Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/25958/2013

THE IMMIGRATION ACTS

Heard at Newport, Wales
On 24 March 2014

Determination Promulgated
On 12 September 2014

Before

The President, The Hon. Mr Justice McCloskey and
Vice President Arfon-Jones

Between

BOBBY PREMARAJAN AMARASINGAM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant: Mr Syedali (of Counsel), instructed by LG Law Chambers
Respondent: Mr Hibbs, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. This appeal originates in a decision made on behalf of the Secretary of State for the Home Department (hereinafter the "*Secretary of State*")

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dated 7th June 2013, whereby the Appellant's application for settlement on the basis of 14 years continuous length of residence in the United Kingdom, coupled with his claim under Article 8 ECHR, was refused. On appeal, the First-Tier Tribunal ("*the FtT*") overturned the Secretary of State's decision on both grounds.

Immigration Rules Framework

2. The Appellant's application was made and determined under the former version of paragraphs 276A and 276B of the Immigration Rules. While these provisions of the Rules underwent significant alteration in 2012, since the Appellant's application pre-dated 09 July 2012 it was decided in accordance with the former paragraph 276B. Under this provision, settlement in the United Kingdom could be sought on the basis of a minimum of 14 years continuous residence. The second qualifying condition was that there were no public interest reasons for refusing the application. The third requirement was framed in the following terms:

> *"The applicant has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application".*

The Appellant was aged 50 when his application was made. Thus the English language requirement applied to him.

3. The reference in the new decision letter to "ESOL" certification can be related to paragraph 33B of the Immigration Rules. This was introduced originally on 02 April 2007 (HC398) and amended with effect from 07 April 2010. At the time when the Appellant's settlement application was submitted and determined, paragraph 33B was in the following times:

> ***"Knowledge of language and life in the United Kingdom***
>
> *33B. A person has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom for the purpose of an application for indefinite leave to remain under these rules (unless paragraph 33BA applies) if -*
>
> *(a) i) he has attended an ESOL course at an accredited college;*
>
> *ii) the course used teaching materials derived from the document entitled "Citizenship Materials for ESOL Learners" (ISBN 1-84478-5424);*
>
> *iii) he has demonstrated relevant progress in accordance with paragraph 33F; and*
>
> *iv) he has attained a relevant qualification; or*

(b) he has passed the test known as the "Life in the UK Test" administered by learndirect ltd or if taken in the Isle of Man, the test known as the "Life in the UK Test" or if taken in the Bailiwick of Guernsey or the Bailiwick of Jersey, the test known as the "Citizenship Test" administered by an educational institution or other person approved for this purpose by the Lieutenant Governor; or

(c) in the case of a person who is the spouse or civil partner or unmarried or same sex partner of:

i) a permanent member of HM Diplomatic Service; or
ii) a comparable UK-based staff member of the British Council on a tour of duty abroad; or
iii) a staff member of the Department for International Development who is a British citizen or is settled in the UK, a person designated by the Secretary of State certifies in writing that he has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom for this purpose".

It is common ground that the Appellant does not hold a qualification compliant with paragraph 33B of the Rules.

The Impugned Decision

4. The Secretary of State's refusal decision rehearsed, firstly, the Appellant's immigration history, asserting that he had been unlawfully present in the United Kingdom since March 1994. In May 2012 he submitted an application for settlement on the basis of 14 years continuous residence. The letter continues:

> *"On 01 April 2003, paragraphs 276 A-D of the Immigration Rules were introduced to reflect the previous Ministerial statement concerning the question of normally regularising the immigration status of those who can demonstrate 10 years continuous lawful residence or who have resided in the United Kingdom for 14 years or more either lawfully or unlawfully."*

Continuing, the decision noted that, when requested, the Appellant had provided certain further information. However:

> *"…. You have provided no evidence for the following periods, 2005-2012 and 1994-2003. Therefore you have not demonstrated that you have been continually resident here in the UK as you claim"*

In the immediately ensuing paragraphs, the frailties of the evidence submitted by the Appellant were highlighted. The decision then addressed a quite separate issue:

> *"In addition it is also noted that you have not provided a knowledge of life/English speaking other languages (ESOL) certification … therefore …. you cannot meet the requirements under paragraph 276B(iii)".*

This is a reference to the third of the cumulative requirements which must be satisfied by applicants under paragraph 276B.

5. In summary, therefore, the Appellant's application for settlement was refused on two grounds. First, there was insufficient evidence of *"at least 14 years continuous residence in the United Kingdom"*. Second, he did not satisfy the English language requirement. On appeal the First-tier Tribunal (the *"FtT"),* firstly, reversed the first of these grounds. Having considered the evidence of the Appellant, supporting witnesses and the documentary evidence, the Tribunal pronounced itself satisfied that the Appellant had been continuously resident in the United Kingdom as claimed, namely from March 1994 thereby satisfying paragraph 276B(i) of the Rules. The Tribunal then considered the various factors adumbrated in paragraph 276B(ii), holding that there were no public interest factors adverse to the Appellant's case. This finding was juxtaposed with a further finding, in the following passage:

> *"On my findings the Appellant does not contravene the requirements of paragraph 276(iii). With respect to sufficient knowledge of the English language and of life in this country, in relation to paragraph 276B(iv) I am satisfied that the Appellant has appropriate knowledge and experience of both".*

This is an abrupt, unreasoned and unparticularised finding. In particular, the Judge did not address the terms of the refusal reason (*supra*) which stated that the Appellant had not provided the requisite ESOL ("English Speaking Other Languages") certification **or** paragraph 33B of the Rules. Finally, the Tribunal found that the refusal decision represented a disproportionate interference with the Appellant's right to respect for private and family life. Accordingly, the appeal succeeded under both the Immigration Rules and Article 8 ECHR.

