Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16091/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 April 2019	**On 10 May 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR PERCY MAGODO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Mr L Youssefian, Counsel instructed by House of Immigration

DECISION AND REASONS

1. In a decision sent on 24 January 2019 Judge Lewis of the First-tier Tribunal (FtT) allowed the appeal of the respondent (hereafter the claimant) against the decision made by the appellant (hereafter the Secretary of State or SSHD) on 14 November 2017 refusing his human rights claim for indefinite leave to remain on the basis of his private and family life. On page 2 of the decision the case officer wrote:

"**Consideration**

Your human rights application for indefinite leave to remain on the basis of enjoying a family life has been considered under the Immigration Rules, including the family and private life Rules, and outside the Immigration Rules.

Your case has not been considered by the Secretary of State personally, but by an official acting on her behalf.

Immigration history

- On 30/01/02 you arrived in the UK
- On 13/11/08 you applied for leave to remain under Human Rights A8, you were granted leave on a discretionary basis from 15/03/10 to 15/03.11
- On 11/03/11 you applied in time for further leave to remain, you were again granted leave on a discretionary basis from 07/04/11 to 07/04/14
- On 05/03/14 you applied in time for further leave to remain and you were again granted leave on a discretionary basis from 17/06/14 to 17/06/17
- On 10/06/17 you submitted your current in time application for indefinite leave to remain.

It is noted that all of your periods of discretionary leave were granted on the basis that you were the carer for your British spouse. It is also noted that after writing out to you on 19/10/17 to request evidence that you were still the carer for your spouse, you responded in writing on 30/10/17 to inform us that you have not been your spouse's carer since 2013. You also informed us that you have been living apart for the last 4 years and that you are in the process of obtaining a divorce".

2. At the hearing before the judge it was argued that the SSHD's reference in the refusal letter to the claimant being granted a period of discretionary leave from 15 March 2010 was erroneous and that the evidence pointed to the grant date being two years before, on 15 March 2008. The judge ultimately accepted this argument, stating at paragraphs 15-19 that:

> "15. Mr Balroop, with reference to the Respondent's policy document 'Asylum Policy Instruction, Discretionary Leave' (version 7.0, published 18 August 2015) refers to a past practice of granting discretionary leave to remain for an initial period of 3 years. He

submits that this makes it more likely than not that the initial period of discretionary leave was from 15 March 2008 until 15 March 2011. In further support of this submission he identifies a letter from the Respondent to the Appellant dated 29 April 2014 (Appellant's supplementary bundle, page 73) which states in part *"our records have shown that you have now completed a 6 year period of discretionary leave to remain in the United Kingdom"*. This letter appears to have been written to the Appellant at the time that his application made on 5 March 2014 was pending, inviting the Appellant to consider whether instead of applying for leave to remain as the spouse of a settled person he wanted to apply for indefinite leave to remain.

16. I pause to make the following two brief observations in respect of the letter of 29 April 2014:

    (i) Whilst the letter alerted the Appellant to the fact that he was *"entitled to apply for indefinite leave to remain"* on the basis that he had completed a six-year period of discretionary leave, it was appropriately cautious in avoiding indicating that the Appellant was entitled to succeed on such an application – *"I cannot give an indication of the likelihood of success of such an application"*.

    (ii) In the event the Appellant did not at that time seek indefinite leave to remain.

17. I am not able to identify any other documents on file that assist in resolving the question of the date of the first grant of discretionary leave to remain.

18. On the basis of the materials that are available – and with particular emphasis on the Respondent's own letter of 29 April 2014 – it seems to me more likely than not that the Appellant was indeed granted an initial period of 3 years discretionary leave to remain from 15 March 2008. I so find.

19. Mr Balroop, on this premise, invites consideration to two consequences: that the Appellant would have completed 6 years discretionary leave to remain by 14 March 2014, and 10 years continuous lawful residence by 14 March 2018. It is submitted that both these circumstances are pertinent to a consideration of proportionality".

