



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

Appeal Number: IA/23214/2014

THE IMMIGRATION ACTS

Heard at Field House

On 3 March 2016

**Decision &
Promulgated
On 8 July 2016**

Reasons

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

**GAMAGE RUMESH JUDE WIJETUNGE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Pinder, instructed by Polpitiya & Co Solicitors
For the Respondent: Mr K Norton, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of Sri Lanka, born 24 April 1993. He entered the UK lawfully with his mother in December 2004, his father having come to the UK as a student in September 2004. The appellant's leave was subsequently extended on numerous occasions and on 16 October 2013 he submitted a further in time application for an extension of his leave, such application being made at the same time as applications made by his parents.
2. The appellant's parents' applications were refused in decisions of 11 March 2014 and each had directions for their removal set by the

respondent pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006. On the same date the appellant's application was rejected as being invalid, for the following reasons:

"On 16 October 2013 you submitted an application for leave to remain in the United Kingdom as a Tier 4 student. As stated in that application, your application is not valid unless and until you undertake all of the required steps, including providing your biographical and biometric information.

As you have not provided your biographical and biometric information within the time specified by the Secretary of State, your application has been rejected as invalid." (emphasis in original)

3. The appellant lodged a notice of appeal with the First-tier Tribunal against the aforementioned decision. However, on 9 April 2014 First-tier Tribunal judge Birrell concluded as follows:

"Section 82 of the 2002 Act gives a right of appeal where there is an immigration decision which is defined in section 82(2) of that Act. The decision made by the Respondent is not a relevant decision as defined in the 2002 Act. It is a letter rejecting the Appellant's immigration application for leave as a Tier 4 student as invalid. Without a relevant immigration decision that cannot be a valid appeal even on human rights grounds. Accordingly I direct that a notice be served under Rule 9 of the 2005 Rules, and I direct that no further steps are to be taken by the Tribunal."

4. On 17 April 2014 the appellant submitted a further application for leave to remain to the Respondent. That application was refused in a decision of 19 May 2014, and it is a challenge to that decision which underpins the appeal now before me. In "*Section B*" of this decision, headed "*Appeal Rights*", the following is said;

"You made an application on 17 April 2014. However, your leave to enter/remain expired on 2 November 2013. You therefore did not have leave to enter/remain at the same time of (sic) your application. Therefore, there is no right of appeal against this decision."

5. The appellant's appeal came before First-tier Tribunal judge Clarke on 13 March 2015, on the same occasion as the appeals of the appellant's parents against the decisions made in relation to them on 11 March 2014. It is sufficient at this stage to identify that judge Clarke allowed the appellant's parents' appeals on the basis that the requirements of paragraph 276B of the Immigration Rules had been met.

6. As to the appellant's appeal, Judge Clarke found:

"[20] On 17 April 2014 the Appellant made a combined application for leave as a Tier 4 (Gen) Student - Dependent Joiner and for a Biometric Residence Permit.

[21] On 25th April 2014 the Appellants' Solicitors wrote to the UK Border Agency and made the case that the Respondent's decision to reject the Third Named Appellant's application for variation of his leave to remain as a

Tier 4 student dependent as invalid was “incorrect”. The reason put forward was that the Third Named Appellant, his mother and father “*provided biometric and biographical information at Southall Broadway Post Office on 11 November 2013. They did this together.*” The letter continued, “*Despite having complied with this requirement, your office wrote on 23 November 2013 reminding our client to provide his biometric and biographical information. By letter dated 4 December 2013 this firm wrote to you providing the evidence to confirm that the applicant has complied with this request. Nothing further was heard from you until your letter dated 11 March 2014 rejecting our client’s application as invalid. It is abundantly clear from the evidence provided to the SSHD that our client duly complied with the requirement to provide the necessary biometric and biographical information and provided the evidence that this had been done.*”...

[24] I was asked as a preliminary issue to decide the validity of the Third Named Appellant’s appeal by Counsel for the Appellants...

[25] I take as my starting point that a valid appeal requires a valid application and an appealable immigration decision. ...