The Issues

6. The main ground on which permission to appeal was granted to the Secretary of State was that the *FtT's* finding in relation to the English language requirement was, arguably, unreasoned and irrational. Before this Tribunal, both parties were agreed that the central issue raised by the grounds of appeal was whether the Appellant had adduced evidence that he had obtained an English language qualification in accordance with the requirements prescribed in the Immigration Rules. The permission Judge

referred specifically to paragraph 33B of the Rules (*supra*). This features nowhere in the decision of the FtT.

7. It is common ground that paragraph 33B applied to the Appellant's application. It is agreed that there was no evidence before the FtT that the Appellant had acquired either of the stipulated qualifications. The effect of this is that the Appellant's application did not comply with paragraph 276B(iii) of the Rules and the FtT was wrong to find the contrary. Mr Syedali, representing the Appellant, did not, realistically, contest this.

8. In argument, Mr Syedali sought to uphold the decision of the FtT on a different basis. This was set forth in paragraph 18 of his skeleton argument. The gist of this submission was that, at the time of determining the Appellant's application, there existed a relevant policy which, if properly applied, would have entitled the Appellant to succeed in his Article 8 ECHR claim. We observed that, **if correct**, this <u>could</u> render the Secretary of State's decision not in accordance with the law and could, in consequence, provide a sustainable basis for upholding the FtT's Article 8 decision. The reasons for this is that, in certain circumstances, the failure of a public authority to act in accordance with a relevant policy is justiciable. This species of failure is not confined to judicial review challenges. Rather, it can be considered by both the FtT and the Upper Tribunal under the "not in accordance with the law" ground of appeal enshrined in paragraph 84(1)(e) of the Nationality, Immigration and Asylum Act 2002.

9. The argument was developed in a somewhat *ad hoc* manner and it plainly took the Secretary of State's representative by surprise. Furthermore, it was apparently based on a more recent version of the policy in question, rather than the policy in force at the material time. In these circumstances, with reluctance, we adjourned the hearing of the appeal, with the following directions:

   a. The Secretary of State was to respond to the Appellant's argument, by 7th April 2014.

   b. The Appellant would rejoin, in writing, by 21st April 2014.

   c. This panel of the Upper Tribunal would then consider the further written submissions lodged and make any additional directions, including directions as to relisting, considered appropriate.

<u>**Our Conclusions**</u>

10. Although each party purported to comply with these directions, the response was unsatisfactory. As a result, on 11 June 2014, the Tribunal promulgated further directions with a view to enhancing its comprehension of the case made by both parties on the discrete, central issue which had materialised. While this elicited an improved response on behalf of the

Secretary of State, the panel was left with much groundwork to carry out. In particular:

(a) The Applicant's further submission purported to rely on a passage in a November 2011 UKBA policy ("Long Residence"), which was not attached. The policy excerpts attached did not correspond with the submission. Furthermore, the passage quoted in counsel's submission, under the Rubric "**Granting an Extension**" does not correspond to the relevant passage in the November 2011 policy [page 43 of 51]. Thirdly, we find the reference to a version of this policy from 11 November 2013 obscure and uninformative.

(b) The further submission on behalf of the Secretary of State contends that the operative policy is that dated 10 April 2013 and purports to quote from page 10 of this policy, the excerpt beginning with the heading "**Extension Requirements**". However, the quotation which follows in the submission differs radically from the corresponding passages on pages 10 and 11 of the April 2013 policy. We find this frankly bizarre.

11. In these circumstances, we are driven to conclude that the Appellant has not placed before the Tribunal any policy or guidance of the Secretary of State which advances his case in any way. In particular, we can find nothing in the further materials submitted supportive of the contention that the English language and knowledge about life requirements enshrined in the former paragraph 276B(iii) were either disapplied or relaxed to the Appellant's advantage.

12. The Appellant's further submissions also highlighted that the appeal had succeeded before the FtT under Article 8 ECHR. This was challenged by the Secretary of State in the permission to appeal application and was not excluded from the grant of permission to appeal. The sole question for the FtT was whether the refusal of the Appellant's application constituted a disproportionate interference with his right to respect for private and family life. The question for this Tribunal, on appeal, is whether the FtT committed any material error of law in its consideration and determination of this issue. Taking into account the provisions of the Immigration Rules in force when the application was decided (on 07 June 2013), together with the guidance provided in the leading decision of MF Nigeria [2013] EWCA Civ 1192 and the impact of section 55 of the Borders Citizenship and Immigration Act 2009, we conclude that while the terms of the Judge's self-direction could have been more explicit and focussed, the correct test has been applied in substance. Thus no error of law was committed.

13. Accordingly to summarise:

(a) The FtT's conclusion that the Appellant's application satisfied paragraph 276B of the Immigration Rules is unsustainable.

(b) However, we find no error of law in the FtT's further conclusion regarding Article 8 ECHR.

Decision

14. We affirm the decision of the FtT to allow the appeal under Article 8 ECHR. The Secretary of State's appeal is dismissed accordingly.

Signed:

THE HON. MR JUSTICEMCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 08 September 2014