R (on the application of Sorae) v Secretary of State for the Home Department IJR [2016] UKUT 00030 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of

Ewaen Sorae

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Kebede

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Mr C Mannan of Counsel, on behalf of the Applicant, instructed through Direct Access and Ms J Gray of Counsel, on behalf of the Respondent, instructed by the Government Legal Department, at a hearing at Field House, London on 3 December 2015

Decision: the application for judicial review is refused

JUDGMENT

(1) This is an application for judicial review of the decision of the Secretary of State for the Home Department ("SSHD") dated 5 November 2014, entitled "supplementary reasons for refusal letter", to maintain an earlier decision of 20 March 2014 to refuse the applicant's application for indefinite leave to remain in the United

Kingdom as a Tier 1 (General) Migrant under the Points-Based System. Permission to apply for judicial review was granted by Upper Tribunal Judge Allen on 3 September 2015 following an oral hearing.

(2) The applicant is a national of Nigeria, born on 4 July 1978. He entered the United Kingdom on 30 September 2003 with a visa valid until 31 October 2004 and applied for leave to remain as a student. His application was rejected but he was subsequently granted various periods of leave to remain as a student until 31 August 2008. On 30 November 2007 he was granted leave to remain until 30 November 2009 as a Highly Skilled Migrant and then from 26 November 2009 until 30 November 2012 as a Tier 1 (General) Migrant.

(3) The applicant returned to Nigeria prior to the expiry of his leave. During his stay in Nigeria he states that he prepared the relevant documentation which he was intending to submit on his return to the United Kingdom for an application for further leave, but he was attacked by robbers who took his documents. He did not have time to obtain duplicate documents before returning to the United Kingdom and so arranged to have duplicates forwarded to him once he was in the United Kingdom. He returned to the United Kingdom on 29 November 2012. He claims to have received the duplicate documents in January 2013.

(4) The applicant then made his application for indefinite leave to remain as a Tier 1 (General) Migrant on 5 February 2013, on the basis of five years' continuous residence under the Points-Based System, referring also to his private life established in the United Kingdom. He included in his covering letter an explanation for the delay in submitting the application, referring to the exceptional circumstances preventing him from making the application within the period of his leave, namely the robbery and theft of his documentary evidence and the need to obtain duplicate documents from his accountant. He included, within the documents submitted in support of his application, and in support of his claim of exceptional circumstances, a police investigation report from Nigeria.

(5) The applicant's application was, however, rejected on 25 February 2013 as invalid, owing to his fee payment being rejected by the bank. He then re-submitted his application on 28 February 2013.

(6) In a decision made on 20 March 2014, and sent to the applicant on 1 April 2014, the respondent refused the application under paragraph 245CD(i) of the immigration rules, on the basis that he had overstayed in the United Kingdom for a period in excess of 28 days. The respondent calculated that the applicant had submitted his valid application for indefinite leave to remain 89 days after the expiry of his leave to remain on 30 November 2012 and accordingly had stayed in the United Kingdom in breach of the immigration laws. The respondent advised the applicant, in the refusal letter, that he would have to make a charged application on the specified form if he wanted consideration to be given to his family and private life under the immigration rules.

(7) On 1 April 2014 the respondent made a decision to remove the

applicant under section 10 of the Immigration and Asylum Act 1999 (administrative removal), advising the applicant in the notice of decision that he was entitled to a right of appeal from outside the United Kingdom.

(8) On 10 April 2014, in a Pre-Action Protocol ("PAP") letter, the applicant submitted that he was entitled to an in-country right of appeal, having raised Article 8 grounds in his application, and that his removal was in breach of his Article 8 human rights, a matter which the respondent had failed to consider in refusing his application. It was further submitted that the respondent had failed to consider the exceptional circumstances referred to by the applicant when making his application which had led to his application having been made out of time. The respondent's failure to consider the exceptional circumstances was contrary to the Home Office policy "Guidance - Applications from overstayers (non family routes)" and to the "Statement of Changes in Immigration Rules" and accompanying "Explanatory Memorandum". It was also contrary to the guidance on long residence and private life, which was relevant since the applicant qualified for indefinite leave to remain on the basis of 10 years lawful residence in the United Kingdom. The rejection of the applicant's application of 5 February 2013 on validity grounds was also challenged under the principles in Basnet (validity of application - respondent) Nepal [2012] UKUT 113, but it was acknowledged that that would not have made any difference to the out of time issue in any event.

