



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/00416/2013

THE IMMIGRATION ACTS

**Heard at : Field House
On : 14th November 2013 & 14th January 2014**

**Determination Promulgated
On : 16th January 2014**

Before

Upper Tribunal Judge McKee

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ASWANI KUMAR BOBBA

Respondent

Representation:

For the Appellant: Miss A. Holmes & Miss A. Everett of the Specialist Appeals Team

For the Respondent: Mr Edwin Lewis of Acculegal Solicitors

DETERMINATION

1. On 30th November 2012 Mr Bobba's application for indefinite leave to remain in the United Kingdom was refused. He needed to have spent a period of ten continuous years here with lawful leave in order to succeed under Part 7 of the Immigration Rules, but according to the Reasons for Refusal Letter there were two intervening periods when he had no leave. The first ran from 1st July to 7th September 2005, the second from 1st to 8th October 2007. The refusal to vary Mr Bobba's leave was accompanied by a decision to remove him under section 47 of the Immigration,

Asylum and Nationality Act 2006, and an appeal against those decisions was lodged with the First-tier Tribunal.

2. After some procedural complications the appeal came before Judge Thanki on 12th July 2013. He allowed the appeal because he regarded the time spent here without leave ~ which he took to be 21 days rather than the much longer total set out in the Reasons for Refusal Letter ~ to be insufficient to break the continuity of residence. The application had also been refused because Mr Bobba had an unspent conviction, and it was a requirement of rule 276B(iii) of HC 395 that the applicant should not have any unspent convictions within the meaning of the Rehabilitation of Offenders Act 1974. Judge Thanki took the view that Mr Bobba's offence was relatively minor (he was fined for drink-driving, and disqualified from driving for 15 months), so that to refuse his application because his conviction was not yet spent was disproportionate. Because he was purporting to allow the appeal under the Immigration Rules, the judge did not think it necessary to consider the Article 8 issue which was raised in the amended Grounds of Appeal.
3. This outcome was challenged on behalf of the Secretary of State on the sole basis that, in respect of the requirement to have no unspent convictions, the Tribunal had "*no power to require the respondent to exercise discretion outside of the Immigration Rules.*" In granting permission to appeal to the Upper Tribunal, Judge Cox thought it arguable that paragraph 276B(iii) was "*not a provision which calls for an exercise of discretion or, as the Judge put it at one point, consideration of proportionality.*" When the matter came before me on 14th November Mr Lewis did attempt, albeit not too vigorously, to contest this point. It is a bad one. Paragraph 276D stipulates that indefinite leave "*is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 276B is met.*" Accordingly, the requirement at paragraph 276B(iii) is a mandatory requirement, which the Secretary of State can only disapply if she departs from the Immigration Rules. Section 86(6) of the Nationality, Immigration and Asylum Act 2002 makes it clear that a refusal to depart from the Immigration Rules is not the exercise of a discretion which is amenable to the jurisdiction of the Tribunal.
4. Mr Lewis also sought to rely upon the argument which he had advanced before the First-tier Tribunal, namely that a requirement for leave could not be dependent upon something extraneous to the Rules. But it was clear to me that the principle in *Pankina* and *Alvi*, which forbids requirements for leave to enter or remain to be set out in Policy Guidance rather than in the Immigration Rules, does not extend to a requirement made by reference to primary legislation. The sticking point for the Policy Guidance was that it had not been laid before Parliament. That cannot be said of the Rehabilitation of Offenders Act. And as Sedley LJ said at paragraph 26 of *Pankina*, "*a measure which has to be laid before Parliament is not vitiated if, rather than being self-contained, it derives part of its content from an extant and accessible outside source.*" The notion of 'incorporation by reference in legislation' is discussed by Foskett J in *English UK* [2010] EWHC 1726 (Admin), and clearly there is nothing wrong with the reference to the 1974 Act in rule 276B(iii).
5. But Mr Lewis now had an altogether different argument. The requirement to have no unspent convictions was deleted on 13th December 2012 by HC 760, just two weeks after the decision in the instant case, and was replaced by a requirement that "*the*

applicant does not fall for refusal under the general grounds for refusal.” Simultaneously on 13th December 2012, a new paragraph 322(1C) was inserted into Part 9 of the Rules, which provides that a person who has been convicted of a criminal offence but not given a custodial sentence is to be refused variation of his leave if his application is made within 24 months of the conviction which earned the non-custodial sentence. Mr Bobba’s conviction was 5th November 2009, more than two years before his application for ILR on 9th March 2012. Had the decision on his application been made on or after 13th December 2012, it would not, said Mr Lewis, have been subject to mandatory refusal.

