



**Upper Tribunal  
Immigration and Asylum Chamber  
Judicial Review Decision Notice**

The Queen on the application of Vakhtang Kulumbegov

Appellant

v

Secretary of State for the Home Department

Respondent

**Before Mr Justice Pepperall sitting as an Upper Tribunal Judge.**

**Application for judicial review: substantive decision**

Having considered all documents lodged by the parties and having heard Mr Kulumbegov (in person) and Mr Staker instructed by Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on Thursday 28 November 2019.

Upon the Respondent agreeing to reconsider the decision dated 19 November 2018

And upon the Respondent agreeing that the Applicant has 30 days from the date this order is sealed to be issued a new Certificate of Sponsorship by Temenos UK Limited

And upon the Respondent agreeing that the Applicant may amend his application for Tier 2 ICT leave to remain to reflect the new Certificate of Sponsorship issued by Temenos UK Limited

And upon the Respondent agreeing to reconsider the Applicant's Tier 2 ICT application within 3 months (absent special circumstances) of receipt of the Applicant's letter containing the details of the new Certificate of Sponsorship

And upon the Respondent agreeing that if Temenos UK Limited is not willing to sign a new Certificate of Sponsorship, his application will be considered on the basis of a leave outside the rules application

And upon the Respondent agreeing not to refuse the application on the basis that the Applicant was an overstayer between 20 December 2018 and the date that the new decision is made

Decision: the application for judicial review is refused

Permission to appeal to the Court of Appeal

I refuse permission to appeal to the Court of Appeal because any appeal has no real prospect of success and there is no other compelling reason for an appeal to be heard:

- (1) While the claim is properly arguable, on 8 November 2019 the Respondent agreed to reconsider the decision, pay the Applicant's costs and give appropriate assurances to ensure that the Applicant's position is not prejudiced. The claim was, from that date, academic.
- (2) In refusing judicial review, I applied well-established principles that Tribunal should not ordinarily entertain an academic claim.

Costs

- (1) The Respondent do pay the Applicant's reasonable costs up to and including 8 November 2019, such costs to be assessed by detailed assessment on the standard basis if not agreed.
- (2) The Applicant do pay the Respondent's costs after 8 November 2019, such costs summarily assessed in the sum of E3,447.

Signed-

Mr Justice Pepperall

Dated: 28 November 2019

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Applicant's solicitors:  
Respondent's solicitors:  
Home Office Ref:  
Decision(s) sent to above parties on:

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**Notification of appeal rights**

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing

whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

IN THE UPPER TRIBUNAL

JR/1481/2019

Field House,  
Breams Buildings London  
EC4A IWR

28 November 2019

**BEFORE**

**MR JUSTICE PEPPERALL: SITTING AS AN UPPER TRIBUNAL JUDGE.**

**Between**

Vakhtang Kulumbegov

Applicant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

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Mr Kulumbegov (in person).

Christopher Staker, instructed by Government Legal Department  
appeared on behalf of the Respondent.

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**JUDGMENT**

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Mr Justice Pepperall

1. By these judicial review proceedings, Vakhtang Kulumbegov challenges the lawfulness of the Secretary of State for the Home Department's decision of 19 September 2018 refusing his application for further Leave to Remain and his subsequent decision of 20 December 2018 upholding such refusal.
2. Mr Kulumbegov was born on 5 June 1983 and is a citizen of the Russian Federation. He entered the United Kingdom in March 2010 with entry clearance as a visitor and then, from 30 May 2010 with entry clearance as a Tier 2 (Intra-Company Transfer) migrant in order to work for his sponsor, Temenos UK Limited as a Senior Business Consultant. His Leave to Remain was subsequently extended in 2011, 2013 and 2015. The last such extension was granted until 22 May 2018.
3. On 15 May 2016, Mr Kulumbegov was convicted by the East Dorset Magistrates' Court of an offence of assault by beating. The offence was committed against his wife after Mr Kulumbegov discovered that she was seeing another man. The magistrates imposed a community sentence order requiring Mr Kulumbegov to undertake 150 hours of unpaid work. Mr Kulumbegov appealed against both his conviction and sentence. On 11 July 2016, the Crown Court at Bournemouth dismissed the appeal against conviction but reduced the hours under the community sentence order to 100 hours. Mr Kulumbegov properly reported his conviction to the Home Office.

