Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: IA/34832/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 July 2017	**On 19 July 2017**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

SOHAIL AMIR

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. S. Karim of counsel, instructed by M A Consultants (London)

For the Respondent: Mr. P. Singh, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant, who was born on 8 March 1983, is a national of Pakistan. He arrived in the United Kingdom on 8 December 2004, as a student, and his leave in this capacity was subsequently extended until 31 October 2009. He applied for leave to remain as the partner of a person settled here on 22 August 2009 and he was granted leave to remain in this capacity until 27 July 2012. He applied for indefinite leave to remain in this capacity on 25 July 2012 but his application was refused on 6 March 2014. He appealed and his appeal was heard by First-tier Tribunal Judge James on 31 July 2015. The Judge decided to remit the case make to

the Respondent for a re-consideration. She did reconsider her decision and made a further refusal on 24 November 2015.

2. The Appellant appealed against this decision and his appeal was heard by First-tier Tribunal Judge Wright, who dismissed his appeal in a determination promulgated on 11 November 2016. First-tier Tribunal Judge Hollingworth granted the Appellant permission to appeal against this decision on 10 May 2017.

ERROR OF LAW HEARING

3. Both counsel for the Appellant and the Home Office Presenting Officer made detailed oral submissions and I have referred to the content of these submissions, where relevant, in my decision.

DECISION

4. At the appeal hearing, the Appellant had accepted that his marriage was no longer subsisting but submitted that he was entitled to leave to remain on the basis of long residence.

5. It was the Respondent's case that the Appellant had not met the requirements of paragraph 276B(iii) of the Immigration Rules as he was subject to one of a general ground of refusal, namely paragraph 322(1C)(iv) of the Rules. This states that where a person is seeking indefinite leave to remain, such leave is to be refused where a person has:

"within the 24 months prior to the date on which the application is decided, been convicted of or admitted an offence for which they have received a non-custodial sentence or other out of court disposal which is recorded on their criminal record".

6. The Appellant's application for indefinite leave to remain was re-considered and then refused on 24 November 2015. There was a Certificate of Conviction in the Appellant's Bundle before the First-tier Tribunal Judge which showed that the Appellant was tried and convicted of assisting unlawful immigration into an EU Member State at Kingston Crown Court on 26 September 2013, which was more than 24 months before the decision in question. The

certificate also shows that he was subsequently sentenced at Kingston Crown Court on 29 November 2013.

7. First-tier Tribunal Judge Wright had relied on the fact that a print out of the Appellant's PNC referred to his conviction having occurred on 29 November 2013. This does not concur with the Certificate of Conviction and I agree with counsel for the Appellant that the certificate is the best evidence of the date of conviction as it emanates from the Court itself.

8. It is also clear that paragraph 322(1C)(iv) of the Immigration Rules refers to a "conviction" and not the date of sentence or the date that any conviction is recorded on his PNC. The reference in the paragraph to being "recorded on their criminal record" does not mean that this is the date of conviction. It refers to the need to take into account any non-custodial sentence or other out of court disposal.

9. As a consequence, I find that the First-tier Tribunal Judge did err in law in his construction of the meaning of paragraph 322(1C)(iv) of the Immigration Rules.

10. As noted by the Home Office Presenting Officer, the First-tier Tribunal Judge also went on to consider whether it was open to the Respondent, in the alternative, to exercise her discretion under paragraph 322(5) of the Immigration Rules, which states that leave should normally be refused due to:

"the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security".

11. I find that the Home Officer Presenting Officer was correct to submit that it was open to the First-tier Tribunal Judge to look at this provision in the alternative.

12. The First-tier Tribunal Judge acknowledged that the Appellant's counsel had referred to the Respondent's Guidance on *General ground for refusal Section 1 – version 26.0,* published on 19 April 2016. Page 69 of this Guidance states that "a suspended prison sentence must be treated as a non-custodial sentence". It also states at page 75 that "it is unlikely a person will

be refused under the character, conduct or associations grounds for a single conviction that results in a non-custodial sentence outside the relevant timeframe".

