



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

Appeal Number: IA/04054/2014

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham

Determination

On 27 October 2014

Promulgated

On 7 November 2014

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ROBERTSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**DORCUS MAKWAIRA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms S Lloyd, Counsel, instructed by A2, Solicitors

For the Respondent: Mr L Tarlow, Presenting Officer

DETERMINATION AND REASONS

Immigration History

1. The Appellant in this appeal was in fact the Respondent in the First-tier Tribunal hearing. However, for ease of reference the Appellant and Respondent are hereafter referred to as they were before the First-tier Tribunal. Ms Mukwaira will therefore be referred to as the Appellant and the Secretary of State will be referred to as the Respondent.

2. The Appellant is a female citizen of Zimbabwe, whose date of birth is 18 November 1967.
3. As to the background to the case, the Appellant entered the UK on 17 November 1999. Her leave expired on 7 May 2000. She remained in the UK and was granted a residence permit as the family member of a Dutch national on 21 June 2001. This was revoked on 14 April 2004 because the Secretary of State was not satisfied that her Sponsor was exercising Treaty rights. She had further leave to remain outside the Rules from 19 November 2010 to because she was undergoing treatment for breast cancer and on 17 December 2011 she made an application for leave to remain outside the Rules on the basis of her private and family life in the UK. . This was refused on 23 November 2012. The Appellant appealed against the refusal to vary leave (the substantive decision) and against the decision to remove under s 47 of the Immigration, Asylum and Nationality Act 2006 (2006 Act). Her appeal was heard by First-tier Tribunal Judge Andrew on 26 February 2013; the appeal against the substantive decision was dismissed. The appeal against the removal decision was allowed to the limited extent that it was not in accordance with the law because it was issued at the same time as the substantive decision when, at that time, the Secretary of State did not have authority to issue both a substantive decision and a removal decision at the same time.
4. In re-making the decision to remove, the Secretary of State reconsidered the Appellant's "case" as stated in the reasons for refusal letter dated 24 December 2013 (the RL). It appears from the Notice of Decision, issued on 30 December 2013, (the Notice) that two decisions were issued; a refusal to vary leave to remain and a decision to remove the Appellant under s 47 of the Immigration, Asylum and Nationality Act 2006 (2006 Act), the reasons for which are contained within the RL. The Appellant's appeal against those decisions was allowed by First-tier Tribunal Judge D Ross, the reasons for which are contained within his determination promulgated on 15 August 2014. Unless otherwise stated, references to paragraphs are references to paragraphs within his determination. All references to paragraph 276B of the Immigration Rules are references to this provision before it was removed from the Immigration Rules on 9 July 2012.
5. Judge Ross stated that it had not been challenged that the Appellant had been in the UK since 17 November 1999. She had therefore been in the UK for a period of 14 years and 8 months. He therefore allowed her appeal under paragraph 276B, finding that **Edgehill & Anor [2014] EWCA Civ 402** applied and therefore the Appellant's claim fell to be assessed under the Immigration Rules in force prior to 9 July 2012 (the Old Rules).
6. In the grounds of application, it is asserted that:
 - a. The Judge materially misdirected himself in law and/allowed or permitted a procedural irregularity to occur which deprived the Respondent of a fair hearing because:
 - i. The Appellant did not raise either in the grounds of appeal or in response to a s 120 notice any issue under paragraph 276B of the Immigration Rules and this issue was not in fact

raised until the Appellant's representative made her closing submissions;