4. The details of the allegation of assault were briefly set out in a statement of PC Phillip Robbins dated 6 November 2015. The complaint was that Mr Kulumbegov had caused his wife two areas of bruising in the course of grabbing and pushing her. One was the size of a 50p coin on her right hand; the other, on her right upper arm, was smaller. Although there were no further visible injuries, Ms [V] also complained that Mr Kulumbegov had kicked her leaving her with a sore bottom and pulled her hair causing again some soreness.
5. Mr Kulumbegov maintains his denial of any assault. Indeed, he defended case before the criminal courts on the basis that Ms [V] was injured as he attempted to prevent her from taking her own life. He realistically accepts that he cannot go behind the conviction. Plainly the Secretary of State was entitled to take the conviction at face value, and Mr Kulumbegov does not argue otherwise.
6. On 5 May 2018, Mr Kulumbegov applied for a further extension of his Leave to Remain. This application was again supported by his sponsor, Temenos UK Limited. By that time, he was earning £45,000 per annum. By his decision of 19 November 2018, the Secretary of State refused Mr Kulumbegov's application. Brief reasons were given for the decision:

“You have applied for leave to remain in the United Kingdom as Tier 2 (Intra-Company Transfer: Long Term) but the Secretary of State is satisfied it would be undesirable to permit you to remain in the United Kingdom in the light of your conduct.

The Home Office has reviewed the facts known about your case and it has been concluded that, following your conviction for battery on 15 June 2016, your removal on the grounds of your conduct would be conducive to the public good.

This type of offence is an important consideration, together with the need to protect the public from serious crime and its effects.

In light of this the Secretary of State has deemed that refusal is appropriate under paragraph 322(5) and is not prepared to exercise discretion in your favour.

Therefore, you do not satisfy the requirements of the Immigration Rules for this category and it has been decided to refuse your application for Leave to Remain as a Tier 2 (Intra-Company Transfer: Long Term) under paragraph 322 (5) of the Immigration Rules."

7. Mr Kulumbegov sought administrative review of this refusal. Following such review, the Secretary of State upheld the original refusal by a further decision dated 20 December 2018.
8. By this claim, Mr Kulumbegov challenges the lawfulness of these decisions. He argues that the Secretary of State was not entitled to conclude that his conviction was a serious crime. He points out that this was a summary-only offence that was not punished by any term of imprisonment. He argues that the conviction was spent by the time that the Secretary of State came to decide his application for Leave to Remain. Further, he argues that no reasonable decision-maker could properly conclude, on the basis of a

single spent conviction for a summary-only offence that did not attract a sentence of imprisonment, that Leave to Remain should be refused on the grounds of character. He further points to the failure to follow the Secretary of State's own guidance as to the proper approach to minor convictions. Permission to bring this claim was given on the papers by Upper Tribunal Judge Rimington on 13 May 2019.

9. In his realistic submissions on behalf of the Secretary of State, Christopher Staker accepts that the decision letter does not, contrary to Home Office guidance, evidence proper consideration of five important factors, namely the type of offence, the length of the sentence, the judge's sentencing remarks, the immigration history and any pattern of offending. Such concession was rightly made. While any offence of domestic violence is serious, it was important to consider this case properly upon its facts.
10. Paragraph 322 of the Immigration Rules sets out the grounds on which the Secretary of State might refuse leave to remain. Subparagraph (1C) provides:

“where the person is seeking indefinite leave to enter or remain:

- (i) they have been convicted of an offence for which they have been sentenced to imprisonment for at least 4 years; or
- (ii) they have been convicted of an offence for which they have been sentenced to imprisonment for at least 12 months but less than 4 years, unless a



period of 15 years has passed since the end of the sentence; or

(iii) they have been convicted of an offence for which they have been sentenced to imprisonment for less than 12 months, unless a period of 7 years has passed since the end of the sentence; or

(iv) they have, within the 24 months prior to the date on which the application is decided, been convicted of or admitted an offence for which they have received a noncustodial sentence or other out of court disposal that is recorded on their criminal record."

