



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

Appeal Number: HU/09581/2016

THE IMMIGRATION ACTS

Heard at Field House

**On 18 April 2018
(Delivered Orally at Hearing)**

**Decision & Reasons
Promulgated
On 4 May 2018**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EDRIS SALIM

Respondent

Representation:

For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer

For the Respondent: Mr E Fripp, instructed by VIP Legal

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against a decision of Judge Aujla sent on 7 September 2017 in which he allowed the appeal of Edris Salim (whom I shall hereafter refer to as “the claimant”) against a decision of the Secretary of State taken on 22 March 2016 refusing to grant him further leave to remain.

Background

2. The claimant's history is set out in full in Judge Aujla's judgment at paras 2 to 13.
3. The claimant, who is a citizen of Iraq, entered the United Kingdom clandestinely on 9 October 2000 when he was 17 years of age. He claimed asylum shortly thereafter on 13 November 2000. That claim was refused by the Secretary of State on 26 March 2002. The claimant appealed against that decision and his appeal was dismissed on 29 January 2003 and subsequently permission to appeal against the dismissal of his appeal was refused.
4. On 1 December 2006 the claimant submitted an Iraqi Judgment Consideration which was refused by the respondent, the Secretary of State, on 9 January 2009. The claimant appealed against that refusal and that appeal was heard by Judge Parker. In a determination sent on 6 March 2009, she allowed the claimant's appeal under Art 8 of the European Convention on human right ("ECHR"). As a result of that decision the claimant was granted discretionary leave to remain valid from 13 August 2009 until 12 August 2012 under, it is accepted, the (then) Asylum Policy Instruction ("API") on discretionary leave.
5. On 23 July 2012 he made a further application for leave and was granted discretionary leave from 24 September 2013 until 23 September 2016 again under the relevant API.
6. On 11 August 2015 he applied for indefinite leave to remain on the basis of his circumstances, and in particular that he had completed six years' residence with discretionary leave under the API. His application was refused on 22 March 2016 and it is that decision which was appealed to Judge Aujla.

The Judge's Decision

7. In his decision, Judge Aujla considered the decision of Judge Parker and the basis upon which she had allowed his appeal which had led to the grant of discretionary leave. The reason for this was that before Judge Aujla reliance was placed upon the Secretary of State's discretionary leave policy in section 10.1. This provides as follows (it suffices to set out the first three paragraphs):

"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. See section 5.4.

If there have been significant changes that mean the applicant no longer qualifies for leave under the DL policy or the applicant falls for refusal on the basis of criminality (see criminality and exclusion section above), the further leave application should be refused." (my emphasis)

8. In his decision Judge Aujla dealt with the application of the first of those paragraphs at paras 36-40 as follows:

“36. The Appellant came to United Kingdom in 2010 when he was 17 years old. By the time the judge made his findings on 06 March 2009, the Appellant had resided in the United Kingdom for nearly 9 years. The judge found that the Appellant had put down significant roots in the United Kingdom. His private life therefore only strengthened between 2009 and 22 March 2016, the date of the Respondent's decision.

37. The Respondent refused the Appellant's application because family life between him and his girlfriend no longer existed. The Respondent did not consider the matter on the basis of the Appellant's established private life. Instead, she considered the private life claim as if it was a fresh claim and decided it under paragraph 276ADE, without reference to the fact that the Appellant had had the benefit of discretionary leave to remain in the United Kingdom on the basis of both family life and private life for over 6 years. It is my view that her consideration of private life as a fresh issue was inappropriate, unfair and possibly unlawful.

38. The Appellant was not granted discretionary leave to remain solely on family life grounds. The leave was granted on family life as well is (sic) private life grounds. Therefore, the fact that family life no longer existed was not in my view fatal to the success of his application since his private life still continued. By the time the Appellant made his application, he had already completed six years of discretionary leave on the basis of private life and party family life.

39. I have considered the Respondent's policy a copy of which was relied upon and placed before me by Ms Revill. Paragraph 10.1 of the same these as follows (sic):

'10.1 Applicants granted DL before 9 July 2012

Those granted leave under the DL policy in force before 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 basis as the 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.'

40. The Appellant was granted discretionary leave on 13 August 2009, before 9 July 2012. The leave was granted on the basis of both private life and family life. The fact that the Appellant had separated from his girlfriend and therefore did not enjoy family life any longer with her was not in my view fatal to the success of his application and therefore this appeal, since his long-established private life, having arrived in the United Kingdom as a minor aged 17, still continued. In the circumstances, I have no reason to reject Ms Revill's submission that the Appellant satisfied the requirements of the policy, having enjoyed discretionary leave in the United Kingdom for over 6 years."

