Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: IA/08470/2015**

IA/08501/2015

IA/08507/2015

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 29 August 2019	**On 06 September 2019**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

CHARANJIT SINGH
GURBINDER KAUR
SURPREET KAUR

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Jafferji, Counsel
For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The first appellant is a citizen of India ('the appellant'). His wife and child are the second and third appellants in this matter. They are dependents upon his claim. The appellant has appealed against a decision of the First-tier Tribunal ('FTT') dated 10 July 2015, in which it dismissed his appeal on human rights grounds.

Background

2. The appellant's background in the United Kingdom ('UK') is summarised in the chronology below.

2.6.08 A enters the UK with entry clearance as a religious worker.

5.11.08 A granted further leave as a religious worker.

9.12.10 A's application for further leave as a Tier 2 (Minister of Religion) Migrant ('Tier 2 Migrant') refused.

7.3.11 FTT Judge Parker allows A's appeal on Article 8 grounds. The FTT noted that A scored the maximum points under the PBS but he was unable to meet para 245ZF(e) because his leave to remain was not included in the list of relevant categories i.e. he was unable to meet the 'no-switching' requirement. This is because the A had been granted leave as a religious worker under the old Rules and not leave as a Tier 2 Migrant. It was accepted that A performed this role at all material times and it would be disproportionate to expect him and his family members to return to India to apply for entry clearance.

12.4.11 A granted discretionary leave ('DL') for three years to 12.4.11.

11.4.14 A applies for leave to remain as a Tier 2 Migrant.

16.2.15 SSHD refuses application because: a) A was not last granted leave in that capacity (but was last granted DL); b) the Certificate of Sponsorship ('CoS') provided by Sponsor had been cancelled; c) the Sponsor was unable to certify maintenance.

10.7.15 FTT Judge Place dismisses A's appeal on human rights grounds.

23.11.15 A's application for permission to appeal against the FTT's decision refused by the Upper Tribunal ('UT').

4.2.16 Collins J grants permission to challenge the UT's refusal of permission, observing it arguable, inter alia, that the relevant transitional arrangements were material and should have been considered by the FTT.

29.6.18 UT grants permission to appeal.

25.7.19 UT hearing adjourned with directions for the parties to file skeleton arguments.

3. The matter now comes before me to determine whether Judge Place made an error of law.

Hearing / issues in dispute

4. At the hearing before me the representatives agreed that the main issues raised in the grounds of appeal could be summarised as follows:

   (i) Did Judge Place commit an error of law in failing to take into account the respondent's policy on DL when conducting the Article 8 ECHR balancing exercise?

   (ii) If the answer to (i) is yes, would that have made any material difference to the outcome, as the SSHD's position was that the circumstances before Judge Place were different to the circumstances before Judge Parker.

5. At the beginning of the hearing, Mr Mills accepted that as the appellant had been granted DL before 2 July 2012, the 'Statement of Intent: Family Migration' policy dated June 2012 was potentially applicable. This states that those who were granted DL before 9 July 2012, like this appellant, would be subject to transitional arrangements and not necessarily the requirements of the amended Immigration Rules. The policy also states this:

   > "…you will continue to be dealt with under the discretionary leave policy through to settlement if you qualify for it."

6. The DL policy as in force at the date of the hearing before Judge Place (version 6) repeats this in section 10 dealing with transitional arrangements. It also states that an application to extend DL should be made shortly before DL expires and will be subject to an active review. This will depend on the reasons why DL was granted. The policy then states this:

   > "- Decision makers must consider whether the circumstances prevailing at the time of the original grant of leave continue at the date of decision. If the circumstances remain the same and the criminality thresholds do not apply, a further period of 3 years Discretionary Leave should be granted.
   >
   > - If there have been significant changes or the applicant fails to meet the criminality thresholds…the application for further leave will be refused."

7. Mr Mills accepted that pursuant to that policy, DL was usually extended unless there was any material change in circumstances.

8. Both representatives then made helpful submissions and placed reliance upon their respective skeleton arguments.

9. Mr Jafferji submitted that it is implicit from the Judge Place's decision that reliance was being placed upon the transitional arrangements

within the policy documents and these should have informed the correct approach to the applicable legal framework relevant to Article 8.

