Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09772/2014

THE IMMIGRATION ACTS

Heard at Field House (Upper Tribunal)	**Determination Promulgated**
On 10 March 2015	**On 31 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MILOS MILIVOJEVIC
(NO ANONYMITY DIRECTION)

Claimant

Representation:

For the Appellant: Mr L Tarlow (Home office presenting officer)
For the Claimant: Ms A Smith (Counsel instructed by Kingsley Napley Solicitors)

DECISION AND REASONS

1. For ease of reference I shall refer to the parties as the "Secretary of State" who is the appellant in this matter and to Mr Milivojevic as "the Claimant".

2. This matter comes before me for consideration as to whether or not there is a material error of law in the First-tier Tribunal (Judge Flynn) decision

promulgated on 13 November 2014 whereby the Tribunal allowed the Claimant's appeal against the Secretary of State's decision to remove him from the UK having refused to vary leave to remain under the long residence rules. The Tribunal allowed the appeal under the immigration rules and under Article 8 in the alternative.

Background

3. The claimant is a citizen of Serbia and his date of birth is 26 May 1984. He arrived in the UK on 10 September 2002 and was given leave to enter as a student until October 2007 thereafter further leave as a student until September 2011. He was granted leave as a Tier 5 Migrant until 15 October 2012. On 11 October 2012 he submitted an application for indefinite leave to remain on the basis of ten years' lawful residence in the UK.

4. The Secretary of State considered the application and concluded that the Claimant failed to accrue ten years' continuous lawful residence in the UK because he had been out of the UK for a total of 862 days, contrary to paragraph 276A(a)(v) of the rules. The Claimant relied on grounds of appeal that the decision was not in accordance with the Immigration Rules and was unlawful under Section 6 of the Human Rights Act 1998.

5. The case on behalf of the Claimant was that as a well-known professional musician with exceptional talent, travel in and out of the UK was essential in the course of his career and professional engagements. In addition it was necessary for him to have his accordion instrument professionally serviced in Italy and in Bulgaria each year.

6. At the hearing before the First-tier the Claimant produced a schedule of days spent outside the UK in pursuit of his profession which amounted to 779 days in total. Witnesses gave evidence of the fact that the Claimant was exceptionally talented and that his career in the UK should be promoted. None of the facts were disputed.

7. In conclusion the Tribunal found at [43] that the Secretary of State failed to exercise discretion in rejecting the application under the Rules. The Tribunal proceeded to exercise discretion on behalf of the Secretary of State. The Tribunal found that the Claimant had spent a total of 779 days absent from the UK between 2002 and 2012. Excluding the periods of work related absences for concerts, lessons, servicing his instrument and receiving physiotherapy, all of which were integral to his career as a professional musician which amounted to 304 days, this left a net absence of 475 days which was below the permitted period of 540 days [42]. It considered public interest factors. The Tribunal allowed the appeal outright under the Rules [46].

8. In the alternative the Tribunal considered Article 8 outside of the Rules and applied the five step test in **Razgar** which it found to be met on the

basis of private life. In considering proportionality the Tribunal also took into account the delay of fifteen months before the Secretary of State reached a decision, that the Claimant had complied with Immigration Rules and built a professional life consisting of a professional career, musical and personal relationships in the UK.

Grounds of Application

9. The Secretary of State contended that the Tribunal erred in law by failing to follow **Ukus (discretion: when reviewable) [2012] UKUT 00307 (IAC),** and **Mirza and Others [2011] EWCA Civ 159** as regards consideration of Article 8 in circumstances where there can be no safe finding of a disproportionate breach where the immigration matter awaits a lawful decision.

10. Ground 2 referring to "the best interests of the UK" was not pursued.

Permission to Appeal

11. Permission to appeal was granted by First-tier Tribunal Judge Astle on 6 January 2015.

12. The judge found it arguable that the Tribunal failed to correctly characterise the Secretary of State's residual discretion outside the Rules and failed to apply **Ukus [2012] UKUT 00307 (IAC)**. The judge erred in allowing the appeal outright. Further it is argued that the Tribunal gave weight to immaterial matters namely the best interests of the UK.

