



IAC-FH-NL-V1

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

Appeal Number: IA/44449/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 1 February 2016**

**Decision & Reasons Promulgated
On 10 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MUHAMMAD MUGHEES NISAR
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms S Sreeraman, Senior Home Office Presenting Officer
For the Respondent: Mr S Abbas, Legal Representative from Imperium Group
Immigration

DECISION AND REASONS

Introduction

1. For ease of reference I shall refer to the parties as they were before the First-tier Tribunal. Thus, the Secretary of State is once more the Respondent and Mr Nisar is the Appellant.

2. This is an appeal by the Respondent against the decision of First-tier Tribunal Judge Seelhoff (hereafter the judge), promulgated on 11 June 2015, in which he allowed the Appellant's appeal under the Immigration Rules. The Appellant's appeal to the First-tier Tribunal had in turn been against the Respondent's decision of 15 October 2014, refusing to vary leave to remain and to remove him from the United Kingdom by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.
3. The Respondent's original decision had been in response to an application made on 3 July 2014 seeking indefinite leave to remain in the United Kingdom on the basis of ten years' continuous lawful residence. The Respondent had not been satisfied as to the continuous lawful residence and had refused the application on that basis alone. As far as the reasons for refusal letter is concerned nothing was said about the public proviso provision in paragraph 276B(ii) of the Immigration Rules. The Respondent's decision also dealt with Article 8 and refused the application on this basis as well.

The hearing before the judge

4. The Respondent was unrepresented at the hearing.
5. The judge considered the evidence before him and found at paragraph 14 that the Appellant had in fact acquired ten years' continuous lawful residence in the United Kingdom. Paragraph 14 concludes with the following statement by the judge: "I therefore find that the Appellant is entitled to indefinite leave to remain under the Immigration Rules". The appeal was allowed outright.

The grounds of appeal and grant of permission

6. The Respondent sought permission to appeal on the basis that the judge should not have allowed the appeal outright but ought instead to have allowed it on the limited basis that the decision under appeal was not otherwise in accordance with the law, given that the Respondent had yet to exercise her discretion under paragraph 276B(ii) of the Immigration Rules. Reference is made in the grounds to the Upper Tribunal decision in GK (long residence, immigration history) [2008] UKAIT 00011 (IAC). Permission to appeal was refused in the first instance by the First-tier Tribunal but was granted by Upper Tribunal Judge Taylor on 10 October 2015.

The hearing before me

7. At the outset of the hearing Mr Abbas provided Ms Sreeraman and myself with printouts of notes from the Respondent's GCID system. The relevant entry to which I was referred was generated on 7 October 2014, prior to the Respondent's decision. At page 5 of the printout there is an indication that as of that date the Respondent had no concerns in respect of the considerations under paragraph 276B(ii). Mr Abbas confirmed that these notes were not before the judge. In addition to the notes Mr Abbas provided me with the Respondent's long residence guidance (v12.0, valid from 17 October 2014). Mr Abbas submitted that in light of the GCID information the judge had not materially erred in law by allowing the appeal outright. This was

because although the Respondent had not exercised her discretion in terms (i.e. nothing had been said about this on the face of the reasons for refusal letter), the GCID notes confirmed that discretion had been considered and a conclusion reached in the Appellant's favour. Although the judge was unaware of this, any error committed by him in allowing the appeal outright was immaterial because discretion had already in fact been exercised by the Respondent prior to the decision under appeal.

8. Ms Sreeraman accepted that the judge's finding in respect of the ten years' continuous lawful residence had been open to him. However she submitted that the judge had not known about the existence of the GCID notes when making his decision and that his error in allowing the appeal outright was indeed material. She accepted that if the judge's decision was to be set aside I could re-make the decision on the evidence before me and could properly allow the appeal, but only to the limited extent that it should be sent back to the Respondent for a lawful exercise of discretion under paragraph 276B(ii).
9. In response Mr Abbas reiterated the immateriality of any error and also added that this matter had been going on now for some time and should not be prolonged further.