(9) On 2 May 2014 the respondent advised the applicant that a response to the PAP would be delayed. A response was then sent on 9 May 2014 in which the respondent agreed to reconsider the decision of 1 April 2014 in light of the points made in the PAP. On 14 August 2014 the respondent requested the resubmission of the applicant's previously submitted evidence in relation to exceptional reasons for the delay in his application. On 26 August 2014 the applicant submitted two police investigation reports and a letter from his accountants in Nigeria.

(10) In the meantime, the applicant also lodged an appeal to the First-tier Tribunal against the removal decision, considering that there was an in-country right of appeal on the basis that he had made a human rights claim prior to the removal decision, and that appeal was listed for hearing on 14 November 2014.

(11) On 5 November 2014 the respondent, having reviewed the applicant's application, then issued a supplementary reasons for refusal letter maintaining the refusal decision, concluding that the applicant had not made out his claim of exceptional circumstances such as to justify the delay in making his application and again reminding the applicant that he needed to make a separate charged application on the basis of his family and private life.

(12) In a letter dated 14 November 2014 the applicant withdrew the appeal before the First-tier Tribunal, accepting that he had not in fact made a human rights claim in accordance with the requirements of the new immigration rules and that he therefore did not have an in-

country right of appeal.

(13) On 2 December 2014 the applicant submitted his judicial review claim challenging the decision of 5 November 2014.

(14) The grounds of challenge in the application were that:

a) the respondent had wrongly interpreted the applicability of the 28 day rule for overstayers and had given consideration only to why the applicant could have applied before the expiration of the 28 days rather than considering whether the exceptional circumstances applied after the expiration of the 28 days. The grounds asserted that the respondent had failed to consider whether the applicant fell under one of the exceptions to the 28 day period and relied on the Home Office policy guidance and the statement of changes in the rules and explanatory memorandum in submitting that he clearly did fall within the exceptions, by reason of having had problems replacing lost documents as a result of theft;

b) the respondent had significantly delayed in making her decision in the applicant's application, which was a matter of procedural unfairness;

c) the respondent had failed to reconsider the applicant's application within a reasonable period of time.

(15) The respondent, in the summary grounds of defence, submitted that she had a discretion whether or not to conclude that exceptional circumstances existed in any particular case and, in the applicant's case, having taken into account all relevant factors, had reasonably and properly exercised that discretion. It was submitted further that the delay in considering the applicant's application, albeit significant, was not unreasonable and did not disadvantage the applicant and that careful scrutiny had been given by the respondent to the applicant's application in undertaking the reconsideration.

(16) Permission to apply for judicial review was initially refused, but upon renewal to an oral hearing was granted by Upper Tribunal Judge Allen on 3 September 2015, on the following basis:

> "It is arguable that the respondent erred in not expressly considering her policy in the exercise of her discretion, given that the facts of the case ostensibly fall squarely within one of the bullet point examples in the policy document. In the alternative, if she can be said in effect to have exercised her discretion under the policy, this was arguably flawed on the basis that the reason given, at the fifth paragraph of page 2 of the supplementary decision letter, was arguably an irrational basis on which to exercise the discretion."

The Parties' Submissions

(17) At the hearing before me, the challenge was put on the following basis: that the respondent, in her letter of 5 November 2014, had failed to consider the policy guidance and that had the guidance been followed it would have been recognised that the applicant fell within

the last bullet point and, given that no other reasons had been given for refusing his application, he should have been granted leave to remain. Mr Mannan confirmed that the ground of challenge relating to Article 8 was no longer pursued.

(18) Mr Mannan submitted that it was clear from the refusal letter that the respondent, whilst considering whether exceptional circumstances existed to justify the delay in making the application, had had no regard to the terms of the policy itself, which provided a non-exhaustive list of circumstances considered to be exceptional. He submitted that it could not be implied into the wording of the refusal letter that the policy had been considered. The applicant could not have made his application before he had all the relevant documentary evidence, as the respondent suggested, since the application would have been bound to fail due to an absence of specified evidence. I pointed out to Mr Mannan that the applicant could not meet the terms of the policy in any event, as he had not produced any evidence to show the date upon which he had requested replacement documents. His response was that the absence of such an observation by the respondent herself was further confirmation of the fact that the terms of the policy had not been considered.

