



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/20949/2016

THE IMMIGRATION ACTS

Heard at Field House
On 11 July 2018

Decision & Reasons Promulgated
On 23 August 2018

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

SOBIKAN BASKARAN
(NO ANONYMITY ORDER)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Physsas, Counsel instructed by Genga & Co Solicitors Ltd

For the Respondent: Mr E Tufan, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The applicant is a Sri Lankan Tamil originally from the Vanni who says he arrived in the United Kingdom aged 13, on 25 October 2009, claiming asylum 2 days later. He went to live with his great-aunt and great-uncle. He has had no contact with his family in Sri Lanka since 2011.
2. The appellant appeals on human rights grounds against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse him further leave to remain in accordance with her discretionary leave policy.

3. The appellant is now an adult, and section 55 of the Borders, Citizenship and Immigration Act 2009 is not in issue before me.

Background

4. The respondent refused to grant the appellant asylum. However, as he was an unaccompanied minor, the appellant was given discretionary leave to remain, from 31 December 2009 to 31 December 2012.
5. His great-uncle and great-aunt overlooked the need to renew the discretionary leave in December 2012: they could have made an application to renew within 28 days (that is to say, not later than 28 January 2013), but the application was not made until 11 March 2013, just under 2½ months out of time, and 6 weeks outside the 28-day grace period. The appellant was not responsible for that delay as he was still a child. The respondent granted the appellant a further period of discretionary leave, from 1 May 2013 to 3 May 2016.
6. The appellant submitted an in-time application for further leave to remain on 25 April 2016, such that the conditions of his previous leave to remain were extended under section 3C of the Immigration Act 1971 (as amended). The respondent refused, relying on the interruption between January and March 2013 and applying the Immigration Rules as they stood in 2016.

Refusal of leave to remain

7. On 13 August 2016, when refusing further leave, the respondent said this:
 - “17. You claim to have arrived in the United Kingdom on 25 October 2009 and claimed asylum on 27 October 2009. Your asylum claim was refused on 31 December 2009, however you were granted discretionary leave to remain in the United Kingdom until 31 December 2012. You submitted an out of time application for further leave to remain on 11 March 2013, however, *this out of time application will not be held against your compliance as you were a minor at the time the application was submitted.* You were then granted further discretionary leave to remain in the United Kingdom from 1 May 2013 until 3 May 2016. You submitted an in-time application for further leave to remain on 25 April 2016, therefore, the conditions of your previous grant of leave continued until your application for further leave was considered.
 18. Taking your compliance into consideration, it is accepted that there is nothing adverse known which could preclude a grant of leave to remain in the United Kingdom, however, your compliance is not considered a significant compelling reason to justify granting you further leave to remain in the United Kingdom.
 19. It is acknowledged that you claim to have resided in the United Kingdom for approximately six years and ten months, however, there has been no significant delay in processing any of your applications at fault of the Home Office. Therefore, taking your length of time spent in the United Kingdom outside your control into consideration [paragraph 353B of the Rules], it is not considered that there are any significant or compelling reasons to justify granting you further leave to remain in the United Kingdom.”

The Respondent refused to grant any form of leave but gave the appellant an in-country right of appeal which he exercised.

Respondent's discretionary leave policy

8. The appellant relied on the respondent's Asylum Policy Instruction on Discretionary Leave (Version 7 published on 18 August 2015) which said this:

"10.1 Applicants granted discretionary leave before 9 July 2012

Those granted leave under the discretionary leave 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 discretionary leave was granted (normally they will be eligible to apply for settlement after accruing 6 years' continuous discretionary leave (or where appropriate a combination of discretionary leave and LOTR, see Section 8 above)), unless at the date of decision they fall within the restricted leave policy".

9. Mr Tufan accepted at the hearing that both periods of discretionary leave appear to have been granted on the same basis and it is not contended that this appellant has ever fallen within the restricted leave policy. If it were not for the 2½ month interruption, the appellant would have been able to show 6 years' discretionary leave and would have been able to apply successfully for settlement under the policy.

