on the basis of ten years' continuous lawful residence. The application was refused on 24th August 2015, the general reason being that she did not meet the Immigration Rules because the periods of her absence from the United Kingdom were in excess of the permitted time. The appeal of her daughter remains in line with her appeal.

4. The first claimant sought to appeal against the decision, which appeal came before First-tier Tribunal Judge Thew on 12th August 2016.

5. The relevant period which led to the refusal, was an absence of over six months between October 2008 and June 2009, when she travelled to visit her mother who was seriously ill with kidney failure.

6. The Immigration Rule permitted a single absence of up to 180 days, whereas it was noted that her absence was one of 242 days. It said that it was not appropriate to exercise discretion in her case and thus she did not meet the requirements of paragraph 276B(i)(a) of the Immigration Rules.

7. An additional element in the decision of 24th August 2015 was that she had exercised deception in the obtaining of a TOEIC speaking test with Educational Testing Service. Thus her application was refused on the basis of suitability as well as eligibility.

8. In the course of the determination, and for reasons set out therein, the Judge came to the conclusion that there was no proper basis for the respondent to consider that any deception had been exercised in relation to the TOEIC certificate. It is to be noted that Mr Clarke, on behalf of the Secretary of State, does not seek to argue that the Judge was in error on that finding. Thus the challenge to suitability on that ground is not made out and should fall away from the decision.

9. The Judge noted that, in terms of absence, there was some guidance in terms of a policy relating to long residence. The policy indicated, as is set out in paragraph 30 of the determination, that in certain circumstances it may be appropriate to exercise discretion over longer absences in compelling or compassionate circumstances. The policy directs the caseworker where there is a single absence of over 180 days as follows:-

> "You must consider how much the absence was due to compelling circumstances and whether the appellants returned to the UK as soon as they were able to do so.
>
> You must also consider the reasons for the absence".

10. It is far from clear from the decision of 24th August 2015 whether that policy was considered or applied. The explanation that the delay in returning was because the mother was seriously ill with kidney failure was said to have been considered, but it was not accepted that it was necessary for the first claimant to remain in Bangladesh for 242 days before returning to the United Kingdom.

11. The Judge, however, in the course of the determination looked carefully at the circumstances in which the first claimant went to Bangladesh and the reasons why she stayed there. The evidence from the first claimant as to why she felt compelled to remain with her mother over and above the period permitted under the Rules was recorded and that can be seen at paragraphs 37 and 38 of the determination.

12. Essentially the Judge, having considered all that had been said, accepted that the period of 242 days was reasonable and that such of the absence was therefore due to compelling circumstances and that the first claimant returned to the United Kingdom as soon as she was reasonably able to do so.

13. No challenge is made to those findings nor any suggestion made that the Judge was not entitled to come to that conclusion.

14. Challenge is made, however, to the way in which the Judge thereafter dealt with the appeal. The Judge purported to follow **Ukus (discretion: when reviewable) [2002] UKUT 00307 (IAC)** which indicates that where a decision maker has failed to exercise a discretion it will be for the decision maker to complete the task by reaching a lawful decision. In this case the Judge considered that the discretion should have been exercised differently and accordingly allowed the appeal.

15. The Secretary of State sought to challenge the decision, firstly on the grounds that the First-tier Tribunal Judge had failed to provide adequate reasons for finding that the Secretary of State had not discharged the evidential legal burden of proving that the first claimant acted dishonestly. As I indicated that challenge is no longer proceeded with. It was also said that the First-tier Tribunal Judge had failed to provide adequate reasons for finding that discretion towards the first claimant should be exercised differently in relation to the circumstances surrounding the first claimant's absence from the UK for more than six months. As then drafted, it seems to me that such lacks merit, as the Judge clearly had set out reasons why discretion should have been exercised.

16. However, permission was granted to the respondent to challenge, not so much on those particular grounds, but on the question as to whether it was open to the Judge to allow the appeal on the stated basis.