(19) Ms Gray referred to the correspondence between the applicant and the respondent leading up to the decision of 5 November 2014 as providing a clear basis for accepting that it was implicit within the refusal letter that the respondent had considered the policy. She submitted that there was nothing irrational about the respondent's decision to exercise her discretion, under the terms of the policy, against the applicant and there was no requirement for discretion to be exercised in his favour simply because he had had his documents stolen.

(20) In response, Mr Mannan reiterated the points previously made and submitted that it could not be implied that the policy had been followed and neither could it be assumed that the reference to a policy in previous correspondence meant that a policy introduced only two weeks before the decision had been considered by the respondent.

Relevant Policy Guidance

(21) The relevant part of the policy "Guidance – Applications from overstayers (non family routes) – version 6.0", valid from 20 October 2014, states as follows:

> **"If you are refusing an application because of overstaying**
> You must consider any exceptional circumstances that stopped the applicant applying within the 28 days. The 'exceptional circumstances' threshold is high, but can include:
> - The migrant or their representative could not submit an application on time because of:
> - serious illness (supported by the appropriate medical documentation)
> - travel or postal delays. Or

- They are not able to provide the necessary documents because of exceptional or unavoidable circumstances beyond the applicant's control. For example:
  - The Home Office has lost or delayed returning travel documents.
  - **The applicant is having problems replacing lost documents as a result of theft**, fire or flood. They must provide evidence to show the date of loss and the date they requested replacement documents. "

(22) The relevant part of the Statement of Changes in the Immigration Rules states as follows:

"***Applications from overstayers***

7.16 The Immigration Rules are being amended to ensure a consistent approach is taken to those who seek further leave to remain after their previous period of leave has expired. From 9 July 2012 those seeking further leave to remain as family members (including settlement) will be refused if they have overstayed by more than 28 days.

7.17 From 1 October 2012 other immigration rules, including those for persons studying and working in the UK, will be brought into line with this approach, with applicants refused if they have overstayed by more than 28 days.

7.18 There will be a number of safeguards to ensure that the amended rules are fair and proportionate:

• Where an applicant submits an application before their previous period of leave to enter or remain expires, but the application is rejected as invalid after their leave expires, the 28-day window in which the application may be submitted as an overstayer will start from the date on which the application was rejected, rather than when leave expired.

• Caseworkers will continue to have discretion to consider exceptional cases.

Applicants who have overstayed by more than 28 days may provide evidence of exceptional circumstances which prevented them from submitting their application in time."

Discussion

(23) It is not in dispute that the policy "Guidance – Applications from overstayers (non family routes) – version 6.0" was not specifically cited in the respondent's decision of 5 November 2014. Neither is it disputed by Mr Mannan that the respondent was not required to cite the policy in full. However, what is relevant is whether or not the respondent had the policy in mind and considered the applicant's circumstances in line with the terms of the policy. I find myself in agreement with Ms Gray's submission that it is plainly implicit within the terms of the refusal letter, and in particular when considering the correspondence leading up to that decision, that the respondent had the policy very much in mind in considering the applicant's explanation for the delay in making his application.

(24) The respondent's decision of 5 November 2014 was a reconsideration

of the applicant's application, further to a previous decision of 20 March 2014, and in response to the assertions made in the applicant's PAP letter of 10 April 2014. Aside from the grounds relating to Article 8, the main complaint in the PAP was that the respondent had failed to consider the applicant's explanation for the delay in making his application and to consider the exceptional circumstances that he had raised, in line with the Home Office policy guidance. It was as a result of that complaint that the respondent, in her letter of 9 May 2014, agreed to reconsider the decision of 20 March 2014/ 1 April 2014, stating the following:

> "Decisions for limited or indefinite leave to remain can only be reversed where it is clear that the original decision was not taken in line with the prevailing policy and immigration law at the time the decision was reached….Having reviewed the decision in light of the points made in your letter before claim, the decision of 1 April 2014 will be reconsidered"

