OUTER HOUSE, COURT OF SESSION

[2020] CSOH 15

P840/19

OPINION OF LORD TYRE

In the petition of

AZ (AP)

Petitioner

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Caskie; Drummond Miller LLP
Respondent: Mohammed; Office of the Advocate General for Scotland

7 February 2020

[1] The petitioner, who was born in 1999, is a citizen of Afghanistan. Her father came to the United Kingdom some years ago to claim asylum, and was granted indefinite leave to remain (ILR) in 2009. The petitioner and her mother and three siblings came to the UK in 2013, once the petitioner's father had satisfied the Home Office that he had sufficient income to support them. The members of the family were granted discretionary leave to remain on a five-year route to settlement. Because the petitioner's father developed health problems which for a period of time prevented him from earning, the family were unable, in 2018, to apply for ILR. It is anticipated that the petitioner and the other members of the family will apply for ILR in 2023, after ten years' lawful residence in the UK.

[2] Since coming to the UK, the petitioner has demonstrated her ability to undertake higher education. She applied and was accepted for an HNC course in aircraft engineering at the University of the Highlands and Islands at Perth. In order to undertake that course, the petitioner will require to pay whatever tuition fees, if any, are charged. A person in the position of the petitioner with limited discretionary leave to remain is charged overseas student fees (£6,720 per annum). On the other hand, according to the petitioner's averments, a person with ILR would be treated in the same way as a home student who, in Scotland, has the whole of their tuition fees paid for them by the Scottish Government. The petitioner has applied for ILR. That application has been refused.

[3] In this petition, the petitioner seeks reduction of the decision refusing to grant her ILR, and also reduction of a part of the respondent's policy in relation to discretionary leave to remain, on the ground that it fails to take account of the distinctive position of Scottish students regarding tuition fee support.

Discretionary leave to remain

[4] Section 3(1) of the Immigration Act 1971 provides that a person who is not a British citizen may not enter the United Kingdom unless given leave to do so in accordance with the provisions of or made under that Act. Section 3(1) further provides that a person who is already in the UK may be given leave to remain, either for a limited or an indefinite period. Section 3(2) requires the respondent to lay before Parliament statements of the rules, or of any changes in the rules, laid down by her as to the practice to be followed for regulating entry into and stay in the UK of persons who need leave, including any rules as to the period for which leave is to be given, and the conditions to be attached in different

circumstances. The duty incumbent upon the respondent in terms of section 3(2) is discharged by the making and regular amendment of the Immigration Rules.

[5] In terms of section 4(1) of the Act, the power to give or refuse leave to enter the UK is exercised by immigration officers; however, the power to give leave to remain in the UK is exercised by the respondent. The Immigration Rules include detailed provisions concerning the conditions for application for and granting of leave to remain. It is, however, within the power of the respondent to grant leave to remain in circumstances which do not fall within the Immigration Rules. This is referred to as discretionary leave (DL).

[6] The respondent's policy in relation to DL is set out in an asylum policy instruction entitled "Discretionary Leave", version 7.0 of which was published in August 2015. The background to the policy is explained in paragraph 1.2 as follows:

> "The Immigration Rules are designed to cover the vast majority of circumstances in which migrants will be granted leave because they are entitled to remain in the UK. However, there are a small number of Home Office policies that recognise there may be individuals who do not meet the requirements of the Immigration Rules, but there are nonetheless exceptional and/or compassionate reasons for allowing them to remain here…"

Paragraph 1.3 further explains:

> "The policy objective is to maintain a firm, but fair and efficient immigration system that generally requires those who do not meet the rules to leave the UK, but carefully considers exceptional and compassionate individual circumstances that may justify leave on a discretionary basis by:
>
> • providing a mechanism to cover those few cases where it would, at the time leave is granted, be unjustifiably harsh to expect someone to leave or enforce their removal - it is intended to be used sparingly;
>
> • carefully considering evidence relating to exceptional compassionate circumstances raised as part of a protection claim to assess whether a grant of DL is appropriate;
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> • granting limited leave appropriate to the individual circumstances but not more than 30 months unless there is compelling evidence to justify a longer

> period and ensuring that those granted DL generally do not benefit from a faster route to settlement than those who meet the Immigration Rules;…"

[7] Section 4.3 of the policy instruction states, under the heading "Recourse to public funds, work and study":

> "Those granted DL have recourse to public funds and no prohibition on work. They are also able to enter higher education. However, those on limited leave are not eligible for higher education student finance under existing Department of Business, Innovation and Skills regulations…"

It may be noted that the regulations referred to apply to England and Wales. No reference is made to the regulations made by the Scottish Ministers which determine eligibility in Scotland for student support, or the regulations which govern the charging of tuition fees by Scottish higher and further education institutions.

