



(IMMIGRATION AND ASYLUM CHAMBER)

UPPER TRIBUNAL

APPEAL NUMBER:

IA/40854/2013

IA/49730/2013

THE IMMIGRATION ACTS

Heard at: Field House

Determination

Promulgated

On: 30 July 2014

On: 01 September 2014

Prepared: 28 August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MR FABRICE APOLLINARE SAMBA (1)

MS SUNITA MAHARJAN (2)

NO ANONYMITY DIRECTION MADE

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellants: Mr A Mahmood, Solicitor, Sunrise Solicitors

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

- 1.** The first appellant is a national of Congo, and his partner, the second appellant, is a national of Nepal. They appealed against the decision of the respondent refusing their applications for leave to remain in the UK on the basis of Appendix FM and paragraph 276 ADE of the rules.
- 2.** With regard to the second appellant, it was noted that paragraph EX.1 did not apply.

- 3.** The appellants' child's birth certificate was produced showing that he was born in Hillingdon on 7th August 2011. The child did not meet the residence criteria.
- 4.** Removal directions under s.47 of the Immigration, Asylum and Nationality Act 2006 were made.
- 5.** Both appellants were issued one stop warnings.
- 6.** The First-tier Tribunal Judge noted in his determination promulgated on 13th May 2014 that he disagreed with the contention on behalf of the first appellant that he had met the requirements of the ten year long residence rule [42]. That is because it is stated by him in his application that he has been in the UK for nine years and five months.
- 7.** By the date of hearing, namely 28th April 2014, he had been in the UK within 28 days of the ten year requirement. In the first appellant's case, as at the date of application he had only been here for nine years and five months and the policy guidance required that applications received outside the 28 day concession period should be refused. Accordingly he was not able to take advantage of the concession in the policy guidance.
- 8.** The Judge also considered the submission in the skeleton argument that the appellants' child is a British citizen. There was no evidence that that was the case. In any event, the appellants have always been subject to restrictions and neither of them has been settled for the purpose of the British Nationality Act 1981. The Judge found that the child was therefore not a British citizen [43].
- 9.** The Judge went on to find that neither appellant met the long residence requirements of paragraph 276ADE. The first appellant had not lost ties with Congo. The second appellant is in touch with her family in Kathmandu. Nor could the appellants avail themselves of the provisions of EX.1 as they were not involved in a relationship with a child who is a British citizen.
- 10.** Their appeals are also dismissed on human rights grounds.
- 11.** On 3rd June 2014, First-tier Tribunal Judge Reid granted the appellants permission to appeal on the basis that it was arguable that the Judge's conclusions on long residence at paragraph 42 applied the wrong date for calculation of the 28 day concession period. The Judge should have considered the first appellant's ten year long residence application as at the date of the statement of additional grounds following the one

stop notice. The Judge failed to consider the effect of s.3C of the Immigration Act 1971.

12. It was also contended that the decision dismissing the first appellant's additional grounds of appeal deprived the second appellant of her argument that she was eligible for leave to remain as the mother of a British child under EX.1.
13. Mr Mahmood submitted before me that the Judge failed to engage with the additional grounds of appeal, and in particular to take into account section 3C leave when reaching a decision on the first appellant's eligibility for indefinite leave to remain on the basis of ten years' long residence. He submitted following the decision of the Upper Tribunal in **MU (Statement of Additional Grounds - Long Residence - Discretion) Bangladesh [2010] UKUT 442 (IAC)**, that the appellant had accrued ten years' lawful leave (including leave extended by s.3C of the 1971 Act) whilst his appeal was pending.
14. Accordingly, it was contended that the appellant had completed more than ten years' lawful continuous residence as at the date of the appeal decision and therefore the appeal should have been allowed on that ground.
15. Insofar as the second appellant is concerned, she too raised additional grounds of appeal under cover of a letter dated 23rd April 2014 following the service of the one stop warning, contending that in the event that the Tribunal accepted the first appellant's additional grounds of appeal entitling him to indefinite leave to remain on the grounds of ten years' long residence, it would render the appellants' child eligible for registration as a British citizen under s.1 (3) of the British Nationality Act 1981.
16. The second appellant argued in her additional grounds that this would thus entitle her to become eligible for leave to remain under EX.1.
17. Accordingly, Mr Mahmood contended that the Judge made material errors in dismissing the first appellant's additional grounds which deprived the second appellant of establishing her case, namely her eligibility to apply for leave to remain as the mother of a British citizen under EX.1.
18. In addition, he submitted in respect of both appellants that the appellants' appeal should be allowed on Article 8 grounds, given that she will be the mother of a British child in the event that the appeal of the first appellant is allowed under paragraph 276B and 276C of the Immigration Rules.