3. The judge went on to conclude that the claimant was entitled to succeed in his appeal since he now met the requirements of paragraph 276B regarding ten years' continuous lawful residence.

4. On the way to this conclusion the judge rejected the claimant's submission that he was also entitled to succeed on the basis of the SSHD's policy, 'Asylum Policy Instruction, Discretionary Leave' (version 7, published 18 August 2015) at Section 10 "Transitional Arrangements" dealing with applicants granted DL before 9 July 2012, which stated that normally applicants will be eligible to apply for settlement after accruing six years' continuous residence.

5. The SSHD's principal ground contends that:

> "8. It is respectfully submitted that no evidence was submitted by the Representatives which could have brought Judge Lewis to the conclusion that this appellant was ever granted leave from March 2008.
>
> 9. This was never part of the appellant's evidence and was only brought about by an unsubstantiated submission made on his behalf.
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> 10. Given that this mistake of fact by the judge was the only reason that this appeal was successful the Respondent respectfully request permission to appeal.
>
> 11. The judge has failed to provide reasons why he finds the Reasons for Refusal letter erroneous and his findings is based solely on speculation".

6. The claimant submitted a Rule 24 response whose central plank was that the SSHD had failed to establish that there had been a mistake of fact as alleged. It pointed out that in order to amount to an error of law, on the authority of **E v SSHD** [2004] EWCA Civ 49 at [66], several requirements had to be met:

> *"First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the factual evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning"*.

In this Response it was argued that not all these requirements had been met in this case. The Response also contained a further ground contending that even if I found the judge had erred in relation to the alleged mistake of fact, I should conclude that the judge was wrong not to allow the appeal on a distinct basis, namely that the claimant should have had the DL policy applied in his favour.

7. I heard helpful submissions from both representatives.

8. I am not persuaded that the SSHD's grounds are made out.

9. First, it is incorrect of the grounds to state that there was "no evidence" that could have brought Judge Lewis to the conclusion that the appellant had ever been granted leave from March 2008. The letter of 29 April 2014 was at least some evidence pointing that way. Further, by virtue of this letter, the judge cannot be said to have reached his finding on the basis of "an unsubstantiated submission".

10. Second, whilst a different judge might well have taken the view that it was for the claimant to prove he had been granted DL in March 2008 (and the normal way of doing that would be by production of a letter making such a grant or at least a request to the Tribunal to direct that the SSHD check her records), it was open to the judge on the limited evidence to reach a decision on the matter.

11. Third, the SSHD's grounds fell far short of establishing either that there had been a mistake of fact or, if there had, that it met the criteria enjoined by the Court of Appeal in **E**.

12. As regards establishing whether there had been a mistake of fact, the SSHD took no steps to adduce further evidence pursuant to Rule 15(2) of the Procedure (Upper Tribunal) Rules 2018. Even a statement stating that a check had been made and no grant of leave for that date could be found would probably have sufficed.

13. Even assuming the SSHD had established there had been a mistake of fact (and assuming there had therefore been an availability of evidence on the matter) and that this evidence was uncontentious and objectively verifiable, it simply could not be said that the SSHD bore no responsibility for the mistake, since the letter of 29 April 2014 appeared to be premised on the SSHD's "records" showing that the claimant had "now completed a 6 year period of discretionary leave …". That was logically impossible if he had only been granted DL in 2010.

14. Mr Youssefian also sought to argue that even if I found the judge to have erred in his application of paragraph 276B, by virtue of the alleged mistake of fact, I should still come to an ultimate conclusion (whether by way of immateriality of the error or by way of re-making) that the claimant should succeed under the DL policy (contrary to the judge's own finding). However, given my conclusion that the SSHD's grounds are not made out, I need not address this argument.

No anonymity direction is made.

Signed Date: 3 May 2019

Dr H H Storey
Judge of the Upper Tribunal