(25) It is absolutely clear from this, when considered together with the PAP letter, that the reason for the agreement to reconsider the decision was that the original decision had not been taken in line with the relevant policy and that a reconsideration was to take place in order to take account of the policy. Accordingly the purpose of the respondent's subsequent letter of 14 August 2014, requesting resubmission of the evidence previously produced confirming the applicant's exceptional reasons for the delay in his application, was to enable the applicant's explanation and evidence to be considered under the terms of the policy. The refusal letter of 5 November 2014 made it clear, at page 2, paragraph 2, that the applicant's application had been reconsidered in light of his representations in the PAP and there can be no doubt, therefore, that, whilst the policy was not cited in terms, paragraphs 3 to 5 of page 2 of that letter were nevertheless specifically addressing the applicant's circumstances within the policy. There was nothing in the respondent's conclusions at paragraphs 4 and 5 to suggest that the considerations had been anything other than in line with the terms of that policy. I do not agree that the respondent's consideration of why the applicant was prevented from making an application before the expiry of the deadline indicates a failure to consider a policy concerning exceptional circumstances applying after the expiration of the deadline, as the initial grounds assert at [11]. Neither do I agree with Mr Mannan's submission as to concerns that the wrong policy, or a different version, had been considered, when it is clear from the extract of the policy quoted in the PAP letter (which incidentally had been force since 12 September 2013) that the policy remained, where relevant, in identical terms in the updated version of 20 October 2014.

(26) Accordingly there is no merit in the first ground. It is clear that the respondent exercised her discretion under the terms of the relevant policy and I dismiss the applicant's claim to the contrary.

(27) As to the basis upon which the respondent exercised discretion, I find nothing irrational in the conclusion reached. At paragraphs 3 and 4 of page 2 of the letter of 5 November 2014 the respondent found that

the reasons given by the applicant for the delay in making his application did not amount to exceptional circumstances, since it had been open to him to submit his application within the time limit with an explanation for the absence of relevant supporting evidence, making the same representations about the theft of relevant documents, and submitting the police investigation report already in his possession. There is nothing irrational about such a conclusion. The documents the applicant claims to have had stolen related solely to his business activities in Nigeria whereas it is clear from the list of documents in his letter of 5 February 2013 that the majority of the documentation related to his business activities in the United Kingdom and there is no reason why those could not have been submitted with an in-time application. Accordingly it was not irrational for the respondent to conclude that the theft of documents in Nigeria did not amount to exceptional circumstances justifying the delay in making his application. It is, moreover, clear from the policy that the threshold for demonstrating exceptional circumstances is a high one. The policy lists circumstances which can amount to exceptional circumstances and I do not accept, as Mr Mannan's submission appeared to suggest, that it automatically follows in every case that problems replacing documents as a result of theft will amount to exceptional circumstances. It is for the respondent to consider all the circumstances, which is what she undoubtedly did in the applicant's case. I therefore also dismiss the applicant's claim in this respect.

(28) Finally, and as I pointed out to Mr Mannan, it seems to me that the applicant could not, in any event meet the terms of the policy, since he failed to meet the requirement to provide evidence to show the date that he requested replacement documents. Neither the police investigation reports nor the accountant's letter provides such information. Mr Mannan submitted that the fact that that was not a matter raised by the respondent reinforced his case that the policy had not even been considered. I do not agree. The respondent clearly did consider the policy and the fact that she did not make that observation adds nothing to the applicant's case. On the contrary, it is the case that even if the applicant made out his grounds as stated and there had been a failure to consider the policy (which I do not find to be the case), that is immaterial, since he could not in any event meet the terms of the policy.

(29) Accordingly I find that the respondent was entitled to refuse the applicant's application on the basis that she did. There was nothing unreasonable, irrational or unlawful about her decision.

Decision

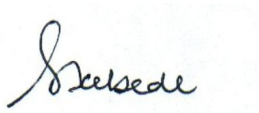
(30) For all of these reasons, the claim must fail and the applicant's application for judicial review is refused.

Permission to appeal to the Court of Appeal

(31) Permission to appeal to the Court of Appeal is refused on the basis that there is no arguable point of law capable of affecting the outcome of the application.

Costs

(32) The applicant, being the losing party, bears the burden of meeting the respondent's costs. The respondent is to send the applicant her schedule of costs and any written submissions from the parties as to costs are then to be made to the Upper Tribunal no later than 14 days from the date of this order.



Signed: _____

Upper Tribunal Judge Kebede

Dated: _____ **10 December 2015**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was given (Civil Procedure Rules Practice Direction 52D 3.3(2)).