IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/05352/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20th May 2015	**On 29th May 2015**

Before

LORD MATTHEWS, SITTING AS AN UPPER TRIBUNAL JUDGE
DEPUTY UPPER TRIBUNAL JUDGE FRANCES

Between

ENTRY CLEARANCE OFFICER - MANILA

Appellant

and

MAMI BELL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr I Jarvis, Home Office Presenting Officer
For the Respondent: Mr G Davison, counsel instructed by LEXLAW Solicitors

DECISION AND REASONS

1. We shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Japan born on 20th June 1957. Her appeal against the decision of the Entry Clearance Officer [ECO] dated 19th March 2014 refusing her entry clearance as a returning resident under paragraph 18 of the Immigration Rules was allowed by the First-tier Tribunal on 28th October 2014. The appeal was decided on the papers.

2. The Appellant has been married to David Christopher Bell, a British citizen, since January 1990 and they have a British citizen child born on 11th February 1994. The Appellant and her husband jointly own property in the UK and the Appellant was settled with indefinite leave to remain in the UK from 1990 until 2001. The Appellant's husband has been employed outside the UK since 2001 and she has travelled with her husband and her son. They visited the UK as a family for two weeks on four separate occasions. The Appellant's mother-in-law is aged 92 and is in need of increasing support because of health problems.

3. The Appellant's application to return to the UK was refused by the ECO because she had been living outside the UK for more than two years, paragraph 18(ii). The decision was reviewed by the Entry Clearance Manager [ECM], who concluded that the Appellant left the UK through choice and she had spent the last thirteen years living overseas with her husband as a result of his employment. The Appellant had entered the UK four times as a visitor and had not lived in her family home for several years. The ECM stated that as the Appellant now wished to return to the UK to live she should apply for a new settlement visa because her residence status had lapsed some time ago.

4. First-tier Tribunal Judge Petherbridge found that the decision was not in accordance with the law because the ECO and ECM had failed to consider paragraph 19 of the Immigration Rules which states:

> "A person who does not benefit from the preceding paragraph by reason only of having been away from the United Kingdom too long may nevertheless be admitted as a returning resident if, for example, he has lived here for most of his life."

   The judge found that the purpose of this discretionary Rule was to avoid injustice or undue hardship which might arise from an inflexible application of the two year Rule. The judge identified the relevant factors to be taken into account in exercising discretion under this paragraph and applied them to the facts of the Appellant's case.

5. The judge concluded that the decision was not in accordance with the law in that it did not consider the relevant Rules. The judge considered the Appellant's application and allowed the appeal under paragraph 19.

6. The Respondent sought permission to appeal on the ground that the judge had failed to follow Ukus (discretion: when reviewable) [2012] UKUT 00307 (IAC) and had taken on the role of the primary decision-maker in allowing the appeal under the Immigration Rules. Permission to appeal to the Upper Tribunal was granted on that basis by First-tier Tribunal Judge Osborne on 9th December 2014.

7. In her Rule 24 response the Appellant submitted that the judge had made clear findings and given reasons as to why the application should succeed. Those findings were not challenged and were open to the judge on the evidence. The judge was entitled to consider the correct Immigration Rule

subject to the requirement of fairness. Had the ECO considered paragraph 19 the judge would have come to the same conclusion and therefore any error was not material and there was no disclosed lack of fairness.

Submissions

8. Mr Jarvis submitted that it was clear from paragraphs 22, 23 and 36 of the First-tier Tribunal Judge's decision that neither the ECO nor the ECM had taken into account paragraph 19 and that the decision was not in accordance with the law. The judge erred in law in finding that the Appellant could succeed under paragraph 19. Applying the decision in Ukus and Section 86 of the 2002 Act it was clear that where there is a discretion inside the Rules the judge can allow an appeal on the basis that the discretion should be exercised differently, but it was only if the ECO had exercised such a discretion that the judge could review it. The jurisdiction was limited to allowing the appeal insofar as it was not in accordance with the law for failing to deal with the discretion.

9. The Rule 24 response referred to the case of CP (Section 86(3) and (5); wrong immigration rule) Dominica [2006] UKAIT 00040. Mr Jarvis submitted that in this case the judge could not look at an alternative immigration rule because it was not permitted by statute. The judge could not ignore this jurisdictional point because to do so would fetter the ECO's role as a primary decision-maker. The 2002 Act was clear and the case of Ukus reiterated the situation. The judge had no jurisdiction to consider the discretion in paragraph 19 if it had not been exercised by the ECO or the ECM.

10. On behalf of the Appellant, Mr Davison submitted that it was clear from the ECM's decision that the Entry Clearance Manager had paragraph 19 in mind. He had taken into account the grounds of appeal submitted in response to the ECO's refusal. These appeared at pages 12 and 13 of the Appellant's bundle and referred to the exceptions to the two year rule and to the relevant guidance. It was clear that the ECO had this document before him and considered it and therefore he must have had paragraph 19 in mind in reviewing the decision.

11. Further paragraph 22 of the decision stated that the ECO did not consider paragraph 19 of the Immigration Rules, but that the ECM considered it obliquely. The ECM had refused to exercise discretion in the Appellant's favour on the basis that she had been out of the country for more than two years. Paragraphs and 18 and 19 of the Immigration Rules went hand in glove and it would be very surprising if the ECM was unaware of paragraph 19. The ECM had exercised discretion in this case and therefore the judge was entitled to review it. The judge set out the Immigration Directorate Instructions in relation to paragraph 19 and had approached the rule in a fair manner. Therefore, it was open to the judge following CP Dominica to consider the applicability of paragraph 19 in relation to the Appellant.