[27] In respect of the October application, I find that this was an application that was made when the Appellant had extant leave to remain. However, it appears that, for whatever reason, the Home Office did not receive the biographical and biometric information from the Third Named Appellant. I find that the biographical and biometric information was received in respect of his father and mother’s application as there was no query raised by the Home Office about his parent’s information. However, I find that the Home Office for reasons unknown did not receive the Third Name Appellant’s biographical and biometric information. The absence of this information thus generated the reminder letter to the Third Named Appellant of 11 November 2013.

[28] The validity of the Third Named Appellant’s appeal arising out of the October application was decided by Judge Birrell in the decision of 9 April 2014. Judge Birrell decided that there was no valid appeal as there was no valid immigration decision. If the Third Named Appellant disagreed with Judge Birrell’s decision, then the appellant should have appealed the decision or considered the option of judicial review. Ms Bayati for the Appellants emphasised to me that judicial review was a remedy of last resort. I accept that judicial review is indeed a remedy of last resort but having received the decision of Judge Birrell, the appellant’s remedies at that point were limited. I note in the Skeleton Argument of 12 March 2015 that it is conceded by the Appellant’s Counsel, “*the only option in such circumstances would be to take judicial review proceedings.*” The Third Named Appellant - for reasons unknown - did not issue any challenge by way of judicial review or appeal against Judge Birrell’s decision. ...

[30] ... The October 2013 application was rejected as invalid by the Respondent. As there was no valid application, there was no appealable immigration decision. Judge Birrell’s decision makes this principle clear: “*... Without a relevant immigration decision that cannot be a valid appeal even on human rights grounds.*” Judge Birrell decided the issue of whether there was a valid appeal in respect of the October application and concluded there was no right of appeal. Nothing was done by the Third Named Appellant.

Accordingly, I find that the Third Named Appellant did not have a valid appeal on the basis of the October 2013 (sic) and that this matter was decided by Judge Birrell. I find the matter of res judicata in respect of the October application.

[31] Rather than issuing any challenge to the decision of Judge Birrell, the Third Named Appellant instead submitted his April application. Unfortunately for him his leave had expired and therefore he could not make the application. As he did not have a valid application, there could not be an appealable immigration decision.

[32] I therefore find that the Third named Appellant did not have a valid appeal. ...

[34] When the Third Named Appellant submitted his second application on 17 April 2014 his leave to remain had expired on 2nd November 2013 which was more than 28 days before the submission of his application. As the Third Named Appellant did not have leave to remain when he made the second application, there was no valid application and therefore no valid appeal. ...

[36] On the basis of my findings above, I decided that the Third Named Appellant did not have a valid appeal. I continued to hear the appeals of the First and Second Named Appellants."

7. To complete the history of this case before the Tribunal, the Appellant appealed the decision of Judge Clarke but that appeal was dismissed by Deputy Upper Tribunal judge Doyle in a decision promulgated on 12 October 2015. The Appellant then sought permission to appeal Judge Doyle's decision to the Court of Appeal. That application came before Upper Tribunal Judge Kebede who, on the 7 December 2015, reviewed the decision of Judge Doyle and set it aside. The matter thus initially came before me to consider afresh whether the decision of Judge Clarke contains an error of law capable of affecting the outcome of the appeal.

Error of law in FtT's decision

8. In my conclusion judge Clarke's decision is clearly infected by legal error.
9. Judge Clarke's focus on the decision of Judge Birrell is entirely misconceived. Judge Birrell was undoubtedly correct in her conclusion that there had been, at that time, no immigration decision against which an appeal could have been brought by the instant appellant - the decision of 11 March 2014 obviously not being such a decision. This, though, says nothing about the lawfulness of the decision of the SSHD to treat the application of 16 October 2013 as invalid. Judge Birrell was not required to, nor did she, consider this issue.
10. Neither can I see the relevance of the appellant not bringing a judicial review against the decision of 11 March 2014 to treat his application as invalid. The fact that no judicial review was brought does not render the SSHD's conclusions unimpeachable and the decision lawful. This was a

matter for Judge Clarke to determine on the evidence before her. She erred in such determination, failing to engage in the appropriate level of analysis and scrutiny of the relevant evidence before her.