11. Of course, in this case, Mr Kulumbegov was not within subparagraph (1C) since he had neither been sentenced to a term of imprisonment nor had a community sentence order been made in the 24 months prior to the decision upon his application for leave. Among the further grounds on which the Secretary of State should normally refuse leave to remain, sub-paragraph (5) provides:

"the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C)), character or associations or the fact that he represents a threat to national security."

12. The Home Office guidance as to the proper consideration of cases under paragraph 322(5) provides:

"The main types of cases you need to consider for refusal under paragraph 322(5) or referral to other

teams are those that involve criminality, a threat to national security, war crimes or travel bans.

A person does not need to have been convicted of a criminal offence for this provision to apply. When deciding whether to refuse under this category, the key thing to consider is if there is reliable evidence to support a decision that the person's behaviour calls into question their character and/or conduct and/or their associations to the extent that it is undesirable to allow them to enter or remain in the UK. This may include cases where a migrant has entered, attempted to enter or facilitated a sham marriage to evade immigration control. If you are not sure the evidence to support your decision is reliable, then speak to your line manager or senior caseworker ..."

"Before you refuse leave to remain under paragraph 322(5), you must first refer your decision to your senior caseworker.

You must:

- Give specific reasons to refuse under this paragraph
- Not include vague generalisations about a person's character, conduct or associations
- Only refer to the specific reason you are refusing the application
- Not refer to a threat to national security in your refusal notice

When a case falls into one of the above categories, you must consider it in line with the guidance in this section, regardless of whether the application is valid or not. However, when you consider such a case, you must only take into account information which is new and was not known to the Home Office at the time of any previous decision. You must not take action on information which was known to the Home Office at the time of the previous decision, unless advised to by a senior caseworker."

13. Further guidance is given in respect of criminal behaviour falling below the Criminal Casework threshold:

"When an applicant has been convicted of a criminal offence which does not meet the CC threshold, you may still refuse leave to remain under paragraph 322(5). For example, the applicant has committed an offence which by its nature or circumstances, suggests that it is not conducive to the public good to let the applicant remain in the UK. Such offences may include (but are not limited to):

- Offences which involve violence
- Sexual offences
- Offences against children
- Serious drug offences

When you have such an application, you must refer the case to a senior caseworker. The senior caseworker will then decide whether the case is to be refused under paragraph 322(5). Each case must be considered

on its own merits. However, you should take the following into account for all cases:

- Type of offence
- Length of sentence
- The judge's sentencing remarks
- Immigration history
- Any pattern of re-offending

If you refuse an application on these grounds, you must get the certificate of conviction from the sentencing crown court. You must also get the judge's sentencing remarks from the appropriate court reporting company."

14. Specific guidance is then given as to cases involving single convictions:

"It is unlikely a person will be refused under the character, conduct or associations grounds for a single conviction that results in a non-custodial sentence outside the relevant time frame.

However, the greater the number of cautions warnings, absolute and/or conditional discharges and admonishments on a person's record, the more likely it is that the character and conduct provisions are applicable."

15. Finally, guidance is given as to cases involving community sentence orders:

"... if an applicant has multiple community sentences, or one or more community sentences alongside other

non-custodial sentences, particularly over a short period of time, you must consider whether you can refuse under the persistent offender and/or character, conduct and associations category.”

16. This case concerns a single conviction for a summary-only offence where the court, both at first instance and on appeal, did not consider it necessary to impose a custodial sentence. There was no pattern of offending and Mr Kulumbegov was otherwise a hardworking professional man. There is accordingly a proper basis for arguing that the decision in this case was irrational and that the Secretary of State failed to follow his own guidance. Further, as conceded, the decision does not properly evidence the consideration of all relevant factors as required by the guidance.
17. The Secretary of State has, however, acknowledged that the decisions cannot stand. Indeed, on 19 July 2019, the Secretary of State made an open offer to reconsider her predecessor's decision of 19 November 2018 and invited Mr Kulumbegov to withdraw his claim upon terms that the Secretary of State would pay his costs. Such offer was refused. Mr Kulumbegov pointed out that he had lost his job by reason of the original decision and that Temenos was no longer willing to sponsor his application. Accordingly, on 8 November 2019, the Secretary of State made an improved offer by which she agreed, first, to accept a new certificate of sponsorship and to allow Mr Kulumbegov to amend his application to reflect such new certificate. On that basis, the Secretary of State agreed to reconsider the Tier 2 application. Failing any new

