Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03041/2019

THE IMMIGRATION ACTS

At Field House
Heard on Papers

Decision and Reasons Promulgated
On 17 January 2020

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

And

D AY
(anonymity direction made)

Respondent

DECISION AND REASONS

1. The Respondent DAY is a national of Sri Lanka born in 1998. On the 28th May 2019 the First-tier Tribunal (Judge Brewer) allowed his appeal on human rights grounds. The Secretary of State now has permission to appeal against that decision.

2. The substance of the First-tier Tribunal decision is that this DAY is a young man who had, by the date of his appeal, accrued six years' continuous residence with Discretionary Leave (DL) and that as such, under the terms of Home Office policy, he qualified for a grant of Indefinite Leave to Remain (ILR). The substance of the Secretary of State 's appeal before the Upper Tribunal was that in so finding, the First-tier Tribunal has misconstrued the said policy.

3. Before I turn to deal with the parties' respective arguments on the policy issue it is appropriate that I record two matters.

4. First, that this appeal is determined by me alone following a transfer order signed by Principle Resident Upper Tribunal Judge O'Connor on the 27th September 2019 September 2019. The appeal was originally heard by myself and Deputy Upper Tribunal Judge Holmes sitting at the Royal Courts of Justice on the 22nd July 2019. At that hearing both parties simply sought to rely on a Home Office Asylum Policy Instruction (API) dated August 2015 entitled 'Discretionary Leave'. The part in issue was entitled 'transitional arrangements'. That being so, we were surprised to find that neither party had seen fit to furnish us with the policy that preceded the August 2015 API. The heading 'transitional arrangements' was to our minds indicative of the fact that this document was intended to reflect the arrangements to be made - in the transitional period - between one policy and another. We needed therefore to see the original policy. The hearing was adjourned so that said policy could be produced, and if necessary submissions made on it. The Tribunal thereafter received from Mr Bramble, Senior Presenting Officer for the Secretary of State, an email containing nothing more than hyperlinks to seven different policy documents. The Secretary of State then indicated that he intended to make no further submissions. Ms Miskiel, Counsel for DAY thereafter provided some assistance by identifying and providing copies of the actual policy in place when DAY embarked on his route to settlement, and making detailed written submissions. I am grateful for her assistance. The transfer order has been made because it has not proved practicable to have the matter resumed before myself and Judge Holmes within a reasonable time frame.

5. Second, it was accepted at the hearing on the 22nd July 2019 that whatever the outcome of the Secretary of State's appeal, this was a matter that had to be remitted to the First-tier Tribunal since there were grounds of appeal that had not been addressed by its decision, viz protection issues and whether DAY qualified for leave to remain on human rights grounds regardless of the terms of the Home Office policy on DL.

6. Those preliminary observations made, I turn to deal with the substance of the appeal.

Case History and Decision of the First-tier Tribunal

7. The chronology of pertinent events is as follows:

18 April 2011	DAY arrives in UK
10 June 2011	DAY granted DL for three years on grounds that he is an unaccompanied asylum-seeking child (UASC)
9 July 2012	Policy changed – transitional provisions in force

6 May 2014	DAY applied for further DL *(DL continues by virtue of s3C(2)(a) of the Immigration Act 1971)*
2 December 2014	DAY granted DL as a UASC until he is 17½, on the 4 July 2015
18 June 2015	DAY makes application for protection and/or leave on human rights grounds *(DL continues by virtue of s3C(2)(a) of the Immigration Act 1971)*
4 January 2016	Respondent's 18th birthday
1 June 2017	DAY has accrued six years of continuous DL
14 July 2017	DAY varies his application of 18 June 2015 to include an application for settlement on the grounds that he has now accrued six years of DL
13 March 2019	Decision to refuse to grant asylum, settlement or any further DL *DAY appeals and so DL continues by virtue of s3C(2)(c)of the Immigration Act 1971*

8. On the 30th April 2019 the appeal came before Judge Brewer of the First-tier Tribunal. The Tribunal's decision is dated the 28th May 2019. It began its reasoning by noting the Secretary of State's concession that at the date of the appeal DAY had, by virtue of s3C, accrued almost eight years of continuous residence with DL. The Secretary of State's position, however, was that settlement would only be granted after 6 years of continuous DL where the applicant "continued to qualify for further leave on the same basis as their original DL was granted". The DL had been granted because DAY was an unaccompanied minor, and by the date of the decision on the 13th March 2019 he was an adult.

