Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA245402015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 May 2017	**On 26 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SAFDAR SHAH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer
For the Respondent: Mr Safdar Shah in Person

DECISION AND REASONS

1. The appellant in this case is the Secretary of State and the respondent is Mr Safdar Shah. However for the purposes of this decision I refer to the parties as they were before the First-tier Tribunal, where Mr Shah was the appellant.

2. The history of Mr Shah's case is set out in the decision of the First-tier Tribunal promulgated on 24 October 2016. In summary Mr Shah first entered the United Kingdom on 10 September 2006 with entry clearance as a student until 31 December 2007. He was granted further leave to

remain on the same conditions on a number of occasions until 30 June 2010. On 8 July 2010 he was granted leave to remain until 30 January 2012 as a Tier 4 (General) Student. On 23 April 2012 he was granted leave to remain until 23 April 2014 as a Tier 1 (Post-Study) Migrant.

3. On 28 February 2014 an application for leave to remain as a Tier 1 (Entrepreneur) Migrant was refused. The appellant made a further application on the same basis on 23 April 2014. On 12 June 2015 a decision was made by the respondent to refuse that application and the decision included a One-Stop Warning under Section 120 of the Nationality, Immigration and Asylum Act 2002 requiring the appellant to inform the respondent of any reasons why he thought he should be allowed to remain.

4. At the outset of his hearing before the First-tier Tribunal Mr Shah indicated that he no longer intended to pursue his appeal in relation to his Tier 1 (Entrepreneur) Migrant application and that he only intended to proceed his application for leave to remain on the grounds of long residence. As noted at paragraph [6] of the First-tier Tribunal decision and at paragraph [15] prior to that hearing, the respondent received the appellant's additional grounds of appeal dated 15 August 2016. Mr Kotas confirmed that these have been received by the respondent on 16 August 2016. These grounds confirmed that the appellant arrived in the UK on 10 September 2006 and that he would therefore have completed ten years' lawful residence on 9 September 2016. The grounds set out that Mr Shah had completed an MBA in the UK and therefore was exempt from the English language test and provided evidence of this. He also indicated that he had passed his Life in the UK Test and provided a copy of the Lift in the UK Test certificate. Mr Shah concluded in his further grounds of appeal confirming that:

> "I am entitled for indefinite leave to remain in the United Kingdom under Rule 276B of the Immigration Rules. I therefore request the Tribunal to allow my appeal on this ground."

5. The appellant was unrepresented both before the First-tier Tribunal and the Upper Tribunal. In her decision promulgated on 24 October 2016 Judge Mackintosh confirmed the evidence that she had heard and set out her reasons for allowing the appellant's appeal under the long residence Rule at paragraphs 15 to 19 of the decision and reasons.

6. The respondent appeals with permission on the grounds that:

   (1) if the judge was seeking to allow the appeal on the basis of the Immigration Rules the judge had to make findings on all of the applicable sections of Rule 276B and that the only finding was in respect of the length of residence and there was no engagement with the rest of the Rule which was a material error;

(2) it was argued that the judge could not lawfully allow the appeal with respect to the Immigration Rules in any event as paragraph 276B(ii) required a public interest assessment which it is for the Secretary of State to make in the first instance and it was asserted that the judge had acted unlawfully in seeming to accept that 276B(ii) was met as a discretion had not yet been exercised by the Secretary of State;

(3) that all of the grounds of the Rules had not been met as the appellant had not made a valid application as required by Rule A34 under SET.(LR) relying on **Weiss, R (on the application of) v Secretary of State for the Home Department [2010] EWCA Civ 803**, at paragraph [12].

Error of Law Hearing

7. As already indicated Mr Shah was unrepresented before me. I explained to him that I would him every assistance in the presentation of his appeal. Mr Shah provided a skeleton argument with annexed case law and the respondent's guidance. Although this had not been copied to Mr Kotas, I adjourned the hearing until later in the list to allow Mr Kotas an opportunity to read Mr Shah's Rule 24 response, which Mr Shah confirmed was in essence what was set out in his skeleton. Mr Kotas told me he was then in a position to proceed.

8. Mr Kotas, although he indicated he could not concede any of the grounds, confirmed that he was not making any further submission on grounds 5A and B of the Secretary of State's grounds, in relation to the alleged error in the judge making a public interest assessment and allowing the appeal without the appellant having made a valid application on the relevant form. Mr Kotas accepted that such would make a nonsense of the Section 120 One-Stop Notice.