Decision on error of law

10. In my view there was a material error of law in the judge's decision.
11. He was of course perfectly entitled to conclude that the Appellant had in fact acquired the necessary residence in the United Kingdom, and the Respondent has expressly accepted this (both in the grounds of appeal and before me). However, it is clear that in light of decisions such as GK and Ukus (discretion: when reviewable) [2012] UKUT 00307 (IAC), the judge should then have allowed the appeal only to the limited extent the decision under appeal was not otherwise in accordance with the law and that the Appellant's application for indefinite leave to remain remained outstanding before the Respondent awaiting a fresh and lawful decision, with particular reference to the discretion under paragraph 276B(ii).
12. The judge was wholly unaware of the existence of the GCID notes. Nothing was said about the discretionary element of paragraph 276B(ii) at the hearing before him, and of course nothing had been said in the reasons for refusal letter. In addition, there had been no concession of the issue by a Presenting Officer (the Respondent being unrepresented before the judge). In short, there was no evidential basis upon which the judge could have concluded (expressly or by implication) that the discretion had been exercised at all, or that any such exercise could only have resulted in a favourable outcome for the Appellant. There is an error of law here.
13. Is it material? Yes.
14. I am not convinced that the GCID entry constituted an exercise of discretion by the Respondent in the first place. There is simply nothing in the decision notified to the

Appellant and against which his appeal is brought. In any event, although the GCID notes would appear to have been in the Appellant's favour as regards the public interest proviso under the paragraph 276B(ii), there was of course a temporal gap between the entry on 7 October 2014 and the judge's decision in June 2015. It was possible that new matters may have come to light or that new circumstances may have come into existence which could have affected the view of the Respondent and/or the judge. Given that the discretion issue was not addressed at all by the judge and the temporal gap, I am not sufficiently confident that the outcome of the appeal would have been the same absent the error of law.

15. In light of the above I conclude that the decision must be set aside.

Re-making the decision

16. Both representatives were agreed that I could re-make the decision based upon the evidence before me. This I now proceed to do.
17. The judge's finding as to the length of continuous lawful residence has not been challenged and is preserved. Therefore the Appellant clearly meets the requirement of paragraph 276B(i) of the Immigration Rules.
18. In respect of paragraph 276B(ii), I am not satisfied that there has in fact been an exercise of discretion insofar as the decision under appeal is concerned. The GCID entry is an indication of a view taken, but is not a confirmed outcome as regards the discretion. In any event, I look at the Appellant's case as of today and there been no further consideration of the Appellant's case since October 2014. Further, Ms Sreeraman has not conceded the outcome of any discretionary exercise. I am not satisfied that an exercise of discretion under paragraph 276B(ii) would, as of now, permit of only one answer.
19. In these circumstances I allow the appeal only to the limited extent that the decision of the Respondent was not otherwise in accordance with the law.
20. I would add the following observations. The contents of the GCID notes are relevant and on the face of it they certainly appear to be favourable to the Appellant as of October 2014. In making a fresh decision the Respondent will need to have regard to the view of her own caseworker at that time.
21. When considering the exercise of discretion now one would hope that a speedy decision can be reached, as this matter has indeed been somewhat protracted now. It may be advisable for the Appellant's representatives to submit any updated information to the Respondent in the near future and prior to any fresh decision being made.

Anonymity

22. No direction has been sought and none is required.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I re-make the decision by allowing the appeal on the limited basis that the Secretary of State's decision was not otherwise in accordance with the law. Mr Nisar's application for indefinite leave to remain is outstanding before the Secretary of State, awaiting a lawful decision in light of the Upper Tribunal's decision.

No anonymity direction is made.

Signed

Date: 5 February 2016

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a full fee award of £140.00. This is because the Respondent should have accepted the lawful residence on the evidence before her. Further, there should also have been an exercise of discretion (one way of the other) in the original refusal notice.

Signed

Date: 5 February 2016

Deputy Upper Tribunal Judge Norton-Taylor