Neutral Citation Number: [2015] EWHC 1558 (Admin)

Case No: CO/10790/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 June 2015

Before :

HER HONOUR JUDGE DEBORAH TAYLOR
(Sitting as a Judge of the High Court)

- -

Between :

THE QUEEN (on the application of CHARITH MISSAKA WIJESINGHE)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Mr A. Jafar (direct access) for the **Claimant**
Miss J. Anderson (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing date: 27 January 2015

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Judgment

HHJ Deborah Taylor :

1. This is a claim by the claimant Charith Missaka Wijesinghe for judicial review of the Secretary of State's decision on 25 January 2012 to reject as invalid his application for leave to remain as a Tier 4 (General) Student. The relief sought is a mandatory injunction directing the defendant to grant the claimant leave to remain.

Factual Background

2. On 11 Sept 2009 the claimant entered the United Kingdom as a student with leave valid until 9 January 2012. On that date, the last day of his permitted stay, he made an application for further leave to remain as a T4 (General) Student. He claims that the college he attended completed the form on his behalf, save for his personal details, debit card details and signatures, which he completed himself.

3. On 12 January 2012 in response to the application the defendant sent a letter to the claimant at an address which it is accepted was not his address. Mr Jafar on the claimant's behalf told the Court it was the address of someone from the college. The letter stated

"Thank you for the application by the above-named on Form Tier 4. It will now be passed to a casework unit.

If there is any problem with the validity of the application, such as missing documentation or omissions on the form, a caseworker will write to you as soon as possible to advise what action you need to take to rectify the problem. If there is an issue with the fee you have paid, your application will be rejected and details sent to you on how to make another application.

You should expect to receive further correspondence from us giving you instructions for the next steps in making your application……..

We would appreciate it if you did not enquire about the progress of the application before you hear from us. It is not possible to make enquiries in person about the progress of an application at any of our Public Enquiry Offices, Biometric Enrolment Centres or via our Immigration Enquiry Bureau……."

4. On 25th January 2012 the defendant sent a further letter in ICD.3676 standard form returning the application as invalid. The reasons given were as follows:

> *Where an application form has been specified in accordance with the Immigration Rules (HC395) the application must comply with the requirements set out in paragraph 34A of these rules and the Immigration (Biometric Registration) Regulations.*

The box crossed on the form to indicate that a requirement had not been met was that which stated

> *Any section of the form which is designated as mandatory in the application form and/or related guidance notes must be completed as specified(we have highlighted the relevant parts on the form which have not been completed)*

The form ICD.3463 Ex Gratia Payment Approval was completed by the caseworker. The mandatory sections which had not been completed on the application form were identified as H ("About your previous address"), J ("About your immigration status"), K ("Have you ever claimed public funds") L1-2, L5-24 ("About your course") and M ("About your maintenance"). There were therefore substantial parts of the form left incomplete.

5. The claimant did not challenge the decision either at that stage or within the statutory limitation period of 3 months. The reason given in the grounds for judicial review is that the claimant did not receive a copy of the letter of 25 January 2012 (or indeed the letter of 12 January 2012), and only found out the reason for the return of the application when he obtained his file of papers from the Home Office in February 2013. Nonetheless, the claimant did not commence this claim until 5 August 2013, one year and four months out of time.

6. However, between the letter of 25 January 2012 and commencement of this claim, the claimant did make two further applications for leave to remain. Whilst the

applications and decisions are not the subject of these proceedings they are of significance in the chronology of this case. The claimant made his second application on 16 March 2012, a combined application for leave to remain as a Tier 4 (General) Student Migrant and for a Biometric Residence permit. That application was refused in a letter dated 17 October 2012 for the reason that the claimant had relied upon a Confirmation of Acceptance (CAS) from Lincoln's College Manchester, which was not at that date listed on the Tier 4 Sponsor Register as required. No reference was made in the decision letter to the earlier application, but the claimant was informed that his leave to remain had expired on 9 January 2012, and therefore he did not have leave to remain at the time of this March application. A further combined application was made on 5 December 2012 which was refused in a letter dated 26 February 2013. After that refusal, the claimant did not issue these proceedings for a further six months.