- 19.** In support of those submissions Mr Mahmood submitted that the Judge failed to consider the effect of the additional grounds following the service of the one-stop warning. Nor had the Judge referred to the authorities of **AS (Afghanistan)** and **NV v Secretary of State [2009] EWCA Civ 1076** and **Patel and Others v Secretary of State [2013] UKSC 72** constituting binding authorities in deciding all appeals where additional grounds of appeal have been raised following the service of the one stop warning under s.120 of the 2002 Act.
- 20.** Further, he contended that the Judge erred by failing to give a decision on additional grounds even if they had not been raised in the original application of 10th October 2013.
- 21.** In the event the Judge erred in failing to apply s.3C of the Immigration Act 1971 during the appeal process: the first appellant's residence was lawful by virtue of s.3C of the Immigration Act 1971 as confirmed by relevant Home Office guidance relating to indefinite leave to remain on the basis of ten years' long residence.
- 22.** I have had regard to the long residence and private life guidance valid from 11th November 2013, which was accepted as the relevant guidance for the purpose of this appeal.
- 23.** At page 24 of the guidance, reference is made to the fact that s.3C and s.3D of the Immigration Act 1971 both extend a person's leave in certain circumstances. Section 3C extends leave when a person with leave to enter or remain makes an in time application. That must be made before their leave expires. If he has 3C leave and the application is refused, 3C leave continues until their appeal rights are exhausted.
- 24.** It is expressly stated that both s.3C and s.3D leave counts as existing leave to enter or remain in the UK and therefore as lawful residence for the purpose of the ten year long residence rule.
- 25.** It is also provided at page 25 that a person may complete ten years' continuous lawful residence whilst they are awaiting the outcome of an appeal and submit an application on that basis.
- 26.** Mr Mahmood also submitted that as far as the second appellant is concerned, the Judge erred in assuming that because she has Nepalese friends in London who accept her in spite of her status as a mother of a child from an African father, this did not mean, as found by the Judge, that the wider Nepalese society would be accepting of her despite her status as the mother of such a mixed race child.

- 27.** The compassion, empathy and care shown to her by her personal friends in the UK cannot be taken to be representative of what would be visited upon her by the wider Nepalese society were she to return there with her child.
- 28.** On behalf of the respondent, Ms Everett relied on the short Rule 24 response, contending that the Judge appropriately directed himself. Furthermore, he determined the matters that were raised before him and the findings are sustainable. It was open to both parties to relocate to the country of nationality of the other and it was not a disproportionate interference in their family life for them to do so.
- 29.** There were no very compelling circumstances that rendered such a course unduly harsh.
- 30.** Ms Everett submitted that if the decisions fall to be remade, and it is found that the first appellant had satisfied the requirement of ten years' continuous lawful residence, the relevant public policy issues should be determined and considered not by the Tribunal but by the respondent.

Assessment

- 31.** The relevant legal provisions informing this appeal are set out below.
- 32.** Paragraph 276B of the Immigration Rules sets out the requirements to be met by an applicant for indefinite leave to remain on the grounds of long residence in the UK; he must have had at least ten years' continuous lawful residence here, and, having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the grounds of long residence, taking into account his age, the strength of connections in the UK, his personal history, including character, conduct, associations and employment record and domestic circumstances, any previous criminal record and the nature of any offence of which he has been convicted; compassionate circumstances and any representations received on his behalf.
- 33.** Further, he must not fall foul for refusal under the general grounds for refusal.
- 34.** 'Lawful residence' is defined as residence which is continuous residence pursuant to existing leave to enter or remain.