First-tier Tribunal decision

10. The First-tier Tribunal dismissed the appeal, applying Section 117B(5) of the Nationality, Immigration and Asylum Act 2002 (as amended) because the appellant's status has been precarious throughout and therefore little weight should be given to the appellant's private life.

Permission to appeal

11. The appellant appealed with permission to the Upper Tribunal. Permission was granted by Upper Tribunal Judge Coker on the basis that it was arguable that the First-tier Tribunal Judge failed to have adequate regard to the respondent's Policy and Rules in reaching her decision and to give adequate or any reasons for the findings made.
12. The relevant submission in the grounds of appeal is at paragraph 11 thereof in which Ms Physsas summarises the points in the appellant's favour: the brevity of the interruption in his leave to remain, , the application being submitted out of time by his carers and the respondent's express acceptance that the interruption would not be held against the appellant's compliance, his having been a minor at the date of the error.
13. The grounds contend that the First-tier Tribunal failed to consider properly the fact that the appellant would have qualified for indefinite leave to remain, were it not for an error by his carers and assert that the interference with his private life is not proportionate.

14. There follows a quotation from *Chau Le* (Immigration Rules – de minimis principle) Vietnam [2016] UKUT 00186 (IAC) which itself refers to the decision of the Supreme Court in *Patel v Secretary of State for the Home Department* [2013] UKSC 72 wherein Lord Carnwath, Judge of the Supreme Court, giving the judgment of the Court, said this:

“56. Although the context of the rules may be relevant to the consideration of proportionality, I agree with Burnton LJ that this cannot be equated with a formalised "near-miss" or "sliding scale" principle, as argued for by Mr Malik. ...

57. It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the rules are not reviewable on appeal: section 86(6).”

15. That is the basis on which this appeal came before me.

Discussion

16. The heart of this case is the exercise of the respondent's discretion outside the Rules, and the extent to which it is fettered by her policy and her assertion that the interruption in January-March 2013 would not be held against the appellant's compliance.
17. The respondent's policy states that those granted discretionary leave before 9 July 2012, a group which includes this appellant, will be dealt with under that policy through to settlement, which will normally be available after 6 years' discretionary leave and/or leave to remain outside the Rules, unless they fall within the restricted leave policy. The appellant does not fall within the restricted leave policy.
18. The interruption in the appellant's leave was not of his making. He was a child. The respondent in her refusal letter said that the interruption would not be held against his compliance, but then stated that the appellant's compliance was not a significant compelling reason to justify granting further leave to remain. However, in her policy, it appears that (absent any restricted leave issues) compliance is sufficient for the grant of further leave to remain. The respondent's decision is inconsistent and disproportionate, particularly as this appellant has now been in the United Kingdom for 9 years, including most of his secondary education.
19. I have considered the weight to be given to the Upper Tribunal decision in *Chau Le*, which is based on the decision of the Court of Appeal in *The Secretary of State for the Home Department v SS (Congo) & Ors* [2015] EWCA Civ 387, post-dating the decision of the Supreme Court in *Patel*. This is not a 'near miss' case as *Patel* and *SS (Congo)* define it. Rather, it is a combination of estoppel (the assertion that the interruption would not be held against the appellant's compliance) and failure by the respondent to apply her own policy on discretionary leave.
20. I am not satisfied that proper consideration was given to the respondent's stated policy on how she would apply her discretionary leave and settlement policies to those

whose discretionary leave began before 9 July 2012, nor to the effect of the respondent's assurance in the August 2016 that she would not hold the period of 2½ months between 31 December 2012 and 11 March 2013 against the appellant's compliance, given that it was not his error but that of his carers, and he was a minor at the time.

21. The First-tier Tribunal decision erred in law in failing to have regard to the respondent's policy and the assurance given in the refusal letter that the interruption would not be held against his compliance. That error is material: on a proper view of the evidence and the respondent's assurance and policy, this appeal would have been allowed and the respondent's decision found to be disproportionate.
22. I set aside the decision of the First-tier Tribunal and substitute a decision allowing the appeal. The question as to what leave should now be granted is a matter for the respondent, in line with her policy set out above.

Conclusion

The appellant's appeal is allowed.

Signed: *Judith A J C Gleeson*
Upper Tribunal Judge Gleeson

Date: 15 August 2018