UTIJR6

JR/3371/2019

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

Fahad Sultan Khan
Gul Fatima Sultan

Applicants

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Kamara

Application for judicial review: substantive decision

Proposed: This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10:00 am on 20 May 2020.

Having considered all documents lodged and having heard the parties' respective representatives, Mr M Symes, of Counsel, instructed by Joshi Solicitors, on behalf of 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 20 March 2020.

Decision: the application for judicial review is granted

Introduction

1. These judicial review proceedings, issued on 21 June 2019, challenge the respondent's decision dated 25 March 2019 granting the applicants limited leave to remain in the United Kingdom rather than indefinite leave to remain.

Procedural history

2. The applicants are citizens of Pakistan and were born on 4 March 1990 and 7 February 1992, respectively. Their immigration history and procedural background is as follows.

3. On 15 July 2006 the applicants entered the United Kingdom with their mother as visitors. Their mother applied for asylum on 11 August 2006, with the applicants listed as child dependants. That application was refused on 11 September 2006 with an in- country right of appeal, which was itself dismissed on 7 December 2006. The applicants appeal rights were exhausted on 28 February 2007.

4. On 10 May 2007 and 11 June 2009, the applicants submitted further submissions, which were refused on 29 March 2010 with no right of appeal.

5. On 21 July 2010, the applicants sought a reconsideration of their asylum claim under the 'Legacy' scheme. In response, the applicants forwarded a completed Legacy questionnaire under cover of a letter dated 22 December 2010. The applicants were granted Discretionary Leave (DL) on 30 September 2012, valid until 29 September 2015.

6. By way of a letter dated 15 June 2013, the applicants requested a grant of ILR. There does not appear to have been a response to that request.

7. The applicants made an in-time application for a further grant of DL on 14 September 2015. That application was granted on 11 March 2016 and was valid until 10 March 2019.

8. The applicants made a second request for a grant of ILR on 17 October 2018. The respondent replied on 25 October 2018, refusing that request and explaining that the applicants were on the 10-year route to settlement because the initial grant of DL was made after 9 July 2012. Three further requests for ILR were made between 30 October 2018 and 27 November 2018 which met with the same response from the Secretary of State, the last response dated 13 March 2019.

9. On 25 March 2019, the applicants were granted DL until 12 September 2021.

10. The applicants sent pre-action protocol correspondence on 3 May and 22 May 2019 in response to which the respondent maintained her position, by way of a letter dated 29 May 2019.

11. Both the original and renewed grounds argued firstly, that there was lack of clarity and irrationality in the decision-making process; and secondly, that there was a legitimate expectation for the grant of ILR.

12. Permission to apply for judicial review was granted by Upper Tribunal Pitt following an oral hearing on 3 September 2019, on the following basis:

> *"It is arguable that the applicant's (sic) made an application for leave prior to 9 July 2012 that had not been decided by that date, that the grants of 36 months of leave and not 30 months indicated that they were on the 6 year track to ILR, not the 10 year track, and that the respondent relied on incorrect transitional provisions in refusing to grant ILR."*

13. The respondent provided detailed grounds of defence, dated 1 November 2019, in which it was requested that all aspects of the claim be dismissed, and that the applicants meet the respondent's costs of defending this challenge. The arguments made on the respondent's behalf were as follows. It was common ground that the applicants could not meet the requirements of the Immigration Rules. It was not accepted that the applicants were entitled to be granted settlement under the Asylum Policy Instruction on Discretionary Leave dated August 2015 because they were first granted DL after 9 July 2012; it was irrelevant that they initially applied before that date and that they had not completed a period of 10 years' DL. Furthermore, it was not accepted that the transitional provisions in the API on DL applied because they were granted DL for similar reasons. It was contended that even had the applicants been granted DL before 9 July 2012 this would not entitle them to a grant of ILR after accrual of 6 years' DL. That the applicants were granted two periods of DL of 3 years' duration was not the yardstick for a grant of ILR. Addressing the grounds directly, it was argued that the initial grant of DL for 3 years was incapable of giving rise to a legitimate expectation of a grant of ILR and there was no promise by the respondent that the applicants would be granted ILR on completion of 6 years' DL. It was not accepted that there was a lack of clarity giving rise to illegality or irrationality in the decision-making process. Lastly, that the applicants were legacy cases was said to add nothing to their claim because this did not entitle them to the grant of leave.