- ii. The Judge did not give any reasons for allowing the grounds to be amended; the presenting officer in his hearing note (which was set out in the grounds) objected to the issue being raised at such a late stage as this issue had not been raised before, either during the appeal or in the appeal before Judge Andrew. The Judge did not mention this objection nor did he give reasons for allowing the grounds to be amended.
 - iii. The facts of **Edgehill** and the Appellant's appeal are different; the facts in **Edgehill** were focused on a pre-rule change decision. The application of December 2011 had been refused and dismissed on appeal. In the current case, the Respondent was considering the matter when issuing a removal decision and the relevant rules to be applied were therefore those in force on 24 December 2013.
 - iv. The Court of appeal in **Edgehill** was looking at the transitional provisions for the changes in the Immigration Rules. However, the Respondent was considering the application of 2011 and the following refusal letter of 23 November 2012. There was therefore no provision of the Immigration Rules which was preserved by the transitional provisions on which the Appellant could rely. The removal decision and the reasons for refusal letter were maintaining the decision of 23 November 2012 and at the appeal before Judge Ross paragraph 276B was no longer in the Immigration Rules and the application made by the Appellant for leave to remain had already been refused, appealed and the appeal dismissed. The Judge therefore materially erred in law in considering the appeal under paragraph 276B (as was) of the Immigration Rules.
- b. The Judge erred in failing to make findings on material matters because, having found that the Appellant had been in the UK for 14 years, he allowed the appeal without any consideration of the 'public interest' criteria found within paragraph 276B, which he was obliged to consider pursuant to **MU ('statement of additional grounds'; long residence; discretion) Bangladesh [2010] UKUT 442(IAC)**. The facts that would have been relevant were overstaying after expiry of her visit visa, that her residence card leave was curtailed in 2004, that she did not appeal against that decision and that Judge Andrew found that she had no claim on the basis of Article 8. The failure to consider this aspect of the appeal amounts to a material error of law.
7. Permission was granted on the basis that (i) there was a paucity of reasoning to show how the Judge was satisfied that the Appellant had at least fourteen years continuous residence in the UK and (ii) it was arguable that the Judge had 'ignored the history of the case' and gone on

to apply the wrong Immigration Rules and the wrong tests in allowing the appeal.

8. In submissions, Mr Tarlow essentially relied on the grounds of application.
9. As to whether or not the Appellant had raised reliance on paragraph 276B before the First-tier Tribunal, Ms Lloyd submitted that in the grounds of appeal before the First-tier Tribunal, at paragraph 3, it was stated that the Respondent did not consider the Appellant's application properly and only considered it retrospectively in light of the Article 8 claims made after 9 July 2012. She submitted that this was obviously a reference to the Immigration Rules and there can be no doubt that that ground related to the changes to the Immigration Rules, that is, that it is clear that the ground related to a consideration of the application under the new Rules when the old Rules applied. The grounds pleaded were therefore wide enough to cover reliance on paragraph 276B. The Respondent was fully aware of the possibility that the old Rules applied due to **Edgehill**, which had been decided before the hearing in July 2014. If it applies to the Appellant's case, it is not open to the First-tier Tribunal to decide the application under the new Rules because the old Rules should be applied.
10. She further submitted that in any event: (i) she had provided a skeleton argument at the hearing and although she could not say for definite that she had handed up her skeleton argument at the commencement of the hearing, it was her practice to do so and paragraph 276B was referred to within it and therefore the Respondent was aware of it and the Judge had jurisdiction to deal with it; (ii) even if the issue had only been raised in submissions, the presenting officer could have asked to make submissions on any additional points that had been raised and therefore the submissions raised on behalf of the Respondent on this point should be rejected.
11. As to which Immigration Rules (the old or the new) should apply, Ms Lloyd submitted that the reasons for refusal letter of 24 December 2013 clearly stated that the Appellant's application was made on 17 December 2011 and that it was that application that was being reconsidered and therefore the old Rules applied. She submitted that the Appellant had been granted leave to remain for treatment for breast cancer and the substance of the decision of 24 December 2013 was a refusal to vary leave as stated in the Notice which accompanied the reasons for refusal letter. This could only happen if she had continuing leave since her application of December 2011. When asked if she was suggesting that the decision of Judge Andrew, who determined the Appellant's substantive application for leave to remain, did not have the effect of ending any continuing leave under s 3 of the Immigration Act 1971 (the 1971 Act) she stated that there was no need to decide this point because the Respondent stated in the RL that the application that was being decided was the application of 17 December 2011 and it is that application which has been refused.
12. I raised with Ms Lloyd the effect of paragraph A277C of the Immigration Rules, which came into force on 6 September 2012, and to which changes were made subsequently, which gives the Respondent discretion to apply the new Rules even if the old Rules apply. I gave her a copy of paragraph A277C. She submitted that it did not preclude the Respondent from

