Upper Tribunal
(Immigration and Asylum Chamber)

Iqbal (Para 322 Immigration Rules) [2015] UKUT 00434 (IAC)

THE IMMIGRATION ACTS

Heard at Eagle Building, Glasgow
On 28 May 2015

Determination Promulgated

Before

The President, The Hon. Mr Justice McCloskey
Upper Tribunal Judge MacLeman

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NAVEED IQBAL

Respondent

Representation:

Appellant: Ms C Johnstone, Senior Home Office Presenting Officer
Respondent: Mr Sharma of Matthew Coen and Associates Limited

(i) The effect of the words "are to be refused" in paragraph 322 of the Immigration Rules is to render refusal of leave to remain the United Kingdom obligatory in cases where any of the listed grounds arises. The decision maker has no discretion.

(ii) The doctrine of substantive legitimate expectations is a nuanced, sophisticated one which should not be prayed in aid without careful reflection.

DETERMINATION AND REASONS

Introduction

1. This appeal has its origins in a decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"), dated 19 March 2015, whereby the application of the Respondent, a national of Pakistan aged 36 years, for variation of his leave to remain in the United Kingdom was refused.

2. The factual matrix is both uncomplicated and uncontentious. In brief compass, between April 2007 and October 2013 the Respondent was the beneficiary of three successive grants of leave to remain in the United Kingdom as the spouse of a United Kingdom national. On 13 October 2011 he was granted limited leave to remain in the United Kingdom as a spouse for a period of two years. The index decision was precipitated by the Respondent's application for indefinite leave to remain as a work permit holder. The Secretary of State's decision expresses two reasons for refusing the application:

   (a) as the Respondent had at no time had leave to enter or remain as a work permit holder he failed to satisfy the conditions of paragraph 134(i), (ii), (iii), (iv) and (v) of the Immigration Rules (the "*Rules*"); and

   (b) having regard to his conviction on 21 January 2014 of the offence of selling tobacco to a person aged under 18 years the application was also refused under paragraph 322(1C)(iv) of the Rules.

Relevant Immigration Rules

3. At this juncture it is convenient to set out the material provisions of the Rules. The subject matter of Part 5 is "*Persons seeking to enter or remain in the United Kingdom for employment*". This is followed by the separate heading "*Work Permit Employment*" and a series of "*general requirements*". Paragraph 134 is embraced by the heading "*Indefinite leave to remain for a work permit holder*". This prescribes a total of eight requirements. It is clear from the syntax and the repeated use of the conjunctive "*and*" that all of these requirements must be satisfied. The text is as follows:

> *"134 Indefinite leave to remain may be granted on application provided the applicant:*
>
> *(i) has spent a continuous period of 5 years lawfully in the UK, of which the most recent period must have been spent with leave as a work permit holder (under paragraphs 128 to 133 of these rules), and the remainder must be any combination of leave as a work permit holder or leave as a highly skilled migrant (under paragraphs 135A to 135F of these rules) or leave as a self-employed lawyer (under the concession that appeared in Chapter 6, Section 1 Annex D of the Immigration Directorate Instructions), or leave as a writer, composer or artist (under paragraphs 232 to 237 of these rules);*

(ii) has met the requirements of paragraph 128(i) to (v) throughout their leave as a work permit holder, and has met the requirements of paragraph 135G(ii) throughout any leave as a highly skilled migrant;

(iii) is still required for the employment in question, as certified by the employer; and

(iv) provides certification from the employee that the applicant is paid at or above the appropriate rate for the job as stated in the Codes of Practice in Appendix J, or where the applicant is on maternity, paternity or adoption leave at the time of the application and not being paid the appropriate rate, the date that leave started and that they were paid at the appropriate rate immediately before the start of that leave.

(v) provides the specified documents in paragraph 134-SD to evidence the employer's certification in sub-section (iv), and the reason for the absences set out in paragraph 128A, and

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

(vii) does not fall for refusal under the general grounds for refusal; and

(viii) 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.