9. Mr Kotas's primary submission was that the judge had not engaged with all of the requirements of 276B, she did not set the requirements out and the only findings it was asserted that she made were in relation to residence. Mr Kotas accepted that no challenge had been raised by the Presenting Officer at the hearing and he submitted that it would have been open to the judge to allow the case to the extent that the decision was outstanding under 276B and remit it to the respondent to make the appropriate checks in relation to the public interest test.

10. In reply Mr Shah relied on his skeleton argument and reiterated that he had submitted his additional grounds of appeal one and a half months before the hearing date (as confirmed by Mr Kotas). In that grounds of appeal to the First-tier Tribunal he had noted that he fulfilled all the requirements of the long residence Rule and had specifically confirmed that it was Rule 276B of the Immigration Rules that he was relying on. Mr Shah submitted that the judge had taken into account all of the evidence including that Mr Shah had outlined at his appeal how he met all of the requirements of 276B and the judge recorded the evidence in summary at

paragraphs [11] through to [14]. Mr Shah submitted that after his evidence the judge had asked the Presenting Officer whether she had any questions and there were none and that she had said that "everything looks OK". Mr Shah relied on the judge's findings including that the judge found that the appellant had discharged the burden upon him and that the judge had clearly stated that burden was upon the appellant to demonstrate that he met the requirements of the Immigration Rules and it was Mr Shah's submission therefore that the judge had in mind all of Rule 276B not just one aspect of it i.e. the length of residence in the UK.

11. In reply Mr Kotas reiterated that paragraph 276B was not set out by the judge. When it was put to Mr Kotas that no objections had been raised by the Presenting Officer in relation to the appellant's appeal on the basis that he met the long residence requirements Mr Kotas conceded that he could not argue with the fact that there was no positive case put forward by the Home Office against Mr Shah's grounds of appeal. He relied on the arguments already made.

Discussion

12. As indicated, Mr Kotas did not argue with any force that the grounds of appeal in relation to the judge being in error in making a public interest assessment and in allowing the appeal with no valid form were misconstrued. The appellant was issued with a Section 120 Notice. Such is not in dispute. According to the long residence guidance (Version 15.0) dated 12/2017 it is provided:

> "Under Sections 3C and 3D it is not possible to submit a new application while an appeal is outstanding. However the applicant can submit further grounds to be considered at appeal."

13. The Court of Appeal in **AS (Afghanistan) & NV (Sri Lanka) [2009] EWCA Civ 1076** held that Section 85(2) of the Nationality, Immigration and Asylum Act 2002 was to be construed as imposing a duty on the Tribunal to consider any potential ground of appeal raised in response to a Section 120 Notice, even if it was not directly related to the issues considered by the Secretary of State in the original decision. The Upper Tribunal in **MU ("Statement of Additional Grounds" – long residence – discretion) Bangladesh [2010] UKUT 442** confirmed that as held in **AS (Afghanistan)** there is no time limit on serving a Statement of Additional Grounds in response to a "Section 120 Notice".

14. Thus an appellant may accrue ten years' lawful residence (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. In **AS (Afghanistan)** the Court of Appeal rejected the argument that the Tribunal could not be a primary decision maker in these circumstances. In **Ruhumuliza (Article 1F and "undesirable") [2016] UKUT 00284 (IAC)** the Upper Tribunal rejected the submission that the wording of paragraph 276B(ii) imports a

discretion and that the wording is that of assessment rather than discretion and that the question before the First-tier Tribunal was whether the claimant met the requirements of paragraph 276B and that the Tribunal made no error in making it own assessment.

15. Mr Kotas also relied on **MU (Bangladesh)** for authority that if the Tribunal is becoming the primary decision maker under Section 120 it must take account all the Immigration Rules if an appellant claims to qualify for leave to remain in a different category from that for which he applied to the Secretary of State (paragraph 11). Mr Kotas submitted that this was what the judge had failed to do. I cannot agree. Whilst the decision of the First-tier Tribunal was brief that in itself is of course not an error of law. Whilst I accept that had the First-tier Tribunal set out in more detail the specific provisions including of 276B this challenge might not be before the Upper Tribunal that does not mean that any error, material or otherwise, was made.

