Asylum and Immigration Tribunal

SA (long residence concession) Bangladesh [2009] UKAIT 00051

THE IMMIGRATION ACTS

Heard at Field House
On 12 February 2009

Before

Senior Immigration Judge Storey
Senior Immigration Judge Grubb

Between

SA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M S Alam, Legal Representative from Capital Solicitors
For the Respondent: Miss T Karunatilake, Home Office Presenting Officer

1. Where a more timely decision could have been made in respect of a person who had already accrued the relevant period of residence during the time when the (previous) long residence concession was still in force, i.e. up to 1 March 2006, that concession is a relevant factor in an Article 8 claim (see FH (Bangladesh) [2009] EWCA Civ 385). But in deciding whether the decision was in accordance with the law, that concession cannot assist someone who only applied (and was only in a position to apply) for long residence after its withdrawal: see LL(China) [2009] EWCA Civ 617.

2. The recent revision in Home Office policy, as set out in the April 2009 IDIs dealing with long residence, means that there is, once again, a situation in which immigration rules dealing with long residence co-exist with a policy concession (set out in these IDIs) that in at least one respect is more generous. But in deciding whether the decision is "in accordance with the law", the revived policy will not assist those in respect of whom a decision was made before it came (back) into existence: see AG and Others (Policies; executive discretions; Tribunal's powers) Kosovo [2007] UKAIT 00082.

DETERMINATION AND REASONS

1. The appellant is a citizen of Bangladesh. In a determination notified on 3 July 2008 Immigration Judge (IJ) T Davidson dismissed the appellant's appeal against a decision dated 4 May 2008 refusing the appellant's application to vary his leave to remain on the basis of long residence. The appellant had come to the UK as a student and received a number of grants of limited leave to remain in that capacity. In respect of one of them made in 1999, however, he had applied a short number of days late. The IJ considered that because of the consequent break of sixteen days when the appellant did not have leave to remain, he had not been lawfully resident continuously for ten years as required by paragraph 276A of Statement of Changes in Immigration Rules HC 395 as amended.

2. It is necessary to give more precise particulars. The appellant entered the UK on 9 October 1997 and was granted leave to remain as a student until 31 July 1998. On 6 July 1998 he was granted further leave to remain until 30 September 1999. In early October 1999 he applied for further leave to remain. The respondent accepted that application, albeit late, and granted him further leave to remain from 16 October 1999 until 30 September 2000. Subsequent extensions were granted up to 31 January 2008. It is common ground, therefore, that unless his continuity of residence had been broken in October 1999, he met the requirements of paragraph 276A in full.

3. The IJ found at para 28 that the appellant's continuity of lawful residence had been broken in early October 1999. The appellant's grounds for reconsideration challenged this finding on three main bases. First the decision of the IJ was said to be contrary to a Home Office Immigration Directorate Instructions (IDIs) dealing with long residence which allow for a short delay provided that the application is subsequently granted. Second it was contended that "para 276A(b)(ii) defines lawful residence as continuous residence pursuant to temporary admission … where LTR [Leave to Remain] is subsequently granted". The appellant's third ground had two limbs: the first argued that the respondent, by subsequently granting the appellant further leave to remain in October 1999, had regularised any break in continuity, so that the residence requirement was satisfied; the second contended that, by repeatedly granting the appellant further leave, the respondent had created a legitimate expectation on the part of the appellant that his presence in the UK had been lawful and continuous for the requisite period.

4. The appellant had also invoked a fourth ground, alleging that the IJ had erred in concluding that Article 8 was not engaged in this case, despite finding that the appellant did have a private life. However, Mr Alam confirmed that the Article 8 ground was no longer relied on.

5. In a decision dated 1 December 2008 Senior Immigration Judge (SIJ) Storey found that the IJ had materially erred in law because he had failed to take sufficient steps to establish whether there was in existence at the relevant time a concessionary policy whose effect was to disregard short periods of delay in submitting an application for further leave to remain for other purposes, where the application is subsequently granted. It was thus that the matter came before us for (second-stage) reconsideration.

