ASYLUM AND IMMIGRATION TRIBUNAL

GK (Long residence –immigration history) Lebanon [2008] UKAIT 00011

THE IMMIGRATION ACTS

Heard at: Field House on 8 January 2008

Before

SENIOR IMMIGRATION JUDGE STOREY

Between

GK

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the appellant: Mr A Leventakis, Solicitor, ACS Solicitors
For the respondent: Mr S Kandola, Home Office Presenting Officer

1. *When issues arise as to whether a person has accrued sufficient continuous residence under the long residence provisions of para 276A, so as to establish eligibility under either the "10 year rule" (at para 276B(i)(a)) or under the "14 year rule" (at para 276B(i)(b)), careful attention must be paid to the immigration law applicable during the relevant period or periods of residence.*
2. *Parties to appeals of this kind (where there is a dispute as to whether there has been the requisite period of residence) should take steps to ensure that their submissions furnish an analysis of the individual's immigration history by*

reference to the legislative provisions applicable during the relevant period(s) of residence.

DETERMINATION AND REASONS

1. The appellant is a national of Lebanon. In a determination notified following a hearing on 21 May 2007 Immigration Judges Verity and Neyman dismissed his appeal against a decision dated 16 February 2007 refusing his application for indefinite leave to remain and issuing a certificate that the appellant was not entitled to the protection of Article 33(1) of the Refugee Convention because Article 1(F) applied to him (whether or not he would otherwise be entitled to protection). The appellant's grounds of appeal constituted an asylum appeal under s.55 of the Immigration, Asylum and Nationality Act 2006. The appellant successfully applied for reconsideration and so the matter comes before me.

2. It is unnecessary to set out particulars of the appellant's asylum claim beyond noting that the panel first decided to dismiss the Secretary of State's certificate because they considered that he was ("at the very most" a junior and unimportant member of the Lebanese Forces and that he had not been involved directly or indirectly with any activities which involved the ill treatment of any other person. Having gone on to consider the appellant's asylum and human rights grounds of appeal, the panel concluded that, given his minor role, he would not be of adverse interest to Hizbollah or any other organisation.

3. The panel also considered whether the appellant met the requirements of paras 276A-D of the Immigration Rules HC395 as amended. The relevant provisions currently state:

> **" Long residence in the United Kingdom**
>
> **276A**. For the purposes of paragraphs 276B to 276D:
>
> (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.

276A1. The requirement to be met by a person seeking an extension of stay on the ground 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).

Extension of stay on the ground of long residence in the United Kingdom

276A2. An extension of stay on the ground of long residence in the United Kingdom may be granted for a period not exceeding 2 years provided that the Secretary of State is satisfied that the requirement in paragraph 276A1 is met.

Conditions to be attached to extension of stay on the ground of long residence in the United Kingdom

276A3. Where an extension of stay is granted under paragraph 276A2:

(i) if the applicant has spent less than 14 years in the UK , the grant of leave should be subject to the same conditions attached to his last period of lawful leave, or
(ii) if the applicant has spent 14 years or more in the UK, the grant of leave should not contain any restriction on employment.

Refusal of extension of stay on the ground of long residence in the United Kingdom

276A4. An extension of stay on the ground of long residence in the United Kingdom is to be refused if the Secretary of State is not satisfied that the requirement in paragraph 276A1 is met.

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.

(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.

Indefinite leave to remain on the ground of long residence in the United Kingdom

276C. Indefinite leave to remain on the ground of long residence in the United Kingdom may be granted provided that the Secretary of State is satisfied that each of the requirements of paragraph 276B is met.

Refusal of indefinite leave to remain on the ground of long residence in the United Kingdom

276D. Indefinite leave to remain on the ground of long residence in the United Kingdom is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 276B is met."

4. (It should be noted that the panel, sitting as it was in July 2007, were not concerned with the provisions of paras 276A1-4 and 276B(iii), which were only inserted with effect from 1 April 2007.)

5. The panel decided that the appellant did not meet the requirements of paras 276A-B.

6. The panel was also asked by the appellant's representatives to allow his appeal on the basis that the Secretary of State had failed to apply her own policy concerning the granting of indefinite leave to remain to those who had completed 4 years leave to remain. It made no decision on this matter.

