Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16380/2016

THE IMMIGRATION ACTS

Heard at: Field House
On: 15 May 2018

Decision and Reasons Promulgated
On: 11 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MR SALMAN MOHAMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr D Bazini, counsel, instructed by Jein Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of India, born on 18 December 1983. He appeals with permission against the decision of First-tier Tribunal Judge Roopnarine-Davies, promulgated on 20 December 2017, dismissing his appeal against the respondent's decision to refuse his application for indefinite leave to remain on the grounds of long residence in the UK, pursuant to paragraph 276D of the Immigration Rules.

2. She found that the appellant could not succeed under the Rules. There were two gaps in the lawful leave, between 3 August 2010 and 4 July 2011 and from 6 May 2015 until 22 June 2016.

3. The appellant contended that there were exceptional circumstances under the relevant Guidance. Discretion could be exercised for short breaks in lawful residence. I have been referred to the Long Residence Guidance published for Home Office staff on 3 April 2017.

4. First-tier Tribunal Judge Roopnarine-Davies went on to find that the appellant had very limited private life here. There were no compelling reasons to outweigh the public interest in immigration control [26].

5. On 16 March 2018 the Upper Tribunal Judge O'Ryan granted the appellant permission to appeal. It was arguable that the Judge failed to give adequate reasons for rejecting the appellant's contention that the two gaps in his leave to remain were exceptional within the relevant policy.

6. Mr Bazini, who represented the appellant before the First-tier Tribunal, submitted that the assertion by the Judge at [21] that the Home Office staff instructions on the Long Residence Guidance did not confer rights that would have the effect of 'overriding' the requirements of paragraph 276B, had never been submitted. He had submitted that the Guidance had to be taken into account when reaching conclusions on human rights appeals.

7. Mr Bazini referred to the decision in SF and Others (Guidance - Post 2014 Act) [2017] UKUT 120, where the Upper Tribunal stated that even in the absence of the "not in accordance with the law" ground of appeal, the Tribunal ought to take the respondent's Guidance into account if it points clearly to a particular outcome in the instant case.

8. Mr Bazini submitted that the Judge's approach to the two gaps and whether there were exceptional circumstances was unreasonable and unlawful.

9. With regard to the first gap, he submitted that the Judge accepted the presenting officer's submission in respect of the time it took for the appellant's employer to obtain a Tier 2 licence, that the Secretary is charged with setting and implementing immigration policy and rules and she was entirely within her powers to take the time necessary to do so and 11 months is not unreasonable or unlawful. Mr Bazini submitted that it was unreasonable and unlawful.

10. The appellant had contended that but for the lengthy and unexplained delay in granting the employer's licence (applied for on 20 May 2010 but not granted until 12 April 2011) he would have been granted a Tier 2 visa prior to his leave expiring on 3 February 2011. He had made an in time application on 29 June 2010.

11. It is correct as stated by the Judge that at the time he made his Tier 2 application, his employer had not yet received his licence, but had it done so within a reasonable period, his application would have succeeded either before his application was made, or the decision was made, or an appeal. There was no explanation or any data produced to support the presenting officer's assertion that it was not unreasonable to take 11 months before granting the licence.

12. Mr Bazini referred to the UKVI Service Standards which set out processing times in respect of different types of applications. In respect of customers applying to remain on a temporary basis including as spouses, workers, Tier 1 General and Entrepreneurs, students and organisations seeking to sponsor a worker, there is an eight weeks processing period, (ten days' priority postal and same day premium).

13. The acceptance by the Judge of the presenting officer's assertion was accordingly not justified or substantiated.

14. Mr Bazini noted that the employer was in fact eventually granted the licence and as soon as this occurred the appellant immediately applied for and was granted entry clearance to work for his employer.

15. In the event, the Judge erred in her approach as to whether the reason for the short break in lawful residence was exceptional in circumstances where the delay was as a result of the Home Office's inordinate delay which was contrary to its own standards.