16. Paragraph 276B provides as follows:

> "276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:
>
> (i)(a) he has had at least ten years' continuous lawful residence in the United Kingdom.
>
> (ii) Having regard to the public interest there are no reasons why it will be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his;
>
> (a) age; and
>
> (b) strength of connections in the United Kingdom; and
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> (c) personal history, including character, conduct, associations and employment record; and
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> (d) domestic circumstances; and
>
> (e) compassionate circumstances; and
>
> (f) any representations received on the person's behalf; and
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> (iii) the applicant does not fall for refusal under the general grounds for refusal.
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> (iv) the applicant has demonstrated sufficient knowledge of the English and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL;

(v) the applicant must not be in the UK in breach of immigration laws except any period of overstaying for a period of 28 days or less will be disregarded, as well as any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of overstaying and in determination of an application made within that 28 day period."

17. Whilst I accept that the judge ideally ought to have set out those provisions, particularly in this case as the appellant was relying on Section 120 Notice and effectively the authority of **AS (Afghanistan)**, there is no material error in her failing to do so.

18. The judge indicated at paragraph [5] that the appellant was pursuing only an application for leave to remain on the grounds of long residence. The judge then directed herself at paragraph [10] that the burden of proof was on the appellant to "establish that he meets the Immigration Rules or in the alternative he is entitled to leave to remain outside of the Immigration Rules" and she correctly set out the appropriate standard of proof. The judge then went on to record the appellant's evidence including in relation to his arrival and his absences from the UK. This included that the appellant had completed studies in the UK and has passed the Life in the UK Test as well as a Master of Business Administration (such was not disputed). At [13] it was further recorded that the appellant has many family members in the UK and that during his years of study and self-employment has developed strong friendships and associates and that none of this evidence was challenged. The judge reiterated that the appellant had produced the original certificate of his Masters' degree and corroborating evidence of his business and partnership with his colleague. Finally at paragraph [14] the judge stated that the appellant had confirmed that he was a man of good character with no criminal convictions and who has an established marketing business partner and was seeking to remain in the UK making a meaningful contribution to society.

19. As already noted Mr Kotas conceded that the Presenting Officer's notes of the hearing confirmed that there were no challenges made to the appellant's evidence or case. That is in line with both the appellant's reply to the Secretary of State's grounds for permission to appeal and with the record of proceedings.

20. The judge continued at paragraph [15] to indicate that she had taken into account all of the evidence and the appellant's submissions. This is corroborative of Mr Shah's account that there were no questions or submissions from the Presenting Officer. As already noted the judge again confirmed receipt of the appellant's ground of appeal citing long residence. The judge went on to set out that the evidence from the appellant included documents exhibited with his statement, copies of his identification documents together with business details and additional information within his passport.

21. The judge found, at [17] the evidence of the appellant to be "entirely consistent and credible". In the penultimate paragraph of the decision the judge confirmed the burden was with the appellant to demonstrate that he "meets the requirements of the Immigration Rules". She went on to state that under the long residence Rule it was upon the appellant to establish continued lawful residence in the United Kingdom for a consistent period of ten years and that there was no dispute as to when the appellant entered the UK and that he had remained lawfully since that date. The judge continued that:

> "In the circumstances I find that the appellant has discharged the burden upon him and I therefore allow this appeal."

She repeated this at [19] stating that "for the reasons outlined above I allow this appeal".

22. Whilst the judge in a fuller decision might have set out individually the reasons why she accepted that the appellant met each of the individual requirements of 276B, I am satisfied that reading her decision and reasons as a whole she had in mind all of the provisions of the Rule 276B setting out as she did the appellant's background and the strength of his connections in the United Kingdom, his history, his character, his circumstances in the UK, his English language knowledge and Life in the UK Test and that he confirmed his travel to the United Kingdom. It is significant that no challenge was made in relation to any of the evidence and indeed it is not contended by Mr Kotas that any submissions were made at the hearing that the appellant did not meet any of the requirements of 276B.

23. I am satisfied that the judge in finding as she did in all the circumstances that the appellant had discharged the burden of proof on him that the judge properly assessed the appellant's appeal against all the requirements of 276B and found that the appellant has satisfied all of the required elements.

24. As I indicated at the hearing, the decision of the First-tier Tribunal does not contain a material error of law and shall stand.

No anonymity direction was sought or is made.

Signed Date: 24 May 2017

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

As the appellant's successful appeal before the First-tier Tribunal stands I make a full fee award in respect of the appellant's fees.

Signed Date 24 May 2017

Deputy Upper Tribunal Judge Hutchinson