



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

MU ('statement of additional grounds' - long residence - discretion) Bangladesh
[2010] UKUT 442 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

Determination Promulgated

On 9 November 2010

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Before

Senior Immigration Judge McKee

Between

MU

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Zane Malik, Counsel, instructed by Malik Law Chambers

For the Respondent: Mr John Parkinson, Senior Presenting Officer

1. As held in AS (Afghanistan) and NV (Sri Lanka) [2010] EWCA Civ 1076, there is no time limit on serving a Statement of Additional Grounds in response to a 'section 120 notice'. Thus, an appellant may accrue ten years' lawful leave (including leave extended by section 3C of the 1971 Act) while his appeal is pending. The Tribunal may then be asked to decide whether the appellant qualifies for indefinite leave under the Long Residence Rule.

2. An application cannot be made under the Long Residence Rule for only limited leave to remain. Two years' leave may be granted under paragraphs 276A1-4, but only to people who have applied for indefinite leave, and who are ineligible for it solely because their knowledge of English or of life in the UK is not good enough.

DETERMINATION and REASONS

1. The appellant, a citizen of Bangladesh, has been living in the United Kingdom since he arrived here with a student visa on 1 August 2000. His initial grant of one year's leave to enter was followed by successive grants of leave to remain as a student, taking him up to 31 October 2008. Just before this leave expired, the appellant applied for further leave to remain as a Tier 1 (Post-Study Work) Migrant,

but this application was refused on 20th July 2009 because the appellant had based his eligibility upon a postgraduate certificate in Business Management which turned out to be false. As a false document had been submitted, the appellant fell foul of paragraph 322(1A) of the Immigration Rules, as well as not scoring the requisite 75 points under Appendix A.

2. When his appeal came before Immigration Judge Munonyedi on 15th January 2010, the appellant explained that he did not take his exams in July 2008 because he was sure he would fail. His father had died in May, and he was unable to concentrate on his studies because of this bereavement. So he purchased a false certificate for £1,500. He did not want to go back to Bangladesh while his wife, who lives with him and their 5-year old son, was still studying here. Her course did not finish until October 2010, while her leave did not expire until February 2011. He asked for a second chance to continue his own studies, and then return to Bangladesh.

3. Judge Munonyedi dismissed the appeal under the Immigration Rules, and refused to entertain an Article 8 claim as it had not been raised in the Grounds of Appeal, despite the appellant's representative praying in aid *AS (Afghanistan) & NV (Sri Lanka)* [2009] EWCA Civ 1076. She cited Lady Justice Arden's minority judgment as justifying her refusal. In his grounds for seeking leave to appeal to the Upper Tribunal, the appellant claims that he did raise Article 8 both in his original Grounds of Appeal and in his Witness Statement dated 14 September 2009, which is said to constitute a 'Statement of Additional Grounds' under section 120 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

4. It might perhaps be contended that Article 8 has not been properly raised in either of these places. The Grounds of Appeal say no more than that the refusal of further leave to remain is "contrary to the provisions of the European Convention on Human Rights Act (sic)", while the Witness Statement says no more than that "I have a private and family life established in this country ." The term 'Article 8' is not actually mentioned, and one might expect an Article 8 claim to condescend to fuller particulars. Be that as it may, if an obvious human rights point arises in an appeal, the Tribunal must deal with it, whether the appellant has raised it in his grounds of appeal or not. Leave to appeal was indeed granted by Senior Immigration Judge Macleman, restricted to the Article 8 point.

5. On 8th July 2010 the appeal was listed before Senior Immigration Judge Martin, and it was contended by Mr Malik, who was now instructed, that his client should be allowed to lodge a further section 120 statement, this time claiming entitlement to remain on the basis of ten years' lawful residence in the United Kingdom. He had not actually reached the tenth anniversary of his sojourn in the United Kingdom, but he would do so on 1 August 2010. Rather generously, it might be thought, the case was adjourned so that the necessary statement might be served and legal argument marshalled. The appeal was re-listed for 9 November, and on 2 November the appellant signed a statement with the following preamble:

"This statement should also be treated as a 'one-stop' statement pursuant to s.120 of the Nationality, Immigration and Asylum Act 2002 raising an 'additional ground'.

6. When the adjourned hearing came on before me, Mr Parkinson did not dispute that Immigration Judge Munonyedi had made a material error of law by declining to entertain the Article 8 claim, and that, as the decision on the appeal would have to be re-made, a statement under section 120 could be lodged, on the principle expounded by the Court of Appeal in *AS (Afghanistan)*, raising an additional ground. But he did dispute that the appellant could succeed under the 'long residence rule', paragraphs 276A-D of HC 395. While the appellant's continuous residence in the United Kingdom had, he conceded, been lawful for the purposes of paragraph 276B(i)(a), in that it was "pursuant to

existing leave to enter or remain ” as specified by paragraph 276A(b)(i) – which would include the ‘statutorily extended leave’ under section 3C of the 1971 Act which the appellant has enjoyed since his last period of leave to remain as a student would otherwise have come to an end – Mr Parkinson relied on the ‘public interest proviso’ at rule 276B(ii). This makes it possible for indefinite leave to be refused despite an applicant’s having completed ten years’ lawful residence in the United Kingdom, if this would be undesirable on public interest grounds. Such grounds include, at rule 276B(ii)(c), the ‘character, conduct and associations’ of the applicant. Mr Parkinson urged me to find that the appellant’s blatant use of deception in trying to obtain leave to remain as a Tier 1 Migrant did indeed render it undesirable for him to be granted indefinite leave to remain.