7. Mr Leventakis's submissions focussed primarily on the issue of whether the panel had erred in its approach to paras 276A-B and secondarily on whether they should have found that the respondent had failed to apply his own policy regarding those who have completed 4 years exceptional leave to remain.

8. Mr Kandola did not seek to defend the respondent's approach to the appellant's position under paras 276A-B and said he was not in a position to assist as regards whether the respondent had a policy for those who have completed four years ELR. Initially he did however seek to submit that I should consider the grounds before me to include the issue of whether the immigration judge panel was right to dismiss the Secretary of State's s.55 certificate and to find that the appellant did not fall within the Refugee Convention's exclusion clause (Article 1F). However, he conceded that the respondent had not submitted any Rule 30 "Reply" under the Asylum and Immigration Tribunal (Procedure) Rules 2005 in relation to such matters. I ruled that it was too late for him to apply to do so now: see SP (Time for reply – Rules 30(2) and 45(4)(c)) Pakistan [2006] UKAIT 00010.

My decision

The long residence rules

9. I consider that the panel materially erred in law in their treatment of the appellant's position under the long residence rules. The panel accepted that the appellant had been in the UK at the date of hearing over 10 years, but stated:

> "Paragraph 276A(b) provides the definition of "lawful residence" and sub-paragraph 276A(b) (ii) is the only one which could possibly apply in this case. That refers to "temporary admission within Section 11 of the 1971 Act where leave to enter or remain is subsequently granted". The appellant had such temporary admission but leave to enter or remain has not subsequently been granted, so the Appellant cannot succeed under the longer residence provisions of the Immigration Rules so that we must dismiss any appeal there may be before us under those Rules".

10. This analysis was erroneous in two respects. First, the panel was wrong to say that para 276A(b)(ii) – which deals with temporary admission - was the "only" provision which could possibly apply in this case. There was another provision which also possibly and (as I will come on to) was indeed the only one that actually applied, namely para 276A(b)(i) – which deals with existing leave to enter or remain.

11. That the panel was wrong to overlook para 276A(b)(i) can be seen from a brief description of the appellant's immigration history, which was not in dispute. I shall set it out step by step.

    1) The appellant arrived in the UK on 29 November 1995 and was granted 6 months leave to enter;

    2) he applied for asylum on 25 January 1996;

    3) this application was refused on 11 April 2001 but on the same date he was granted 4 years exceptional leave to remain until 11 April 2005;

    4) he applied for indefinite leave to remain on 31 January 2005;

    5) this application was refused on 16 February 2007 (his case was also certified under s.55 on the same date);

    6) he appealed and his case was heard by the immigration judge panel on 21 May 2007.

12. Covering as it does a period of over 11 years (from arrival on 12 November 1995 to the date of decision on 16 February 2007) the appellant's immigration history has to be considered in the context of the law applicable at the relevant time. The only part of that law of relevance to this type of case is that governing extensions of leave pending a decision on an application to vary leave.

13. The *current* law governing extensions of leave is set out at s.3C of the Immigration Act 1971 (the 1971 Act) as amended. It states:

> **"3C. Continuation of leave pending variation decision**
> (1) This section applies if -
> (a) a person has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,
> (b) the application for variation is made before the leave expires, and
> (c) the leave expires without the application for variation having been decided.
> (2) The leave is extended by virtue of this section during any period when –
> (a) the application for variation is neither decided nor withdrawn,
> (b) an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 could be brought , whilst the appellant is in the United Kingdom, against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission), or
> (c) an appeal under that section against that decision is pending (within the meaning of section 104 of that Act.)

(3) Leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom.
(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.
(5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).
(6) In this section a reference to an application being decided is a reference to notice of the decision being given in accordance with regulations under section 105 of that Act (notice of immigration decision)."