applying paragraph 276B. Ms Lloyd referred to the changes to the Immigration Rules from 28 July 2014, which applied regardless of when the application was made; but stated that the decision had actually been made before these came into effect.

13. As to the need to consider the countervailing factors under paragraph 276B, Ms Lloyd submitted that even if the Appellant had been in the UK unlawfully, the whole purpose of paragraph 276B was that those who had been here unlawfully could succeed if they could establish 14 years continuous residence. She further submitted that evidence had been given by witnesses, which was set out at [4 - 7], and there had been no cross-examination by the presenting officer. The Judge could therefore accept the evidence of the witnesses and there was nothing within the evidence that could amount to countervailing factors which needed to be taken into account. He had specifically stated that "...having regard to the public interest there are no grounds why it would undesirable for her to be given indefinite leave to remain on the grounds of long residence taking account of her age, strength of her connections in the UK, her personal history, domestic circumstances, and any representations received..."
14. On conclusion of the hearing, I reserved my decision. Ms Lloyd asked if she may send in written representations on paragraph A277C by the end of the day, with Mr Tarlow to respond within 7 days thereafter. I agreed to consider any written submissions limited to the application of paragraph A277C which were sent to me within the agreed time scale.

Analysis and reasons

15. As to which Rules should apply, pre or post 9 July 2012, Ms Lloyd's submissions focussed on the wording of the RL and the Notice of Decision for support of her assertion that what was under consideration was the application made by the Appellant in December 2011. What is stated within the RL at paragraph 1 is:

"On 17 December 2011 you applied for further leave to remain in the United Kingdom. Your application was refused on the 23 November 2012. Your case has been reconsidered."

16. This lends substance to the submission of the Respondent that what was in fact reconsidered was the decision of 23 November 2012, and not the application. This application was refused and the substantive decision dismissed by Judge Andrew on 23 February 2013. There was no onward appeal against the decision of Judge Andrew. The Appellant's continuing leave under s 3 therefore ended when the proceedings were concluded. I disagree with Ms Lloyd's assessment that there was no need to consider the impact of the decision of 23 November 2012 and the decision of Judge Andrew in assessing whether the Appellant had continuing leave. Section 3C (2) specifically provides that :

"The leave is extended by virtue of this section during any period when—

- (a) the application for variation is neither decided nor withdrawn,

(b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought, while the appellant is in the United Kingdom against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission), or

(c) an appeal under that section against that decision, brought while the appellant is in the United Kingdom, is pending (within the meaning of section 104 of that Act).”

17. Continuing leave ends after dismissal of an appeal and where leave has ended, an Appellant can only have extant leave if a grant of leave is made. There was no grant of leave between Judge Andrew’s decision being issued and reconsideration of the Appellant’s case on 24 December 2013. Where there is no extant leave, a decision cannot be described as a ‘refusal to vary leave’. The Respondent’s erroneous heading “Decision to refuse to vary leave to enter or remain” within the Notice can only be understood by a consideration of the text beneath it, in which it is stated

“You applied on 17 December 2011 for variation of your leave to enter or remain. That application has been refused. Full details for this decision are provided in the attached letter,”

the latter being a reference to the RL.