16. With regard to the second gap, the Tier 4 application, he referred to the internal email dated 2 May 2015 at page 86 of the bundle. That email from the case worker noted that it appeared that they had failed to follow their own Patel guidance, and they did not issue a certified copy of the appellant's passport, despite two requests from the representatives, within a 60 day timeframe. His application was in time as he has previously been issued a Tier 2 visa in May 2014. He was therefore unable to obtain a sponsor as he had not got a certified passport. He then lodged a family life application the day before the 60 days had expired. A certified copy of the passport was sent one day after the 60 day suspension: "Can you re-issue a further 60 day letter?"

17. The case worker therefore recognised that the appellant had been treated unfairly and considered that a further 60 day letter should be issued to remedy this.

18. There was an internal email in response dated 8 April 2015. It was noted that they sent a certified copy of the applicant's passport to him on 25 February 2015. During the 60 day period the applicant can provide them a CAS or submit a fresh application in a different category, which he has done by submitting the family application.

19. There was then reference in the response to the appellant's solicitor's letter dated 28 March 2015. "...So the applicant has had more than 30 further days from we sent his passport copy, to obtain a CAS whilst in possession of the Patel letters and certified copy of his passport. Therefore, her stance is that we should not issue further Patel letters and would require confirmation as to which applications he wishes to be considered.

20. Mr Bazini submitted that contrary to his submissions, the Tribunal has taken the second email at face value and concluded that there was no unfairness.

21. That, he submitted was plainly wrong. The appellant was entitled to a 60 day Patel letter when his proposed educational provider had its licence revoked. He was given a 60 day letter but this was effectively useless as the Home Office had not returned his passport, without which no licensed educational provider would accept him as a student. There were repeated requests for the passport which were sent to him by the Home Office after the 60 day period provided.

22. There was in fact no further 30 days in which an application could be made from when the appellant finally received the passport. That is because in order for a licensed educational provider to offer a CAS to a student he would need to provide not only his passport but evidence of valid leave which in this case would be a valid Patel letter.

23. However, at the time the passport was returned to him, his Patel letter had expired and he could not make such an application. The 30 day period referred to was the period that had passed since receiving the passport but was not effective without a valid Patel letter

covering the period. He thus did not have a 30 day period to find a sponsor. In any event he was entitled to be given 60 days.

24. Mr Bazini submitted that the finding at [24] that there was scant evidence of any attempts made by the appellant to find a sponsor, even though by 26 February 2015 he was in possession of the necessary documents and the respondent was holding the Tier 4 application open as at April 2015 was misconceived: The respondent refused to provide a further Patel letter and the appellant was obliged to remain with his family life application (which was a variation within the 60 days, only made because the Home Office had not provided the passport), rather than the student application which was bound to fail without a CAS, which could not be obtained without a Patel letter.

25. He submitted that although his solicitors might have erred with regard to the approach to the JR Proceedings by failing to serve the respondent, this did not alter the fact established from the Home Office's own records that the appellant should have been given a further 60 day letter.

26. Mr Bazini contended that he is still entitled to such a letter, which would render his time in the UK as valid leave since the 2015 period. Had he been provided with such a letter, it is likely that he would have completed his ten years in February 2016.

27. Mr Bazini referred to page 15 of the Long Residence Guidance relating to periods of overstaying. It provided that the threshold for what constitutes "exceptional circumstances" is high, but that could include delays resulting from unexpected or unforeseeable causes such as the inability to provide necessary documents. This would only apply in exceptional or unavoidable circumstances beyond the appellant's control, for example, that it is the fault of the Home Office because it lost or delayed returning travel documents.

28. This he submitted is only an example. It could clearly include the inordinate delay in providing the sponsor licence to the appellant's employer. The Judge would be obliged to decide whether the appellant's circumstances fell within the guidance and that was not considered. Consideration of the policy is particularly relevant when assessing the proportionality of the decision.

