



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/13740/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 4th February 2015**

**Determination
Promulgated
On 17th February 2015**

Before

**THE HONOURABLE MRS JUSTICE PATTERSON
DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD**

Between

**MR IRFAN ALI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs H Price, Counsel instructed by Pioneer Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan who appealed against the decision of the Respondent dated 1st March 2014 to refuse his application made on 19th August 2013 for indefinite leave to remain on the basis of ten years'

continuous lawful residence in the United Kingdom. His subsequent appeal to the Tribunal was dismissed under the Immigration Rules by First-tier Tribunal Judge Steer in a decision promulgated on 3rd November 2014.

2. The judge set out the background. The Appellant had entered the UK on 4th September 2003 with entry clearance as a student and was granted further leave to remain as a student on four subsequent occasions. His further application on 16th January 2010 was refused and a subsequent appeal was dismissed by both the First-tier Tribunal and Upper Tribunals.
3. On 11th May 2011 he made a fresh application for leave to remain as a Tier 4 (General) Student and the next day he became appeal rights exhausted. On 7th June 2011 his application of 11th May 2011 was rendered void by the Respondent as it had been submitted whilst the Appellant had an ongoing appeal. On 27th July 2011 he submitted an out of time application for leave to remain as a student which was granted on 9th September 2011 until 30th August 2013.
4. On 19th August 2013 he submitted the application which is the basis of this appeal.
5. Judge Steer noted that the Appellant was without lawful leave between 8th June and 8th September 2011, a period of approximately three months. That period of leave broke the period of claimed continuous residence here and therefore the Appellant could not demonstrate ten years' continuous residence.
6. The judge then went on to consider the terms of the refusal letter. She noted that the Appellant maintained that the Respondent ought to have exercised her discretion in his favour as refusal had been on the basis of a technicality. The thrust of the submissions on behalf of the Appellant (as we shall see from the Grounds of Appeal) were that discretion to allow him leave to remain should be properly exercised in a grant of leave in his favour.
7. The judge noted that the Respondent had set out her published guidance on the exercise of discretion where continuous leave had been broken. The Appellant had submitted his application 50 days out of time and had not provided any evidence that he had submitted the application together with an explanation of the exceptional reasons as to its late submission. In his witness statement the Appellant had stated that the delay had been caused by the need to obtain a new CAS and bank statements. The judge said that the Appellant had not provided any further detail, or documentary evidence outlining exceptional circumstances that had intervened such that it had taken a period of 50 days to obtain the documents. The judge also concluded that from the detailed refusal letter the Respondent had exercised her discretion under the published guidance and had exercised that discretion properly.

8. There was nothing to suggest that the Appellant had established family life in the UK and in relation to private life the provisions of paragraph 276ADE applied. There were no submissions made as to human rights grounds outside the Rules and the judge went on to dismiss the appeal.
9. Grounds of Appeal were lodged which we shall summarise. The Appellant was being penalised not because he had failed to obey the Immigration Rules but because he was caught by a technical point which was not even made out by the Respondent. The 50 day gap that had appeared was a direct result of the return of the application by the Respondent as the Appellant had to start the process of finding a college and building up his maintenance all over again. The judge had failed to give adequate weight to this explanation at page 12 of the Appellant's bundle in his personal statement. The whole point of Counsel's submissions was not that the application should have been accepted at the time as lawful as at the time the Respondent may well have acted lawfully. The submission made by Counsel was that when the same was considered by the Respondent for the purpose of continuous residence, there was discretion to take into account the whole background of how the Appellant had in fact appealed and even pursued his appeal all the way to the Upper Tribunal. The judge had failed to understand the correct basis of the appeal and had speculated about the lawfulness rather than use of discretion of the Respondent. Moreover the judge had not mentioned the case of **Ukus (discretion: when reviewable) [2012] UKUT 00307 (IAC)** which had been relied on heavily by Counsel. It had been submitted to the judge that since the Respondent had failed to follow the guidance in **Ukus** the correct course of action was for her to substitute her own discretion for the Secretary of State's and make a lawful informed decision.
10. In considering the grounds First Tier Tribunal Judge Cox found that the grounds had arguable merit and that the decision might be unsafe. Thus the matter came before us.
11. Before us Ms Price produced a skeleton argument which we have considered and which repeated much of what was said in the Grounds of Appeal. In particular it was said that having exercised her discretion in his favour previously the Appellant had a legitimate expectation that his leave would be continued. She reminded us that Judge Cox had concluded the decision might be unsafe. She emphasised to us that the only basis of challenge to the decision was on the issue of discretion. The Secretary of State could have asked the Appellant, as an overstayer, to return to his country of nationality and make a fresh application. She had not done that. Ms Price had asked Judge Steer to remit the matter back to the Secretary of State so that discretion could be exercised properly.
12. Reliance was placed on the case of **Ukus** as set out in the grounds. The Appellant had been here lawfully and had taken steps to continue that. He was seeking not to break the Rules. There had been no material change in the Appellant's circumstances since he had submitted an out of time application for leave to remain as a student which had been granted. The

