Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43120/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16 February 2015	**On 12 March 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Shanti Rajathurai
[No anonymity direction made]

Claimant

Representation:
For the claimant: In person
For the appellant: Mr I Jarvis, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Afako promulgated 13.11.14, allowing the claimant's appeal, on human rights grounds and on the basis that the decision was not in accordance with the law, against the decisions of the Secretary of State dated 27.9.13 to refuse her 10-year long residence application pursuant to paragraph 276B; her British Overseas Citizen (BOC) application; and to remove her from the UK pursuant to section 47 of

the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 14.10.14.

2. First-tier Tribunal Judge Holmes granted permission to appeal on 9.1.15.

3. Thus the matter came before me on 16.2.15 as an appeal in the Upper Tribunal.

Error of Law

4. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Afako should be set aside.

5. Judge Afako concluded that as the claimant did not have existing leave when she left the UK on 8.12.05, her period of residence was broken and thus she could not establish continuous residence for the necessary unbroken period, as required under paragraph 276A of the Immigration Rules. Whilst the judge omitted to make a formal decision dismissing the appeal on this immigration ground, it can be inferred from §13 of the decision. There has been no appeal against this part of the decision and that claim must stand dismissed.

6. Peculiarly, Judge Afako proceeded next in the decision to consider the claimant's human rights claim, before considering the BOC claim in respect of which he reached a decision that the Secretary of State's decision in that regard was not in accordance with the law.

7. As Judge Holmes pointed out in granting permission to appeal, if the BOC decision was not in accordance with the law, Judge Afako erred in law on the basis that the he should have done no more than allow the appeal on the limited basis that the decision was not in accordance with the law, so that the application remained outstanding. In accordance with Mirza [2011] EWCA Civ 159, there was no need to "travel into article 8 once unlawfulness is established, and there are obvious difficulties presuming a removal which, if the law is observed, may never happen." The article 8 claim remains part of the claimant's still undetermined case for non-removal.

8. However, for the reasons set out below, I am not satisfied that the decision to effectively remit the BOC part of the case to the Secretary of State was correct and find that the decision was in fact in accordance with the law.

9. Nevertheless, there are a number of flaws in the article I also note that at §15 Judge Afako proceeded to consider the article 8 private life claim following the Razgar steps, but omitted to consider paragraph 276ADE of the Immigration Rules. That invalidates any article 8 assessment, since it is only necessary to consider the claim outside the Rules if the Rules are not met. As stated in R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin), "*The Immigration Rules are the important first stage and the focus of Article 8 assessments. Indeed it will be an error of law not to address Article 8 by*

reference to the Rules," reliance being placed on Halleemudeen v SSHD [2014] EWCA Civ 558.

10. Further, if the claimant cannot meet paragraph 276ADE, that would be a highly relevant factor to be taken into consideration in the proportionality balancing exercise, thus rendering the article 8 assessment flawed on that ground alone.

11. Further, whilst at §16 the judge 'acknowledged' section 117B of the 2002 Act to the effect that immigration control is in the public interest, the judge failed to appreciate that this public interest is to be weighed against the rights of the claimant in the proportionality balancing exercise. The judge seems to have considered that section 117B only goes to the issue of necessity in the Razgar steps. That is an error of law which also vitiates the article 8 ECHR assessment.

12. The grounds of application for permission to appeal also point out that in assessing the article 8 claim at §23 the judge took into account the immaterial matter that if the claimant had made representations the Secretary of State might have exercised her discretion. I agree that if it was taken into consideration, it was irrelevant to the article 8 assessment. Similarly, there are other irrelevant findings apparently taken into account in the article 8 assessment, such as the finding at §44 that the claimant is the descendant of a British Overseas Citizen. Given that this issue was effectively remitted to the Secretary of State it was not capable of informing the article 8 assessment.

13. In the circumstances, whether or the BOC decision was in accordance with the law, the article 8 ECHR assessment is flawed and cannot stand.

14. In relation to the BOC claim, notwithstanding that at §44 it is recorded that Mr Staunton, the representative of the Secretary of State at the First-tier Tribunal appeal hearing, indicated that if the judge found the claimant's father to be a BOC, the decision would be reviewed, the Secretary of State has sought to appeal the BOC part of the First-tier Tribunal decision. At paragraph 13 of the grounds it is submitted that the judge in error failed to note that pursuant to IDI Aug/01 a British Overseas Citizen would be required to present a passport confirming the status, in order to qualify for a grant of indefinite leave to enter the UK.