[8] Section 5 of the policy instruction deals with duration of discretionary leave, stating at the outset that the duration of DL must be determined by considering the individual facts of the case, but that leave should not normally be granted for more than 30 months at a time. Paragraph 5.3, entitled "Non-standard grant periods: longer periods of stay" begins:

> "There may be cases where a longer period of leave is considered appropriate, either because it is in the best interests of a child (and any countervailing considerations do not outweigh those best interests), or because there are other particularly exceptional compelling or compassionate reasons to grant leave for a longer period (or ILR). In cases not involving children (as the main applicant or as dependants), there must be sufficient evidence to demonstrate that the individual circumstances of the case are not just unusual but can be distinguished to a high degree from other cases to the extent that it is necessary to deviate from a standard grant of DL under this policy."

[9] The following provisions of paragraph 5.3 deal specifically with applications for ILR by students seeking funding for higher education:

> "An example of where it would not normally be appropriate to grant a child ILR may be because they would like to qualify for a student loan in order to go to university. This would not normally be a sufficiently exceptional or compelling reason without additional factors. Individuals in this position may be aged 18 or over and are not prevented from going to university by a grant of limited leave – rather they would not be eligible for a student loan. Some universities may have other

> funding which they could apply for, such as bursaries, scholarships or other types of support or fee waiver; likewise, some commercial companies and charities.
>
> Higher education institutions also have discretion to treat an 'overseas' student as a home student and charge the home student tuition fee, which is usually lower. A grant of limited leave provides permission to work and individuals could choose to seek employment before they attend university, study part time and work part time to fund their course, or wait until they qualify for ILR after completing an appropriate probationary period of limited leave and access a student loan at that point."

Again it may be noted that no specific reference is made to the Scottish situation in which certain students may qualify to have their tuition fees paid by the Student Awards Agency Scotland.

The petitioner's application for ILR

[10] On 4 March 2019 the petitioner, with the assistance of her agents, submitted an online application for ILR. The form included an instruction in the following terms:

> "Explain briefly why you are applying for indefinite leave to remain in the UK, and the category of your last grant of leave. You will also need to provide documents in support of your case."

The petitioner's response was:

> "The applicant accompanied her mother to the UK under five year spouse settlement route. The applicant has now accrued over five years residence since the date of first arrival in the UK. She cannot be added as dependent on SET(M) online and they do not have funds to apply for the rest of the family members. The applicant wishes to continue her education in Aircraft Engineering and she has been offered place in UHI in Perth. For this reason, the applicant wishes to avail settled status ASAP."

I was informed that there was a limit of 1000 characters for this box on the form; the petitioner's response used somewhat less than half of that allowance. She also stated, elsewhere in the form, that she was still wholly dependent on her parents for all sorts of support, including financial support. In order to submit the application, she required to pay a fee of £2,408.80.

The respondent's decision refusing to grant ILR

[11] By letter dated 5 July 2019, the respondent refused the application for ILR, although it was noted, for the avoidance of any doubt, that this did not mean that the petitioner had to leave the UK as a result of the decision. The reasons for refusal were stated as follows:

> "You have further stated a reason for you applying for settled status is so you can pursue your studies at UHI in Perth in Scotland. Further education and studying is not a reason whereby indefinite leave to remain outside of the rules is applicable. There are routes available to enter and remain in the UK on a temporary basis for those who wish to study in the UK. Therefore it is open to you to apply for the relevant visa or entry clearance to allow to you [sic] complete the preferred education qualifications.
>
> Given the above, it is considered that it has not been demonstrated that your circumstances are so exceptional or significantly compelling to warrant indefinite leave to remain outside of the Immigration Rules…"

[12] I should note for the sake of completeness that on 26 August 2019, the petitioner's agents sent a pre-action protocol letter to the respondent intimating an intention to challenge the above decision by judicial review proceedings. In contrast to the original application for ILR, the pre-action protocol letter made express reference to the differences in student funding as between Scotland and England, and submitted that the respondent had been obliged to have regard to the fact that, unlike in England where fees would be funded by a substantial loan, in Scotland a grant of ILR would have a decisive effect on the financial ability of the petitioner to pursue higher education. It was suggested that by failing to have regard to that matter, the respondent had failed to show respect for the devolution settlement. The respondent's reply dated 29 August 2019 added nothing to what had been said in the decision letter:

> "You have stated that your client is unable to pursue her career by not granting her ILR outside the rules. However, further education and studying is not considered exceptional, compelling or compassionate reasons to grant ILR outside the rules. It is

> open for your client to apply for the relevant visa or entry clearance to allow her to complete her preferred proposed course."

Argument for the petitioner

[13] On behalf of the petitioner it was submitted that the respondent's decision refusing ILR should be reduced because it failed to take account of the fact that in Scotland the granting of ILR would not merely result in the charging of reduced tuition fees or the availability of student loan finance, but rather would mean that the petitioner would have her tuition fees paid for her. Although the petitioner's application did not expressly mention either the importance of obtaining finance or the significance of the difference between Scotland and England & Wales, the respondent had to be taken to be aware of both matters and of the terms of her own published policy. She had to be assumed to be well aware without being reminded that the real barrier to persons with DL accessing further or higher education was liability for fees. Instead, she had described further education and studying as "not an applicable reason" for granting ILR outside the rules, and had closed her mind. In so doing she had failed to address the specialties of the petitioner's situation, and had left out of account a matter critical to her decision. Her decision was irrational and inadequately reasoned.