Secretary of State had a discretion which had not been properly exercised. We were asked to set the decision aside and allow the appeal outright.

13. In response to submissions from Mr Bramble she said that **Sultana and Others (rules: waiver / further enquiry; discretion) [2014] UKUT 540 (IAC)** did not apply as it was a points-based case. Importantly, the Secretary of State had already exercised discretion in the Appellant's favour and there had been no material changes since that time. The Appellant was being asked to comply with the requirement of the Rules which the Secretary of State kept changing. The whole case turned on whether the Secretary of State had exercised her discretion properly.
14. Mr Bramble referred us to **Sultana** and to the head note which indicated that:

“Where applicants wish to invoke any discretion.... they should do so when making the relevant application, highlighting the specific provision of the Rules invoked and the grounds upon which the exercise of discretion is requested. Where any request of this kind was made and refused, a brief explanation should be provided by the decision maker.”

In paragraph 20 it was said that an applicant:

“should make his case accordingly, the court advancing all relevant facts, justifications and explanations. Issues of this kind belong firmly to the domain of the primary decision maker and should not be belatedly ventilated at the stage of either first instance or second instance appeal”.

Furthermore, “adequate, intelligible explanation for any discrete refusal of this kind should always be provided by the ECO.”

Mr Bramble reminded us of the history of the case and said the only point that the Appellant had expanded was in his witness statement at paragraph 5 was the fact that his application was 50 days out of time.

15. In terms of the refusal letter the Secretary of State had exercised her discretion. In particular at page 3/7 detailed reasons were given why the Appellant had not demonstrated ten years' continuous lawful residence and, on page 4/7, it was noted that the Appellant had provided “no exceptional reasons for not submitting a valid application within 28 days. With this in mind it is considered not appropriate to exercise discretion in your circumstances.” While the judge had not specifically mentioned **Ukus** she had followed the approach taken there. The judge had dealt with the issue of discretion in her decision noting in the reasons for refusal letter that the Respondent had set out her published guidance on the exercise of discretion where continuous leave had been broken (paragraph 23). The burden was on the Appellant to set out the reasons for the delay

in his witness statement. The judge had commented on that, noting that the Appellant had not provided further detail on the reasons for the delay.

16. There had been no error by the judge who had given full consideration to the issue of whether the Respondent had carried out her discretion properly. We were asked to uphold the decision.
17. We reserved our decision.

Conclusions

18. The proper approach to the exercise of discretion by the Secretary of State and any subsequent decision by the Tribunal is as set out by Vice President Ockelton, in the case of **Ukus**.
19. The head note is in three parts. Firstly, if a decision maker in the purported exercise of a discretion vested in him noted his function and what was required to be done when fulfilling it, and then proceeded to reach a decision on that basis the decision is a lawful one, the Tribunal cannot intervene in the absence of a statutory power to decide that the decision should have been exercised differently. Secondly, where the decision maker has failed to exercise a discretion vested in him, the Tribunal's jurisdiction on appeal is limited to a decision that the failure renders the decision "not in accordance with the law". Because the discretion is vested in the Executive, the appropriate course will be for the Tribunal to require the decision maker to complete his task by reaching a lawful decision on the outstanding application, along the lines set out in **SSHD v Abdi [1996] Imm AR 148**. In such a case, it makes no difference whether there is such a statutory power as is mentioned above. Thirdly, if the decision maker has lawfully exercised his discretion and the Tribunal has such a statutory power the Tribunal must either (i) uphold the decision maker's decision (if the Tribunal is unpersuaded that the decision maker's discretion should have been exercised differently); or (ii) reach a different decision in the exercise of its own discretion. That is the approach Judge Steer had to follow.
20. We consider that **Sultana** is relevant to the present case in that it sets out guidance on the use of discretion and, for example, as referred to by Mr Bramble, applicants when making a relevant application should highlight the specific provision of the Rules invoked and the grounds upon which the exercise of discretion is requested. However the outcome of this appeal does not hinge on that.
21. The facts in this case are not really in dispute and we note there was no oral evidence presented at the appeal which proceeded on the basis of submissions only (paragraph 13 of Judge Steer's decision). Accordingly the factual background as set out by Judge Steer is not contentious. In particular it is not disputed that on 27th July 2011 the Appellant had