35. Section 85(2) of the Nationality Immigration and Asylum 2002 Act provides that if an appellant under s.82(1) makes a statement under s.120 of that Act, the Tribunal shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in s.84(1) against the decision appealed against.
36. In **MU (statement of additional grounds - long residence - discretion) Bangladesh [2010] UKUT 442 (IAC)**, the Upper Tribunal in reliance on the decision in **AS (Afghanistan) and NV v SSHD [2009] EWCA Civ 1076**, held that there is no time limit on serving a Statement of Additional Grounds in response to a “section 120 notice.” Thus, an appellant may accrue ten years' lawful leave (including leave extended by s.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.
37. In **AS (Afghanistan)**, supra, the Court of Appeal held that the Tribunal itself has jurisdiction to determine any additional grounds for seeking stay in the UK which have been raised following the service of such one stop warnings.
38. In **Patel and Others v Secretary of State [2013] UKSC 72**, the Supreme Court held that there is no express provision dealing with the form of the response, nor imposing on the Secretary of State any express duty to consider it or determine the issues raised by it. Under s.85(2) the Tribunal hearing an existing appeal under s.82(1) is required to consider any matter raised in the s.120 statement if it “constitutes a ground of appeal of a kind listed in s.84(1) against the decision appealed against.”
39. The Supreme Court had regard to the majority decision in **AS (Afghanistan)**, supra, namely that s.85(2) was to be construed as imposing a duty on the Tribunal to consider any potential ground of appeal raised in response to a s.120 notice, even if it was not directly related to the issues considered by the Secretary of State in the original decision.
40. As already noted, both s.3C and s.3D of the Immigration Act 1971 extend a person's leave in certain circumstances. Section 3C extends leave when a person with leave to remain makes an in time application. If a person has 3C leave, and their application is refused, s.3C leave continues until their appeal rights are exhausted. In particular, it is provided that both s.3C and s.3D leave count as existing leave to enter or remain in the UK and therefore constitutes lawful residence for the purpose of the ten year long residence rule.

- 41.** Paragraph 4 of the UKBA guidance to the application form, SET (LR) for indefinite leave to remain on the basis of ten years' long residence, states: "please do not apply more than 28 days before completing the qualifying period. If you apply earlier than that your application may be refused."

The underlying facts

- 42.** The first appellant is a national of Congo. He was born on 7th April 1982. He came to the UK on a student visa on 7th May 2004.
- 43.** There have been successive extensions of his leave to remain as a student. He made an in time application for variation of his leave to remain on 10th October 2013. That is the decision which, having been refused by the respondent, triggered the current appeal. He appealed against that refusal.
- 44.** It is common ground that he was served with a one stop warning under s.120 of the 2002 Act that accompanied the refusal decision of 19th November 2013. In the one stop warning he was directed to inform the respondent of any reasons why he thought that he should be allowed to stay in the UK. That includes why he wishes to stay here and any grounds why he should not be removed or required to leave. It is expressly provided that if he later applies to stay here for a reason which he could have given to the respondent "now," he may not be able to appeal if the application were to be refused. This ongoing requirement to state his reasons is made under s.120 of the Nationality, Immigration and Asylum Act 2002.
- 45.** In accordance with the UKBA guidance on ten years long residence, a person becomes eligible to apply for indefinite leave to remain on the basis of such ten years' residence, 28 days before completion of the ten years long residence.
- 46.** On 14th April 2014 the first appellant produced "additional grounds of appeal" which were sent both to the presenting officers' unit in Cardiff and served on the Tribunal. These were expressly stated to be the service of additional grounds pursuant to the one stop warning.
- 47.** In his additional grounds, he contended that he was entitled to indefinite leave to remain in the UK pursuant to 276B and 276C of the rules. In particular, he asserted that he entered the UK on 7th May 2004 and became eligible for indefinite leave to remain "as of 9th April 2014, having continuously and lawfully resided in the UK."

- 48.** He relied on the UKBA guidance on long residence for leave to remain on the basis of ten years' long residence 28 days before completion of those ten years.
- 49.** The First-tier Tribunal Judge did not engage with his additional grounds of appeal.
- 50.** The second appellant came to the UK in September 2009 on a Tier 4 General student visa valid until October 2012. She applied in time for a variation of that leave, which was refused on 1st October 2013. She appealed against that refusal.
- 51.** She too was served with a one stop warning under s.120, set out in the immigration decision dated 1st October 2013.
- 52.** In due course, she submitted separate additional grounds of appeal. She contended in those grounds that she should be granted leave to remain as the partner of a person who is being admitted for settlement at the same time.
- 53.** Having regard to the foregoing, I find that the First-tier Tribunal Judge erred in failing to apply s.3C of the Immigration Act 1971 during the appeal process. I find, after applying s.3C, that the first appellant had completed ten years' lawful and continuous residence as at the date of the appeal decision.
- 54.** That in turn impacts on the second appellant's grounds of appeal as set out in her additional grounds.
- 55.** Section 1(3) of the British Nationality Act 1981 provides that a person born in the UK after commencement who is not a British citizen by virtue of sub section (1) or (2) shall be entitled to be registered as a British citizen if, while he is a minor, his father or mother becomes a British citizen or becomes settled in the UK and an application is made for his registration as a British citizen.
- 56.** The second appellant contended that in the event that the Tribunal accepts the first appellant's grounds for indefinite leave to remain based on ten years' long residence, their child, Samuel Maharjan Samba, born in the UK on the 7th August 2011, will the become eligible for registration as a British citizen; she will be entitled to rely on her additional grounds for leave to remain under EX.1(b) of Appendix FM of the rules, as she is in a genuine relationship with a partner who will be settled in the UK and there are insurmountable obstacles to the family life continuing outside the UK and it would not be reasonable to expect the child to leave the UK.