[14] The petitioner further submitted that the first of the two paragraphs quoted above from Paragraph 5.3 of the asylum policy instruction should also be reduced. The policy set out in that paragraph left out of account the distinctive position of persons in Scotland holding DL, which was a relevant matter in relation to the granting of ILR. The respondent was not entitled to regard herself as exercising a discretion of last resort, arising only in the

event that all other discretionary means of obtaining funding had been unsuccessfully explored.

Argument for the respondent

[15] On behalf of the respondent it was submitted that the petition should be dismissed. As the respondent's DL policy stated, it was intended to cover only exceptional and compassionate circumstances and to be used sparingly. Reading the decision letter as a whole, it was clear that the policy had been applied and that the correct question had been answered. The petitioner's application did not found on exceptional and compassionate circumstances. Nor did it contain anything about the funding of further or higher education in Scotland. Funding was not raised as an issue. The respondent was under no obligation to take into account matters that had not been placed before her.

[16] As regards the DL policy itself, it was accepted that it did not deal expressly with differences between England and Wales on the one hand and Scotland on the other. It did not require to: the policy set out in paragraph 5.3 allowed for exceptions, and any Scottish specialties regarding funding could be raised.

Decision

[17] I deal firstly with the petitioner's application for reduction of the respondent's decision. There is no doubt that the decision did not address the difference that exists between Scotland and England & Wales regarding tuition fees for further and higher education. The difficulty for the petitioner is that the respondent was not asked to address it. The reason given in the petitioner's application for ILR was not that she wanted to secure payment on her behalf of her tuition fees but rather that she wished to take up an offer of a

place in higher education. The decision letter states, quite accurately, that further education and studying is not a reason for granting ILR outside the rules: as the asylum policy instruction makes clear at paragraph 4.3, persons with DL are able to enter further or higher education.

[18] The question is whether the respondent erred in failing to read the reason stated in the petitioner's application as referring to funding of higher education rather than entry to higher education, and then further erred in failing to be aware of and to take account of the availability of payment of tuition fees in Scotland for certain persons with ILR, and then further erred in failing to appreciate that this was a material consideration against the background of the petitioner's financial situation as narrated in her application. In my opinion this is asking too much of the decision-maker. The respondent was, in my opinion, entitled to approach the question of whether, in accordance with paragraph 5.3 of the policy instruction, the petitioner has made out exceptional compelling or compassionate reasons to grant ILR on the basis of the application made, and not on the basis of a different application that might have been but had not been made. It is evident from the terms of the policy that no express account is taken in it of the availability in Scotland of tuition fee support; that being so, the onus lay, in my opinion, on the applicant to raise the matter as a reason for departing from the "normal" position as stated in paragraph 5.3, under reference to the situation applicable in England and also in Scotland in respect of anyone who does not meet the conditions for tuition fee support.

[19] Turning to the application for reduction of the policy set out in the paragraph quoted above from paragraph 5.3 of the DL policy document, I am not persuaded that any basis for reduction has been established. Although it does not deal expressly with the position in Scotland, the policy is stated to be that it would not *normally* be appropriate to grant a child

ILR because they would like to qualify for a student loan to go to university, and that this would not normally be a sufficiently exceptional or compelling reason without additional factors. The policy simply does not deal at all with persons who qualify for tuition fee support in Scotland and are not, to that extent, in need of loan funding. There is therefore nothing to prevent this being raised, in appropriate circumstances, by an applicant for ILR who considers that he or she would qualify for such support, and for whom availability of support would be financially necessary. I accept that it would be helpful if the published policy did cover the situation expressly, but its absence does not constitute a reason for granting an order for reduction of this part of the policy.

[20] I do not consider that it would be proper, in reaching my decision, to have regard to the subsequent correspondence consisting of the pre-action protocol letter and the respondent's reply. The decision challenged is the decision in response to the application for ILR, and I do not consider that judicial review of that decision should be influenced by the terms of a later response to a letter framed in significantly different terms.

Disposal

[21] For these reasons, I shall accede to the respondent's motion to sustain her fourth and fifth pleas in law (ie that in reaching her decision she did not leave out a material consideration, and that the DL policy is not unlawful) and to dismiss the petition.

[22] I wish, however, to add this. Although, as I have said, the terms of the respondent's reply to the pre-action protocol letter cannot be taken into account as a reason for reduction of the decision to refuse ILR, they leave me with a sense of unease that the petitioner's argument based on Scottish peculiarities of tuition fee support has not yet received substantive consideration by the respondent. It is not, of course, for this court to express any

view as to how the respondent ought to exercise her discretion, were such an argument to be presented (under reference to material demonstrating that tuition fee support would in fact be available to the petitioner). It may be open to the petitioner simply to make a fresh application, but that would, on the face of it, involve payment by her of a further £2,400 which no doubt she could ill afford. I would invite the respondent to explore with the petitioner's advisers whether a means can be found for consideration of the argument for the granting of ILR that formed the basis of this petition, without the need for payment by the petitioner of another application fee.