Setting aside of FtT's decision

11. The question still remains, however, as to whether the FtT's decision should be set aside. In order to determine this I must consider for myself whether the SSHD's decision of 19 May 2014 was an 'immigration decision'. If the SSHD was incorrect in her conclusion that the application of 16 October 2013 was not valid, then the appellant would have had leave to remain on 17 April 2014 i.e. the date he made his latest application; the consequence of which is that the SSHD's decision of 19 May 2014 would be an immigration decision pursuant to section 82(2)(d) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").
12. On 25 January 2016 I heard oral evidence to the effect that the appellant had submitted his biometrics through the Post Office at the same time and on the same date as his parents i.e. 11 November 2013. A copy of a single Post Office receipt, dated 11 November 2013, was produced showing a payment being made for three 'Home Office BRPs'. Mr Norton did not seek to dispute the truth of this evidence and I accept it. In the circumstances I conclude that the appellant did produce the necessary biometric and biographical information to the SSHD at the same time as his parents.
13. Despite this Mr Norton commends me to answer the question of whether the decision of 19 May 2014 was an immigration decision in the negative, albeit for reasons not provided by the SSHD in the decision notice itself.
14. By way of written submission made on 5 February 2016 Mr Norton asserted that the decision of 11 March 2014 to reject the appellant's application of 16 October 2013 as invalid, was of itself invalid because it was made "*...contrary to established policy that Rejections (as opposed to Refusals) can only be made within 3 months of the application.*"
15. The written submission continues by asserting that: "*Therefore, the 'Rejection' of 11/3/14 was invalid and the appellant's leave was extended (and remains so) as of 16/10/13. The decision under appeal currently before the UT is the 2nd decision (a 'Refusal') dated 19/5/14. This is also invalid. For the avoidance of doubt, the appellant has a pending decision before the SSHD as a Tier 4 dependent Joiner....if there is no valid decision, there can be no valid appeal...*"
16. I reject this submission for three reasons. First, Mr Norton did not provide a copy of the policy the SSHD is said to have infringed. Absent production of the policy, I am not prepared to accept that the terms of such policy act so to prevent absolutely the SSHD treating an application as invalid after a period of more than 3 months of the application has expired. Second, even if it does I do not accept that a decision made in breach of policy is necessarily an invalid decision. It seems to me as though it would be a

valid decision unlawfully made. Third, and irrespective of all I say above, even if it is assumed that the decision of 11 March 2014 is an invalid decision, I can see no sound basis in law for this having the consequence advocated by Mr Norton i.e. rendering the decision of 19 May 2014 invalid. On the contrary, if there had been no valid decision on the appellant's application of 16 October 2013 then that application would have remained pending as of the date of the second application on 17 April 2014, a date on which the appellant would also have had leave to remain pursuant to section 3C of the Immigration Act 1971.

17. Mr Norton's second submission, developed at the further hearing in April 2016, was to the effect that by virtue of regulations 3, 4 and 23 of The Immigration (Biometric Registration) Regulations 2008 ("the 2008 Regulations"), when taken in combination with the terms of the cover sheet to the specified application form submitted by the appellant on 16 October 2013, the appellant was required to submit a Biometric Residence Permit with that application. He failed to do so and instead submitted it on 11 November 2013. His application was, therefore, invalid and the SSHD had no discretion to treat it as being otherwise.
18. Once again I find there to be no merit in Mr Norton's submission, it being clearly founded on a misreading of the 2008 Regulations.
19. Regulation 3 of the 2008 Regulations is headed "*Requirement to **apply for** a biometric immigration document*" (emphasis added). Regulation 3(1) requires that a "*person subject to immigration control must **apply for** the issue of a biometric immigration document where he satisfies*" a number of identified conditions. The appellant satisfies such conditions and was therefore required to ***apply for** the issue of a biometric immigration document*. Nothing in regulation 3 makes it a mandatory requirement to provide a biometric immigration document on the date that the application is submitted to the SSHD; indeed, it presupposes that this will not be the case.
20. Regulation 23 of the 2008 Regulations sets out the consequences for failing to comply with, *inter alia*, the requirement to "***make an application** for the issue of a biometric immigration document*" (emphasis added).
21. The application form sent to the SSHD on 16 October 2013, within which the appellant is identified as being a dependent, has two distinct sections dealing with biometric information.
22. The first is a section of the form reading as follows:

"What happens next?"