6. That would, in my view, be a factor to weigh in the balance if one were considering an Article 8 claim, but it does not enable Mr Bobba to succeed under the Rules. Mr Lewis tried yet another argument. In May 2012 the Legal Aid, Sentencing and Punishment of Offenders Act 2012 received the Royal Assent, and section 139 amended the Rehabilitation of Offenders Act 1974 so as to reduce to 12 months the period taken for a fine to be ‘spent’. Mr Lewis was unable to say, at the earlier hearing, when this section came into force, but it turns out to have been on 12th October 2012, although the Rules were not amended until 13th December. But he contended that section 141(1)-(2), which says that section 139 “*applies in relation to convictions ... before the commencement date*” and that the Rehabilitation of Offenders Act “*applies in relation to convictions or cautions before the commencement date as if the amendments and repeals made by section 139 had always had effect*”, applies to his client. The retrospective effect of section 141 was, according to Mr Lewis, such that, when Mr Bobba’s application was decided in November last year, even if it was before LASPO was in force (about which we were not sure at the time), his conviction had long ago been spent, because his fine incurred a rehabilitation period of only one year.
7. Miss Holmes did not think that such an interpretation of section 141 could be right, and Mr Lewis could not cite any authority to back up his interpretation. There was also the problem that section 140 of LASPO inserted a new section 56A into the UK Borders Act 2007, headed “*no rehabilitation for certain immigration or nationality purposes*”, and one of these purposes is a decision on leave to remain under the Rules. It seemed possible that 140 cancelled out any effect which section 141 might have on the present appeal.
8. The best course seemed to be to adjourn the appeal so that Mr Lewis could consider whether he should continue to advance the contention that his client was eligible for indefinite leave under the Rules. If he was not, he was entitled in any event to a decision on his Article 8 claim, which was left undetermined by the First-tier Tribunal.
9. When the hearing resumed today, the Secretary of State was represented by Miss Everett, who handed up a copy of section 4 of the Rehabilitation of Offenders Act 1974. This sets out the ‘effect of rehabilitation’, namely that a person whose conviction has become ‘spent’ under the Act need never admit to having had such a conviction, except in circumstances provided for by order of the Secretary of State. I already had a copy of Chapter 8 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (‘LASPO’), section 139 of which amends the 1974 Act so as, *inter alia*, to reduce the rehabilitation period for a fine (as incurred by Mr Bobba) from five years to one year. But section 140 inserts a new section 56A into the UK

Borders Act 2007, headed 'No rehabilitation for certain immigration or nationality purposes'. This means that, for the purpose of deciding an application for leave to remain under the Immigration Rules, as in Mr Bobba's case, it matters not that a previous conviction has become 'spent'. The Secretary of State may still take it into account for the purposes of the General Grounds of Refusal, which have taken the place of references to the Rehabilitation of Offenders Act throughout the Immigration Rules.

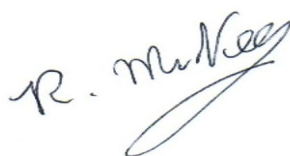
10. Where does that leave Mr Bobba? Section 141 of LASPO makes transitional and consequential provisions, and Mr Lewis had already drawn attention to subsections (1) and (2), which give retrospective effect to section 139. But the fact that Mr Bobba's conviction was to be regarded as spent before he made his application for indefinite leave would not avail him if section 140 prevented him from being regarded as rehabilitated.
11. Fortunately for Mr Bobba, subsection (9) of section 141 comes to his rescue. This says that section 140 "does not affect –
 - (b) any applications for immigration or nationality decisions made but not finally determined before the commencement date."
12. Mr Bobba's application was made in January and re-submitted in March 2012, i.e. before the commencement date of 1st October 2012, but the application was only decided on 30th November 2012, i.e. after the commencement date. So for the purposes of his application, the rehabilitation provisions of the 1974 Act were still to be applied, and by virtue of section 139 of LASPO the rehabilitation period for his conviction was only one year, not five. The upshot is that, although paragraph 276B(iii) of HC 395 still required, at the date of decision in Mr Bobba's case, that "*the applicant does not have one or more unspent convictions within the meaning of the Rehabilitation of Offenders Act 1974*", Mr Bobba did in fact have no unspent convictions, because the fine imposed on him in 2009 had become spent in 2010, thanks to the retrospective changes wrought to the 1974 Act by section 139 of LASPO. These changes were in force from 1st October 2012, and hence at the date of decision on 30th November 2012.
13. It turns out therefore that Judge Thanki reached the right conclusion for the wrong reasons. It was not a question of Mr Bobba failing to meet the requirement of rule 276B(iii) and the Secretary of State failing to exercise discretion in his favour, resulting in a disproportionately harsh decision. As explained above, there was no discretion to be exercised. Mr Bobba did actually satisfy the requirement of rule 276B(iii), because by the date of decision his conviction fell to be treated as having become spent in November 2010.
14. Rather than holding that the First-tier Tribunal made a material error of law requiring the decision on the appeal to be re-made by the Upper Tribunal, I think it is simpler to say that there was an error of law, but it was not material to the outcome, so that the First-tier decision stands. In closing I would just apologise to Mr Lewis for the inconvenience caused by his having to apply for an adjournment of the second hearing, which was originally listed for 2nd January. I had in fact left a note on the file that the case was not to be listed before 5th January, but the note appears to have been overlooked.

DECISION

The Secretary of State's appeal is dismissed.

Richard McKee
Judge of the Upper Tribunal

14th January 2014

A handwritten signature in black ink, appearing to read "R. McKee". The signature is written in a cursive style with a large, sweeping flourish at the end.