13. He went on to distinguish this policy and, when explaining why it should not apply to the Appellant and how he fell within a class where discretion should not be exercised, he relied on a number of factors.

14. Firstly, he found that the Guidance only applied for the general grounds for refusal. However, page 2 of the Guidance states that it is relevant "to all categories of applications for entry clearance and leave to remain in the UK". Therefore, the Guidance also applied to a decision under paragraph 276B(ii).

15. The Home Office Presenting Officer also relied on the case of *SF and others (Guidance, post-2014 Act) Albania* [2017] UKUT 00120 (IAC).

16. However, the ratio of this case is that:

"Even in the absence of a "not in accordance with the law" ground of appeal, the Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular outcome in the instant case. Only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal".

17. Therefore, the policy in relation to those who had convictions was that a suspended sentence was a non-custodial sentence and that it was unlikely that a person would be refused leave for a single conviction which attracted a non-custodial sentence.

18. It is true that at paragraph 12 of *SF and Others*, the Vice President had noted that :

"On occasion, perhaps where it has more information than the Secretary of State had or might have had, or perhaps if a case is exceptional, the Tribunal may find a reason for departing from such guidance".

19. However, the question was whether the First-tier Tribunal Judge had identified such an exceptional factor. He had taken into taken into account the fact that the Appellant was

sentenced to nine months imprisonment, suspended for eighteen months, for a serious immigration crime and the Home Office Presenting Officer submitted that he was entitled to find that his case was outside the bounds of "normality" as it as in the public interests and the interests of the security of the United Kingdom to enforce immigration controls. The Home Office Presenting Officer also relied on the case of *SF and others (Guidance, post-2014 Act) Albania* [2017] UKUT 00120 (IAC).

20. However, as counsel for the Appellant submitted the policy addressed those who had convictions and, therefore, a conviction would not reasonably be treated as an exceptional factor on its own.

21. The First-tier Tribunal Judge also relied on *MU ('statement of additional grounds') – long residence – discretion) Bangladesh* [2010] UKUT 4423 (IAC) and the fact that he was only able to show that he had been here for more than ten years by remaining after his marriage had come to an end.

22. However, the head note of *MU* clearly states that:

"1. As held in AS (Afghanistan) and NV (Sri Lanka) [2010] EWCA Civ 1076, there is no time limit on serving a Statement of Additional Grounds in response to a 'section 120 notice'. Thus, an appellant may accrue ten years' lawful leave (including leave extended by section 3C of the 1971 Act) while his appeal is pending. The Tribunal may then be asked to decide whether the appellant qualifies for indefinite leave under the Long Residence Rule".

23. It is not authority for the proposition that indefinite leave to remain cannot accrue if the reason for earlier leave is no longer relevant. In any event, it was clear from First-tier Tribunal Judge James' decision, promulgated on 5 August 2015, that the Appellant had submitted his initial application for indefinite leave to remain on the basis of marriage on 25 July 2012 but that the Respondent had not made a decision on this application until 6 March 2014. First-tier Tribunal Judge James also found in paragraph 11 that the Respondent's decision, due to mere passage of time as a consequence of delay on the part of the Respondent had become unlawful. Therefore, the responsibility for the delay lay with the Respondent. In addition, reference should have been made to First-tier Tribunal Judge James's decision.

24. As a consequence, I find that First-tier Tribunal Judge Wright did make material errors of law in his decision and reasons.

DECISION

(1) The Appellant's appeal is allowed.

(2) The decision by First-tier Tribunal Judge Wright is set aside.

(3) The appeal is remitted to the First-tier Tribunal for a re-hearing before a First-tier Tribunal Judge other than First-tier Tribunal Judge James or Wright.

Nadine Finch

Signed Date 17 July 2017

Upper Tribunal Judge Finch