Our Decision

6. The contents of the Statement of Changes in Immigration Rules HC 395 governing long residence are set out at paragraphs 276A and 276B. These state:

> "Long residence in the United Kingdom
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> 276A. For the purposes of paragraphs 276B to 276E:
>
> a) 'continuous residence' means residence in the United Kingdom for an unbroken period, and for these purposes a period shall not be considered to have been broken where an applicant is absent from the United Kingdom for a period of 6 months or less at any one time, provided that the applicant in question has existing limited leave to enter or remain upon their departure and return, but shall be considered to have been broken if the applicant:
>
> (i) has been removed under Schedule 2 of the 1971 Act, section 10 of the 1999 Act, has been deported or has left the United Kingdom having been refused leave to enter or remain here; or
>
> (ii) has left the United Kingdom and, on doing so, evidenced a clear intention not to return; or
>
> (iii) left the United Kingdom in circumstances in which he could have had no reasonable expectation at the time of leaving that he would lawfully be able to return; or
>
> (iv) has been convicted of an offence and was sentenced to a period of imprisonment or was directed to be detained in an institution other than a prison (including, in particular, a hospital or an institution for young offenders), provided that the sentence in question was not a suspended sentence; or
>
> (v) has spent a total of more than 18 months absent from the United Kingdom during the period in question.

(b) "lawful residence" means residence which is continuous residence pursuant to:

(i) existing leave to enter or remain; or

(ii) temporary admission within section 11 of the 1971 Act where leave to enter or remain is subsequently granted; or

(iii) an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain.

…

"Requirements for indefinite leave to remain on the ground of long residence in the United Kingdom

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;

or

(b) he has had at least 14 years continuous residence in the United Kingdom, excluding any period spent in the United Kingdom following service of notice of liability to removal or notice of a decision to remove by way of directions under paragraphs 8 to 10A, or 12 to 14, of Schedule 2 to the Immigration Act 1971 or section 10 of the Immigration and Asylum Act 1999 Act, or of a notice of intention to deport him from the United Kingdom; and

(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) previous criminal record and the nature of any offence of which the person has been convicted; and

(f) compassionate circumstances; and

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

(iii) the applicant has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application."

7. In order to decide what decision to substitute for that of the IJ, we first consider the appellant's position under the Immigration Rules, second his position under Home Office policy, third, his position in relation to any legitimate expectation.

The issue of whether there was a break in continuity of lawful residence

8. In the course of submissions, both before the IJ and before us, there was some argument as to the precise date on which the appellant applied for further leave to remain in early October 1999. The Home Office file suggested the appellant had applied in person on 12 October 1999; Mr Alam suggested at several points that in fact it was an earlier date by several days. In our judgment, for the purposes of this appeal, the precise date in October 1999 when he applied does not matter. Even on the earliest possible date on which Mr Alam stated the appellant could be said to have applied (namely 7 October 1999, the date he signed the application form) he was already six or seven days late. His leave to remain expired on 30 September 1999.

9. In any event, once an application is made after expiry of limited leave to remain the respondent is not obliged to reach a decision within any particular period, certainly not within a few days. There was nothing unlawful about no decision being made until 16 October 1999 to grant the appellant further leave to remain beginning on 16 October 1999 and continuing until 30 September 2000. The bare fact of the matter is that there was a relatively short period during which the appellant had no valid leave, between 1 October – 15 October 1999 inclusive.

10. Mr Alam appeared to suggest during his submissions that it would have been open to the respondent to have backdated the grant of further leave to remain to this appellant to 1 October 1999. But there is no power in law for the respondent to have done any such thing. Of course, if the appellant had applied in time i.e. on or before 30 September 1999, his leave would have been automatically extended by operation of s.3C of the Immigration Act 1971 as amended. But his application was out of time. If an appellant has no extant leave to remain he can be granted further leave to remain, but only from the date when the respondent makes that decision.

11. Mr Alam sought to argue that whatever the position under immigration law at large, paragraphs 276A-B themselves make clear that a break in lawful residence can be or is to be disregarded. He prayed in aid the wording contained in paragraph 276A(b)(ii), which defines lawful as "continuous residence pursuant to … (ii) temporary admission within Section 11 of the 1971 Act where leave to enter or remain is subsequently granted …". However, this appellant never had temporary admission within s.11 of the 1971 Act.

