



IAC-AH-CO-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/10687/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 11th December 2015**

**Decision & Reasons Promulgated
On 5th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MOHAMMED ZUBAIR IKRAM
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms A Fijiwala, Senior Home Office Presenting Officer

For the Respondent: Ms G Peterson of Counsel instructed by Vincent Solicitors

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appealed against a decision of Judge Seifert of the First-tier Tribunal (the FTT) promulgated on 28th May 2015.
2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal. I will refer to him as the Claimant.

3. The Claimant is a male citizen of Pakistan born 10th July 1988 who entered the United Kingdom in 2000. He was granted discretionary leave to remain outside the Immigration rules, following a successful appeal, his leave being valid between 25th January 2011 and 24th January 2014.
4. On 8th January 2014 the Claimant applied for further leave to remain. His application was refused on 10th February 2014, the Secretary of State issuing a Notice of Immigration Decision of that date, refusing to vary leave to remain, and indicating that a decision had been taken to remove the Claimant from the United Kingdom. A letter dated 10th February 2014 was issued by the Secretary of State giving reasons for the decision.
5. The Claimant's appeal was heard by the FTT on 14th October 2014. The FTT decided that the appeal could not succeed with reference to paragraph 276ADE of the Immigration rules in relation to the Claimant's private life, but the Claimant's appeal was allowed in relation to his private and family life, pursuant to Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) which was considered outside the Immigration rules.
6. The Secretary of State applied for and was granted permission to appeal. In summary it was contended that the FTT had taken an incorrect approach to consideration of Article 8 outside the rules, by failing to give reasons for considering the appeal outside the rules, and failing to give weight to the public interest.

Error of Law

7. The hearing to ascertain whether the FTT had erred in law took place on 13th October 2015. After hearing submissions from both parties I set aside the decision of the FTT, having found a material error of law. Full details of the application and grant of permission, together with the submissions made by the parties are set out in my decision promulgated on 20th October 2015. I set out below my conclusions and reasons for setting aside the decision of the FTT;
 17. The only application for permission to appeal the decision of the FTT was made by the Secretary of State. Permission was granted for the reasons set out in the decision of Judge Pooler.
 18. In my view the FTT erred when considering the appeal on Article 8 grounds. I find no error in considering Article 8 outside the Immigration rules, but the error in law is the failure to carry out a balanced proportionality assessment, by failing to consider and give weight to the public interest in maintaining effective immigration control.
 19. The Upper Tribunal confirmed in Dube [2015] UKUT 00090 (IAC) that judges must have regard to the specified considerations set out in section 117A - 117D of the 2002 Act. It is not however an error of law to fail to refer to section 117A - 117D considerations if the judge has applied the test he or she was supposed to apply, according to its terms. What matters is substance, and not form.
 20. I have taken the guidance in Dube into account in considering the FTT's decision. Section 117B is mentioned in paragraph 50 with the FTT rejecting the submission

made on behalf of the Claimant that it should not be considered because it had not been in force at the date of the Secretary of State's decision. All that is stated with reference to section 117B is that it does not provide that no weight should be attributed to the private and family life that the Claimant has established in the particular circumstances of this case. I find that to be inadequate.