12. Lastly, there was no material error of law in this case because there was no challenge to the judge's findings.

13. In response, Mr Jarvis submitted that it was clear from paragraph 19 of the judge's decision that neither the ECO nor the ECM had considered paragraph 19 of the Immigration Rules and paragraph 20 of the decision stated that no consideration had been given to the application in line with paragraph 19 of the Immigration Rules.

14. From the decision of Ukus it was clear that the ECM had to demonstrate he had looked at the discretion in paragraph 19 of the Immigration Rules. It was not enough to refer to it obliquely. The ECM should note his function and what was required to be done in fulfilling it. The 2002 Act preserved the right of the ECO to be the primary decision-maker. The fact that the Respondent had not challenged the findings was not relevant since the judge had no jurisdiction to make those findings.

Discussion and Conclusions

15. In the case of Ukus the Upper Tribunal held that:

> "If a decision-maker in the purported exercise of a discretion vested in him noted his function and what was required to be done when fulfilling it and then proceeded to reach a decision on that basis, the decision is a lawful one and the Tribunal cannot interfere in the absence of a statutory power to decide that the discretion should have been exercised differently (see Section 86(3)(b) of the Nationality, Immigration and Asylum Act 2002).
>
> Where the decision-maker has failed to exercise a discretion vested in him, the Tribunal's jurisdiction on appeal is limited to a decision that the failure renders the decision 'not in accordance with the law' (Section 86(3)(a)). Because the discretion is vested in the Executive, the appropriate course will be for the Tribunal to require the decision-maker to complete his task by reaching a lawful decision on the outstanding application, along the lines set out in Secretary of State for the Home Department v Abdi [1996] Imm AR 148. In such a case, it makes no difference whether there is such a statutory power as is mentioned in paragraph 1 above.
>
> If the decision-maker has lawfully exercised his discretion and the Tribunal has such a statutory power, the Tribunal must either (i) uphold the decision-maker's decision (if the Tribunal is not persuaded that the decision-maker's discretion should have been exercised differently); or (ii) reach a different decision in the exercise of its own discretion."

16. We are not persuaded by Mr Davison's first submission that it is clear from the ECM's review that he considered paragraph 19 of the Immigration Rules. There was no reference to it in the Appellant's grounds of appeal at pages 12 and 13 of the Appellant's bundle, and the ECM made no reference to it or to an exercise of discretion in the ECM Review.

17. At paragraph 19 of the decision the judge found that neither the ECO nor the ECM would appear to have considered the Appellant's application with regard to paragraph 19 of the Immigration Rules. At paragraph 20 the judge found that the decision of the ECO was not in accordance with the

law and did not comply with the Rules. This was because no consideration would appear have been given to the Appellant's application in line with the requirements of paragraph 19 of the Immigration Rules.

18. At paragraph 22 the judge stated "However it was necessary for the ECO to have gone on to consider the Appellant's application under paragraph 19 which he certainly did not do and neither did the ECM consider it other than to say somewhat obliquely:

> I have examined the application in detail and am satisfied that the ECO did consider all other relevant evidence and did take a common sense and pragmatic approach to the application. After being outside of the United Kingdom for 13 years the Appellant does not qualify as a returning resident."

19. At paragraph 23, the judge stated, "This amounts to no more than the ECO/ECM refusing the application on the grounds that the Appellant has been outside of the United Kingdom for more than two years."

20. On reading the decision as a whole, we find that the First-tier Tribunal Judge concluded that neither the ECO nor ECM had considered the Appellant's application with regard to paragraph 19 of the Immigration Rules. This is clear from reading paragraphs 19, 20, 22 and 23.

21. We find that it is also clear from paragraph 9 of the decision in Ukus that the First-tier Tribunal can only review the discretion where it has been exercised by the primary decision-maker. We find that since the First-tier Tribunal Judge found that the ECO and ECM had failed to apply paragraph 19 of the Immigration Rules, which involved the exercise of discretion, the only course open to the judge was to allow the appeal to the limited extent that the decision was not in accordance with the law and remained outstanding for a lawful decision to be made.

22. We note that there is nothing preventing the Appellant from making an application for settlement as a spouse given that she has not lived in the UK for thirteen years and there was no challenge to the factual findings made by the judge.

23. Accordingly, we allow the Respondent's appeal and set aside the decision to allow the appeal under the Immigration Rules. We remake it as follows: The Appellant's appeal to the First-tier Tribunal is allowed to the limited extent that the decision of 19th March 2014 is not in accordance with the law and remains outstanding for a lawful decision to be made.

24. We are concerned that the Appellant made her application for entry clearance over a year ago and the ECO and ECM failed to consider a relevant provision of the Immigration Rules in refusing her application. Accordingly we make the following direction:

Forthwith on receipt of this decision the Respondent shall make a decision on the Appellant's entry clearance application under paragraphs 18 and 19 of the Immigration Rules.

Notice of Decision

The Respondent's appeal to the Upper Tribunal is allowed

The Appellant's appeal to the First-tier Tribunal is allowed to the limited extent that the Respondent's decision of 19th March 2014 was not in accordance with the law and remains outstanding for a lawful decision to be made.

We direct that the ECO make a decision under paragraphs 18 and 19 of the Immigration Rules, forthwith on receipt of this decision.

No anonymity direction is made.

Signed Date 28th May 2015

Deputy Upper Tribunal Judge Frances