4. The subject matter of Part 8 of the Rules is "Family Members". This provides for, *inter alia*, in paragraph 284, extending a person's stay as the spouse or civil partner of a person present and settled in the United Kingdom. The core requirements for a successful applicant are that he must possess or have previously been granted limited leave to enter or remain in certain terms; be married to or the civil partner of a person present and settled in the United Kingdom; have not remained in breach of the immigration laws, disregarding any overstaying period of 28 days or less; intend to live permanently with the other partner (and vice versa); and have adequate accommodation and the ability to maintain themselves and any dependents without recourse to public funds.

5. The third discrete code within the Rules which falls to be considered is the division within Part 9 which, *inter alia*, governs the refusal of leave to remain in the United Kingdom. In the context of this appeal the relevant provision is paragraph 322, which provides in material part:

> "*In addition to the grounds for refusal of extension of stay set out in Parts 2 – 8 of these Rules, the following provisions apply in relation to the refusal of an application for leave to remain, variation of leave to remain or, where appropriate, the curtailment of leave. Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom are to be refused* [are the following]*: ……..*
>
> *(1C) ……*

(iv) they have, within the 24 months prior to the date on which the application is decided, been convicted of or admitted an offence for which they have received a non-custodial sentence or other out of court disposal that is recorded on their criminal record."

Decision of the FtT

6. Following receipt of the Secretary of State's decision and the customary "*one stop warning*" notice under section 120 of the Nationality, Immigration and Asylum Act 2002 (the "*2002 Act*") the response was made that the Respondent was also seeking an extension of his leave to remain in the United Kingdom as a spouse. He further made a case under Article 8 ECHR. In its determination, the FtT noted that the hearing of the appeal had previously been adjourned to afford the Secretary of State the opportunity to reconsider the matter in the light of the Respondent's section 120 response. However, such reconsideration had not materialised. It was represented to the Tribunal that the application for leave to remain as a work permit holder had been made in error. In allowing the appeal, the FtT found that all of the requirements specified in paragraph 284 of the Rules were satisfied. Thus, it concluded, the Appellant was entitled to an extension of his leave to remain as the spouse of a person present and settled in the United Kingdom. The Judge further reasoned that paragraph 322(1C) was applicable only in the context of the refusal decision under paragraph 134 and did not apply to the Respondent's further, free standing application under paragraph 284 and the determination thereof. Therein lies the nub of the grant of permission to appeal to this Tribunal.

Our Decision

7. At the stage of the Respondent's appeal to the FtT, the Secretary of State's decision to refuse him indefinite leave to remain as a work permit holder was no longer under challenge. Rather, through the mechanism of the section 120 notice, the FtT was required to decide whether the Respondent was entitled to an extension of his leave to remain as a spouse, under paragraph 284 of the Rules. The FtT proceeded to decide in the Respondent's favour. The main question arising is whether the Tribunal erred in its assessment that paragraph 322(1C) of the Rules did not apply.

8. As noted above, paragraph 322 is contained in Part 9 of the Rules. We consider that by virtue of its opening words – "*In addition to*" – it supplements the grounds for refusal of extension set out in the preceding Parts 2 – 8 of the Rules. It operates in every case where there is an application for leave to remain or variation of leave to enter or remain. It is also operative in the context of curtailment of leave decisions. We further consider that the effect of the words "*are to be refused*" is to deprive the decision maker of any choice or discretion. If any of the seven grounds in the menu which follows is applicable and is duly established, the application must be refused. The decision maker is thus mandated. This construction of paragraph 322(1C) is fortified by contrasting the language used in paragraph 322(2) – (11) and paragraph 323. In the former discrete code, the terms used are:

> "*Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom* ***should normally be refused***."

We have highlighted the last four words since, in our judgment, they differ sharply from the injunction in paragraph 322(1C) contained in the words "*are to be refused*". A further contrast of note arises out of the heading of paragraph 323 of the Rules:

> "*Grounds on which leave to enter or remain **may be curtailed***."