We will write to you if any of the required supporting documents are missing or unsuitable.

Once we have received all of the required supporting documents, we will send you a biometric notification letter inviting you to enrol your fingerprints and facial image”

23. There is nothing before me to suggest the appellant received a letter of the type referred to in the first of the aforementioned paragraphs. He did, however, receive a letter of a type referred to in the second paragraph.
24. The second section of the application form that makes reference to biometric information relates specifically to an applicant’s extant biometric resident permit. If such a permit is in existence the form requests details relating to it. This section of the form, insofar as it relates to the appellant, is fully completed. An affirmative answer in relation to the appellant is also given in response to the question of whether the extant biometric resident permit can be submitted with the application.
25. On page 2 of the “*Application cover sheet*” to the application form relating to the instant appellant is a table headed “*Documents to be provided*”. The table has two columns - the left hand column being a list of the documents required, some of which are identified as being mandatory including the biometric residence permit. The right hand column is headed “*For official use only*”. The material entry in that column for the instant purposes is that which reads “*BRP*”, under the heading “*Evidence of Identity*”.
26. My conclusion from reading the application form as a whole is that the appellant had an extant biometric residence permit as of the date of application (16 October 2013) and that he provided such permit with his application, as required.
27. Although Mr Norton suggested otherwise, this conclusion is not inconsistent with the terms of the SSHD’s letter of 11 March 2014, which I do not read as suggesting that the aforementioned requirements of the form had not been complied with. The fact that this letter specifically identifies a failure by the appellant to provide biometric and biographical information *within the time specified* by the SSHD, also, strongly suggests that what was of concern to the SSHD at that point in time was a claimed failure by the appellant to respond to the biometric notification letter inviting him to enrol his fingerprints and facial image.
28. I have already dealt with this claimed failure above, and concluded that the appellant did properly respond to such request on 11 November 2013.
29. For these reasons I conclude that the SSHD was wrong to treat the appellant’s application of 16 October 2013 as invalid. It was a valid application which remained outstanding as of the date of the later variation of the application, made on 17 April 2014. Therefore, as of that date the appellant had section 3C leave. The decision of 19 May 2014 refusing such application was consequently an immigration decision pursuant to section 82(2)(d) of the 2002 Act against which the appellant was entitled to, and did, bring an appeal before the First-tier Tribunal.

30. The FtT had jurisdiction to determine such appeal, and Judge Clarke's conclusion to the contrary was wrong in law. In all the circumstances I set aside Judge Clarke's decision.

Re-making of the decision under appeal

31. I directed, without dispute, that the Upper Tribunal should undertake the re-making of the decision.
32. Mr Norton properly accepted that the appellant meets the eligibility requirements of paragraph 276ADE of the Immigration Rules. He further indicated that although formal suitability checks on the appellant had not been carried out by the SSHD, he had himself undertaken such checks and, having done so, he had not come across any information indicating that the suitability requirements had not been met.
33. Given this, and having considered the evidence before me for myself, I find that the appellant has established that he meets all of the requirements of paragraph 276ADE of the Immigration Rules.
34. Ms Pinder further commended to the Tribunal that the appeal should be allowed on the basis that the requirements of paragraph 276B of the Immigration Rules had been met (i.e. that the appellant has 10 years continuous lawful residence in the United Kingdom). She observed when doing so that: (a) this was the basis upon which the appellant's parents' appeals had been allowed by the FtT; and, (b) the appellant has at all times been a dependent on his father's leave to remain and thus given that his father had been found to have been lawfully resident in the United Kingdom for a continuous 10 year period it must follow that the same findings should be made in relation to the appellant.
35. At the hearing Mr Norton did not dispute that the appellant had accrued 10 years lawful residence in the United Kingdom (given my earlier ruling). He asserted, however, that if the Tribunal were to reach this stage in its consideration of the appeal then it should simply conclude that the SSHD's decision was not in accordance with the law; the SSHD not yet having considered this issue and in particular not having considered whether to exercise the discretion to grant leave identified within the rule itself. Ms Pinder submitted to the contrary.
36. On 27 May 2016 I invited further written submissions from the parties on the issue of whether the Upper Tribunal could lawfully consider paragraph 276B of the Rules, given that the accrual of 10 years lawful residence occurred after the date of the decision under challenge.
37. Whilst I received detailed submissions from the appellant in response to the aforementioned directions, no response has been received from the SSHD. This has made my task on what is a complicated issue even more difficult. Nevertheless, I approach my consideration of this jurisdictional issue on the basis that the SSHD does not, save in relation to whether the