14. The applicant's skeleton argument was received on 15 January 2020. The grounds set out in the judicial review application continued to be relied upon and can be summarised as follows. The first ground was characterised as a failure by the respondent, in granting further DL rather than ILR, to follow policy. The relevant policy being the exceptional circumstances proviso in paragraph 5.1 of the API on DL of August 2015 which allowed for a departure from the usual position of granting 30 months' DL and for the person in question being eligible to apply for settlement after 6 years' DL rather than 10. It was argued that the applicants fell firmly within the ambit of that policy and that there were no cogent reasons to justify departure from it. As for the second ground, the argument was that the policy made a clear, unambiguous statement, devoid of relevant qualification, which established that the sole requirement for ILR (excepting exclusion) was two grants of DL of 3 years' duration.

15. The applicant sought the following outcome; that the respondent's decision of 25 March 2019 be quashed.

The Relevant Law

Discretionary Leave policy 2009

Standard Period for Different Categories of Discretionary Leave

It will normally be appropriate to grant the following periods of Discretionary Leave to those qualifying under the categories set out above. All categories will need to complete at least six years in total, or at least ten years in excluded cases, before being eligible to apply for ILR.

Article 8 cases – three years
Article 3 cases – three years
Other ECHR Articles – three years

Asylum Policy Instruction: Discretionary Leave (Version 7.0; 18 August 2015)

"**5.1 Exceptional circumstances**

Where removal is no longer considered appropriate following consideration of the exceptional factors set out in paragraph 353B of the Immigration Rules and the guidance in Chapter 53 of the Enforcement Immigration Guidance (EIG), 30 months' DL should be granted, unless one of the following situations applies:

…

- where the UK Border Agency (as it was) made a decision either before 20 July 2011 or before 9 July 2012 that a grant of leave on the grounds then listed in Chapter 53 was not appropriate, but after that date reconsidered that decision and – on the basis of the same evidence (ie the evidence available to the original caseworker) – it is decided that the earlier decision was wrong and leave should have been granted

Where the above applies and the relevant date was before 20 July 2011, Indefinite Leave to Remain (ILR) outside the rules should be granted. This is because before 20 July 2011 ILR was normally granted in cases which met the exceptional circumstances criteria in Chapter 53.

Where the above applies and the relevant date was before 9 July 2012, three years' DL should be granted, with the person normally becoming eligible to apply for settlement after 2 periods of 3 years' DL (6 years' continuous leave). This is because from 20 July 2011 to 8 July 2012 the UK Border Agency (as it was) granted 3 years' DL in cases that met the exceptional circumstances criteria in Chapter 53.

…

10.1 Applicants granted DL before 9 July 2012

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.

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 hearing

16. The parties made succinct oral submissions in line with their respective written arguments. In addition, each made submissions concerning the recent judgment in *R (on the application of Ellis) v Secretary of State for the Home Department (discretionary leave policy; supplementary reasons)* [2020] UKUT 82 (IAC).

17. Mr Symes argued that the decision was useful to his arguments and that there was nothing in the applicants' case to render it abnormal. He relied on headnote 2, in particular:

> *"The Home Office discretionary leave policy should not be read as saying that, once it is decided that an individual continues to qualify for further leave on the same basis as before, he must automatically be granted indefinite leave to remain after 6 years' continuous discretionary leave unless at the date of decision he falls within the restricted leave policy. The word 'normally' is used advisedly, so as to maintain the maximum possible discretion. Where a policy governs what is to happen in the normal case, it remains open to the decision-maker to take a different course in a particular case, provided he or she takes account of the policy and has reason for considering the case to be abnormal."*

18. Mr Malik submitted that there was no obligation on the respondent to grant ILR and that the natural words used in the policy should be applied, having regard to the context.

19. At the end of the hearing, I reserved my judgment.

Discussion

Ground one – irrationality/failing to follow published policy

20. In reaching this decision, consideration has been given to the representatives' written and oral argument as well as the documents before me.

21. The applicants' case turns on whether their situation fell within the exceptional circumstances to the August 2015 DL policy. For ease of reference I will set this out again here.