9. It will be clear from those paragraphs, in particular para 40, that Judge Aujla took the view that the decision of Judge Parker was not based solely on the family life that then existed between the claimant and his partner, but was also on the basis of his private life which continued at the time of the decision. As a result of that Judge Aujla decided that the policy continued to apply and in para 41 concluded:

"I find that the Respondent's decision was not sustainable as it was in breach of the Appellant's right to private life under article 8. The Appellant satisfied the requirements of the policy. This appeal is therefore allowed on article 8 grounds."

The Submissions

10. In her grounds, the Secretary of State contends that the judge erred in law in concluding that the policy continued to apply and therefore that the appeal should be allowed under Art 8.

11. In his submissions, Mr Kotas who represented the Secretary of State submitted in essence that the basis of the original grant for DL following the decision of Judge Parker was on the basis of the claimant's private and family life. The latter no longer existed, as was accepted before Judge Aujla, and therefore it could not be said that the claimant continued to qualify for further leave on the same basis that DL was originally granted.

12. On behalf of the claimant, Mr Fripp in his helpful skeleton argument and submissions submitted that Judge Aujla was entitled to find that Judge Parker's decision to allow the claimant's appeal was not solely on the basis of family life but also on the basis of private life, which sufficiently continued and indeed, given the effluxion of time is perhaps enhanced today, such that it was not irrational for Judge Aujla to consider that the policy applied.

Discussion

13. There is no doubt on reading Judge Parker's determination that her decision was based on both the claimant's family life with his (then)

partner, as well as his private life. I was taken to passages in her determination starting at para 41 and running on to para 55 in which she refers to the claimant's circumstances relevant to his private life, both in the UK and as it would be if he were returned to Iraq, but also as regards his family life with his partner. There is no gainsaying the fact that she was influenced by both in reaching her decision that the Secretary of State's decision breached Art 8 of the ECHR. Equally, it is clear that both were material to her decision, for example, at para 44 she said:

"I accept that he has a private including family life in the United Kingdom. I am satisfied that there would be interference to this if he were to be required to leave. This is particularly the case for his relationship with his partner, which is a close one. They are living together and would like to marry and I am satisfied that they are genuine about this. They see their long-term future together and in such circumstances there would clearly be an interference if the appellant were required to leave."

14. Similarly, at para 54 she refers to the issue of proportionality of the claimant's removal in terms of "the impact that this would have on his family and private life".
15. In my judgment it is simply not permissible to read Judge Parker's determination as being based on anything other than a claim involving an amalgam of issues arising from the claimant's family life with his then partner and his private life.
16. The Secretary of State's policy only applies so that it would have the effect that Judge Aujla gave to it in allowing the claimant's appeal under Art 8 if the claimant continued to qualify for further leave "on the same basis as [his] original DL was granted". In the extract from section 10.1 of the policy, which set out above, the second paragraph makes clear what that is intended to encompass and it is the "circumstances prevailing at the time of the original grant of leave" and whether they "continue at the date of decision". As Mr Fripp submitted, of course, it is very unlikely that the circumstances prevailing, perhaps three years after an original grant of DL will be precisely the same. In some cases, the circumstances will have moved on in favour of a claimant with a deepening of a relationship or private life. In others, and this is one such case, a part of their Art 8 claim as originally brought may no longer pertain, here, that based on the applicant's relationship with his then partner. The policy itself recognises that a sensible and reasonable approach has to be taken to whether or not the same basis exists today as existed at the time of the original grant of DL, so para 3 which I set out above refers to "significant changes" which may lead to the policy not applying.
17. Mr Kotas handed up the Secretary of State's decision under challenge which refers in para 4 to the original grant being on the basis of the claimant's family life. Mr Fripp handed up the original letter granting leave which says nothing about the basis of the grant other than it is accepted, of course, that it was on the basis of Judge Parker's decision. Judge

Parker's decision was not solely based on the claimant's family life, it was based upon a combination of that family life and his private life and the impact of his removal on that amalgam of his private and family life in the UK.

18. In my judgment, Judge Aujla could not reasonably come to the conclusion that, once the relationship between the claimant and his then partner was no longer present, the circumstances prevailing at the date of the Secretary of State's decision under challenge in this appeal were the same (so as to "continue") as those that prevailed at the time of Judge Parker's decision, and perhaps more importantly, the grant of discretionary leave on that basis.

Decision

19. For these reasons, Judge Aujla materially erred in law in concluding that the Secretary of State's DL policy applied and thereby allowing the appeal under Art 8 on that basis. His decision cannot stand and is set aside.
20. The appeal will be remitted to the First-tier Tribunal for a *de novo* rehearing on Art 8 not to heard by Judge Aujla.

Signed



A Grubb
Judge of the Upper Tribunal

2 May 2018