15. It could have been better pleaded in the grounds, but Mr Jarvis produced a skeleton argument points out that the IDI policy referred to by the Judge was abolished with effect from 5.3.02, as the judge noted at §38. Although she had been in the UK between 1978 and 1987, the claimant returned to the UK on 16.9.02 (with leave as a student) and thus there was no extant policy that she could have taken advantage of in 2002, as the judge found at §40, quite apart from the fact that she left the UK and last returned in May 2006, by which time the policy had long since elapsed.

16. It is not clear that the judge reached any conclusion on the discussion in the decision as to whether the claimant could rely on a previous presence in the UK between 1978 and 1987. The judge postulated a number of "ifs," such as at §42, but made no actual finding. At §43, the judge stated "this is therefore a case where the respondent needs

to consider the appellant as a BOC who had a work permit in the United Kingdom prior to 5 March 2002… There may well be other implications arising from the fact that her father was a BOC; I have dealt only with the matters raised during the appeal." With respect to the judge, a finding that the decision of the Secretary of State was not in accordance with the law requires a definite foundation for such a conclusion. It was for the claimant to establish her case and the judge does not identify what provision, either of statute or policy, that has been breached. An assurance that the case would be reviewed or looked at again is insufficient to found a conclusion that the decision was not in accordance with the law. The judge has to identify a specific policy which was in force at the date of decision or which governed her case when considered at the date of decision. Even when it was in force the policy concession required the claimant to both be a BOC and to present a work permit on entry. As the claimant never had a BOC passport she would not have been able to demonstrate that she was a BOC and she never presented a work permit as a BOC.

17. In the circumstances, the finding that the decision of the Secretary of State was not in accordance with the law is flawed for lack of legal foundation and cannot stand. Further, there is no purpose in sending the decision back to the Secretary of State when the outcome of the issue is inevitably going to be resolved against the claimant.

18. Having set the decision aside, I proceeded to remake the decision, finding for the same reasons as given by the First-tier Tribunal that the long-residence claim must be dismissed. I also find no error of law in the BOC decision of the Secretary of State.

19. That leaves only the claimant's article 8 private life claim. She told me she has a niece in the UK, who is married, but no closer family. She does not have a partner or child in the UK. In the circumstances, the claimant cannot meet the requirements of Appendix FM.

20. In relation to private life and paragraph 276ADE, the claimant has not been in the UK 20 years. Given that, for the reasons set out herein, I am dismissing the appeal on all grounds, she cannot reach a 10 year long-residence claim as the conclusion of the appeal will break her continuous lawful leave long before she reaches the 10 years in 2016.

21. The claimant told me about her long residence in the UK from May 2006. She is employed as a staff nurse and is financially self-sufficient. She has developed a wide range of friendships and associations through her life in the UK, particularly work colleagues, and is used to the way of life in the UK. However, she is too busy to be involved in any community activities or charity work. I take into account the history set out at §6 of the First-tier Tribunal decision, as well as the considerations at §18, together with those matters set out in her witness statement. I also bear in mind that pursuant to section 117B(1), immigration control is in the public interest.

22. The claimant is a US citizen, where she has two siblings and in fact still owns a home. She has lived in the UK for a significant period and is qualified to work there as a

nurse. She does not anticipate difficulty in obtaining further employment in the USA. In the circumstances, with all due respect to her desire to remain in the UK, there is nothing compelling about her personal circumstances here. She was unable to point me to any significant obstacles to reintegration into the USA. In fact, she mainly pleaded for time to be able to arrange her departure if she had to leave. As she has had her leave extended since 2012 because of the length appeal process, she may well be in a good position to seek further leave to remain on the same Tier 1 basis, but that is a matter for her to consider and the Tribunal cannot advise in respect of the same. This long appeal process has been unfortunate, but is no fault of the Secretary of State or the Tribunal.

23. In the circumstances, I find that the claimant cannot meet the requirements of 276ADE for leave to remain on the basis of private life. Even if I went on to consider article 8 ECHR outside the Rules, the very same considerations would come into play and I would have to reach the conclusion that the decision is entirely proportionate to the claimant's private life rights and does not produce a result which is unjustifiably harsh (Nagre). Following the latest authority of Singh v SSHD [2015] EWCA Civ 74, it is not in fact necessary to go on to consider article 8 where it is clear that all private life considerations have been addressed in the 276ADE claim, which I conclude has been done.

24. In the circumstances, the claimant's appeal must fail on all grounds.

Conclusion & Decision:

25. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by:

(a) Dismissing the long-residence claim pursuant to paragraph 276AB of the Immigration Rules;

(b) Dismissing the BOC claim;

(c) Dismissing the appeal on human rights grounds.

Signed: Date: 16 February 2015

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the BOC claim remains to be decided.

Signed: Date: 16 February 2015

Deputy Upper Tribunal Judge Pickup