submitted an out of time application for leave to remain as a student which had been granted. It is also not disputed that he was without lawful leave between 8th June and 8th September 2011, a period of approximately three months. We did not understand Ms Price to dispute the fact that this period of leave broke the period of claimed continuous residence in the United Kingdom and therefore the Appellant could not demonstrate ten years' continuous lawful residence in terms of the Rules.

22. We can also accept, as Ms Price urged us to do, that the Immigration Rules are not straightforward, that there are often changes in them and no doubt the Appellant was doing his best to comply with those changes. Ms Price's contention is that given the factual background to the case and the fact that the Secretary of State had exercised her discretion in favour of the Appellant in the past then absent any change in the material circumstances, discretion should have been exercised in his favour again.
23. However, it seems to us that the Secretary of State was making two distinct decisions on different issues at different times, and it cannot realistically be said that any legitimate expectation was created by the fact that the Secretary of State allowed the Appellant to continue as a student when he submitted an out of time application for leave to remain. We cannot see any inconsistency in the Respondent's position that she would look afresh at the merits of the Appellant's application on whether he should succeed on the ten year residence route. There was plainly no representation, promise or assurance by the Secretary of State that might have led the Appellant to consider he had a legitimate expectation that the application would have had a favourable outcome. It would be wrong to conflate the decisions as they were entirely different in nature. Contrary to the submissions of Ms Price it is quite clear from the detailed refusal letter that the Secretary of State did exercise her discretion and noted that there were no "exceptional reasons" for not submitting a valid application within 28 days. We do not think that Ms Price disputed this but had argued before Judge Steer that insufficient weight had been placed on the Appellant's explanation for why it had taken the length of time it did take to submit the application.
24. Far from ignoring the explanation given by the Appellant, Judge Steer referred to his witness statement and said that the Appellant "did not provide any further detail, or documentary evidence, outlining exceptional circumstances that had intervened such that it had taken a period of 50 days to obtain a new CAS and bank statement." She went on to say that she considered the Respondent had exercised her discretion properly as the Appellant had not provided such detail and supporting evidence to establish exceptional circumstances had existed which had prevented him from submitting the application at an earlier date. We consider that the judge was entitled to reach such a view. The Appellant says very little about this in paragraph 5 of his witness statement, simply saying that to submit a new CAS letter and bank documents "took further time".

25. Judge Steer concluded, on the basis of what was presented to her that the Respondent had exercised her discretion properly for the clear and cogent reasons she gave. Indeed in our view it is difficult to see how Judge Steer could have decided otherwise. In our view the exercise of discretion is very much a matter for the Secretary of State and should not be interfered with by the Tribunal unless it can be said that the decision is Wednesbury unreasonable which is not the position reached in this case. Contrary to what is said in the skeleton argument the fact that the Respondent had already exercised her discretion in favour of the Appellant on one occasion did not - at the risk of repetition - give him a legitimate expectation that discretion would be exercised in his favour on an entirely separate issue. It seems to us that, contrary to the grounds of appeal, the judge did understand the correct basis of the appeal and was entitled to make the findings she did on whether the Respondent had exercised her discretion properly. There is no error in law.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

We do not set aside the decision.

No anonymity direction is required or is made.

Signed

Date

Deputy Upper Tribunal Judge J G Macdonald