IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11164/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 March 2015	**On 29 April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ARDIT MUSTALI
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Holmes, Home Office Presenting Officer
For the Respondent: Mr M Saleem of Counsel instructed by Malik & Malik Solicitors

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Abebrese promulgated on 29 October 2014 allowing the appeal of Mr Mustali against a decision of the Secretary of State for the Home Department dated 24 February 2014 to refuse to vary leave to remain and to remove him from the United Kingdom pursuant to Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. Although before me the Secretary of State is the appellant and Mr Mustali is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to the Secretary of State as the Respondent and Mr Mustali as the Appellant.

Background

3. The Appellant is a national of Albania born on 17 April 1981. He entered the United Kingdom illegally in or about July 2000 and on 26 July 2000 made an application for asylum. His application for asylum was refused on 12 January 2001. No steps were taken by the Appellant either to regularise his status or to leave the United Kingdom, and indeed it is said that he absconded to evade immigration enforcement.

4. In or about 2010 he made an application to the Secretary of State for discretionary leave to remain and on 24 January 2011 he was granted three years' discretionary leave up until 23 January 2014. On 17 January 2014 the Appellant made an application for further leave to remain which was refused on 24 February 2014 - and it is that refusal and the removal decision taken in consequence that is the subject of the appeal before the Tribunal.

5. In respect of the immigration history it is to be noted that at the time that the Appellant was seeking discretionary leave to remain which resulted in the grant in January 2011 he was in a relationship with a Polish national, Ms Jolanta Dec. During the course of the more recent application for further leave to remain made in January 2014 the Secretary of State wrote to the Appellant requesting information as to his current circumstances including, in particular, his relation with Ms Dec. The Appellant responded through representatives by letter dated 21 February 2014 confirming that the relationship had come to an end upon Ms Dec returning to Poland at the end of 2012.

6. The Appellant's appeal against the decision to refuse to vary leave to remain and to remove him from the United Kingdom was heard by First-tier Tribunal Judge Abebrese who allowed the appeal for reasons set out in his determination on human rights grounds with reference to Article 8 of the ECHR.

7. The Respondent sought permission to appeal which was granted by Designated First-tier Tribunal Judge Murray on 9 December 2014.

Consideration

8. Although this is the Secretary of State's, appeal much of the focus both today and at a previous hearing before me on 20 January 2015 has been in respect of a matter raised on behalf of the Appellant, and that is in respect of the exact basis of the previous grant of leave in January 2011. Mr Saleem essentially seeks to argue as follows.

9. It is submitted that the Appellant was granted three years' discretionary leave to remain pursuant to the 'Legacy' programme; that the grant was made after a consideration of the Appellant's circumstances against the framework of paragraph 395C of the Immigration Rules as they then were; that the application for further leave to remain fell to be considered in accordance with policy outside the Rules and not under the Rules; and that in considering the policy outside the Rules the similar parameters and framework in respect of paragraph 395C should again be applied to the Appellant rather than the current (or at least current at the time of the Secretary of State's decision) form of the Rules. It is argued that the Respondent failed to decide the Appellant's application in accordance with the argued-for approach, and in those circumstances the submission is made that the Secretary of State's decision was not in accordance with the law and it follows that the First-tier Tribunal Judge should have allowed the appeal on that basis and remitted it to the Secretary of State to consider in accordance with the law.

10. Although there is no cross-appeal in this regard, or a Rule 24 response, considerable indulgence has been extended to the Appellant and his representatives to run the submission because of the potential relevance of this submission to the basis upon which the First-tier Tribunal Judge determined the appeal.

11. To put that submission and indeed the background to the Appellant's case in wider context it is necessary to consider the grant of leave in January 2011 and that is best done by consideration of the minute prepared by the decision-maker who determined the Appellant's case. The 'minute' is a document which as Ms Holmes has indicated is not ordinarily disclosed in cases, but was before the First-tier Tribunal Judge: it sets out the thinking that informed the decision-maker who granted leave.