Preliminary Issue: Application to debar the defendant from defending the claim

7. In the Order granting permission, HHJ Serota QC refused the defendant an extension of time to file an Acknowledgment of Service. Three extensions had been given previously and he considered that the delay was unacceptable. The Order stated :

> *"the defendant ... who wishes to contest the claim or support it on additional grounds must file and serve detailed grounds for contesting the claim or supporting it on additional grounds and any written evidence within 35 days of the order ..*

8. The defendant filed an Acknowledgement of Service with summary grounds of defence on 11 March 2014, the day after the required date in the order. The summary grounds set out the substantive points relied upon by the defendant, including that the claimant was out of time to bring his claim, and that the decision of the Court of Appeal in *Rodriguez v SSHD* [2014] EWCA Civ 2 overturned the Upper Tribunal judgment upon which the application relied. Detailed grounds of defence were not filed until September 2014, some six months later, and well outside the time limit in the order. No response was filed by the claimant in response to either the summary grounds which referred to the Court of Appeal decision in *Rodriguez,* nor in response to the detailed grounds. In fact, Mr Jafar told the Court that he had not received the detailed grounds, and submitted that as the defendant had failed to comply with the order of HHJ Serota QC in filing detailed grounds within 35 days, the defendant should be debarred from defending this claim. This was a point not taken prior to the hearing.

9. Mr Jafar relies upon CPR Rule 54.14(1) which provides:

> *"A defendant and any other person served with the claim form who wishes to contest the claim or support it on additional grounds must file and serve-*
>
> *(a) detailed grounds for contesting the claim or supporting it on additional grounds; and*
>
> *(b) any written evidence*
>
> *within 35 days after service of the order granting permission".*

That provision was reinforced in the order of HHJ Serota QC. Mr Jafar submitted that the obligation is mandatory, and the Court should exercise its general power to strike out for non – compliance under Rule 3.4(2)(c), albeit there is no automatic sanction

applicable to this rule. He referred to the approach taken by this court in *R (on the application of Jasbir Singh and ors) v SSHD* [2013] EWHC 2876 (Admin) to successive extensions of time, and submitted that no good reason has been given for the failure to serve detailed grounds in time, and that it is a substantial breach of the rule and order which justifies the striking out of the defence.

10. In response Miss Anderson has referred to *R (on the application of RA) (Nigeria) v SSHD* [2014] EWHC 4073 (Admin) where the same point was raised, as in this case without notice at the outset of the hearing. Andrew Thomas QC considered the cases of *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537, the three-stage test outlined in *Denton v TH White Ltd* [2014] EWCA Civ 906, and *R (on the application of Mohammadi) v SSHD* [2014] EWHC 2251 (Admin). He rejected the application to strike out the claim on the basis that there was no identifiable prejudice to the claimant, the defendants response was set out in summary grounds of defence which went into some detail, and whilst compliance with rules of court is important, he agreed with the observations in *Mohammadi*, that in judicial review claims the public interest will usually be a highly significant consideration. He found non – compliance to be of form rather than substance, and that debarring the defendant from responding to the claim was not in the public interest, which lay in proper consideration of the case on its merits.

11. In this case, the defendant did serve detailed grounds, albeit late. Whilst there is some fleshing out of the points raised in the summary grounds served one day late, there is nothing of real substance which is different. No response was filed to the summary grounds, the detailed grounds were served well in advance of this hearing, and no response was served at that stage or indeed before this hearing. Mr Jafar can point to no real prejudice. Taking all the circumstances into account, as in *RA Nigeria* the public interest lies in permitting the defendant to respond to the claim and the application to debar the Secretary of State from doing so is refused. Insofar as it is necessary to do so, time is extended in respect of the summary grounds and detailed grounds until 30 September 2012.

The application for judicial review

12. Section 50(1) and (2) of the Immigration, Asylum and Nationality Act 2006 provide for the making of Rules under s. 3 of the Immigration Act 1971 to require use of specified forms, and submission of specified information and documents, and for the consequences of failure . The relevant Immigration Rules made pursuant to the Act are paragraphs 34, 34A and 34 C. Paragraph 34A provides :

> 34A. Where an application form is specified the application or claim must also comply with the following requirements:
>
> (i) Subject to paragraph A34 the application must be made using the specified form,
>
> (ii) any specified fee in connection with the application or claim must be paid in accordance with the method specified in the application form, separate payment form and/or related guidance notes, as applicable;
>
> (iii) any section of the form which is designated as mandatory in the application form and/or related guidance notes must be completed as specified.

Paragraph 34C provides

> Where an application or claim in connection with immigration for which an application form is specified does not comply with the requirements in paragraph 34A such application or claim will be invalid and will not be considered.
>
> Notice of invalidity will be given in writing and deemed to be received on the date it is given, except where it is sent by post in which case it will be deemed to be received on the second day after it was posted excluding any day which is not a business day.

