Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34508/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 February 2018	**On 26 February 2016**
Determination prepared 1 February 2018	

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

KHALID FAIZE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Georget, Counsel, instructed by Messrs Malik & Malik Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Afghanistan born on 17 October 1993, appealed against a decision of the respondent dated 17 November 2015 refusing an application for further leave to remain. The appellant had arrived in Britain on 19 November 2007. He made an application for leave to remain on 11 February 2008. He was granted discretionary leave from 4 August 2008 to 1 April 2011. He applied in time for further leave to remain. He had continuation of leave under Section 3C of the 1971 Immigration Act

from 1 April 2011 to the grant of discretionary leave which was ended on 31 July 2013. That second grant of discretionary leave had followed a refusal on 24 November 2011 of the application for further leave and a successful appeal heard on 13 January 2012 against that refusal, the appeal having been allowed on Article 8 grounds but dismissed on asylum grounds and under Articles 2 and 3 of the ECHR a decision upheld in the Upper Tribunal, who dismissed the respondent's appeal.

2. The appellant made a further application in time for leave to remain which was refused and the appeal against that refusal was heard by Judge of the First-tier Tribunal Clapham in February 2015. Judge Clapham remitted the matter back to the Secretary of State. By that stage the appellant had had over six years' leave to remain. The Secretary of State reconsidered the application and made a further decision to refuse on 17 November 2015. It was in those circumstances that the appeal came back for hearing before Judge Malcolm. Judge Malcolm considered the application made and the argument put before her that the appellant qualified for indefinite leave to remain because he had lived in Britain for six years with discretionary leave.

3. Judge Malcolm did not accept the arguments put forward. She noted evidence from the appellant that he had no family in Afghanistan and could not read or write Dari and would have no family support, as well as evidence of the ways in which he had integrated into Britain, but, having applied the structured approach set out in **R (Razgar) [2004] UKHL 27**, she then considered the arguments put forward by the appellant's representative that the appellant qualified for indefinite leave because he had had six years' discretionary leave and the counterargument put forward by the Presenting Officer that the appellant's discretionary leave had come to an end because the further period of discretionary leave had been granted so that the appellant could complete a carpentry course when in fact he had not done so. The judge took the view, having considered transitional arrangements, that there had been significant changes which meant that the appellant would no longer qualify for leave under the discretionary leave policy and therefore a further leave application should be refused and took the view that the appellant's circumstances stopped the running of the discretionary leave. She therefore found that the appellant had not met the qualifications for indefinite leave to remain. When applying the law relating to Article 8 of the ECHR the judge found that there were no exceptional compelling factors which meant that the appellant should be granted leave under the provisions of Article 8 of the ECHR.

4. The appellant appealed. The grounds of appeal argued that the appellant was entitled to indefinite leave to remain because of the length of time he had had discretionary leave and secondly argued that the judge had erred when concluding that she was not did not have jurisdiction to find that and that the decision of the Secretary of State was unlawful.

5. Upper Tribunal Judge Jordan granted permission. Having set out the appellant's immigration history and referred to his various appeals and having emphasised that the appellant had always had leave to remain either under discretionary provisions or under the provisions of Section 3C, he stated:-

> "6. An in time application to appeal accrues further continuation leave.
>
> 7. The respondent contended that the appellant's leave ended when he (by his own volition) completed his carpentry course. I am uncertain on what basis this is asserted. It might be that discretionary leave was subject to a condition that the appellant was required to attend his studies but where is this condition said to be found? It may be that the respondent was entitled by notice to cancel, revoke or curtail discretionary leave if the condition underlying the grant of discretionary leave was no longer being fulfilled but does discretionary leave end automatically without such notice?
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> 8. The matters should be argued out at a hearing."

6. At the hearing before me Mr Bramble argued that Judge Jordan had erred in granting permission as the appellant, he argued, had not had discretionary leave for a period of six years. He referred to the relevant transitional provisions which are set out at section 10 of the relevant Immigration Directorate Instructions. They state as follows:-

> "10.1 Applicants granted DL before 9 July 2012
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> Those granted leave under the DL policy in force before 9 July 2012 will normally continue to be dealt with under that policy through to settlement if they continue to qualify for further leave on the same basis as their original DL was granted (normally they will be eligible to apply for settlement after accruing six years' continuous DL (or where appropriate a combination of DL and LOTR, see section 8 above)), unless at the date of decision they fall within the restricted leave policy.
>
> Caseworkers 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, the individual does not fall within the restricted leave policy and the criminality thresholds do not apply, a further period of three years' DL should normally be granted. Caseworkers must consider whether there are any circumstances that may warrant departure from the standard period of leave. See section 5.4.
>
> If there have been significant changes that mean the applicant no longer qualifies for leave under the DL policy or the applicant falls for refusal on the basis of criminality (see criminality and exclusion section above), the further leave application should be refused."

7. Mr Bramble argued that the appellant had been granted discretionary leave initially because he was a minor. The second period of discretionary leave had been on an entirely different basis – that was to enable him to finish a course in carpentry. He argued, moreover, that the period of 3C leave in between the two periods of discretionary leave did not count as discretionary leave – Judge Jordan, he argued, had been wrong to state that the 3C leave continued the existing leave and therefore was, in effect, discretionary leave. He also argued that the appellant's discretionary leave came to an end when either he stopped the course or at the end of the period of discretionary leave and it could not be continued because of the 3C leave granted when the appellant made the further application before the second period of discretionary leave ended. The refusal of the further application had been on 17 November 2015. He accepted of course that the fact that the appellant had been in Britain for ten years but, more importantly, that he would shortly reach the ten year anniversary of his first application for discretionary leave was another matter which could lead to a successful application for indefinite leave to remain under the ten year provisions but emphasised that that was not an issue that was before me or before Judge Malcolm – he was of course correct in that contention.