12. Mr Alam submitted in the alternative that paragraph 276A(b)(ii) should assist the appellant by analogy. He argued that just as the rule allowed for short periods (of up to six months) of absence abroad to be disregarded, so it must have intended that short periods of overstay could be disregarded. However, we can find no basis for casting aside the plain and unambiguous wording of para 276A(b). This subparagraph exhaustively defines what lawful residence is for the purposes of the long residence rule; it does not say that the three situations set out are merely examples. Indeed, if Mr Alam were right and para 276A(b) was read as allowing a period of overstay to be disregarded, then there would be no reason in principle why it could not be (nonsensically) as long as nine years and 364 days. Nor would there would ever have been a need for the policy concession that was made between April 2003 and March 2006 (a matter we deal with below at para 14-18).

13. We see no merit whatsoever in Mr Alam's submissions that the requirements of paragraph 276A of the Rules were met notwithstanding the clear break in the appellant's period of lawful residence.

Pre-existing Home Office Policy

14. Mr Alam also submitted that we should consider whether the decision could be said to be not in accordance with the law by virtue of the appellant standing to benefit from the long residence concessionary policy. As we know from the reported Tribunal decision, OS (10 years' lawful residence) Hong Kong [2006] UKAIT 00031, there was a period during which the Immigration Rules on long residence co-existed with a concessionary policy that did contain a specific provision making allowance for persons who had broken their continuity of lawful residence by virtue of applying for an extension of leave a few days late. The concession in question was set out at paragraph 6(3) of OS as follows:

> "Lawful residence
>
> Where a person has completed ten years continuous lawful residence he should normally be granted indefinite leave to remain without enquiry.
>
> When considering whether a person has remained in the United Kingdom lawfully for ten years, the following breaches of conditions made for the purpose of this concession should be considered as lawful:
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> - A short delay in submitting an application provided the application is subsequently granted."

15. However, as Miss Karunatilake confirmed to us, this policy was withdrawn by the respondent on 1 March 2006, a date well before the appellant applied for consideration under the Immigration Rules dealing with long residence (namely paragraphs 276A-C). Miss Karunatilake, in response to directions made prior to the hearing before us, also confirmed, contrary to what the respondent had intimated

earlier, that there had never been a generic policy excusing short delays by immigration applicants of any kind who are subsequently granted leave to remain.

16. Mr Alam sought to argue that the respondent had not demonstrated that the policy concession had not remained on the IND website after 1 March 2006, but the long and short of the matter is that the respondent had formally cancelled the policy on 1 March 2006 and there is nothing to show that it was not in fact withdrawn as at that date.

17. Mr Alam also submitted that even if the policy had been cancelled on 1 March 2006, the appellant was entitled to benefit from it because at the relevant date when he applied late, i.e. October 1999, the policy was still in place. However, even assuming the same policy was in place then (neither party was able to assist us with a definitive answer on that), the policy was one whose material scope of application only covered those who had *completed* ten years' lawful residence. The policy said nothing about those who had still to complete ten years' lawful residence. At that time the appellant had only completed some four years of lawful residence and was plainly not eligible for long residence.

Legitimate expectation

18. At the hearing Mr Alam also relied on the contention that the decision was not in accordance with the law because it was contrary to the appellant's legitimate expectation that his short delay in applying for further leave to remain would later be disregarded. The expectation was said to arise from the fact that the respondent had condoned any breach of immigration law by deciding to grant him further leave to remain shortly after. However, there had never been such a legitimate expectation. So far as the policy that was in existence between April 2003 and 1 March 2006 was concerned, it contained no promise that it would carry on forever. So far as the decision to grant further leave to remain on 16 October 1999 was concerned, it did not contain or imply a promise that the appellant's period of overstay would be disregarded for all purposes thereafter. It only indicated that the respondent had decided not to treat it as a reason for refusing to grant further leave to remain as a student.

19. In short, none of the appellant's submissions made in this case (save for that concerned with a recent change in Home Office policy) stand scrutiny.

20. As a postscript we would add that since the hearing the Court of Appeal has considered the long residence rule and the concession in force until 1 March 2006 more than once. In FH (Bangladesh) [2009] EWCA Civ 385 their lordships were concerned with an appeal brought on Article 8 grounds. They plainly saw merit in the submission that a person who had *already accrued* the relevant period of long residence during a period when the concession was still in force could expect to benefit from it in circumstances where a more timely decision could have been

made in his case. However, their lordships said nothing to suggest the concession could assist someone who only applied (and was only in a position to apply) for long residence after withdrawal of the policy. In LL(China) [2009] EWCA Civ 617 the Court was concerned with an appellant who in November 2007 had been refused long residence on the basis that during her 10 years of lawful stay she had been out of the country on 27 occasions. At paras 19-20 Laws LJ, with reference to the long residence concession and its predecessor, stated:

> "19. I regard all these arguments as entirely misconceived. The appellant made no application under the 1987 policy or the 2000 concession. Had she done so it would no doubt have been considered appropriately but, for reasons given by the AIT, would have been extremely unlikely to succeed. When she applied for indefinite leave to remain the new Rules were in force and had been for over four years. They cannot be regarded as analogous to retrospective legislation since they did not undermine the established rights of any affected person. An immigrant might or might not have applied under the earlier policies. If he or she did not there would have been no basis for his or her getting the benefit of them by a later application made at a time when the new Rules were in force. The earlier policies might have had the character of retrospective legislation or something like it if they purported to remove the basis established by earlier provisions on which an immigrant was actually enjoying a lawful residence in this country, but that they did not do. The fact that the new Rules altered the regime on which persons already here might stay is legally inoffensive, so long at least as such a person had placed no reliance on any of the earlier provisions.
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> 20. In the appellant's case she applied for indefinite leave, as I have said, on 10 August 1997, within the currency of her student leave. That current leave was then extended, by force of statutory provisions which I need not describe, while her fresh application was outstanding and until any appeal process was exhausted. Because of the protracted nature of the appeal proceedings, she has remained here pursuant and only pursuant to her student leave as extended by statute. Her only claim to remain, since she has no further student leave, will have to be under paragraph 276A-D of the Rules which have had effect, as I have said, since 1 April 2003. On the facts she has no case under those Rules. Any appeal to earlier policies is wholly artificial and in reality the truth is that this lady cannot show continuous residence under any of the successive regimes to which we have been referred."

21. Since the reasoning set out in those cases relating to earlier long residence concessions is entirely consistent with our own we did not consider it necessary to invite the parties to make further submissions on their implications for this case.

Post-decision policy

22. Subsequent to the hearing before us the appellant's solicitors submitted a copy of the relevant section of the respondent's IDI dealing with long residence updated in April 2009. They now include para 2.3.3 which states as follows:

> "**2.3.3 Breaks in lawful residence and the use of discretion**
> If an applicant has a **single** short gap in lawful residence through making one single previous application out of time by a few days (not usually more than 10 calendar days

out of time) caseworkers should use discretion granting ILR, so long as the application meets all the other requirements.

It would **not usually** be appropriate to exercise discretion when an applicant has **more than one gap** in their lawful residence due to submitting more than one of their previous applications out of time, as they would not have shown the necessary commitment to ensuring they have maintained lawful leave throughout their time in the UK.

It may be appropriate to use your judgement in cases where an applicant has submitted a single application more than 10 days out of time if there are extenuating reasons for this (e.g. postal strike, hospitalisation, administrative err or on our part etc). This must be discussed with a Senior Caseworker.

…"

23. The above makes clear that the respondent has effectively decided very recently to revive an earlier policy concession applied in respect of applicants for long residence who have made a previous application out of time by a few days. Its terms are not precisely the same, but they are broadly similar. This change in policy has been made some considerable time after the date of decision in this case (which was 4 May 2008). In a letter of 5 May 2009 the appellant's representatives submitted that as this was a second-stage reconsideration the Tribunal should consider the current position and conclude that the appellant could now benefit from this new policy.

24. We cannot accept that it would be right for us to approach matters in this way. In AG (Policies; executive discretion; Tribunal's powers) Kosovo [2008] UKAIT 00082 the Tribunal gave guidance on several matters relating to policies. One matter it had to address was whether by virtue of s.85(4) of the Nationality, Immigration and Asylum Act 2002 the appellant (PB) was entitled to benefit from a policy (the seven year policy, DP5/96) whose terms the appellant did not meet at the date of the hearing but did (appear to) meet by the date of the hearing. The Tribunal stated at para 66:

"An appeal on the ground that the decision "is otherwise not in accordance with the law" in a case of this type is an attack on the decision making process and so cannot succeed except by showing that there was a fault in that process. Despite s.85(4), therefore, insofar as the appeal was based on the policy, it needed to be directed to the circumstances as they were at the date of the decision, because the complaint is that the Secretary of State ought at that date to have applied the policy as it was on that date. The fact that since the date of the decision the child's age, and the time she spend in the United Kingdom, have both increased, is not a matter "relevant to the substance of the decision" in the context of an attack on the decision-making process, and is not a matter on which any evidence could add to the position as it is accepted to have been at the date of the decision. "

