

**Upper Tribunal
(Immigration and Asylum
Chamber)**
IA/36062/2013



Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House, London

On 24th June 2014

Determination

Promulgated

On 25th July 2014

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**MR SHUHAN AHMED
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr S Whitwell, Home Office Presenting Officer

For the Respondent: Mr A Rahman

DETERMINATION AND REASONS

1. The Secretary of State appeals with permission against the decision of Judge Ferguson promulgated on 11th March 2014, in which he allowed the appeal of the Respondent against the Appellant's decision of 24th July 2013 refusing the Respondent further leave to remain in the United Kingdom.
2. For the sake of clarity in this determination, I will refer to the Secretary of State as "the Respondent" and Mr Shuhan Ahmed as "the Appellant" which is how they were referred to before the First-tier Tribunal Judge.

3. By way of background the Appellant is a citizen of Bangladesh born 15th April 1995, and is now therefore 19 years of age. He entered the United Kingdom in June 2005 entering on a family visit visa along with his mother and sister. His mother departed the United Kingdom leaving the Appellant and his sister with family relatives. The Appellant made application on 23rd April 2009 for indefinite leave to remain. That application was refused. He was however granted discretionary leave to remain until 22nd April 2012. On 22nd April 2012 he made an in-time application to extend this status but this was refused by the Respondent on 24th July 2013. It is that decision which the Appellant appealed and which came before the First-tier Tribunal Judge.
4. There are two components to the Respondent's grounds seeking permission.
 - (i) The first ground asserts that the Judge's finding that the Appellant should be granted discretionary leave was irrational; this is on the basis that the Judge made significant adverse credibility findings against the Appellant, finding that the Appellant and others had not been honest with respect to the contact that the Appellant had with his mother.
 - (ii) The second ground asserts that there is misdirection in law in that the Judge's determination demonstrates that he did not fully understand the decision of the Secretary of State and failed to remind himself, when considering the discretionary leave issue, the basis on which discretionary leave had been granted in the first place. The Appellant had been granted discretionary leave under the policy relating to unaccompanied minors. Under this policy the Appellant could only have been granted discretionary leave until he reached the age of 17 years 6 months. As pointed out to the judge at the FtT hearing, at the date of decision the Appellant was over 18 years of age. It is difficult therefore to see any reason why he should be granted a further period of discretionary leave when he no longer fulfils a basic requirement of that policy.
5. It is correct to say that when the Appellant appealed to the First-tier Tribunal he relied on several factors in pursuing his appeal. These are set out by the First-tier Tribunal Judge in [9] and [10] of his determination as follows;

"Mr Ali highlighted facts which were not contentious: that the application was made on 19th April 2012 when Mr Ahmed still had discretionary leave to remain and was still aged under 18 and had lived in the United Kingdom for 6 years and 10 months in the United Kingdom (sic). If the Secretary of State had assessed the application within a reasonable length of time Mr Ahmed would have been under 18 and would have completed 7 years residency in the United Kingdom. Taking the relevant date as the date of decision not application he could have come within paragraph 276ADE (iv).

Mr Ali's primary submission however was that the application had been made before the introduction of the new rules on 9th July 2012 and those rules should not have been applied retrospectively. Instead, the Secretary of State should have assessed the application under the transitional provisions. She had not acted in accordance with her own policy on discretionary leave, a copy of which was provided which showed the Transitional Arrangements at page 16. It was submitted that there were no circumstances to show that the Secretary of State should have departed from the grant of a further three years leave. The delay since April 2012 was the fault of the Secretary of State taking 15 months to decide the application and if the case was looked at even within 6 months of the application then nothing would have changed from the time he was given DL. The terms of the guidance were not considered. Reference was made to *Fatima Mohammed [2012] EWHC 3091* to submit that the failure of the Secretary of State to apply the policy made the decision unlawful. That concluded the submissions".

6. In allowing the appeal the Judge noted:

"Although the respondent considered that there was a change of circumstances the only change which was considered appears to have been the fact that the Appellant had, by the date of decision, attained 18 years of age. There was no consideration of any of the other factors, and assessment of the relevance of the age was made only under paragraph 2876ADE which was not in force at the date of the application. The Secretary of State delayed making a decision for 15 months. Had the application been considered within a reasonable period of time, which I accept should be assessed as 6 months, the situation would have been that Mr Ahmed would have been still aged under 18 and would have lived in the United Kingdom for more than 7 years at the date of decision".