17. Thus it is a matter that came to me to determine the issue.

18. Directions had been issued to the Secretary of State to make representations on the matter for which permission had been granted. Sadly no submissions have been prepared. I am grateful, however, to Mr Biggs for his detailed skeleton argument and to Mr Clarke in presenting certain documents to assist a determination of that issue.

19. In essence the nub of the challenge made to the approach taken by the First-tier Tribunal Judge lies with, and to the extent that Section 86 of the 2002 Act, as amended by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and the Asylum and Nationality Act 2006 remains in force and effective.

20. This was a matter considered in particular by the Upper Tribunal in **Greenwood (No. 2) (para 398 considered) [2015] UKUT 00629 (IAC)**. The detail of Section 86 is set out in paragraph 20 and the Tribunal considered in some detail what was the outcome of the various amendments, including The Immigration Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2014 and The Immigration Act 2014 (Commencement No. 4, Transitional and Saving Provisions and Amendment) Order 2015.

21. The relevant passages in Section 86 that originally is of relevance are those contained in 86(3) and (6):-

> "(3) The Tribunal must allow the appeal in so far as it thinks that—
>
> (a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including Immigration Rules), or
>
> (b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently.
>
> ...
>
> (6) Refusal to depart from or to authorise departure from Immigration Rules is not the exercise of a discretion for the purposes of subsection (3)(b)."

22. It would seem that part of that Section 86 was preserved by the Transitional and Saving Provisions Amendment Order 2015 (Commencement No. 4) of 25th February 2015. That amendment coming into force on 6th April 2015 is set out in some detail in that Order at Article 8, which incorporates 9(1)(a) to (d) and (2) and (3).

23. It is the argument, as advanced by Mr Biggs, that so far as the power under 86(3)(b) such remains for certain categories of cases. In support of that matter he relies upon Section 9(1)(c)(iv), namely "to refuse to vary a

person's leave to enter or remain and where the result of that decision is that the person has no leave to enter or remain".

24. He submits that the application which was made by the first claimant was to be granted indefinite leave to remain and therefore was an application that fell squarely within that particular sub section.

25. On behalf of the Secretary of State, Mr Clarke relies upon the final wording to Article 9(1)(c) "unless that decision is also a refusal of an asylum, protection or human rights claim".

26. He submits that it is entirely clear from the decision that was made and was the subject of appeal, that the first claimant's application was treated as a human rights claim and therefore Section 86 is not applicable.

27. Mr Biggs however relies upon Section 113 of the 2002 Act which defines a human rights claim as:-

> "meaning a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom (or to refuse him entry to the United Kingdom) would be unlawful under Section 6 of the Human Rights Act 1998".

He submits that such is not the application that was made by the first claimant, notwithstanding how it was treated by the Secretary of State in the decision of 24th August 2015.

28. The explanatory note to Commencement No. 4 Transitional and Saving Provisions Amendment Order speaks of Article 8 inserting a new Article 9 into the Commencement Order, which contains some saving provisions for certain types of decisions or applications which are made prior to 6th April 2015. The explanatory note sets out a number of matters but does not deal specifically with the application for indefinite leave to remain.

29. It seems to me, however, that there is a practical distinction between an application for indefinite leave to remain and applications to remain as a Tier 1, Tier 2 or Tier 4 Migrant. Refusal of the former does not automatically bring to an end the leave that had been granted and which could continue until the expiry of that leave as originally granted, whereas refusal of Tier 1 and Tier 2 or Tier 4 Migrant brings to an end the basis upon which they can lawfully remain in the United Kingdom.

30. It is to be noted that in the appeal itself, which led to the hearing before the First-tier Tribunal Judge, the aspect of removal was linked with the application for indefinite leave to remain.

31. In all the circumstances I am not persuaded that the power as provided under Section 86 is preserved in the situation that presents itself in this appeal.

32. Even if I am wrong on this matter, this is the consideration whether the policy highlights a discretion to be exercised in making a decision under the Immigration Rules, or whether it is a discretion which is to be exercised outside of the Rules. Mr Biggs invites me to read the policy in conjunction with the Immigration Rules as part and parcel of the original decision making process, thus qualifying to some extent the requirements of the Rules.