25. Earlier at para 45 the Tribunal drew a distinction between assessment of proportionality under Article 8 and deliberation upon policies:

> "Although the assessment of proportionality under Article 8 may and often will raise issues similar to those to be considered when ascertaining whether the Secretary of State properly applied any relevant policy, it is important to keep the issues separate, because they are not the same. Human rights are to be considered at the date of the hearing; but the argument that the decision is "otherwise not in accordance with the law", being an argument about the decision-making process, looks back at the time when the decisions was taken, and to the responsibility of the person taking it then. Between the date of the decision and the date of the hearing the facts may have changed, and the policy may have changed. The human rights argument has to be made and assessed on the basis of today's facts; and issues of proportionality have to be determined on the basis of the application of today's policy to today's facts; but it is unlikely that the decision can be attacked on process grounds except by reference to yesterday's policy as applied to yesterday's facts (indeed possibly only by reference to yesterday's appreciation of the facts).

26. In this case it is not a matter of an appellant seeking to benefit from an *existing* policy whose main criteria (having a child who has been resident in the UK for more than seven years and is still under the age of 18)) he can only hope to meet post-decision; rather the appellant is seeking to benefit from a *subsequent* policy, one only (re) introduced post-decision. However, the underlying principle articulated in AG is the same: to decide on whether a decision is in accordance with the law, one looks at the date of decision. That applies whether at the date of decision there is a policy in existence or not. In the instant case, there was not. Accordingly this submission must fail.

27. Since Mr Alam did not seek to rely on Article 8 in this case, we do not need to attempt a human rights assessment, but we would underline that the Tribunal's reference in the above passage to a human rights assessment applying "today's policy to today's facts" has to be read in conjunction with earlier passages in the determination. It does not mean the judicial decision maker's task is to decide whether today's policy was not applied (and so the appeal stands to be allowed on the limited basis that it remains for the Secretary of State to apply the policy). Nor does it mean that the judge should treat his or her task is to decide whether the appellant succeeds or fails under today's policy per se. As the Tribunal noted at para 40, analysing R (on the application of Tozlukaya) v Secretary of State for the Home Department [2006] EWCA Civ 379):

> "It is in that context that a judicial decision-maker has to take into account any applicable policy, because if the policy itself "tells in favour of the person concerned being allowed to stay in this country" it is a factor that has to be incorporated into an assessment of the argument going to the importance of immigration control. The decision maker is not said at paragraph [79] to be concerned with exercising any discretion under the policy. Rather, the task is to ascertain whether the terms of the policy tell generally in favour of non-removal, because that finding, if made, has an impact on the proportionality of the particular proposed removal".

28. Thus when it comes to human rights assessment the importance of the reference to "today's policy" is that the immigration judge must have regard to the current position, not (as when looking to see whether the decision was "in accordance with the law") the position at the date of decision. It remains relevant to consider what the appellant's position was, in terms of policy, at the date of the executive decision. What is different when conducting the Article 8 balancing exercise is that the judge has also to look, inter alia, at what is the *continuing basis* for the executive decision. He is obliged therefore to take into account the fact (if it is a fact) that today there is a policy in existence that benefits (or appears to benefit) the appellant. Taking such a matter into account may well lead the judge to consider that this shows that there is no longer a public interest, or the same level of public interest, in maintaining the negative immigration decision as there was previously. That in turn will impact on the judge's decision as to whether the decision is incompatible with the appellant's human rights.

29. As to the general position, we would observe that the recent revision in Home Office policy, as set out in the April 2009 IDIs dealing with long residence, means that there is, once again, a situation in which immigration rules dealing with long residence co-exist with a policy concession (set out in the IDIs) that in at least one respect is more generous. Quite why, given the resumption after three years of very much the same policy, the Secretary of State chose to discontinue it previously, is not a matter for us (although it might be a question the appellant, through his representatives, may wish to ask the Secretary of State with a view to having his case reviewed on a discretionary basis). Nor is it a matter for us whether his precise length of overstay constituted under this policy "a single short gap" or not.

30. For the above reasons:

    The Immigration Judge materially erred in law.

    The decision we substitute for his is to dismiss the appellant's appeal. The decision appealed against was in accordance with the law.

Signed

Senior Immigration Judge Storey