7. The Respondent sought permission to appeal. Thus the matter comes before me to decide whether the First-tier Tribunal erred in law. Before me Mr Whitwell essentially relied on the grounds seeking permission. Those grounds are fully set out in [4] above.
8. In response Mr Rahman submitted that the FtT Judge had not erred. He referred to [15] of the determination and said that the Respondent's delay in making a decision had worked to the Appellant's detriment. The Judge had found that had the application been considered in time the appellant would have been under 18 years of age and would have been granted a further period of leave. He asked that I find the determination sustainable and dismiss the respondent's appeal.

Error of Law

9. I find favour with Mr Whitwell's submissions. I find that the Judge materially erred in his consideration and the conclusions which he reached in this determination, such that the decision must be set aside and remade. I find I am in a position to remake the decision. My reasons for setting aside the decision and remaking it are as follows.
10. It is not challenged that the Appellant entered the United Kingdom as a visitor accompanied by his mother and sister. He was a minor at that time.

His mother returned to Bangladesh and he and his sister were apparently left in the care of their first cousin Afsar Khan.

11. In 2009 the Appellant applied for further leave to remain. He was granted discretionary leave to remain as an unaccompanied minor. This leave was granted in accordance with the Respondent's policy in force at that time and in line with that leave the Appellant was granted discretionary leave to remain up to 17 years 6 months of age. This leave expired on 22nd April 2012.
12. Shortly before the expiry of that leave, the Appellant applied for further discretionary leave to remain. On 24th July 2013 the Respondent refused that application applying 276ADE of the Immigration Rules which came into effect on 9th July 2012.
13. The Appellant as is known appealed that refusal and when the matter came before the First-tier Tribunal Judge he made the following findings none of which have been seriously challenged:

"I accept the submissions of Mr Sheridan as to the facts. Mr Ahmed's mother, aunt and cousin have together made arrangements to bring him and his sister to the United Kingdom and ensure they remain here for the "better life" referred to by Mr Khan. To do this they have not been honest about the contact that Mr Ahmed and others in the family have with his mother. Mr Ahmed was not an honest witness at all, beginning with the clumsy lie in his statement that his "Bangla language skills were not that good" in comparison to his English language skills, and continuing with his inability to explain how he knew about his mother's situation if he was not in contact with her and why he was not more concerned to locate her if she was in fact missing without explanation".

14. The error with the Judge's determination starts at [13]. This is because the Judge fails to recognise and remind himself that the Appellant had been granted discretionary leave on account of his age and under a policy (then in force) which was limited to minors and which could no longer apply to the Appellant, he having reached his majority. In [13] the Judge sets out the change to the Immigration Rules on 9th July 2012, which were accompanied by Transitional Arrangements applicable to those who had been granted discretionary leave before 9th July 2012. What the Judge fails to recognise is that those arrangements state:

"Decision makers must consider whether the circumstances prevailing at the time of the original grant of leave continue at the date of decision. If the circumstances remain the same and the criminality thresholds do not apply a further period of three years discretionary leave should normally be granted".

It stands to reason that there has been a significant change in the Appellant's circumstances in that he has reached the age of majority and therefore cannot take advantage of the policy relating to unaccompanied minors.

15. Further the assertion by the Appellant that the Respondent had delayed in making her decision, and that this had in some way prejudiced the Appellant, is without merit. The Appellant has suffered no prejudice by any claimed delay, since he has been allowed to remain in the UK in any event until after his 18th birthday. It is of further note that the Respondent in coming to her decision, took into account paragraph 276ADE of the Immigration Rules at present in force. Finding that the Appellant could not meet those requirements, she then considered whether his application raised any circumstances which had not been considered above and which could be said to be exceptional within the meaning of the Article 8 ECHR jurisprudence. No such circumstances were raised and likewise none were raised at before me.
16. For the foregoing reasons the appeal of the Respondent is allowed and the decision of the First -tier Tribunal set aside and re-made.

DECISION

17. The determination of the First-tier Tribunal, contains a material error of law. It is set aside. I hereby remake the decision. The appeal of Shuhan Ahmed against the SSHD's decision of 24th July 2013 refusing him further leave to remain in the United Kingdom is dismissed.

No anonymity direction is made

Signature

Judge of the Upper Tribunal

Dated

I have dismissed the appeal and therefore there can be no fee award.

Signature

Dated