14. Section 3C embodies the rule of automatic extension of leave to persons who apply to vary leave within the currency of their existing leave. However, as is helpfully explained in DA (Section 3C – meaning and effect) Ghana [2007] UKAIT 00043, this rule has been a long-standing feature of our immigration law. Prior to 2 October 2000, automatic extension of leave to a person making an application for variation of leave was conferred by the Immigration (Variation of Leave) Order 1976 (SI 1976/1572), operated when relevant in conjunction with s.14. As from 2 October 2000, under the Nationality, Immigration and Asylum Act 1999 this rule was inserted into the 1971 Act as s.3C. That provision has undergone two further sets of amendments: the first with effect from 1 April 2003 by s.118 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act); and the second with effect from 31 August 2006 by s11 of the Immigration, Nationality and Asylum Act 2006. But neither of these has altered the provisions governing continuation of leave pending a variation decision.

15. From the above it can immediately be seen that the appellant has had continuous lawful leave to remain since his arrival in the UK. Because he made his (asylum) application for variation in January 1996, which was a date before his (then) current leave expired, that leave was extended by operation of the Variation of Leave Order 1976 (as amended). It was extended until his application was decided. When the decision on his asylum application was eventually made (on 11 April 2001) he was granted 4 years leave to remain until 11 April 2005. But once again, before his current leave expired he applied for a variation of his leave: that application meant that his leave was automatically extended by operation of s.3C of the 1971 Act (as amended with effect from 1 April 2003 by the 2002 Act). The decision refusing that application, dated 16 February 2007, is the subject of this appeal and his leave is extended during the period whilst his appeal is pending by operation of s.3C(2)(c) in its current form.

16. Hence when assessing whether the appellant had continuous presence for the requisite period within the meaning of paragraph 276A the panel should have recognised that he had existing leave to enter or remain under 276A(b)(i). They erred in overlooking this.

17. Mr Kandola submitted, tentatively, that the long residence issue under paragraph 276A-D did not arise in this case because the appellant had not applied for long residence. I see no merit in that submission. The appellant had applied for indefinite leave to remain (ILR). It is true he had done so on a form which referred to persons who have been in the UK for 4 years with exceptional leave to remain (ELR) and made no reference to long residence. But there was an applicable immigration rule - contained within paras 276A–D - under which the position of someone who had applied for ILR and who had long residence fell to be considered. The appellant's position should have been considered under it. In deciding to consider this as a ground of appeal the panel was acting properly under Kwok On Tong principles: see RM (Kwok On Tong: HC395 para 320) India [2006] UKAIT 00039.

18. Nevertheless, as we have seen, the panel's failure to consider the applicability of para 276A(b)(i) amounted to a material error of law.

19. There was also an error in the panel's treatment of para 276A(b)(ii) but it is not one which was material since it was based on a false premise. That false premise was that the appellant had been granted temporary admission under Section 11 of the 1971 Act. As a matter of law the appellant could not have been granted temporary admission because he had leave to enter.

20. I cannot ascertain why the panel thought that the appellant may have been granted temporary admission. Mr Kandola for the respondent confirmed that there was nothing on the Home Office file to show that this had happened. It may have been that the panel thought that he had because of something said by Mr Leventakis, who represented on that occasion as well. I infer that from the fact that he made the same suggestion to me, although he accepted that he had nothing on his file to confirm it. (I would observe that even if for some period prior to 11 April 2001 the appellant had been someone granted - and properly granted - temporary admission, it is plain that on that date he was granted lawful leave to remain for 4 years and so the panel would still have needed to look at whether he met the requirement of continuous lawful residence as set out in para 276A(b)(i) taken together with 276A(b)(ii) (the latter which refers to "temporary admission within section 11 of the 1971 Act where leave to enter or remain is subsequently granted".)

21. Having found a material error of law and ascertained that neither party suggested that I should adjourn, I decided I was in a position to decide the appeal for myself.

22. In my view it is clear that the appellant met (and continues to meet) the requirements of para 276B(i)(a). That is to say, he was a person who had had "at least 10 years continuous lawful residence in the United Kingdom". At the date of the decision (16 February 2007) he had had

accrued over 10 years lawful residence since he arrived lawfully on 29 November 1995. As regards the requirement of para 276B(ii), the respondent has nowhere suggested that there were any public interest considerations making it undesirable for the appellant to be given ILR save for the exclusion-related reasons which the panel rejected.