10. Mr Mills submitted that it was fundamental that the appellant did not apply for an extension of DL, but rather made an application for leave under the Rules. He submitted that it followed that the transitional arrangements relevant to applications for an extension of DL were irrelevant in those circumstances and Judge Place made no material error of law.

11. After hearing from both representatives I reserved my decision. I also heard from both representatives on the appropriate disposal of the appeal, should I find an error of law. They agreed that any re-making would involve substantial fact-finding. This is because the person said to have sponsored the appellant in the earlier stages of his time in the UK was sentenced to nine years imprisonment for facilitating illegal workers and the appellant has been named as one of these.

12. I now provide my decision with reasons.

Error of law discussion

13. I must first of all address whether Judge Place erred in law in failing to apply the policies I set out above. Mr Mills has submitted that there was no obligation to do this because this was not argued before Judge Place and there could be no such argument in this case because the appellant did not apply for an extension of DL but leave as a Tier 2 Migrant.

14. Although I am told that the appellant was represented by Counsel, there was no skeleton argument before Judge Place. The grounds of appeal to the FTT against the SSHD's decision did not specifically rely on any argument based upon the policies referred to above. I also note that the application to the SSHD (which was drafted by solicitors) did not rely on the policies or seek an extension of DL, but rather made an application for leave to remain as a Tier 2 Migrant.

15. As conceded before Judge Place, the application under the Rules was bound to fail for the obvious reason set out in the decision letter – the appellant did not have leave in a category that permitted him to apply in-country for leave. He had DL and was therefore caught by the 'non-switching' requirement of the relevant Rule.

16. When the decision is read as a whole I am satisfied that it was argued on behalf of the appellant, that when assessing the proportionality of his removal, the FTT should consider whether or not he could benefit from the relevant policies in the light of the findings made by Judge

Parker. Immediately under the heading 'my findings' at [14] of the decision, the appellant's Counsel submission is recorded as follows:

> "…nothing had changed since Judge Parker's determination in 2011, other than that the Appellant had been here longer and therefore his ties to the UK were stronger. He asked me to find that the Appellant met all the requirements for leave to remain as a Tier 2 (Minister of Religion) Migrant, other than the fact that he does not fall into one of the required categories for transition to that category set out in the Immigration Rules. There would be no benefit in terms of immigration control in requiring the Appellant to leave the UK to make an application from India."

17. The reference to nothing having changed must be viewed in the light of Judge Parker's findings and the DL policy I have quoted from above. I am satisfied that the case being presented on behalf of the appellant was that the respondent's own policy guidance required his DL to be extended because there had not been any significant changes and there was no question of him not meeting the criminality thresholds. I also note that the statement of intent policy was in the appellant's bundle before Judge Place.

18. Judge Place failed to address the fact that the submission recorded was predicated upon and supported by the policies. Moreover, in so far as the FTT entirely accepted at [16] and [20] that the new legal framework applicable to Article 8 cases as contained in s. 117 of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') applied without more, that constituted an error of law. Whilst the FTT was obliged to apply the new legal framework, it was also required to take into account the policies when assessing proportionality for the purposes of Article 8 of the ECHR. AMA (Article 1C(5)) – proviso – internal relocation) Somalia [2019] UKUT 11 (IAC) says this at [36]:

> "The only issue before the FTT in this case was whether AMA continued to qualify for protection under the Refugee Convention. It is important to read the headnote in SF and others (Guidance - post-2014 Act) Albania [2017] UKUT 120 (IAC) 10 to the effect that even in the absence of a 'not in accordance with the law' ground of appeal, the Tribunal ought to take the SSHD's guidance into account if it points clearly to a particular outcome, in its proper context. SF involved an assessment of the reasonableness of expecting a child to leave the UK, and the SSHD's own guidance was relevant to assisting the Tribunal to make judgments, consistent with the approach that would be taken by the SSHD - see [10] to [12]."