Error of Law Hearing

13. Mr Tarlow relied on the grounds of appeal. In essence the Tribunal had been wrong to exercise a discretion that was not the Tribunal's discretion to exercise. Instead of allowing the appeal outright the Tribunal ought to have remitted the matter to the Secretary of State for reconsideration and to exercise discretion.

14. Ms Smith relied on a Rule 24 response arguing that the Tribunal always had a residual discretion and that the Tribunal had properly allowed the appeal outright or in the alternative under Article 8. She further submitted that that the findings made by the Tribunal have not been challenged by the Secretary of State. There had been considerable delay on the part of the Secretary of State in reaching a decision and there was likely to be further delay in the event that the matter is remitted for reconsideration and this had a significant impact and restriction on the claimant's career.

15. At the end of the hearing I reserved my decision which I now give with my reasons.

Discussion and Decision

16. I find that there was a material error of law in the First-tier Tribunal's decision. The Tribunal failed to follow the approach in **Ukus** (cited above). The Tribunal was required to consider whether or not the Secretary of State had discretion and if so whether or not that discretion had been exercised, and in the event that it had been exercised whether it had been exercised fairly and properly. The Tribunal in **Ukus** clearly sets out the various stages to be considered. This case squarely falls into the category of cases where there is discretion and the Secretary of State has not exercised that discretion. As is specified in paragraphs 2 and 3 of the headnote of Ukus;

"2. Where the decision maker has failed to exercise a discretion vested in him, the Tribunal's jurisdiction on appeal is limited to a decision that the failure renders the decision 'not in accordance with the law' (s 86(3)(a)). Because the discretion is vested in the Executive, the appropriate course will be for the Tribunal to require the decision maker to complete his task by reaching a lawful decision on the outstanding application, along the lines set out in SSHD v Abdi [1996] Imm AR 148. In such a case, it makes no difference whether there is such a statutory power as is mentioned in paragraph 1 above.

3. If the decision maker has lawfully exercised his discretion and the Tribunal has such a statutory power, the Tribunal must either (i) uphold the decision maker's decision (if the Tribunal is unpersuaded that the decision maker's discretion should have been exercised differently); or (ii) reach a different decision in the exercise of its own discretion."

17. At the First –tier hearing the Claimant produced material that was not before the Secretary of State that was relevant to the issue of breaks in continuous residence, including a revised schedule of absences. The guidance produced by the Secretary of State (repeated in the decision at [38]) clearly sets out the scope of discretion exercisable by the Secretary of State. I find that the Tribunal erred by taking the decision to allow the appeal outright when the proper course was for the matter to be remitted to the Secretary of State.

18. Furthermore, I am satisfied that the Tribunal ought not to have considered this matter under Article 8 following the Court of Appeal in **Mirza** in which it was stated that "there was no need to travel into article 8 once unlawfulness had been established". The Secretary of State had no opportunity to assess all the relevant material and to make a considered and lawful decision under the Rules and exercise her discretion. In circumstances where the application is made under the long residence Rules it must be right that a lawful decision is made by the Secretary of State, that in turn would impact on and illuminate any assessment of proportionality under Article 8.

19. It was common ground that there had been no challenge to the findings of fact made by the Tribunal as regards the reasons for and number of absences from the UK and the fact that the bulk of those could be treated

as absences reasonably pursued in connection with professional engagements as a musician [40-42].

Notice of Decision

20. I find a material error of law in the decision and reasons which shall be set aside.

21. I remake that decision.

22. I allow the appeal to the extent that the decision made is not in accordance with the law. I remit the matter to the Secretary of State for reconsideration.

23. I further make a direction for the reconsideration to be **expedited** in view of the considerable delay and restrictions imposed on the appellant's professional musical career.

No anonymity order is made.

Signed Date 30.3.2015

GA Black
Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award. A hearing before the Tribunal was necessary and the Claimant submitted further material at that stage.

Signed

Deputy Upper Tribunal Judge G A Black
Date 30.3.2015