29. Mr Bazini referred to the Rule 24 response which contends that the grounds amount to a disagreement with the findings of the Judge. It is contended that the conclusions were open to her on the evidence. The grounds relating to the first gap in residence at paragraph 9 rely on a misinterpretation of the respondent's guidance: It "plainly refers to applications for leave to remain and not the sponsorship licence." The appellant took a risk in applying for leave to remain with the sponsor who did not have a licence. For all he knew the sponsor may not have been granted a licence at all.

30. Mr Bazini submitted that contrary to those assertions, the Home Office document does relate to organisations seeking to sponsor a worker. The processing time is approximately two months.

31. In reply, Mr Tufan acknowledged with regard to the second gap that he had some sympathy.

32. As to the first gap, he referred to the headnote in SF and Others. The facts point clearly to a particular outcome. He submitted that the Tier 2 sponsor Guidance had no time limitations.

33. In response, Mr Bazini submitted that in 2010 and 2014 a period of eight weeks was the expected time for a decision to be made. The fact that it took 20 weeks cannot on any basis be found to be reasonable.

34. It is clearly a point that was and remains in issue. There was no evidence justifying the submission at [21] that she was entirely within her powers to take the time necessary to process the employer application and that 11 months was not unreasonable.

35. That assertion has not been "made good." In certain cases there may be a number of reasons justifying such a lengthy period. However, in this case no evidence was produced to justify the 11 month period taken. All that is known is that the employer was granted a licence and that leave to enter was granted shortly thereafter.

36. With regard to SF, the policy does apply in hindsight. It applies to the issues in this case. There may be exceptional circumstances resulting from the situation where the appellant is delayed through the fault of the Home Office. He submitted that the Judge has not given adequate consideration to the underlying issues in this appeal.

Assessment

37. I am not satisfied that the First-tier Tribunal Judge has given proper consideration as to whether in the circumstances of this case there were exceptional circumstances within the applicable Home Office guidance regarding the gaps which occurred in this case.

38. Further, there was no basis for the finding that the secretary of state, who is charged with setting and implementing immigration policy, was entirely within her powers to take the time necessary to decide the employer's application to become a Tier 4 sponsor and that 11 months was not unreasonable. The basis for the acceptance of the presenting officer's contention in that respect had not been substantiated and adequately justified.

39. It is also not clear that the appellant did in effect have a further 30 days to find a new sponsor but failed to do so [23]. In order to be offered a CAS, the appellant would need not only his passport but evidence of valid leave, namely, a valid Patel letter. At the time that he was returned his passport, his 30 day period granted had already passed. Moreover, the policy was to give 60 days.

40. As noted by Judge O'Ryan in granting permission to appeal, the key issue was whether certain parts of the Home Office staff instructions on long residence should have resulted in the respondent and consequently, the Judge, in treating the two discrete gaps in the appellant's continuous leave to remain as being exceptional.

41. I find that the Judge has failed to give adequate reasons for rejecting the appellant's contention that the two gaps were exceptional within the policy.

42. Moreover, the Judge was required to consider whether, in determining the human rights appeal, the policy regarding the application of the Rules suggests a particular outcome. In such a case, the policy as noted by Judge O'Ryan is relevant in the assessment of the proportionality of the respondent's decision.

43. I accordingly set aside the decision of the First-tier Tribunal. The parties agreed that in that event the decision would have to be re-made.

44. Mr Bazini submitted that in the circumstances, having regard to the amount of evidence still required, this is an appropriate case to remit to the First-tier Tribunal. Mr Tufan did not seek to argue otherwise.

45. In the circumstances I am satisfied that this is a proper case to remit to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside.

The appeal is remitted to the First-tier Tribunal (Taylor House) for a fresh decision to be made by another Judge.

Anonymity direction not made.

Signed Date 8 June 2018

Deputy Upper Tribunal Judge C R Mailer