9. In considering this contention the First-tier Tribunal found as follows:

> "23. I turn then to the DL policy. In the policy an applicant in fact requires 10 years' residency before being eligible for settlement. However, the Transitional Arrangements in section 10 set out that if the decisions made on DL were made under the previous policy, that is the policy in force before 9 July 2012, they will continue to be dealt with under that policy and section 10.1 states that "*normally they will be eligible to apply for settlement after accruing 6 years' continuous DL*".
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> 24. Section 8 of the DL policy deals with settlement applications. This confirms as set out in 10.1 that a person will normally become eligible to apply for settlement after 6 years' (taking account of the transitional arrangements) limited leave. The DL policy says at 8.2: "*where a person has held DL for a continuous period of 6 years and continues to qualify for DL under the policy, they*

> *should be granted settlement unless there are any criminality or exclusion issues*" (my emphasis). There are no criminality or exclusion issues in this case.
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> 25. The respondent seems to be relying on section 10 of the policy. Section 10.1, part of which I have set out above, states that "*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*". In a new paragraph the DL policy goes on to say: "*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 3 years' DL should normally be granted. Caseworkers must consider whether there are any circumstances that may warrant departure from the standard period of leave*". The reference here to a further period of 3 years is clearly a reference to further DL, but not ILR/settlement. Indeed, in another separate paragraph, but still in section 10.1, the DL policy says: "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". Again, as I read this it is a reference to further DL.
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> 26. In short if, as I suspect, the respondent was using section 10 to consider the appellant's eligibility for ILR, and I think that must be the case considering the language used in the refusal letter and that in section 10, he has fallen into error. The appropriate section is section 8.
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> 27. Section 8 simply says what I have set out above – that "*where a person has held DL for a continuous period of 6 years and continues to qualify for DL under the policy, they should be granted settlement unless there are any criminality or exclusion issues*".

10. The First-tier Tribunal being satisfied that there were no countervailing factors, the appeal was allowed. Although not articulated in the determination the Secretary of State accepts that the basis of the First-tier Tribunal's decision to allow the appeal on human rights grounds was that the policy was indicative of where the balance should be struck in terms of the Article 8 proportionality assessment.

The Appeal

11. The dispute between the parties in this appeal relates to the true interpretation of the Home Office policy. Where the policy refers to applicants "continuing to qualify for DL" should this be read as a requirement for *any* application for further leave i.e. including settlement, or is it confined to applications for a further period of limited DL?

12. The policy in force at the date of the decision to refuse settlement was that dated August 2015. As I have set out above the First-tier Tribunal found the relevant part of that policy to be found at section 8:

> "Where a person has held DL for a continuous period of 10 [6] years and continues to qualify for DL under the policy, they should be granted settlement unless there are any criminality or exclusion issues".

13. I am satisfied that the First-tier Tribunal erred in confining its analysis to this passage. The first paragraph in section 8 makes it clear that in *this* case, the relevant section was section 10:

> "This section applies to those granted an initial period of limited leave under the DL policy on or after 9 July 2012 and who do not, at the date of decision, fall within the restricted leave policy. **See section 10 - Transitional Arrangements for cases where an initial period of DL was granted before 9 July 2012**".

14. Section 10 reads as follows. I have highlighted the material parts for the purpose of this decision:

> "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 6 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.
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> **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 3 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.
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> **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**.