21. There is no adequate consideration of sub-section (1) which provides that the maintenance of effective immigration controls is in the public interest. It is apparent that sub-section (2) does not adversely affect the Claimant, because he can speak English.
22. There is no comprehensive analysis of whether the Claimant is financially independent, which is relevant to consideration of sub-section (3), although there is reference in paragraph 18 to the Claimant giving evidence that he had part-time employment which started the previous month, and in paragraph 29 the witness Mr Ahmed stating that the Claimant supports himself financially. The FTT found in paragraph 42 that the Claimant and Mr Ahmed were credible witnesses although the Claimant did not claim, according to the FTT decision, to be financially independent, and there was no specific finding as to his financial independence.
23. I find that the FTT did not adequately consider sub-sections (4) and (5) which state that little weight should be given to a private life established by a person at a time when the person is in the United Kingdom unlawfully, or when that person's immigration status is precarious.
24. In this case the Claimant was in the United Kingdom unlawfully from 2001 until he was first granted leave on 25th January 2011. Thereafter because he had limited leave to remain his immigration status was precarious. The Upper Tribunal confirmed in AM Malawi [2015] UKUT 0260 (IAC) that a person has a precarious immigration status if his continued presence in the United Kingdom is dependent upon him obtaining a further grant of leave.
25. There is no adequate consideration of the unlawful status of the Claimant and no adequate consideration of private life established while his immigration status was precarious. These are matters that should have been factored into the consideration of proportionality and because they were not, that consideration is unsafe and amounts to an error of law.
26. I set aside the decision of the FTT. In relation to error of law, I have not considered the issue raised in the Claimant's rule 24 response, relating to the Secretary of State's discretionary leave policy. This is because there was no application made for permission to appeal that point, and EG and NG confirms that the Upper Tribunal cannot entertain an application purporting to be made under rule 24 for permission to appeal until the First-tier Tribunal has been asked in writing for permission to appeal and has either refused it or declined to admit the application.
27. In my view it is appropriate to have a further hearing before the Upper Tribunal so that the decision can be re-made.
28. As the FTT hearing has been set aside, I considered it may be appropriate to hear submissions from both parties as to whether the Secretary of State's decision dated 10th February 2014 was in accordance with the law, on the basis that the Claimant had previously been granted discretionary leave to remain, and was

applying for further leave, and this was made clear in the covering letter with the application for leave, which was dated 30th December 2013. The FTT Record of Proceedings confirms that this point was raised before the FTT, but no finding was made upon it. It was not a matter that could be considered when dealing with error of law, as no permission had been granted to appeal, but in my view it may be possible to consider that point at further hearing, now that the FTT's decision has been set aside. Both parties should be in a position to make submissions on this issue."

Re-making the Decision

8. The resumed hearing took place on 11th December 2015. Ms Peterson indicated that no evidence would be called but reliance would be placed upon the evidence given to the FTT on the basis that this evidence had not been challenged, and the FTT had found the Claimant, his brother and a further witness Mr Ahmed to be credible.
9. I firstly heard submissions from Ms Fijiwala who relied upon the reasons for refusal letter dated 10th February 2014.
10. Ms Fijiwala noted that the skeleton argument produced by Ms Peterson relied upon paragraph 276ADE(vi), but pointed out the FTT had found against the Claimant on this point, and there had been no challenge to the FTT findings on this issue.
11. Turning to the issue of whether the Secretary of State's decision dated 10th February 2014 was in accordance with the law, Ms Fijiwala submitted that it was, notwithstanding that there had been no consideration of the Claimant's application to have his discretionary leave extended further to the Home Office policy on discretionary leave.
12. Ms Fijiwala explained that the application had not been considered with reference to discretionary leave because the Claimant had submitted an incorrect application form. The Claimant had made his application using form FLR(FP) and form FLR(O) should have been used if the Claimant was applying for discretionary leave, having previously been granted a period of discretionary leave. Ms Fijiwala referred to a copy of the discretionary leave policy which had been submitted at the hearing on 13th October 2015 and referred to section 10 which dealt with transitional arrangements, contained at page 16 of the policy, and pointed out that at the bottom of the page, it was indicated that from 1st April 2013 all applications for further leave outside the rules should be made on the FLR(O) form if the application is chargeable.
13. It was therefore the Secretary of State's case that because the incorrect form had been submitted, there was no obligation to consider the request to extend discretionary leave, and it was not open to the Tribunal to consider discretionary leave as this had not been considered by the Secretary of State.
14. Ms Fijiwala went on to argue that the appeal should not be allowed with reference to Article 8 outside the Immigration rules. I was asked to take into account with reference to the considerations set out in section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) that the Claimant had not established that he

was financially independent, and that little weight should be placed on private life which had been established when he was in the UK unlawfully, or with a precarious immigration status. I was asked to find that the Claimant had not established family life that would engage Article 8, with his adult brother or sister.