13. In the course of the hearing Immigration Directorate Instruction Guidance on specified forms and procedures was provided ("the Guidance"). It states

> **This page tells you what action to take if you receive an invalid application on a specified application form.**
>
> You must reject an application as invalid if it does not meet the specified requirements of paragraph 34A of the Immigration Rules. Although the rules do not specify a time limit for when you can reject an application, you must do this as soon as possible. You must complete all validation checks, including fee exceptions where they apply, before you reject the application. This ensures that the applicant is not given the impression that their application is valid in all other respects, if there is more than one requirement that their application does not meet.
>
> **Action for caseworkers**
>
> If you are going to reject the case as invalid, then you must do the following:
>
> • Mark the application as 'Invalid' and sign and date this at the top of section 1, or the front page of the form if different.
>
> • Note the reasons for considering the form to be invalid in the case notes field of CID.
>
> • Return the form and any photographs or documents to the applicant or immigration adviser with an ICD.3676 covering letter. This will be an ICD.3678 or ICD.3679 if there are fee issues.
>
> • Enter REJECT into the CID outcome field.
>
> ….
>
> **This page tells you when it may be appropriate to use discretion when assessing whether an application made on a specified form is valid.**
>
> Because the requirements for an application to be valid are specified in the Immigration Rules, there is an element of discretion. The requirements have been limited to things which are relatively simple to check, important to the decision making

> process and which applicants normally have no difficulty in complying with. The exercise of any discretion will therefore be confined to exceptional circumstances, and must be authorised by an officer of at least SEO level (Deputy Chief Caseworker or equivalent).
>
> If the application was received more than three months ago and does not meet the specified form requirements, you must use discretion when you consider whether it is valid and not reject it as invalid. You must request more information if you need this to make a decision on the application. If the applicant does not provide this within the timescale you have set, you must refuse the application.
>
> You must not use discretion and accept an application or claim as valid if a specified fee has not been paid. The requirements for the payment of fees are in the relevant fees regulations. An application that does not include the correct fee is invalid because of the regulations rather than the Immigration Rules.
>
> If you use discretion to accept an application as valid, you must consider it under the Immigration Rules and published policy appropriate to the application.

Submissions

14. Mr Jafar accepted that the application is out of time, the reason given being that the claimant was unaware of the reasons for the decision in time, and was then unable to access legal advice. He submitted that the court should allow the application out of time as the consequences for the claimant would be extremely harsh, and for the defendant insignificant.

15. On the substance of the application he submitted that the defendant's decision of 25 January 2012 was unlawful as she failed to consider her own Evidential Flexibility policy, and returned the application as invalid without giving the claimant an opportunity to complete incomplete parts of the application form. In the grounds of appeal reliance was placed on the decision of the Upper Tribunal in *Rodriguez*. Between the application and the hearing the Court of Appeal overturned that decision. Mr Jafar submitted that is not an end to this matter. He relied upon the distinction drawn in *Rodriguez* at paragraph 86, (referring to the judgment of Sullivan LJ in *Alam v SSHD* [2012] EWCA Civ 960 at paragraphs 49-51), between invalid applications and those which are valid, but lack specific information. He submitted that this case falls into the former category and is therefore not to be determined on the basis of *Rodriguez.*

16. Mr Jafar's new submission was that within the letter of 12 January 2012 there is a further distinction drawn by the defendant, between applications which are invalid because a fee has not been paid, and those which are invalid because of omissions in the documents or form. There is a representation that where there is missing documentation or there are omissions on the form, a caseworker would write to the applicant to advise what action he needed to take to rectify the problem. In contrast, if there was an issue with the fee being paid the application would be rejected and details sent to the applicant on how to make another application. In this case, Mr Jafar submitted that the defendant did not comply with this policy. The fee was paid, and the rejection for invalidity was because of failure to complete parts of the form. Consequently in accordance with the letter he ought to have been advised on action he

needed to take to rectify the problem. The Defendant did not exercise her discretion lawfully in failing to advise him as to how to do so and in rejecting the application as invalid. He submitted that the fact that the claimant had not received or relied upon the letter of 25 January was irrelevant to the issue of whether the decision was lawful.

17. Miss Anderson on behalf of the defendant submitted that the application should not be permitted out of time. There was no justifiable reason and those given do not stand up to scrutiny. The claimant waited until the last day of his permitted stay to make the initial application for Tier 4 (General) status. On his own case he left it to others to complete the forms for him. Any prejudice arose out of his own actions. The defendant did not accept that the claimant had not received the letter of 25 January because it was not forwarded to him. In any event, he was able to find legal assistance to make two further applications, after the first of which he was informed in October 2012 that his leave to remain had expired on 9 January 2012. Even when his second application was refused and he obtained the file in February 2013 containing the letter of 25 January 2012, he did not make the application for a further six months. Miss Anderson submitted that this application was made opportunistically after the Upper Tribunal decision in *Rodriguez* , and that there is prejudice to the defendant in facing multiple applications out of time.