certificate of sponsorship, she offered to agree to consider the application for leave outside the Immigration Rules. Further, she agreed not to refuse the application on the basis that Mr Kulumbegov has been an overstayer since 20 December 2018.

18. Mr Kulumbegov has refused the improved offer. By his own draft order, he seeks orders quashing the decision of 19 November 2018, a mandatory order compelling the Home Secretary to grant Indefinite Leave to Remain outside of the *Immigration Rules*, an order that the Respondent should consider his case on a priority basis and damages for loss of employment, humiliation, loss of reputation, distress and obstructing and hindering the right to a fair trial. He also seeks further damages under EU law and the *Human Right Act 1998*, together with exemplary damages and an order that the Respondent bears the responsibility for covering his loss of earnings until he finds a new job.

19. I am satisfied that if Mr Kulumbegov succeeded on this claim, he would be entitled to an order quashing the decision of 19 November 2018. He would not, however, be entitled to a mandatory order requiring the Secretary of State to grant him Indefinite Leave to Remain. Equally, in my judgment, he would not be entitled to damages for any unlawful administrative actions of the Secretary of State - see *R (Quark) Fishing Ltd v Secretary of State for Foreign and Commonwealth Affairs* [2007] UKHL 57, at [96]. Damages are potentially recoverable for breaches of the *Human Right Act 1998* or under EU law. The basis for such claims has not, however, been established before me and in

any event – a damages claim would be better brought by a Part 7 claim in the High or County Court.

20. Accordingly, I am satisfied that while Mr Kulumbegov might well have a claim with merit, it is unnecessary for me formally to decide his claim. Mr Kulumbegov's claim is academic and he could not reasonably expect to gain any greater advantage from pressing the matter to a hearing. As Mr Staker put it, the Secretary of State will reconsider his case whatever order I make today.

21. I accept that this case is of great importance to Mr Kulumbegov. Further, I accept the disastrous personal consequences of the Secretary of State's decision in his case and his obvious anger at the way in which he has been treated. These are not, however, proper reasons for this Tribunal entertaining an academic claim that does not, in my judgment, have any greater ramification beyond its own facts.

22. Indeed in *R (Zoolife International Ltd v. Secretary of State for the Environment, Food & Rural Affairs* [2007] EWHC 2995 (Admin), Silber J, said at [36]:

“... academic issues cannot and should not be determined by courts unless there are exceptional circumstances such as where two conditions are satisfied in the type of application now before the court. The first condition is ... that ‘a large number of similar cases exist or anticipated’ or at least other similar cases exist or are anticipated, and the second condition is that the decision in the academic case will not be fact sensitive. If the courts

entertained academic disputes in the type of application now before the court but which did not satisfy each of these two conditions, the consequence would be a regrettable waste of valuable court time and the incurring by one or more parties of unnecessary costs."

23. Silber J added, at [13]:

"These points are particularly potent at the present time where the administrative court is completely overrun with immigration, asylum and other cases and where it would be contrary to the overriding objectives of the CPR for an academic case to be pursued ..."

24. There are no proper grounds in the present case for entertaining an academic challenge when Mr Kulumbegov has already been offered everything that he could realistically hope to achieve through these judicial review proceedings. Accordingly, I dismiss Mr Kulumbegov's claim. The recitals to my order will - as volunteered by Mr Staker - record the Secretary of State's concessions as to her intended approach to the reconsideration of Mr Kulumbegov's case. Further, I award Mr Kulumbegov his costs up until 8 November 2019; again, as conceded by Mr Staker. I shall, however, hear the parties as to the costs since that date.

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