appellant had a valid appeal at all, put forward the further position that the Tribunal is not entitled to give consideration to paragraph 276B of the Rules.

38. Inherent in Mr Norton's submission that the appeal should be allowed on this ground on the limited basis that the SSHD's decision was not in accordance with the law is an acceptance that the Tribunal does have jurisdiction. The fact that no submissions were made to the contrary in response to my directions reinforces this view.
39. Nevertheless, it is a matter of jurisdiction so cannot be settled by the consent of the parties I must therefore deal with it.
40. I assume in the appellant's favour that any matter raised in the appellant's father's response to the section 120 notice is capable of being before the FtT in relation to the appellant as well (the appellant not having been sent a section 120 in his own name because his application was treated as being invalid). This is as a consequence of the appellant being a dependent upon his father's application for leave and the response to the section 120 notice being in the appellant's name as well as that of his father.
41. In her written submissions Mr Pinder contends that the Tribunal is seized of the 276B issue, despite 10 years not having been accrued until after the lodging of the appeal. She places significant emphasis on the following passages from Lord Carnworth's decision in Patel & Ors v SSHD [2013] UKSC 72, the conclusions in which were given in relation to the issue of: *"Whether the conclusion of the majority in AS (Afghanistan) v SSHD [2009] EWCA Civ 1076, that an appeal to the FTT covers not only ground before the Secretary of State when she made the decision under appeal but also any grounds raised in response to a one-stop notice issued under section 120 of the 2002 Act, even if they had not been subject of any decision by the Secretary of State and did not relate to the decision under appeal, is correct."* [paragraph 10(iv)].

[41] The broader approach of the majority seems to me to gain some support from the scheme of section 3C, under which (as is common ground) the initial application for leave to remain, if made in time, can later be varied to include wholly unrelated grounds without turning it into a new application or prejudicing the temporary right to remain given by the section. Thus the identity of the application depends on the substance of what is applied for, rather than on the particular grounds or rules under which the application is initially made. The same approach can be applied to the decision on that application, the identity or "substance" of which in the context of an appeal is not dependent on the particular grounds first relied on.

[42] It is of interest that, at an earlier stage, the broader approach seems to have accorded with the reading of those responsible within the Home Office for advice to immigration officers. The Immigration Directorate's

Instructions, issued in September 2006, noted that it was not possible under section 3C to make a second application, but continued:

"On the other hand, it is possible to vary the grounds of an application already made, even by introducing something completely new. A student application can be varied so as to include marriage grounds. If an application is varied before a decision is made, the applicant will be required to complete the necessary prescribed form to vary his application. If an application is varied post decision, it would be open to the applicant to submit further grounds *to be considered at appeal*... Once an application has been decided it ceases to be an application and there is no longer any application to vary under section 3C(5). So any new information will fall to be dealt with *during the course of the appeal* rather than as a variation of the original application." (para 3.2 emphasis added)

[43] The same approach is supported by the current edition of *Macdonald's Immigration Law & Practice* 8th ed (2010) para 19.22 (under the heading "The tribunal as primary decision maker"). The only implicit criticism made of the majority approach in *AS* is that it did not go far enough. They observe that even without a section 120 notice the tribunal should be free to consider any matter -

"... including a matter arising after the decision which is relevant to the substance of the decision regardless of whether a one-stop notice has been served. The 'substance of the decision' is not the decision maker's reasoned response to the particular application or factual situation that was before it but is one of the immigration decisions enumerated in section 82 and a 'matter' includes anything capable of supporting a fresh application to the decision maker..."