15. The Secretary of State here contends that there have been "significant changes" in that DAY was no longer, at the date of decision, an unaccompanied minor.

16. Ms Miskiel submits that I need not be concerned with whether there were significant changes. She submits that in fact the qualification "if they continue to qualify for further leave on the same basis" must be read as only applying to applications for further DL: the only test for settlement is whether the 6 years have been accrued, and whether there are any countervailing factors. I can find no support for that interpretation in either the August 2015 policy or the 2011 policy to which it refers back. Under the heading '*Applications for Settlement*' the 2011 policy reads:

> "A person will normally become eligible for consideration for settlement after completing six continuous years of Discretionary Leave. However, where a person is covered by one of the exclusion categories they will not become eligible for consideration for settlement until they have completed ten continuous years of Discretionary Leave. Any time spent in prison in connection with a criminal conviction would not count towards the six or ten years. An individual may apply for ILR/settlement at the six or ten year stage shortly before Discretionary Leave expires. **The application will be considered in the light of circumstances prevailing at that time**".
>
> *Consideration of Application*
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> **As with an extension request, the application should be subject to an active review to consider whether or not they still qualify for Discretionary Leave** (or some other form of leave).
>
> *Granting Settlement*
>
> Where a person has held Discretionary Leave for an appropriate period and **continues to qualify for Discretionary Leave**, they should be granted ILR/settlement.

17. In these passages, and in the passages from the 2015 policy that I have set out above [at §14] the text repeatedly emphasises that the test to be applied in considering *any* application for further leave, is whether the applicant would still *qualify* for a grant of DL, not whether he still holds one, for instance by operation of s3C. That much is underlined by the following passage from the 2015 policy:

> "7.2 Unaccompanied children who have turned 18 Unaccompanied children granted DL in accordance with paragraphs 352ZC to 352ZF of the Immigration Rules who have turned 18 by the time they apply for further leave or whilst a pending application is being considered must be considered in the same way as an adult applying for further leave. They will no longer qualify for further leave as an unaccompanied child but caseworkers must consider whether they qualify under another category before refusing the further application. Those granted DL as an unaccompanied child may also apply on another route if they wish to extend their limited leave".

18. This passage was omitted from the First-tier Tribunal's reasoning. I accept that this may be because it did not expressly apply to DAY, since he was granted DL prior to the cited rules taking effect, but the policy, and the meaning thereof, must be read as a whole. If the Secretary of State intended to draw a distinction between one class of adults who had formerly had grants of DL as children and another, one would expect that the policy would have made that clear.

19. I am therefore satisfied that the First-tier Tribunal did err in its interpretation of the 'transitional provisions'. The task before the decision-maker, and then the Tribunal, was to consider whether there had in fact been a change in circumstances such that DAY no longer qualified for a grant of DL.

20. In this case there does not appear to be any ambiguity about why DAY was twice granted DL. The Home Office explanatory statement records that he was granted "UASC leave" on the 10th June 2011, and again on the 2nd December 2014. Unlike the appellant in the unreported decision of Faize (IA/34508/15), upon which DAY relied before the First-tier Tribunal, it cannot be said that the grant of DL was "in essence leave on protection grounds", since on both of those occasions leave was expressly refused on protection grounds. The incontrovertible fact is that by the time that the Secretary of State took his decision there had been a significant change in circumstances, in that DAY was no longer a minor. On that basis the Secretary of State was entitled, in accordance with the policy, to refuse to grant settlement: see R (on the application of SB (Jamaica) and ABD (a minor)) v Secretary of State for the Home Department [2016] EWCA Civ 400.

21. I therefore allow the Secretary of State's appeal, and in accordance with the agreement between the parties at the hearing on the 22nd July 2019 (see my §5 above), remit the matter to the First-tier Tribunal.

Anonymity Order

22. This case concerns an ongoing claim for international protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders we therefore consider it appropriate to make an order in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Upper Tribunal Judge Bruce
30th September 2019