In each of the two contrasting contexts highlighted, we consider that the decision maker has a discretion. By well established principle this discretion is to be exercised taking into account all material facts and considerations, disregarding anything that is immaterial, avoiding any fetter of discretion and having regard to the underlying purpose.

9. It follows from the analysis above that the FtT, in our judgment, fell into error. Paragraph 322 was engaged as the Respondent was seeking a variation of his extant leave to remain. The variation being sought was an extension. The effect of this was to trigger the provisions of paragraph 322(1C). There is no dispute about the conviction upon which the Secretary of State's decision was based in part. The final element of the analysis is that given the mandatory nature of the refusal ground thereby engaged, the Respondent's application had to be refused. The Judge erred in law in his assessment that paragraph 322(1C) was not engaged.

10. The FtT conducted an alternative analysis and conclusion. This arose out of the second ground contained in the Respondent's section 120 Notice, which maintained, in the briefest of terms, that the Respondent was entitled to leave to remain in the United Kingdom on family life grounds. The FtT construed this as an application under the provisions of S-LTR and highlighted specifically paragraph EX.1(b). The Judge noted that there had been no formal application to the Secretary of State under Appendix FM. The Judge twice refers to the "*legitimate expectation*" of the Respondent and his spouse of continuing family and private life in the United Kingdom. He also adverted to section 117B(1) of the 2002 Act and Article 8 ECHR. While it is clear from [36] that he purported to allow the appeal under Article 8 ECHR, having regard to [32] of the Determination and the opening sentence of [35] it is far from clear whether the Judge purported to allow the appeal under the Rules also.

11. We consider that the Judge's "*legitimate expectation*" reasoning is erroneous in law. In the field of immigration, a person's expectations are shaped primarily by the relevant legal rules. These are contained in primary legislation and the Immigration Rules. These are replete with a mixture of hard edged rules and discretionary powers. The correct analysis, in our judgment, is that the "applications" formulated in the Respondent's section 120 Notice did not, as a matter of law, engage or engender the substantive legitimate expectation identified by the Judge. The governing principles in this sphere were rehearsed recently by this Tribunal in Mehmood (Legitimate Expectation) [2014] UKUT 00469, at [13] – [16]. This Tribunal stated, in [15]:

> "*The two basic ingredients of what the law has come to recognise as a substantive legitimate expectation are satisfied where there is an unambiguous promise or assurance by a public official in which the affected citizen reposes trust.*"

We consider that the legal rules under which the Respondent's applications were to be considered do not have these characteristics. The doctrine of substantive legitimate expectations is a nuanced, sophisticated one which should not be prayed in aid without careful reflexion. In the present case, its invocation constitutes a misdirection in law.

12. The further infirmities in the alternative analysis and conclusion of the FtT are the absence of any detailed examination of the relevant provisions of Appendix FM and the lack of analysis of section 117B of the 2002 Act.

DECISION

13. For the reasons elaborated above the decision of the FtT must be set aside. Given the nature of the failings which we have identified we consider remittal to a differently constituted FtT to be the appropriate course.

14. We add the following observation. By virtue of the section 120 Notice compiled on behalf of the Respondent when pursuing his initial appeal, the FtT found itself in the position of primary decision maker. This is unsatisfactory. This consideration presumably explains why the first listing of the appeal was vacated, when a "*reconsideration*" by the Secretary of State was promised. Regrettably, it did not materialise. This unsatisfactory course of events was stimulated by what was acknowledged as an erroneous original application to the Secretary of State under paragraph 284 of the Rules. The Respondent, ever since, has been pursuing his case under different provisions of the Rules and Article 8 ECHR. It would make manifest sense for the parties to agree that the Respondent should, at this stage, supplement and complete his undetermined application made via the section 120 mechanism, with a view to the Secretary of State determining same and rendering the remittal moot.

Signed: Edward McCloskey

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 30 May 2015