



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08571/2017

THE IMMIGRATION ACTS

Heard at Liverpool
On 25 June 2018

Decision & Reasons Promulgated
On 17 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR SAEED AMIRAHMADI

Appellant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Salam, Salam & Co

For the Respondent: Mr. C. Bates, Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Iran, born on 30.7.81. He arrived in the United Kingdom with a student visa in April 2006 and remained with valid leave since that time, except for between 25 October 2011 and 15 April 2012. He made an application for indefinite leave to remain on 18 January 2017 on

the basis of his long residence. This application was refused in a decision dated 25 July 2017. The Appellant appealed on the basis that the decision was not in accordance with the law as his University had mistakenly withdrawn his CAS letter in 2011 and a subsequent application was successful.

2. The appeal came before First tier Tribunal Judge Brookfield for hearing on 30 October 2017. In a decision and reasons promulgated on 7 November 2017, she dismissed the appeal.

3. Permission to appeal was sought, in time, on the basis that the Judge had erred materially in law:

(i) in misdirecting himself as to the Appellant's ability to satisfy the Respondent's policy on long residence and therefore made findings that were legally erroneous, in light of the fact that the period of overstay was the result of "*exceptional circumstances beyond the applicant's control*" and that the evidence in the form of extracts from the Appellant's subject access file with the Home Office showed that the Respondent had recorded the reason for the refusal of the Appellant's application were the fault of the University and (ii) in limiting her consideration of the Appellant's Article 8 claim to consideration of family life and failed to consider his private life.

4. Permission to appeal to the Upper Tribunal was granted by First tier Tribunal Judge Osborne on the basis that it was arguable that the Judge erred in finding that the Appellant accepted the Respondent's decision to refuse his application on the basis that he did not make an application for judicial review and it was further arguable that the Judge failed to give due consideration to the university's acceptance of responsibility for the delay which was arguably beyond the appellant's control.

Hearing

5. At the hearing before me, I began by asking Mr Bates to clarify the Respondent's position on the appeal in light of the grounds of appeal and supporting evidence. Mr Bates very fairly accepted that the letter from John Moores University was before both the Home Office and the First tier Tribunal and that the Appellant could not be blamed for an error by a third party. He accepted that it would arguably be open to the Judge to take into account in any proportionality assessment. The facts of the appeal are undisputed and the only issue is proportionality given that it is a human rights appeal. He submitted that he would be hard pressed to argue that there is a public interest in refusing the application.

6. In his submissions, Mr Salam drew my attention to page 53 of the Appellant's bundle, which is an extract from the Appellant's file in the form of a GCID note, confirming the Respondent's acceptance that the University

had made a mistake. The University subsequently issued a fresh CAS letter and the Appellant applied within three days for further leave. He submitted that discretion had not been exercised by the Home Office given that what happened was clearly not within the control of the Appellant. There are exceptional circumstances as set out in the policy. He submitted that if the requirements of the Rules are met that is enough for the appeal to be allowed on human rights.

Findings

7. I find that, despite the fact that she gave the issues detailed consideration at [8](i)-(xxi) of her decision and reasons, First tier Tribunal Judge Brookfield materially erred in law at [8](vii) when she held as follows:

“The respondent did consider the mix up at the appellant’s university but did not find this established there were exceptional circumstances to allow him indefinite leave to remain in the UK outside the Immigration Rules.”

8. I find that the Judge erred in so finding because whilst in the Respondent’s refusal decision of 25 July 2017 the point is addressed and rejected on the basis that: *“it is not considered to be an exceptional circumstance which would justify waiving the requirement to have completed 10 years lawful and continuous residence”* there is no reference by the Respondent to his policy on Long Residence.

10. The version in force at the date of hearing, which is in this respect materially the same as that in force on 6 January 2012 when the Appellant’s application was refused on the basis of the mistakenly withdrawn CAS letter, provides:

“When refusing an application on the grounds it was made by an applicant who has overstayed by more than 28 days, you must consider any evidence of exceptional circumstances which prevented the applicant from applying within the first 28 days of overstaying.

The threshold for what constitutes “exceptional circumstances” is high, but could include delays resulting from unexpected or unforeseeable causes. For example:

- *inability to provide necessary documents – this would only apply in exceptional or unavoidable circumstances beyond the applicant’s control, for example:*
 - *it is the fault of the Home Office because it lost or delayed returning travel documents ...*

Any decision to exercise discretion and not refuse the application on those grounds must be authorities by a senior caseworker at senior executive officer (SEO) grade or above."

It is apparent from both the refusal decision and the GCID note dated 16 February 2012 that no consideration was given to the Respondent's policy on Long Residence nor was the decision referred to an SEO for consideration of the exercise of discretion.

11. There is no longer in existence a ground of appeal challenging a decision by the Respondent on the basis that it is not in accordance with the law. Following the judgment of the President of the Upper Tribunal in Charles (human rights appeal: scope) [2018] UKUT 00089 (IAC) the correct approach:

"is to decide whether such removal or requirement would violate any of the provisions of the ECHR... whether the hypothetical removal or requirement to leave would be contrary to Article 8 (private and family life).

70. Section 85(4) permits the Tribunal to consider "any matter which it thinks is relevant to the substance of the decision". In a human rights appeal, therefore, a matter will be relevant if and only if it goes to the question of whether the decision is unlawful under section 6 of the 1998 Act."

In practice, any failures by the Respondent that might have amounted to the decision not being in accordance with the law now fall for consideration not under the third principle set out in Razgar [2004] UKHL 27 but as part of the assessment of proportionality.

12. I therefore find that the failure by the Respondent to consider exercising his discretion in accordance with his policy on Long Residence, in light of his express acceptance, as set out in the GCID note of 16 February 2012, that the reason he applied for further leave out of time was "*due to a mix up at the University, they accidentally withdrew his CAS, which led to his application being refused*" is a matter that properly falls for consideration as part of the proportionality balancing exercise.

13. In light of Mr Bates' helpful submission and acceptance that there would have been no public interest in refusing the application, in light of the evidence that the CAS was withdrawn in error, I find that if the Respondent had exercised his discretion in accordance with his policy that the Appellant's leave would have been extended in time, thus enabling him to meet the requirements of paragraph 276B & C of the Immigration Rules.

14. I find no error of approach by the Judge to the question of whether the Appellant has established a private life in the United Kingdom, given that at [8](xii) she found that he had and that Article 8 was engaged. However, I do find that the Judge erred in her assessment of the proportionality of the

Appellant's removal from the United Kingdom. This is because it is clear from her reasoning at [8](xx) that her finding was predicated on the basis that he did not meet the conditions for the grant of indefinite leave to remain under the Rules. It was accepted at [8](xv) that the Appellant speaks English and is financially independent, having obtained a Masters degree in mechanical engineering whilst residing lawfully in the United Kingdom. Whilst these are "neutral factors" no adverse factors were identified in the public interest considerations set out in section 117B of the NIAA 2002, nor in respect of the public interest considerations set out in paragraph 276B(ii) of the Rules.

16. In the absence of any adverse public interest considerations and given that the Appellant has resided lawfully in the United Kingdom since April 2006, except for the period of overstay which arose due to a mistake by his University which the Respondent failed to address through the exercise of discretion at that time, I find on balance that removal of the Appellant from the United Kingdom would amount to a disproportionate interference with his established private life.

Decision

17. I substitute a decision allowing the appeal on human rights grounds on the basis that the decision to remove the Appellant is disproportionate.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

16 July 2018