8. Mr Georget, in reply, argued that the 3C leave continued leave on the same basis as that already granted. There was therefore a continuation of leave and therefore the six year provisions when an applicant had six years' continuous discretionary leave would apply. He also raised the further matter that the appellant should have been granted permission to work over the last two years. He argued that in fact Mr Bramble was trying to bypass the 3C leave that had been given, which was merely a continuation of the leave that had been granted in the past. In reply Mr Bramble referred to a document dealing with "active review" and when such review was required. At paragraph 4.7 of that document is a section entitled: "Active reviews for those with Discretionary Leave". It reads as follows:-

> "As a person with discretionary leave will not be eligible for indefinite leave for six years (or at least ten years for persons covered by the exclusion provisions), the first active review will always be to consider further leave rather than settlement. A person whose discretionary leave is extended may be subject to a number of further active reviews (where less than three years' leave is given, for example). When considering whether to grant further leave to remain or settlement, decision makers should assess whether the applicant qualifies for discretionary leave as at the date of the active review (see the Asylum Instruction on Discretionary Leave for details of the criteria to be met). Decision makers will need to satisfy themselves that the applicant meets the criteria for discretionary leave. The exact considerations will vary depending on the particular reasons for the original grant of discretionary leave if further leave is sought on the same basis. For example, where leave was granted for ECHR Article 8 reasons, decision makers would need to consider the

> applicant's current family situation and whether the applicant's removal would still constitute a breach of Article 8 (see the Asylum Instructions on Considering Human Rights and Article 8 of the ECHR). The section below sets out particular considerations required in the case of applicants who were unaccompanied asylum-seeking children."

Discussion

9. The relevant issue before me is whether or not, taking the time from the first grant of discretionary leave forward by six years, during that time the appellant had or continued to have discretionary leave to remain. The reality is that the appellant had discretionary leave to remain firstly because he was a minor but it was, in essence, leave on protection grounds. His application thereafter was on asylum and human rights grounds – the same basis as his first application. His appeal was allowed by Judge Page "on human rights grounds under Article 8" and that decision although appealed by the Secretary of State was upheld by Upper Tribunal Judge Storey and thereafter the further period of discretionary leave to remain was granted. The vignettes placed in the appellant's travel document record the grants of discretionary leave. They do not indicate anything other than that the appellant had been granted discretionary leave. They state that the appellant had been granted "limited leave to remain in the United Kingdom" and state on the stamp headed discretionary leave in the immigration status document the following:-

> "The Secretary of State has granted the person named on this document leave to enter or remain in the United Kingdom for a reason not covered by the Immigration Rules, in accordance with the Home Office Asylum Policy Instruction on Discretionary Leave. The period for which leave to enter or remain in the United Kingdom has been granted is indicated in the endorsement. While the period of leave indicated remains valid, the holder is able to work in the United Kingdom without any immigration restrictions limiting the type of work they can undertake."

10. It is therefore clear that for whatever reasons the Secretary of State granted discretionary leave to the appellant on two occasions. There is nothing to distinguish between the two periods of leave. When I consider the transitional provisions to which I have referred above I do not consider that there is anything therein that would mean that the leave the appellant had was not characterised as discretionary leave and that the discretionary leave as indicated on the vignettes in his travel document were both periods of discretionary leave. I consider, moreover, that it is trite law that under the provisions of Section 3C the leave to remain granted initially continues after the expiry of leave until such time as there is a further appeal and, if appealed, that the appeal is unsuccessful. For these reasons I conclude that the appellant did have discretionary leave for a period of six years and that therefore he was entitled to settlement

on that basis. I would point out that, having considered the IDIs at section 10, it relevant to take into account that there seems no reason why the appellant should not have been granted settlement – there is nothing to indicate that his conduct had been such that that should not be granted.

11. For these reasons I find that the judge had erred in her interpretation of the weight to be placed on the Section 3C leave – although her determination was not particularly clear on this point it is clear that somehow she considered that the discretionary leave had come to an end because the appellant had not completed his course of study. As Upper Tribunal Judge Jordan said, there is no basis in law for that conclusion.

12. For these reasons I set aside the decision of the First-tier Judge.

13. Given the facts as set out above and my interpretation of the law, which I have also set out above, I find that this appellant does qualify for indefinite leave to remain and therefore I allow his appeal on that basis: the decision is therefore not in accordance with the law and I therefore allow the appeal on human rights grounds.

14. I would add that in any event the appellant has now lived lawfully in Britain for 10 years, counting from the date of his original application, and or would shortly have lived here with authority for and so he would qualify under the 10 years provisions for indefinite leave to remain.

15. Taking that into account and given the appellant's history here, his age and the fact that it appears he has no family to which he could return in Afghanistan and has been out of the country for more than ten years, I find that there would be exceptional compelling circumstances which would mean that his appeal would have been allowed on Article 8 grounds, even if I had not considered that the arguments relating to discretionary leave should succeed.

Decision

The decision of the First-tier Judge is set aside.

I allow this appeal on immigration and human rights grounds.

No anonymity direction is made.

Signed  Date 20 February 2018

Deputy Upper Tribunal Judge McGeachy