15. I then heard submissions from Ms Peterson who relied upon her skeleton argument. I was asked firstly to consider the issue of discretionary leave. Ms Peterson explained that she had only been made aware today by Ms Fijiwala, that it was contended that the wrong form had been used. Ms Fijiwala had submitted samples of forms FLR(FP) and FLR(O), and Ms Peterson pointed out that these were the forms in use from October 2015 in relation to FLR(O) and November 2015 in relation to FLR(FP). The forms in use when the Claimant submitted his application had not been provided. The form in the Respondent's bundle did not contain the first six pages, and therefore it had not been proved that the wrong form was used.
16. In any event it was clear from the covering letter submitted with the application form, that the Appellant's application was based firstly upon his request that he be given further discretionary leave pursuant to the Home Office policy, as he had initially been granted discretionary leave between 25th January 2011 and 24th January 2014.
17. I was therefore asked to find the Secretary of State's decision refusing the Claimant's application, was not in accordance with the law, because there had been no consideration of discretionary leave, and therefore the decision should remain outstanding before the Secretary of State for a lawful decision to be made.
18. In the alternative, I was asked to allow the appeal with reference to paragraph 276ADE(vi) in relation to the Claimant's private life for the reasons set out in the skeleton argument. As a further alternative, I was asked to allow the appeal under Article 8 outside the Immigration rules, both in relation to family and private life, again for the reasons set out in the skeleton argument.
19. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

20. I find as a fact that the Claimant was granted discretionary leave between 25th January 2011 and 24th January 2014 following a successful appeal. His adult brother and sister had their appeals heard together but separately from the Claimant, and following their successful appeals, they were granted discretionary leave from 30th June 2010 to 29th June 2013.
21. The Claimant's brother has produced evidence he was granted further leave to remain on 1st October 2013 to 27th September 2016. There is reference in the FTT decision to the Claimant's sister also having been granted further discretionary leave.

22. In my view it is appropriate to firstly consider the issue of discretionary leave. This was raised as an issue before the FTT, but no findings were made upon it. As the decision is to be remade, it is necessary and appropriate to consider this issue.
23. It is evident that the Claimant's application for leave to remain was made using Form FLR(FP) version 12/2013. The form is dated 16th December 2013 and was received by the Secretary of State on 8th January 2014, prior to the expiry of the Claimant's discretionary leave.
24. The skeleton argument submitted on behalf of the Claimant at paragraph 9 sets out the discretionary leave policy which is found at 10.1 of the Asylum Policy Instruction relating to discretionary leave dated 18th August 2015. In my view that is very similar but not exactly the same as the policy which was in force when the Claimant made his application for further leave, and a copy of this policy was submitted on the Claimant's behalf at the hearing on 13th October 2015 and I set it out below;
- Individuals granted DL on a date prior to and including 8th July 2012 may apply to extend that leave when their period of DL expires. Decision makers must apply the following guidance:
- Applicant's Granted Discretionary Leave Before 9th July 2012**
- Those who, before 9th July 2012 have been granted leave under the DL policy in force at the time will normally continue to be dealt with under that policy through to settlement if they qualify for it (normally after accruing six years continuous DL). Further leave applications from those granted up to three years DL before 9th July 2012 are subject to an active review.
 - Consideration of all further leave applications will be subject to a criminality check and the application of the criminality thresholds, including cases awaiting a decision on a further period of DL on that date. See Criminality and Exclusion Section above.
 - Decision makers must consider whether the circumstances prevailing at the time of the original grant of leave continue at the date of the decision. If the circumstances remain the same and the criminality thresholds do not apply, a further period of 3 years DL should normally be granted. Decision makers must consider whether there are any circumstances that may warrant departure from the standard period of leave. See section 4.4 above.
 - If there have been significant changes or the applicant fails to meet the criminality thresholds (see Criminality and Exclusion Section above), the application for further leave should be refused.
25. There then follows the advice pointed to by Ms Fijiwala, that from 1st April 2013 all applications for further leave outside the rules should be made on form FLR(O) form if the application is chargeable.

26. It is now apparent why the Secretary of State did not consider the Claimant's application to be granted further discretionary leave, because the Claimant's solicitors, who submitted the application, submitted it on form FLR(FP) rather than FLR(O), even though the fee of £578 was paid.
27. On balance, I accept that the incorrect form was submitted with the application. I then have to decide whether this entitled the Secretary of State not to consider the Claimant's application for further discretionary leave. In my view it is relevant to take into account the letter which accompanied the application form, which was prepared by the Claimant's then solicitors, and sent to the Secretary of State together with the application. The letter is dated 30th December 2013 and it is clear that it was received as it is exhibited in the Secretary of State's bundle of documents at C1. The letter commences;

"Dear Sirs

Re Mr Mohammed Zubair Ikram 10.7.1988 Pakistani

The applicant wishes to make an FLR(FP) application to extend his stay in the United Kingdom for leave to remain on the following basis:

- Home Office policy for discretionary leave;
- Private life – Immigration rules (paragraph 276ADE);
- Article 8 of the European Convention of Human Rights (ECHR) and;
- Compassionate and exceptional circumstances-considerations outside Immigration rules.