23. The question arises, however, what follows from this finding. At the hearing the parties appeared to be of the view that if I was satisfied the appellant met the relevant requirements of the 10 year continuous lawful residence rule (as contained in paras 276A-B), I should allow the appeal outright. However, the relevant rules also include para 276C which is in discretionary terms:

> "276C. Indefinite leave to remain on the ground of long residence in the United Kingdom may be granted provided that the Secretary of State is satisfied that each of the requirements of paragraph 276B is met."

24. Accordingly, since the respondent has yet to exercise that discretion, I consider I can only allow the appeal (under s.86(3)(a) of the 2002 Act) insofar as I think that the decision was not in accordance with the law (including immigration rules).

25. In relation to the exercise of discretion which the respondent has now to undertake under para 276C, I would venture only one observation, prompted by the fact that the respondent's original decision clearly expressed the view that the appellant's asylum history merited application (by way of certification) of the Refugee Convention exclusion clauses. The panel rejected that view, no Reply was submitted and I have earlier ruled that the exclusion issue is not for re-opening now. However, since during the course of the hearing Mr Kandola did seek (albeit half-heartedly) to persuade me to re-open it, it may be appropriate to add that were such (exclusion-based) concerns to inform the exercise of discretion under para 276C, that might amount to a failure to accept a judicial determination of the relevant issue.

26. Also for completeness I should briefly refer to the ground of review challenging the panel's treatment of the "policy" of the Secretary of State regarding persons who have been in the UK for 4 years and seek indefinite leave to remain. Neither party was able to furnish me with any evidence that such a policy exists, although Mr Leventakis was adamant that it did.

27. But even had evidence of such a policy (and what it said) been placed before me, the very best that could have happened from the appellant's point of view would have been a decision on my part that the Secretary of State in the reasons for refusal letter of 16 February 2007 had failed to turn his mind to this matter and as a result that I should allow the appeal insofar as the application of the policy remained as a matter

outstanding before the Secretary of State. Since on the principal issue (concerning paras 276A-D) I have in any event only allowed the appeal to a limited extent, it would be appropriate, if need be, for the Secretary of State to look at whether such a policy (if one exists) should apply in favour of the appellant.

28. The Tribunal has had previous occasion to consider the long residence rules, which have been a feature of the Immigration Rules since 1 April 2003: see OS (10 years' lawful residence) Hong Kong [2006] UKAIT 0031**,** HS (Long Residence – effect of IDI September 2004) Pakistan [2005] UKAIT 00169, MW (paragraph 276 -long residence- 'lawful residence') Pakistan [2007] UKAIT 00008 and MO (Long residence rule – public interest proviso) Ghana [2007] UKAIT 00014. What can be seen from this case is that when issues arise as to whether a person has accrued sufficient continuous residence under the long residence provisions of para 276A, so as to establish eligibility under either the "10 year rule" (at para 276B(i)(a)) or under the "14 year rule" (at para 276B(i)(b)), careful attention must be paid to the immigration law applicable during the relevant period or periods of residence. Where such issues arise, they cannot be answered simply by looking at the current law. In this case establishing what was the applicable law at the relevant time has proved relatively straightforward. However, as is clear from DA, matters can be more difficult if the immigration history concerned involves applications for extension of leave once the decision is the subject of a pending appeal. The meaning of s.11 of the 1971 Act may also give rise to difficulties: see Kula [2007] UKHL 54. Given the significant number of amendments that have been made in the past two decades to the legislation governing leave to remain and temporary admission, parties to appeals of this kind (where there is a dispute as to whether there has been the requisite period of residence) should take steps to ensure that their submissions furnish an analysis of the individual's immigration history by reference to the legislative provisions applicable during the relevant period(s) of residence.

29. For the above reasons the Tribunal materially erred in law. The decision I substitute is to allow the appeal but only to the extent that it is outstanding before the Secretary of State to make a decision under para 276C of the Immigration Rules.

Signed:

Dr H H Storey (Senior Immigration Judge)

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