19. Although the appeal before FTT Place was an 'old style' appeal capable of determining whether the decision under appeal was 'not in accordance with the law', it is clear that the submission being made on behalf of the appellant was not on this basis – it was entirely predicated upon Article 8. Nevertheless, where the respondent's own guidance points clearly to a particular outcome, this is relevant when

determining the proportionality of a decision taken in relation to Article 8. I entirely accept that the DL policy focuses upon those who make an application for an extension of DL. This appellant did not. However the wording of the policies make it clear that a person such as the appellant would continue to be dealt with under the DL policy. The spirit of that policy protects those granted DL prior to the change in the Immigration Rules. In my judgment, even though the appellant did not apply to extend his DL, the decision-maker and the FTT was still bound to take into account that the appellant's circumstances in the light of the guidance in the policies. It was therefore important to consider, for the reasons contained in the policies whether the appellant's circumstances had significantly changed.

20. Whilst (as Collins J observed when granting permission) s. 117B "*moves the goalposts*", it was important to treat Judge Parker's decision as the starting point and to expressly consider what if anything, had changed in the light of the policies. In failing to do so the FTT committed an error of law.

21. Mr Mills invited me to find that even if Judge Place should have considered the policies, there was no material error of law because there was a change in circumstances from Judge Parker's decision: i.e. whereas before Judge Parker the appellant met all the requirements of the relevant rule except for the 'no-switching' requirement, the situation had changed as the appellant was unable to meet other aspects of the relevant Rules, in particular having a valid CoS. Judge Place expressly found at [19] that matters were now different because the appellant did not have a valid CoS.

22. Mr Mills submitted that the absence of a valid CoS was key. Although the decision letter refers to the CoS having been cancelled (on 22 November 2014) and the failure to meet the maintenance requirement, Mr Mills accepted that these are likely to be interlinked. As Mr Mills acknowledged, those refused for not having a valid CoS, are almost inevitably refused on maintenance grounds as well because the employer would not be able to properly certify maintenance in the absence of a CoS.

23. I note the observations of Collins J when granting permission in the judicial review proceedings in this matter:

> "Whilst I recognise that those representing the claimants did not investigate why the [CoS] had been cancelled by the Home Office, the FTT judge arguably ought to have appreciated that the SSHD should have explained this, since it seemed contrary to the GURWARA's letters and created the difference from Judge Parker's assessment."

24. Although Judge Place mentioned at [19] that the reasons for the cancellation of the CoS had not been addressed, there was an overriding need to determine why it was cancelled when addressing

the relevant policies. As Mr Mills acknowledged it could have been cancelled simply because the appellant was not entitled to leave as a Tier 2 Migrant in the light of the 'no-switching' requirement, and once this was recognised by the respondent, the CoS was cancelled. This seems to me to be the more likely reason. If the SSHD was not satisfied that the sponsor was genuine or appropriate, it would have been rather important for that to have been said at the time. Mr Mills was unable to access the appropriate system to determine the reason for the cancellation of the CoS.

25. Furthermore, although Judge Place stated that the CoS issue was not addressed, this is difficult to reconcile with the clearly recorded submission at [14] that the Rules are met save for the "no-switching" requirement, as was the case before Judge Parker. Had Judge Place appreciated the relevance of considering the appeal in the light of the potentially applicable policies, that would have led to an enquiry into the reasons for cancelling the CoS. As Collins J observed, the evidence before the FTT from the Gurwara supported the appellant's entitlement to a CoS.

26. In all the circumstances, the failure to apply the policy may have made a material difference to the outcome of the appeal, notwithstanding the position adopted by the respondent regarding the CoS.

27. It follows that the FTT's decision contains a material error of law.

Disposal

28. The findings of fact that need to be made may well be extensive. Mr Mills pointed out that it is most likely that even if the appellant has amassed the requisite 10 years lawful residence and even assuming that the DL policy has the potential to be applied in the appellant's favour, it will be necessary to investigate assess the evidence said to link the appellant to the criminal enterprise that led to a nine year sentence for a previous sponsor. I heard no evidence on this issue and have made no findings. I merely observe that the factual matrix will need to be carefully considered.

29. I have had regard to para 7.2 of the relevant *Senior President's Practice Statement* and the nature and extent of the factual findings required in remaking the decision, and I have decided that this is an appropriate case to remit to the FTT. Extensive findings of fact are necessary and this is likely to involve detailed oral evidence and cross-examination on wide-ranging matters.

Decision

30. The FTT decision contains an error of law and I set it aside.

31. The decision is remitted to the FTT, where it shall be re-made by a judge other than Judge Place.

Signed *UTJ Plimmer* Date

Upper Tribunal Judge Plimmer 30 August 2019