



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/13336/2015

THE IMMIGRATION ACTS

Heard at Field House
On 21 August 2017

Decision & Reasons Promulgated
On 31 October 2017

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

V R
(ANONYMITY DIRECTION MADE)

and

Appellant

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Smyth, Solicitor, Kesar & Co Solicitors

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this order can be punished as a contempt of court. I make this order because this is framed as a protection case and there is invariably a risk in cases of this kind that publicity will itself create a risk.
2. This is an appeal against a decision of the First-tier Tribunal (First-tier Tribunal Judge Veloso) dismissing the appellant's appeal against a decision of the Secretary of State on 13 November 2015 refusing the appellant international protection and leave to remain on human rights grounds.

3. At paragraph 5 of the decision Judge Veloso set out the parameters of the appeal. The letters "DL" mean discretionary leave. Judge Veloso said:

"Mr Smyth confirmed that the appellant's case was that he was entitled to further DL in line with the respondent's policy. His rights and entitlement came under the DL policy, not the Immigration Rules. He was not arguing asylum, humanitarian protection or Article 3 ECHR. He was arguing Article 8 only on the basis of the application of the respondent's DL policy."

4. This is a case where there is considerable potential to become bogged down with side issues and I am grateful to Mr Smyth for avoiding a scatter gun approach, which may have taken a great deal of time but would have caused only irritation, and concentrating on the point that most assisted the appellant.
5. This appeal has previously been determined unsatisfactorily. An earlier decision to allow the appeal on a limited basis was set aside by Upper Tribunal Judge H Storey because the law had changed and the First-tier Tribunal had no power to make the decision that it did. For all that the closing passage of the unsatisfactory decision of the First-tier Tribunal does explain what the appeal is about. There the judge said:

"It is unclear to me why the appellant has been given three years' discretionary leave following the decision promulgated in February 2012 rather than six months until the appellant was 17½. That would have been in accordance with the respondent's policy at the time (as set out in paragraph 17 above). Rather than allowing the appeal on the basis of the Appellant's skeleton argument and submissions, or refusing it on the basis of the refusal letter and the Presenting Officer's submissions, I direct that this case should be remitted to the Secretary of State so that the application can be reconsidered in the light of the documentation produced for the hearing, the respondent's previous and current policies and in particular an explanation as to why the appellant was granted three years' discretionary leave rather than six months (till he became 17½) following the hearing promulgated on 6th February 2012. It should also be made clear to in the reconsideration letter whether the three-year discretionary leave reflected the fact that the application was on the grounds of private life as well as on his being a minor. If the application remains unsuccessful on reconsideration, the appellant will retain a right of appeal."

6. The point is that the appellant entered the United Kingdom in 2009 he was given discretionary leave of three years but the letter giving him discretionary leave in 2012 did not explain the basis of the grant. There was a policy identified as the 2015 discretionary leave policy which showed that the maximum period of discretionary leave was three years and "caseworkers must consider whether the circumstances prevailing at the time of the original grant of leave continue at the date of decision." The policy continues: "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 three years [discretionary leave] should normally be granted."
7. Judge Veloso was satisfied that although she saw a document dated 2015 the material parts of the policy in 2012 were the same and that the appellant was given three years' discretionary leave rather than six months because he was still a minor and entitled to three years' leave under the policy. The grant of discretionary leave was made on 4 April 2012 when the appellant was still only 17 years of age. The letter telling him that

discretionary leave had been granted does not explain the decision. It merely announces it and explains his rights.

8. In the “detailed reasons for refusal” accompanying the decision of 13 November 2015 the respondent said at paragraph 23:

“Careful attention has been given to the wording that removing you would *“at this stage”* interfere with your right to respect for a private life. I have considered that it is also reliant upon your being a minor, a time when best interests including maintaining education and social care. At the time of this promulgation you were 17 years and one month old. You are now 20 years and 10 months old.”
9. The reference to “the wording” is a reference to the reasons given by a First-tier Tribunal Judge for allowing an earlier appeal.
10. In other words, in her letter of November 2015 the respondent said that the appellant had been given leave following the judge’s decision because of his minority and because of things in his private and family life associated with that minority included his being in social care and his being in education. The letter explained that he is now an adult and he was no longer in social care and was no longer in education and was no longer a minor and these were sufficiently different circumstances to warrant his being refused further leave.
11. In his skeleton argument prepared for the hearing Mr Smyth says that this finding of “significant changes” is irrational because there is nothing in the earlier decisions of 4 April 2012 or 13 November 2015 to indicate that the changes identified were changes in circumstances that had had any bearing on the grant of leave to remain.
12. Judge Veloso had found at paragraph 51 that the significant changes included his not receiving public funds and his not continuing his education and neither of these things had been relied upon. Mr Smyth argued that Judge Veloso was irrational to say that these things were relevant. He said there had been no significant changes and therefore under the terms of the policy his leave should have been renewed.
13. Although this is in some ways helpfully clear I find that this skeleton argument exposes the error in the appellant’s submissions. Judge Veloso was not asking herself if the decision is “in accordance with the law”. That was a ground of appeal that is no longer permissible and it is failing to appreciate that that caused the appeal to be determined unsuccessfully on an earlier occasion. Judge Veloso was conducting an Article 8 balancing exercise. Clearly she was addressing her mind to proportionality and what is proportionate is illuminated but not determined by what is said in the Rules or policy. This is the point the Tribunal was trying to make in **Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC)**. Here Judge Veloso was having to decide if refusing further leave was a proportionate interference with the private and family life of this claimant. She had in her mind the Rules (it is common ground that the appellant cannot satisfy the Rules) and the appropriate policies. However Judge Veloso was not concerned with the correct application of the policy by the Secretary of State but with whether the terms of the policy impacted on the Article 8 balancing exercise. She was entitled to note that a change of circumstance could prevent renewal under the policy and it is immaterial whether the Secretary of State noticed or explained such a change. Her decision is that there was a change of circumstance and that is consistent with the policy and it is therefore on the facts

of this case it cannot be said that her decision was inconsistent with the policy or otherwise unlawful. This is precisely the point identified by Mr P Nath, a Senior Home Office Presenting Officer who prepared the Rule 24 response. He said at paragraph 3:

“If the matter was not raised in the SSHD refusal, the FTJ is still entitled to raise this issue and open to make the above findings.”

14. Having reflected on the submissions made by both parties I am satisfied that Mr Nath was absolutely right. This is a case where the judge correctly conducted a balancing exercise, considered proportionality in the light of policies and made her own findings and her own findings were that the facts of the case, consistent with the policy, showed significant changes which meant removal was no longer an unlawful interference with the private and family life of the appellant.
15. It follows therefore that the appeal against the First-tier Tribunal’s decision is dismissed.

Decision

16. I dismissed the appellant’s appeal.

17.

Signed

Jonathan Perkins, Upper Tribunal Judge



Dated: 30 October 2017