7. Mr Malik thought he had the answer to that. His client was not seeking indefinite leave. He was only seeking limited leave. Rule 276A2, he explained, allows an extension of stay of up to two years to be granted if the applicant meets the requirement in paragraph 276A1, which is as follows:

“276A1. The requirement to be met by a person seeking an extension of stay on the grounds of long residence in the United Kingdom is that the applicant meets all the requirements in paragraph 276B of these rules, except the requirement to have sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom contained in paragraph 276B(iii).”

8. The stipulation about meeting “ all the requirements in paragraph 276B ” would seem, on the face of it, to include the ‘public interest proviso’. But Mr Malik argued that rule 276B sets out “ the requirements to be met by an applicant for indefinite leave ”, and his client was only seeking an extension of two years under rule 276A2.

9. Although Mr Malik prays in aid the long-established proposition that the Immigration Rules are to be construed sensibly, according to the natural and ordinary meaning of the words used, that proposition does not assist his ingenious argument. The meaning of a word can vary according to the company it keeps, and rules must be interpreted according to their context. Paragraphs 276A1-4 were introduced into the Immigration Rules on 2nd April 2007, at the same time as a new subparagraph (iii) was added to paragraph 276B. That subparagraph requires applicants for indefinite leave to remain on the grounds of long residence to have sufficient knowledge of the English language and about life in the United Kingdom. Applicants who do not have that knowledge, but who fulfil the other requirements for indefinite leave, may instead be granted two years’ leave to remain under the new rules 276A1-4, during which period they may be expected to acquire the necessary knowledge. Although rule 276A1 refers to “ a person seeking an extension of stay on the ground of long residence ”, this does not mean that people can apply for limited leave to remain solely on the ground of long residence. Applications under the Long Residence Rules, paragraphs 276A-D, are for indefinite leave. Paragraphs 276A1-4 have been introduced as a halfway house, to accommodate applicants who would otherwise fall for refusal because of paragraph 276B(iii). The appellant cannot therefore avoid the ‘public interest proviso’ by asserting that he only wants to remain in the United Kingdom for two years at the most.

10. The ‘one-stop statement’ made by the appellant on 2nd November 2010 does not, on its face, seem to contemplate a limited stay in the United Kingdom in any event. One reads phrases such as these:

“I have a well-established private and family life in the United Kingdom. To ask me to leave the United Kingdom would be an interference with this life, and my circumstances are such that interference would be disproportionate. I have spent ten years of my life in this country. I consider the United Kingdom as my homeland ... During my time in the UK, I have integrated into life here. I have my own

network of friends whom I consider to be family. ... If I were to be removed from the United Kingdom, the development of my private and family life would in fact be hindered.”

11. The language of this statement is quite inconsistent with a desire to stay in the United Kingdom for no more than two years. The appellant cannot get round the proviso at paragraph 276B(ii) of the Rules for there to be no reasons why it would be undesirable for him to be given indefinite leave. Mr Malik argues that it is not open to the Tribunal to dismiss a claim raised under section 120 on any of the ‘general grounds of refusal’ set out at Part 9 of the Immigration Rules. But I agree with Mr Parkinson that if the Tribunal is to become the primary decision-maker under section 120, then it must be able to take account of all the Immigration Rules if an appellant claims to qualify for leave to remain in a different category from that for which he applied to the Secretary of State.

12. In any event, the discretion to refuse indefinite leave on long residence grounds is not confined to Part 9 of the Immigration Rules, but is to be found in the Long Residence Rules themselves. That discretion is exercisable by the Tribunal if it is the first-instance decision-maker. In the present case, I find that the blatant deception practised by the appellant, which triggered a mandatory refusal under paragraph 322(1A) of his application for further leave, justifies refusing his application for indefinite leave under paragraph 276D. That the appellant was only able to raise the ‘Ten-Year Rule’ in the first place because his appeal against the mandatory refusal took so long to be resolved, is also a circumstance which is not irrelevant to the exercise of the discretion under rule 276B.

13. I turn at last to the Article 8 point, the only one on which permission to appeal was originally granted. The appellant’s wife, who is also a citizen of Bangladesh, was enrolled on a course that would have finished by now, but she has chosen to commence another one, for a diploma in IT, ending next July. Mr Malik argues that the appeal should be allowed under Article 8, so that the appellant can stay with his wife (and child), at least until she completes her education. Otherwise, his wife will be faced with the invidious choice of either cutting short her education, or being separated from her husband.

14. I do not think that this choice will involve such hardship to either party as in itself to engage the operation of Article 8. The appellant’s wife knew, when she embarked upon this new course, that her husband’s immigration status was precarious. If he does have to return to Bangladesh without her, the separation will only be for a few months. If she cuts short her IT course instead, there is nothing before me to suggest that her career will be seriously affected, or that a similar course will not be available to her in Bangladesh. This is not a case where the appellant’s wife and child are British or are settled here. The family are only here on a temporary basis, and their family life will only be interrupted briefly if the appellant’s wife chooses to stay here till next summer. The appellant has no doubt acquired a private life during his ten-year sojourn here which will be interfered with if he has to go back to Bangladesh, but he must have regarded his studies as at an end when he applied for leave to remain as a Post-Study Work Migrant. That avenue having been closed to him, it is not disproportionate to expect him to return to his home country.

DECISION

15. The appeal is dismissed under the Immigration Rules and under Article 8 of the ECHR.

Signed Date

Senior Immigration Judge McKee

Judge of the Upper Tribunal