57. It was therefore contended that the Judge should allow her appeal and grant her discretionary leave to remain under EX.1 of Appendix FM.
58. I find with regard to the second appellant, that the First-tier Tribunal Judge did not engage with her additional grounds of appeal. He accordingly did not consider the consequences of a finding that the first appellant was entitled to indefinite leave, and in particular how it might affect the child's immigration status and the second appellant's eligibility to apply under the Rules for indefinite leave to remain in the UK.
59. I accordingly find that there were material errors of law in respect of both appellants, and, as agreed by the parties, I set aside the determination.
60. The parties agreed that I should re-make the decision. Ms Everett contended that even if it is found that the first appellant has satisfied the residence requirements under the Rule, it is for the respondent herself to consider the public interest component under paragraph 276B.
61. Mr Mahmood however submitted that on the authorities of **AS (Afghanistan)** and **Patel**, supra, the Tribunal has the jurisdiction to decide all issues.
62. In re-making the decision, I consider the effect of the additional grounds resulting from the service of a one stop warning.
63. I am required in the circumstances to make a decision on those grounds even though they had not been raised in the original application of 10th October 2013.
64. I have set out the significance of s.3C of the Immigration Act 1971 during the appeal process as well as confirmation from the Home Office guidance on indefinite leave to remain on the basis of ten years' long residence.
65. I find, having regard to the facts relating to the first appellant's residence in the UK including residence in reliance on section 3C of the 1971 Act, that he has been here lawfully for a period of ten years.
66. Paragraph 276B(i)(a) sets out the requirements to be met by an applicant for indefinite leave to remain on the grounds of long residence, which in this case is at least ten years' continuous lawful residence here.

67. The additional requirement to be met by an applicant is that, having regard to the public interest, there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the grounds of long residence. I have already set out the seven matters that must be considered with regard to the public interest.
68. Paragraph 276B(ii) makes it clear that to succeed, applicants must show that their circumstances considered as a whole do not make it undesirable for them to be given indefinite leave to remain.
69. In that respect I have had regard to the decision in **MO (Long residence rule - public interest proviso) Ghana [2007] UKAIT 00014** where the Asylum and Immigration Tribunal itself considered the list of factors under 276B(ii).
70. In **MO** the First-tier Tribunal Judge in fact concluded that the appellant's whole personal history and conduct in the UK had been based on a life of deliberate deceit. His appeal was accordingly dismissed. The Tribunal upheld that finding. There was nothing to suggest that the Tribunal did not have the jurisdiction itself to consider the public interest provisos.
71. The appellant in **MO** appealed under the 14 year rule. Regard was had to his personal history and conduct based on a life of deliberate deceit. He had committed a "most serious offence." This was a case of a man who had taken active steps to use deception by employing a false identity when it suited him. He did this in a short time of arriving.
72. In the current appeal there is no suggestion of any adverse circumstances contemplated by paragraph 276B(ii) rendering it undesirable on public interest grounds for the first appellant to be granted indefinite leave to remain on the grounds of long residence.
73. After considering the public interest under the Rule, I find that there are no reasons why it would be undesirable for the first appellant to be given indefinite leave to remain.
74. Insofar as the second appellant is concerned, there is no dispute regarding the genuineness and subsistence of the relationship between her and the first appellant. In addition, their child was born in the UK.
75. Their child will now become entitled to be registered as a British citizen as his father has become settled in the UK. This requires a formal application to be made for his registration as a British citizen.

- 76.** There should in the circumstances be no obstacle impeding a relatively swift and successful outcome to the child's application for registration.
- 77.** The second appellant will, on registration of her child as a British citizen, become entitled to make an application for leave to remain as the mother of a British child under EX.1.
- 78.** In the circumstances she should be granted discretionary leave to remain pending the registration of her child as a British citizen. Once that has been achieved she should be given a reasonable opportunity to present an application under EX.1, for leave to remain. Pending the outcome of such application she should be granted further discretionary leave to remain in the UK.

Decisions

Having found that there were material errors of law, I re-make the decisions allowing the appeal of each appellant.

No anonymity order made.

Signed

Date: 28/8/2014

Deputy Upper Tribunal Judge Mailer