12. The document is a matter of record on file and so I do not propose to repeat its full contents here, however I will quote from certain passages. It starts off with a summation of the history of the Appellant and the basis of his current claim which is said to be by reference to ten years' residency over which he developed strong ties and a family life with the Polish national, Ms Dec to whom I have already referred. Under the 'consideration' aspect the following is set out:

> "The applicant has submitted many documents in support of his relationship with Jolanta Dec and the relationship has been accepted. They are in a cohabiting relationship and Jolanta Dec is of Polish nationality and so has permission to reside in the UK. The applicant has also engaged in employment in the UK. This has been under a fraudulent name and national insurance number through which he has made tax and national insurance contributions. The applicant has continued this employment under these pretences for seven years and has supported himself through renting accommodation and paying for utility services. The applicant has a 10 year residence which has been obtained through his non-compliance. He stopped reporting on a regular basis so that he would not be removed. He has frustrated the removals process, gained employment under fraudulent

> pretences and was convicted of a common assault in 2005. The UKBA were in contact with the applicant after this incident however removal was not pursued.
>
> It has been accepted that the applicant has established a family life in the UK and he has strong connections in the UK. However, his non-compliance leaves him undesirable to be granted indefinite leave to remain. It has been considered that his removal would cause disproportionate interference with his established family life and so a grant of three years' discretionary leave would be appropriate."

The decision does indeed state a discretionary grant of limited leave to remain in the United Kingdom for three years.

13. When the Appellant applied for further leave to remain it is common ground that in the first instance consideration was required to be had to the Secretary of State's policy on discretionary leave. It is also common ground that the particular form of the policy is the one that has been provided in a complete copy by Ms Holmes for the purpose of the hearing today and was also cited by reference to certain passages in the skeleton submissions of Mr Saleem.

14. The relevant parts of the policy with regard to applicants granted discretionary leave before 9 July 2012 are as follows:

> "Those who, before 9 July 2012, have been granted leave under the DL policy in force at the time will normally continue to be dealt with under that policy through to settlement if they qualify for it (normally after accruing 6 years continuous DL). Further leave applications from those granted up to 3 years DL before 9 July 2012 are subject to an active review. Consideration of all further leave applications will be subject to a criminality check and the application of the criminality thresholds including in respect of cases awaiting a decision on a further period of DL on that date (see criminality and exclusion section above). Decision makers must consider whether the circumstances prevailing at the time of the original grant of leave continue at the date of the decision. If the circumstances remain the same and the criminality thresholds do not apply, a further period of 3 years DL should normally be granted. Decision makers must consider whether there are any circumstances that may warrant departure from the standard period of leave. If there have been significant changes or the applicant fails to meet the criminality thresholds (see criminality and exclusion section above), the application for further leave should be refused."

15. In this particular case as may be seen the minute explaining the decision to grant the Appellant discretionary leave to remain made particular reference to the circumstance of the Appellant being in a relationship with a Polish national. There has been some debate before me as to whether this was the only basis upon which leave was granted or merely one of a number of factors. In my judgment it is unnecessary for me to reach a firm conclusion on that. Nonetheless it would seem that all of the other positive features about the Appellant's private life such as his engagement in employment and business and so on are all qualified in the minute by

adverse references to non-compliance, fraudulent pretences and the frustration of the removals process. On the face of it, it would appear but for the family relationship the decision-maker might well have made a different decision.

16. Another point that has arisen in this context is, given the circumstance of the Appellant being in a relationship with a Polish national, that his case should perhaps properly have been referred to a different department for a consideration of the issuing of a residence permit pursuant to the EEA Regulations. In this regard Ms Holmes observes that whilst it is not transparent why that was not done, equally there should be no obscure or suspicious motive attributed to it and, if anything, it is most likely a matter of oversight. In any event the Appellant himself did not at any point seek to request a residence permit or make any other application under the EEA Regulations which of course it would have been open to him to do notwithstanding the grant of discretionary leave or even perhaps ahead of the grant of discretionary leave, had he wanted to regularise his status at some earlier point. Be that as it may, the Respondent's decision-maker considering the current application and decision wrote the following in the Reasons for Refusal Letter of 24 February 2014:

> "We have considered your application on behalf of the Secretary of State and your application has been refused. You were previously granted discretionary leave to remain solely on the basis of your family life with an EEA national in the UK. You have informed us that this relationship is no longer subsisting. Consequently the circumstances in which you were granted discretionary leave have changed and you will not be granted further leave on the same basis. Your application has been considered under Appendix FM."

and then after that the decision maker set out a consideration of the Appellant's case by reference to the criteria of paragraph 276ADE of the Immigration Rules.

17. It seems to me that the wording of the paragraph just quoted from the Reasons for Refusal Letter is a clear reference and echo of the wording of the discretionary leave policy. The decision-maker identifies that there has been a relevant change of circumstance, that is to say the termination of the relationship with the Appellant's Polish partner, and under the policy that is something that should result in no further discretionary leave being granted. That does not mean to say that somebody should not be granted a variation of leave to remain - but it means that they must establish some alternative basis, ordinarily under the Rules, to be able to secure further leave. It is in this area that Mr Saleem has argued that any further consideration of the Appellant's case should have been by reference to paragraph 395C. However he has been unable to identify any mechanism by which paragraph 395C would come into play once it has been established that the basis upon which discretionary leave was granted has significantly altered. In those circumstances I reject the submission that the Secretary of State and, in turn the Immigration Judge, should have had it in mind that the Appellant's application for variation of leave in

circumstances where there had been a material change of circumstance then fell to be considered by reference to paragraph 395C. It did not. It fell to be considered by reference to the current Rules and the Secretary of State appropriately had regard to Appendix FM and paragraph 276ADE and in turn the First-tier Tribunal Judge was not at fault in considering the case in the first instance by reference to the Rules, albeit that the Appellant conceded that he could not establish that he met the requirements of the Rules.

18. That rather long excursion into issues of policy brings us back to the starting point of the Secretary of State's challenge to the decision of the First-tier Tribunal. In this context the Secretary of State's grounds, as articulated by Ms Holmes before me, essentially argue that the Judge erred in his consideration and application of the factors of Section 117B of the 2002 Act as amended by the Immigration Act 2014. In this context I have reminded myself of the recent decision in **Dube (sections 117A-117D) [2015] UKUT 00090 (IAC)** which has been helpfully included in the bundle prepared by Mr Saleem in support of his submissions today. In particular I bear in mind that the enumerated considerations in Sections 117A to 117D are not an 'a la carte' menu of consideration. Judges are duty bound to have regard to the specified considerations but these are not an exhaustive set of considerations, nor is it the case that they represent any kind of radical departure from the **Razgar** jurisprudence.

19. The First-tier Tribunal Judge's consideration of Section 117B and indeed of the case under Article 8 is set out between paragraphs 11 and 13 of the decision. At paragraph 11 the Judge says the following: "*the Respondents have a public duty to ensure that they maintain an effective immigration control*". Ms Holmes has pointed out that the Judge has confined this sentence to a duty on the Respondent whereas under Section 117A the duty is on the court or Tribunal to have regard to the relevant factors under 117B. Nonetheless the language there, a public duty to ensure the maintenance of effective immigration control, is an echo of the consideration at Section 117B(1). I am not inclined to the view that the Judge's use of the word 'Respondent' rather than an identification that he had a duty to ensure effective immigration control amounts to a material error of law. It seems to me that in substance the Judge had it in mind that the maintenance of effective immigration control was in the public interest and he thereby properly had regard to the consideration at Section 117B(1).

20. So far as Section 117B(2) is concerned - that it is in the public interest that persons seeking to remain are able to speak English - I do not understand it to have ever been disputed in this case that the Appellant is able to speak English and so that does not as it were apply adversely to the Appellant's circumstances.