18. She further submitted that the application has no merit. The application was correctly and lawfully considered as invalid pursuant to paragraph 34C of the Immigration Rules as not only one, but several mandatory sections had not been completed as required by paragraph 34A(iii). The Court of Appeal in *Rodriguez* clarified the position with regard to the distinction between invalid applications and applications where some documentation is missing, and in this case where the application was invalid, the applicable policy was the Guidance rather than the Evidential Flexibility Policy. The letter of 25 January 2012 did not set out any new policy – as with the letter in *Rodriguez*. There was no evidence that the Guidance had not been followed or that the defendant had made the decision unlawfully.

Conclusions

19. The application is undoubtedly significantly out of time. I do not accept that the delay is justified by the reasons given. Two further applications were made with legal assistance before this decision was challenged, and it is clear that after the first application was rejected the claimant was aware that his permission to remain had expired. No attempt was made to find out the reasons for the rejection of this original application, if they were indeed not known at the time. Instead a further application was made and rejected , and then further delay ensued before this claim was made, following the Upper Tribunal decision in *Rodriguez.*

20. Further, I consider there is no basis for exercising any discretion in favour of the claimant to extend time. Any prejudice has been caused largely by his own actions. The initial application was left until the last possible day of the claimant's permission to remain. The claimant on his own case took no steps to check it was properly submitted. When it was rejected as invalid, a choice was made not to challenge the decision, which if successful would have meant he was not an overstayer, but to make new applications in the knowledge that he did so when his permission to remain had expired. Those applications have been considered separately and rejected. The claimant's remedy in this claim even if successful is not, as sought, a mandatory order requiring the defendant to grant him leave to remain, but a reconsideration of the decision that his application was invalid. He has had two further attempts at making valid applications.

21. As far as the claim is concerned, the new basis put forward by the Claimant after the Court of Appeal decision in *Rodriguez* is without merit. This case is one of invalidity and therefore the Guidance applies. There is no evidence that it was not followed. On the contrary, the documents indicate that the caseworker complied with the Guidance , as the technical requirements headed "action for caseworkers" have been complied with and the relevant information has been put into the document in the correct electronic fields. The letter of 25 January 2012 was also in the form set out in the Guidance.

22. I do not accept the argument that the letter of 12 January gave rise to an obligation by the Defendant to write to the claimant to permit him to complete any incomplete sections of the form in order to make an invalid application valid. The letter says that a caseworker will write to advise what action the claimant would need to take to rectify the problem. The letter of 25 January which followed identified the reasons for the application being invalid and set out how to make a valid application. On one view that fulfils the proposal in the previous letter. There is no representation that problems in the current application can as a matter of course be rectified, rather than advice for example as to how to rectify the problems in future. In any event both letters should be seen in the context of the Guidance, which makes clear that whilst there is an element of discretion with regard to invalid applications, at this stage, where the applicant is required to provide information limited to things which are relatively simple to check, important to the decision making process and which applicants normally have no difficulty in complying with, the exercise of any discretion is confined to exceptional circumstances. In this case the claimant failed to provide a substantial proportion of that information, and I accept the defendant's submission that there is no basis for arguing that the discretion was engaged on this basis, or that it should have been exercised in favour of the claimant. This was not a minor omission and the extent of the omissions goes well beyond the scope of this exception. Were the claimant's case to be considered exceptional, any applicants with up to the 20 mandatory fields left incomplete would need to be the subject of a discretionary exercise as "exceptional". Clearly that is not what is envisaged by the policy.

23. As far as the submission by Mr Jafar that there is a distinction in the letter of 12 January between invalidity caused by non payment of fees and that caused by failures to provide mandatory information, that too is consistent with the Guidance, which refers to the distinction when it says, following the passage on discretion ,

> *You must not use discretion and accept an application or claim as valid if a specified fee has not been paid. The requirements for the payment of fees are in the relevant fees regulations. An application that does not include the correct fee is invalid because of the regulations rather than the Immigration Rules.*

Nonetheless, the element of discretion within the Guidance is limited to exceptional cases. The letter sent to the claimant (which, on his case, he did not read and on which he did not rely) is in standard form, and in my judgment within the same category as the letter of 19 May 2011 which was considered in *Rodriguez.* Like that letter it does not represent a new policy binding on the defendant, but an expression of the policy set out in the Guidance.

24. In conclusion, I find that there has been no unlawfulness in the consideration of the claimant's claim or in the decision to reject it as invalid. The defendant was entitled to reject the claim as invalid by reason of paragraph 34A and C of the Immigration Rules, and the Guidance which expressed the defendant's policy as to the exercise of

discretion was followed. For that reason the claim is dismissed. Further, the claim was made out of time and therefore also fails on this ground.