> *"Where the UK Border Agency (as it was) made a decision either before 20 July 2011 or before 9 July 2012 that a grant of leave on the grounds then listed in Chapter 53 was not appropriate, but*

after that date reconsidered that decision and – on the basis of the same evidence (ie the evidence available to the original caseworker) – it is decided that the earlier decision was wrong and leave should have been granted."

22. It is evident from the chronology in this case that the applicants' circumstances fell squarely within this policy. They were refused asylum as child dependents and had exhausted their appeal rights as of 28 February 2007. Thereafter their case was put by way of further representations to the Secretary of State on 10 May 2007 and 11 June 2010. Those submissions were rejected as fresh claims on 29 March 2010, however the circumstances of the family as a whole were reviewed under the "legacy" exercise, which resulted in a grant of DL of 3 years' duration on 30 September 2012.

23. That grant of leave was consistent with paragraph 5.1 of the August 2015 exceptional circumstances proviso that

Where the above applies and the relevant date was before 9 July 2012, three years' DL should be granted, with the person normally becoming eligible to apply for settlement after 2 periods of 3 years' DL (6 years' continuous leave).

24. In the applicants' case, the respondent made a decision before both 20 July 2011 and 9 July 2012 (the decision of 29 March 2010) that was reversed on the same evidence following the "legacy" process. As Mr Malik rightly argued in his DGD, there was no entitlement to the grant of any particular type of leave in such cases. Indeed, in *SH (Iran)* [2014] EWCA Civ 1469, Davis LJ said the following at [43]:

"*… the policy applicable to the cases in the legacy programme to be applied by CRD (and later CAAU) remained at all material times the general law as it stood at the time of consideration of an applicant's case in the same way as elsewhere in UKBA…. The legacy programme created no new rights.*"

25. The second period of DL granted to the applicants was also for a period of 3 years, rather than 30 months and was similarly consistent with the published guidance. According to that guidance, after two periods of 3 years DL people in the applicants' position would "*normally*" become eligible to apply for settlement. There is no indication in this case of any reasons for the Secretary of State to conclude that there was anything abnormal about the applicants' circumstances which would justify a departure from the policy.

26. The decision of 25 March 2019 merely states that the grant of leave was made "*in accordance with the published Home Office Asylum Policy Instruction on Discretionary Leave*." The respondent granted DL rather than ILR without any regard to the Exceptional Circumstance proviso in the policy in question. The failure to follow published guidance is unlawful, applying *Mandalia* [2015] UKSC 59.

27. Accordingly, the applicants succeed on the first ground.

Ground two – legitimate expectation

28. I am bound by what was held in *Odelola* [2009] UKHL 25 at [39]:

> "*I have no doubt that the changes in the immigration rules, unless they specify to the contrary, take effect whenever they say they take effect with regard to all leave applications, those pending no less than those yet to be made.*"

29. Similarly, in relation to the respondent's policies and guidance documents, with reference to *Rahman* [2011] EWCA Civ 814, at [45]:

> "*… a minister is entitled to review, to change and to revoke his policy whenever he considers it to be in the public interest to do so.*"

30. In *Mehmood (legitimate expectation)* [2014] UKUT 00469 (IAC), the Upper Tribunal held:

> "*The first question in every case concerning an alleged legitimate expectation is whether the public authority concerned made an unambiguous representation, promise or assurance devoid of any relevant qualification.*"

31. The previous DL policy of 2009 was in place when the applicants put their circumstances to the respondent on 22 December 2010. While this policy normally granted DL for a period of 3 years, that the initial grant of DL to the applicants was also for three years was incapable of giving rise to a legitimate expectation for the grant of ILR 6 years later.

32. There was no such "*unambiguous representation, promise or assurance devoid of any relevant qualification,*" referencing *Mahmood*; that the applicants would be granted ILR on completion of 6 years of DL. There is no such indication on the face of the 2009 policy or in the correspondence from the Secretary of State. Accordingly, it cannot be said that the previous policy created an express and unequivocal written representation that consecutive grants of 3 years' leave would entitle the applicants to apply for ILR and this ground fails.

Order

The decision of 25 March 2019 is quashed.

T Kamara

Signed: _____

Upper Tribunal Judge Kamara

Dated: **22 April 2020**

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 applicant'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)