21. As regards Section 117B(3), again it is the context of this particular case that the Appellant has advanced his private life arguments, and indeed the Judge has evaluated his private life arguments, very largely by reference

to his economic activity and his setting up and running of his own business. To that extent it would not appear that it is seriously suggested that the Appellant's presence in the United Kingdom would be a burden on taxpayers or that he would otherwise be unable to integrate into society because of financial concerns or difficulties. Those matters it seems to me are explored and identified in substance across paragraphs 11 and 12 of the decision.

22. The further factors in 117B are not so clearly cut in the Appellant's favour. Under Section 117B(4) little weight is to be given to a private life if it is established at a time when the person is in the United Kingdom unlawfully - and it is to be recalled that for a very substantial period of time the Appellant was indeed in the United Kingdom unlawfully. Indeed it is also to be recalled from the minute of the decision-maker back in January 2011 that much of the Appellant's economic activities were done by assuming a false name and otherwise operating outside the framework of legitimacy, notwithstanding that he nonetheless was paying tax and national insurance.

23. Section 117B(5) similarly says that little weight should be accorded to private life established at a time when a person's immigration status is precarious - and in this context Ms Holmes invites me to consider that 'precarious' essentially means with some form of limited leave. Certainly at those times when the Appellant had no leave his immigration status, without doubt, was precarious.

24. It is also the case that when he had limited leave pursuant to his relationship with Ms Dec he must have had it in mind that there was no guarantee that that would lead to settlement. Moreover, he accepted by way of correspondence with the Secretary of State that by the end of 2012 - so just under two years after the grant of discretionary leave to remain - that relationship was at an end: the Appellant could not have expected that that would avail him, or his discretionary leave would otherwise automatically give rise to some form of settlement.

25. Section 117B(6) is of no application in the current case.

26. Notwithstanding what I have just said about Sections 117B(4) and (5) it is, it seems to me, abundantly clear from a reading of paragraphs 11 and 12 in particular, but also paragraph 13, that the First-tier Tribunal Judge had well in mind that the Appellant had a discreditable immigration history. Paragraph 12 in particular sets out the illegality of his presence in the United Kingdom and the illicit nature of some of his business activities. It cannot be said that the First-tier Tribunal Judge has disregarded the matrix of Sections 117B(5) and (6). The question really comes down to the amount of weight that the Judge has accorded the Appellant's private life, given those particular provisions. In this regard I was troubled during the course of submissions by passages at paragraph 14 where it seemed on one reading that the Judge had ignored the change of circumstances in that the Appellant was no longer in a relationship with a Polish national.

The Judge refers to the Appellant having been granted leave because he had established a family life and goes on to say that, based on the findings of the Respondent in 2011 and the continuing progress of the Appellant in this country, it would be disproportionate under Article 8 for him to be removed.

27. I am persuaded that the Judge must have had it in mind that the family life had come to an end. That was at the forefront of the Reasons for Refusal Letter and indeed, as Mr Saleem has pointed out, it was because of that that 276ADE was the subject of consideration rather than the partner route under Appendix FM. It seems to me that the Judge appropriately had regard to the fact that the Secretary of State had acknowledged in 2011 that the Appellant had strong connections in the United Kingdom and the Judge was entitled to consider that those had been "*further cemented*" during the period of his legitimate stay in the United Kingdom since the grant of discretionary leave to remain.

28. Ultimately these matters were a matter of weight for the First-tier Tribunal Judge, and unless it can be said that he has misdirected himself in law or has come to a perverse conclusion in respect of matters of weight, his decision ought not to be interfered with. I am satisfied that he has had due regard to the considerations in Section 117 and has accorded the weight that he considered appropriate in all of the circumstances of the case, including having heard the Appellant give evidence. I do not consider that his decision is perverse and I do not consider that it discloses any misdirection of law.

Notice of Decision

29. The decision of the First-tier Tribunal Judge contains no error of law and stands.

30. No anonymity direction is made.

The above represents a corrected transcript of an ex tempore decision given on 24 March 2015

Signed Date: **27 April 2015**

Deputy Upper Tribunal Judge I A Lewis