18. It is then clearly stated in the RL that the Appellant’s application was refused on 23 November 2013. Ms Lloyd was mistaken in thinking that the Respondent had treated the Appellant’s leave as continuing under s 3 of the 1971 Act when making the decision of 23 December 2013 because the Respondent could not change the provisions of s 3 of the 1971 Act which automatically brings to an end any continuing leave. Furthermore, the terms of the Notice of Decision, read with the RL, and against the continuing leave provisions of s 3C do not support a finding that what was in consideration when the decision of 24 December 2013 was issued was the Appellant’s application of 17 December 2011.
19. It is clear that what the Respondent has in fact done is deal with that aspect of the appeal before Judge Andrew which was found not to be in accordance with the law, that is, the decision to remove. This issue was dealt with in the RL pursuant to the provisions applying at the date of decision, that is the Immigration Rules post 9 July 2012.
20. I find that in stating that **Edgehill** applied, the Judge did not have regard to the history of the Appellant’s application and relied on an Immigration Rule, namely paragraph 276B, which was removed from the Immigration Rules in relation to applications made after 9 July 2012. This being the case, there is no need to consider whether paragraph A277C of the Immigration Rules had a material bearing on the decision or to consider the additional submissions made by Ms Lloyd on this point. There is also no need for me to decide whether the Judge considered the countervailing factors set out in paragraph 276B of the Immigration Rules, although I would note that at [11] the Judge was simply setting out the provisions which would need to be met before an appeal could be allowed under paragraph 276B and he did not in fact consider any countervailing factors

at [12] and therefore inadequate reasons were given for allowing the appeal under 276B, even if it were available to the Appellant.

21. There is also no need for me to consider whether or not the Judge permitted a procedural irregularity to occur in considering a ground of appeal raised in submissions. For completeness, on this point I find as follows:
- a. With regard to the submission that the new Rules applied to the facts of the Appellant's case, I find that HC 194 made many changes to the Immigration Rules in July 2012 and the grounds of appeal before the First-tier Tribunal did not sufficiently particularise the old Rules on which the Appellant sought to rely in challenging the decision of the Respondent. If Rule 276B was to be relied on, it should have been particularised. Moreover, whilst the skeleton argument provided by Ms Lloyd at the hearing may well have been provided to the Respondent and the Judge at the beginning of the hearing, there was no application to amend the grounds of appeal; no mention of an application to amend the grounds is confirmed in the determination. If an application to amend the grounds of appeal before the Judge had been made at the beginning of the hearing, this would have put all parties on notice of the issues to be addressed, including the need to consider the date of application in the context of the history of the proceedings.
 - b. Did this result in a procedural irregularity and unfairness to the Respondent? Ms Lloyd submitted that the presenting officer could have asked to make submissions on the points raised by her. However, the presenting officer did object to the raising of paragraph 276B of the old Rules in submissions. There is no indication within the determination that the Judge indicated at the hearing that he was minded to consider the application of paragraph 276B and whilst the Judge went on to deal with this ground in his determination, there is no record of the presenting officer being afforded an opportunity to make submissions on the point and no explanation within the determination of why the Judge decided to consider the appeal on the basis of paragraph 276B. I find that the Judge did allow a procedural irregularity to occur which deprived the Respondent of a fair hearing.

Decision

22. I find that the decision of Judge Ross is fundamentally flawed for the reasons set out above. I set aside his decision. None of his findings of fact shall stand. As findings of fact will need to be made on all the issues raised in the RL; and because pursuant to paragraph 7(2)(a) of the Practice Statements the Respondent has been deprived of the opportunity of putting her case, this matter is to be remitted to the First-tier Tribunal (not before Judge Ross) for a full hearing of all the issues. Any additional evidence to be relied on must be submitted at least 7 working days before the substantive hearing.

23. It appears that at no stage in the proceedings has an anonymity direction been made. No request has been made for an anonymity order and pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I find no reason to make a direction as to anonymity.

Signed

Date **3 November 2014**

M Robertson
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

I have considered whether to make a fee award. I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011). As the Respondent's appeal has been allowed, the decision of Judge Ross as to the fee award shall be set aside. The award will be made by the First-tier Tribunal Judge who determines the appeal in the.

Signed

Dated **3 November 2014**

M Robertson
Deputy Upper Tribunal Judge