The applicant first entered the UK sometime around January 2000 aged 11 years old. He has since then continuously resided in the UK. He was subsequently granted with discretionary leave to remain on 25.1.2011 until 24.1.2014.

The applicant now wishes to make an application for extension of stay on the above basis.

Home Office Policy for Discretionary Leave

We submit that the applicant should be granted with extension of stay in line with the Home Office's policy on discretionary leave under the transitional arrangements given he was granted discretionary leave prior to 8th July 2012 (i.e. granted in January 2011).

The applicant submits his circumstances which were prevailing at the time of the original grant of leave continue and are still present now if not strengthened given his added time in the UK.

Regarding the criminality checks, we are informed that the applicant does not have any criminal offences in any shape or form against his name.

In line with the policy, the applicant submits that his circumstances prevailing at the time of the original grant of leave continue. The applicant informs us that he has been residing in the UK continuously

since his grant of discretionary leave. The applicant therefore feels he should be granted with extension of stay in the UK due to the above.

Given his factual circumstances are no different from when he previously applied, coupled with fact since his grant of leave to remain in the UK his ties and integration in the UK have only strengthened, the applicant has a legitimate expectation that he would be allowed to extend his stay in the UK."

28. I also find it relevant to take into account section 10 of the FLR(FP) form submitted on behalf of the Claimant which asked whether there is any other information concerning the Claimant or his family which he would like to be considered as part of his application. There is reference in that section to "please see cover letter." There is also reference to the Claimant having previously been granted three years' discretionary leave, and that he now wishes to apply for an extension of his stay.
29. Therefore it has, in my view, been made clear that although the Claimant's solicitors may have submitted the wrong application form, the covering letter confirms that the primary application made on behalf of the Claimant, was for further discretionary leave under the Home Office policy, given that he had previously been granted discretionary leave. The letter could not have made that any clearer. There is also reference to discretionary leave in section 10 of the application form that was submitted. A fee was paid.
30. I have to balance the clearly expressed letter, and the reference to discretionary leave in the application form, against the fact that I accept that an incorrect form was submitted. In my view it must have been clear to the Secretary of State's decision maker, given that the Appellant had already been granted discretionary leave, that he was applying for further discretionary leave. This is not a case where the Claimant was trying to avoid paying a fee. What appears to have happened here is that the Claimant's solicitors made a mistake in submitting the wrong form.
31. I therefore conclude that the decision maker should have considered the Claimant's application with reference to the transitional arrangements that applied to individuals granted discretionary leave before 9th July 2012. This was not done, and I therefore conclude that the decision was not in accordance with the law. In the alternative, my view is that at the very least the Claimant should have been put on notice that an incorrect application form had been submitted. The Secretary of State has only considered part of the Claimant's application, and not considered the primary application that he was making. This has caused unfairness, and because I conclude that the decision is not in accordance with the law, it is appropriate for the appeal to be allowed to the extent that the application remains outstanding before the Secretary of State for the discretionary leave policy to be considered.
32. In those circumstances I do not go on to consider either paragraph 276ADE(1)(vi) of the Immigration rules, or Article 8 outside the Immigration rules.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision. The Claimant's appeal is allowed to the limited extent that the decision of the Secretary of State is not in accordance with the law, and the decision therefore remains outstanding before the Secretary of State for a fresh decision to be made to include consideration of the discretionary leave policy.

Anonymity

No anonymity direction was made by the First-tier Tribunal. There has been no request for anonymity made to the Upper Tribunal and no anonymity order is made.

Signed

Date 15th December 2015

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

The Claimant's appeal has been allowed to a limited extent. I do not find it appropriate to make a fee award. The Claimant should have submitted his application on the appropriate application form.

Signed

Date 15th December 2015

Deputy Upper Tribunal Judge M A Hall