33. Mr Clarke submits that it is clearly a discretion outside of the Rules and falls within the prohibition in 86(6) "Refusal to depart from or to authorise departure from Immigration Rules is not the exercise of a discretion for the purposes of subsection (3)(b)". It seems to me common sense that the policy is informative of the respondent's exercise of discretion as to whether to depart from the Immigration Rules and it cannot properly be said to be part of the Rules themselves. In those circumstances, again, I find that if Section 86 does not apply such as to permit the Judge to have supplemented his discretion for that of the Secretary of State.

34. I recognise this is a matter not without difficulty and I note the decision in **Ukus (discretion: when reviewable) [2002] UKUT 00307 (IAC)**. That however was a case seemingly revolving around the exercise of discretion in the decision making process by the Entry Clearance Officer under Section 86(3)(a) and 86(3)(b) and recognised paragraph 21, however, that not all discretionary powers open to the Secretary of State are appealable in the Tribunal.

35. The real issue in this case, however, is whether there has been a material irregularity in the decision process. This was recognised by the President in a recent decision of the Tribunal in **Greenwood (No. 2) (para 398 considered) [2015] UKUT 00629 (IAC)**. Remittal to the Secretary of State is now not one of the disposal powers available to the First-tier Tribunal. The powers that remain are to allow the appeal, to dismiss the appeal or to make a decision to the effect whereof the Secretary of State either must, or may, make a fresh decision.

36. It seems to me that if one considers policy rather than discretion there is perhaps a better focus that can be addressed to the nature of this appeal.

37. It has long been held that the proper approach to be taken in relation to human rights is to consider whether the claimants succeed under the Immigration Rules, and if not, whether there are any compassionate or compelling circumstances outside of the Rules, which would render it disproportionate for the claimants to be removed from the jurisdiction. This not a near miss situation in that there exists a policy of the Secretary of State, which sets out the circumstances in which a breach of the

Immigration Rules will, in effect be disregarded, there being compelling or compassionate circumstances so to do.

38. In the particular circumstances of this case the accusation of dishonesty has fallen away, and so there is nothing positive to place against the suitability of the first claimant, she having been in the United Kingdom with leave and being obedient to the Immigration Rules. There is nothing in her situation or circumstances on that matter which would call for her removal.

39. Although technically in breach of the Immigration Rules, the respondent, in the policy, has recognised that there may be compelling or compassionate circumstances which exist outside of the Rules which would render refusal/removal unnecessary. The Judge has, in considering the matter, come to the conclusion that there were compelling and compassionate circumstances applying the policy or as recognised by the policy, such that it would be disproportionate to remove the claimants from the jurisdiction.

40. Clearly the Judge cannot exercise the discretion to grant the particular type of leave, namely indefinite leave that was sought, but is entitled to look at the matter as a whole and come to the conclusion that it would be wholly disproportionate in the light of that policy to require the claimants to leave the jurisdiction and indeed to be unfair of the Secretary of State not to grant the leave sought. In terms of the appeal, as lodged by the first claimant, this was recognised by Mr Clarke as not only an application for a specific remedy, but also an indication that it would be disproportionate to remove the claimants from the jurisdiction.

41. In the circumstances I do not find any material error in the outcome of the appeal but would interpret the findings of the Judge along the lines of human rights and proportionality that I have indicated.

42. Even if I am wrong on that, I would simply set aside the decision of the Tribunal Judge and remake it on the basis that there are compassionate and compelling circumstances outside the Immigration Rules which render removal disproportionate such as to allow therefore the appeal in relation to human rights. In the circumstances it would be for the Secretary of State to grant such relief for such a period to reflect the decision as made. I would hope that the application for indefinite leave as originally made would be granted.

Notice of Decision

43. In all the circumstances therefore the appeal of the Secretary of State to the Upper Tribunal is dismissed. The decision of the First-tier Tribunal shall stand, namely that the claimants' appeal in respect of human rights is allowed.

44. No anonymity direction is made.

Signed Date 3 August 2017