UTIJR6

JR/3273/2018

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of Venu [D]

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Jackson

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Mr J Gajjar of Counsel, instructed on a direct access basis by the Applicant and Mr Z Malik of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 8th March 2019.

Decision: the application for judicial review is granted

1. The Applicant, a citizen of India born on 22 January 1973, was granted permission to apply for Judicial Review of the Secretary of State's decision dated 5 February 2018 refusing his application for indefinite leave to remain in United Kingdom as a Tier 1 (General) Migrant, and to the decision maintaining that on administrative review dated 21 March 2018.

2. The Applicant's application indefinite leave to remain was refused by the Respondent on two grounds, first that it was not desirable for the Applicant to be granted indefinite leave to remain due to his

character and conduct under paragraph 322(5) of the Immigration Rules, and secondly, that the Applicant's claimed current earnings were not genuine under paragraph 19(i) of Appendix A to the Immigration Rules. The factual bases behind both reasons for refusal, was in essence a discrepancy between the earnings that the Applicant claimed in an earlier application for leave to remain as a Tier 1 (General) Migrant and the earnings that he had declared to HMRC for the corresponding tax year.

3. The application for Judicial Review was pursued on four grounds as follows. First, the refusal under paragraph 322(5) of the Immigration Rules was procedurally unfair, having been made without any proper notice or opportunity for the Applicant to make submissions in relation to the substance of the decision. Secondly, it was irrational and/or procedurally unfair for the Respondent not to have permitted the Applicant to submit additional evidence that the Administrative Review stage. Thirdly, the decision under paragraph 322 (five) of the Immigration Rules was irrational and the Respondent did not properly exercise her discretion. Finally, the decision to refuse the application under paragraph 19 of Appendix A the Immigration Rules was irrational, a proper assessment not having been undertaken by the Respondent.

4. The substantive hearing of this application for judicial review was heard on 8 March 2019 and prior to the hand down of judgement in the present application, the Court of Appeal handed down its judgement in Balajigari v Secretary of State for the Home Department [2019] EWCA civ 673. The four appeals heard together by the Court of Appeal concerned the meaning of paragraph 322(5) of the Immigration Rules and the approach that should be taken to the application of that paragraph in the case of this kind, with a focus on the requirements of procedural fairness in the making of a decision. Whatever the merits of the application for judicial review prior to this, that decision is accepted by both parties as being relevant, binding and essentially determinative of the key issues in the present application for Judicial Review in the Applicant's favour such that the application must be granted and the decisions under challenge quashed.

5. The parties were given the opportunity to make submissions following the decision in Balajigari and given the agreement that this is one of the cohort of cases to be determined in accordance with that decision, were given an opportunity to agree a form of consent

and/or order to dispose of the present proceedings. The parties have been unable to reach agreement and therefore this decision is being handed down in relatively short form to bring an end to proceedings with an appropriate order.

6. The application for Judicial Review is granted, primarily on the grounds of procedural fairness and for the reasons given by the Court of Appeal in Balajigari. The Respondent has not made any specific submissions in relation to this application for judicial review, save for accepting that it is one of the cohort of cases covered by the decision in Balajigari and the Respondent's submissions in that claim and the other three heard together with it, have been relied upon as to the Secretary of States position generally in relation to such cases.

7. Those submissions proposed that in this cohort of cases, the decision under challenge would be withdrawn (or in the present case quashed as no agreement has been reached for withdrawal), following which the application for leave to remain would be reconsidered in an orderly manner amongst the cohort. Submissions were made as to a number of ancillary matters, including costs, permission to work, leave under section 3C of the Immigration Act 1971, declarations or letters as to dishonesty, provisions for future human rights claims and right of appeal against a future adverse decision and the consequences of voluntary departure. Some but not all of these issues remained in dispute between the Applicant in the present proceedings and the Respondent; in addition to which there is a dispute as to the timescale for reconsideration of the application.

8. The two areas of dispute between the parties remaining immediately prior to hand down of this judgment were in relation to the timing of actions by the Respondent in relation to the reconsideration of the Applicant's application and as to costs. The Respondent submitted that there should be no timescale for the sending of a "minded to refuse letter" and that a new decision should be made within three months of any response from the Applicant to such a letter. However, no substantive reasons have been given in support of this position. In light of the delays and repeated failure of the Respondent to comply with directions in this case following the decision in Balajigari, together with the lack of reasons for the timescales proposed by the Respondent, it is appropriate to include in the order below an initial deadline for the "minded to refuse letter" and for a new decision to be made within two months of any response.

9. As to costs, the Respondent accepts that she is responsible for the Applicant's reasonable costs but only from 13 September 2018 when the Applicant applied to amend his grounds of challenge, the claim prior to that date being unarguable. Although the original grounds of challenge were poor, they did raise substantive challenges in relation to the basis of the refusal under paragraph 322(5) and ultimately, the Applicant has been successful in the remedy sought for the decision under challenge to be quashed. In these circumstances, the Applicant is awarded his costs, not limited to the period following the application to amend his grounds.

Order

(i) The Applicant's application for Judicial Review is granted.

(ii) The Respondent's decisions dated 5 February 2018 refusing the Applicant's application for indefinite leave to remain as a Tier 1 (General) Migrant; dated 21 March 2018 maintaining that decision on administrative review are quashed.

(iii) Upon reconsideration of the Applicant's application, if the Respondent has concerns with the same, she shall send to the Applicant a "minded to refuse letter" within 21 days of the date of this Order, giving the Applicant the opportunity to respond to the Respondent's concerns.

(iv) The Applicant's response in (iii) above shall be sent within 14 days of receipt of the "minded to refuse" letter.

(v) On receipt of the Applicant's response in (iv) above (or upon expiry of the 14 day time limit if no such response is received within that period), the Respondent shall reconsider the Applicant's application within two months, absent special circumstances.

(vi) The Respondent shall pay the Applicant's reasonable costs of this application, to be summarily assessed if not agreed.

(vii) Permission to appeal to the Court of Appeal is refused.

Signed: _____

Upper Tribunal Judge Jackson

Dated: **21st November 2019**

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 sent (Civil Procedure Rules Practice Direction 52D 3.3.