Whether or not such an extension of the majority's reasoning can be supported, that passage indicates that the broader approach in itself is not controversial.

[44] In the end, although the arguments are finely balanced, I prefer the approach of the majority in *AS*. Like Sullivan LJ, I find a broad approach more consistent with the "coherence" of this part of the Act. He noted that the standard form of appeal, echoing the effect of the section 120 notice, urged appellants to raise any additional ground at that stage, on pain of not being able to do so later, and observed:

"... it seems to me that appellants would have good reason to question the coherence of the statutory scheme if they were then to be told by the AIT that it had no jurisdiction to consider the additional ground that they had been ordered by both the Secretary of State and the AIT to put forward." (para 99)"

42. In his judgment in Patel & Ors Lord Mance (with whom Lord Kerr, Lord Reed and Lord Hughes also agreed) also concluded that the majority decision in AS (Afghanistan) had been correct [paragraph 63], albeit he also observed that his decision on this issue was *obiter* [paragraph 62].

43. In AS (Afghanistan), the Court of Appeal had to consider the effect of responses (hereinafter referred to as a statement of additional grounds) made by the appellants to notices served by the SSHD pursuant to section 120 of the 2002 Act. It was concluded that the effect of a section 120 notice, and subsequent response thereto, was that the Tribunal had to determine not only any ground that was before the Secretary of State when she made the decision under appeal but also any ground raised in the statement of additional grounds, even if such a ground had not been the subject of a decision by the Secretary of State and did not relate to the decision under appeal.
44. There were two linked cases before the Court of Appeal. In the first, the appellant had applied for leave to remain as a person intending to establish herself in business under paragraph 206E of HC 395 and, that application having been refused she subsequently submitted an application for leave to remain under the international graduate scheme. In the second, NV (Sri Lanka), the appellant had submitted an application for leave to remain on the basis of ten years' residence in the United Kingdom. This application was refused. She appealed against the Secretary of State's decision and subsequently served a statement of additional grounds seeking variation of her leave to remain on the basis that she was a student.
45. By a majority the Court of Appeal allowed the appeals of the appellants against the decisions of Senior Immigration Judges upholding decisions of Immigration Judges that they were without jurisdiction, and remitted the cases back to the Tribunal for consideration of the additional grounds.
46. Moore-Bick LJ considered, at paragraph 81, that all the material provisions of the Nationality, Immigration and Asylum Act 2002 Act pointed towards a procedural scheme under which the appellant was required to put forward all his grounds for challenging the decision against him for consideration in one set of proceedings, and the Tribunal was placed under a corresponding duty to consider them. It followed, he concluded, that the section 120 notice was not intended to be restricted to matters relating to the original grounds of application or that the decision being challenged could be defined by reference to the particular facts on which it was based.
47. Sullivan LJ, who agreed with Moore-Bick LJ, considered it to be clear that the underlying legislative policy was to prevent successive applications, and emphasised that the words "against the decision appealed against" at the end of subsection 85(2) were properly interpreted as being the decision to refuse to vary the appellant's leave to remain in the United Kingdom rather than the decision to refuse to vary leave to remain under a particular paragraph of the Rules.
48. It is also necessary to consider the decision of the Court of Appeal in AQ (Pakistan) v SSHD [2011] EWCA Civ 833, the issue in that case being

summed up by Pill LJ at paragraph 4 as being whether the points entitlement arising from a Master's degree could count towards the minimum if the degree was awarded after the Secretary of State's decision but before the decision of the Tribunal.

49. Having given detailed consideration to the decision in AS (Afghanistan) Pill LJ (with whom Toulson and Sullivan LJ agreed) said as follows:

"[25] For the Secretary of State it is submitted that AS was not concerned with evidence of events subsequent to the Secretary of State's decision. I agree with that submission...

[35]...A tribunal's task is to "look back at the position as at the date of application [now decision]" as stated by the Tribunal in the present case at paragraph 14 or, as the Tribunal put it in MS, at paragraph 49, in cases where "the rule in question specifies a fixed historic time-line."

50. Also of significance is the short judgment of Sullivan LJ, who also gave one of the majority judgments in AS (Afghanistan):

"[41] ...In AS the Court was not concerned with decisions made by the Respondent under the "Points-based" system of determining applications for leave to remain. In such cases there is a "fixed historic time-line". The effective operation of a points based system requires the points to have been accumulated at the date of the Secretary of State's decision."

51. Drawing all of this together, in my conclusion none of the decisions cited above deal precisely with the scenario that arises in the instant case. It is plain however that in AQ the Court placed importance on the fact that the immigration rule under consideration therein had a fixed historic time-line. It did not need to consider, and left open, the possibility of a different conclusion being reached if there was no fixed historic time line in the immigration rule. Paragraph 276B of the Rules falls within this latter category. The rule does not require an applicant to have 10 years continuous lawful residence as of the date of application.

52. Given all that is said in AS Afghanistan about the underlying legislative policy, the approval in Patel of the majority's broad approach in AS (Afghanistan), the importance attached in AQ (Pakistan) to the rule being considered therein incorporating a fixed historic timeline, and not having heard any submissions from the SSHD to the contrary in this case, I conclude that the issue of 276B having been raised in the response to the section 120 notice, it is incumbent upon the Tribunal to consider it and that it can consider events which post-date the SSHD's decision when doing so.

53. The only matter now left for consideration is Mr Norton's submission that paragraph 276B of the Rules imports a discretion and that, given that the SSHD has not yet considered the exercise of such discretion under the Rule, the Tribunal should not impose its conclusion in relation to this on

the SSHD but rather allow the appeal on the basis that the SSHD's decision was not in accordance with the law.

54. Whilst there is a legal foundation underpinning such submission (see Ukus (discretion: when reviewable) [2012] UKUT 00307(IAC)), this presupposes that paragraph 276B contains within a discretion of the type relied upon by Mr Norton, it does not.

55. Paragraph 276B reads:

'276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

(i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.

(ii) 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 ground of long residence, taking into account his:

(a) age; and

(b) strength of connections in the United Kingdom; and

(c) personal history, including character, conduct, associations and employment record; and

(d) domestic circumstances; and

(e) compassionate circumstances; and

(f) any representations received on the person's behalf; and

(iii) the applicant does not fall for refusal under the general grounds for refusal.

(iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.

(v) the applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period.'

56. Mr Norton fixed his submissions with particular reference to the terms of paragraph 276B (ii); however, I can detect no operative discretion within that subparagraph of the Rule. That subparagraph requires no more than a consideration of all of an applicant's circumstances in the context of performing an assessment of whether there are reasons why it would be undesirable for that applicant to be given indefinite leave to remain.

57. In the instant case, as set out above, Mr Norton has undertaken a suitability check and found nothing of any consequence adverse to the appellant. There is simply nothing on the evidence before me that would make it undesirable for this appellant to be granted indefinite leave to

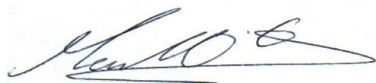
remain. This is not a consideration of the exercise of discretion but a determination of an issue of fact.

58. There being no dispute that all other aspects of the Rule are met by the appellant, I conclude that the appellant meets the requirements of paragraph 276B of the Rules.
59. If subsequent to this decision the SSHD discovers a matter of potential significance relating to this appellant that is thought to be adverse to the public interest then, no doubt, she will give consideration to such a matter when deciding whether to exercise the discretion inherent in paragraph 276C of the Rules. The existence of the discretion in paragraph 276C of the Rules is not though a matter relevant to my decision.

Decision

- (i) The decision of the First-tier Tribunal is set aside
- (ii) Upon re-making the decision the Upper Tribunal concludes that the appellant meets the requirements of both paragraph 276ADE and paragraph 276B of the Immigration Rules. Accordingly, I conclude that the decision of the SSHD of 19 May 2014 was not in accordance with the Immigration Rules.

Signed:



Upper Tribunal Judge O'Connor
8 July 2016