



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/01673/2019

**THE IMMIGRATION ACTS**

Heard at Field House  
On 5 June 2019

Decision & Reasons Promulgated  
On 13 June 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE JORDAN

Between

UMID [K]  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr M. Fazli, Counsel

For the Respondent: Mr T. Lindsay, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a citizen of Afghanistan who was born on 1 January 1994. He is now 25 years old but he remained a minor until 1 January 2012, a circumstance which is material in this appeal. He appeals against the determination of First-tier Tribunal Judge Onoufriou promulgated on 1 April 2019 in which he dismissed the appellant's appeal on all grounds.
2. Both the Reasons for Refusal Letter and the Determination suffered from having to deal with a multitude of issues, including asylum, humanitarian

protection and human rights. Before me, however, the grounds argued were much more limited in scope and correspondingly easier to deal with. In essence, the appeal before me focused on whether the appellant benefited from at least six years of Discretionary Leave entitling him to indefinite leave to remain.

3. The appellant entered the United Kingdom on 3 December 2008, aged 14, and claimed asylum about a week later. This was refused but, on 20 May 2009, he was granted discretionary leave as a minor until 1 July 2011. By then, it was anticipated that he would have been 17 ½ years old.
4. On 1 January 2012, the appellant ceased to be a minor.
5. On 30 April 2013, solicitors acting on the appellant's behalf applied for further leave to remain in the United Kingdom. It is clear from the foregoing that, when this application was made, the appellant had ceased to be a minor and that his leave had expired on 1 July 2011, some 22 months before.
6. The nub of this appeal centres upon decision-making made by the Secretary of State in 2014.
7. In a letter dated 21 August 2014 [Bundle B, 86], the Home Office wrote to the appellant acknowledging the grant of Discretionary Leave had been granted to the appellant in accordance with its policy on Unaccompanied Asylum-Seeking Children. The letter also noted that the appellant's prior leave had expired on 1 July 2011 and that the application for further leave was made on 30 April 2013, namely well out of time. Nevertheless, the letter continued:

'Whilst your application for further to leave to remain in the United Kingdom is pending, please be assured that all your rights and entitlements under the terms of your previously awarded Discretionary Leave To remain will continue and remain the same until your application has been considered.'
8. No reference is made to the application being out of time or to the fact that the appellant had reached his majority on 1 January 2012. It would, of course, have been open to the Secretary of State to treat the application as being out of time and dealt with accordingly. However, it is clear that the Secretary of State did not do this. Instead, the status quo during the period of his Discretionary Leave was perpetuated. The rights and entitlements remained unaltered.
9. The Secretary of State made no alteration in this position when the decision was made on 2 December 2014 [B72-85]. Indeed, the decision-maker explained why it had been done. Paragraph 24 of the decision letter [B74] provides:

‘At that time you were still a minor under instruction of your legal representatives. It appears they failed to inform you that a [Discretionary Leave] application needed to be submitted and you did not do this until you sought legal advice from RAMFEL. This suggests that you were not at fault for the late submission of the [Discretionary Leave] application and it would be unfair to disadvantage you due to this. Therefore your application will be considered as in time.’

10. The application of 30 April 2013 was made principally on asylum grounds with an alternative claim for humanitarian protection based upon the same facts. The associated human rights claim based on Article 8 relied upon little more than the appellant’s presence in the United Kingdom and had no prospect of succeeding without establishing the appellant was at risk on return.
11. The application was refused in December 2014 but an appeal was made in time and came before First-tier Tribunal Judge Khawar who properly dismissed it following a hearing on 10 April 2015. The determination was promulgated on 22 May 2015. The date is important, although coincidental. On 20 May 2015 (or adopting another method of calculation, 22 May 2015) the appellant had spent six years in the United Kingdom following the original grant of Discretionary Leave on 20 May 2009. The appellant became appeal rights exhausted on 9 July 2015.
12. Since then, the appellant has had no further leave to remain.
13. The issue in the current appeal turns upon whether the appellant meets the requirements of the policy which provides for a holder of discretionary leave to qualify for indefinite leave to remain. The respondent’s policy found in the API on Discretionary Leave of 18 August 2015 provides that those who had been granted Discretionary Leave before 9 July 2012, will become eligible to apply for settlement after accruing six years continuous Discretionary Leave. Although subject to exceptions, none is said to apply in the circumstances of this case. The application has to be made no more than 28 days before discretionary leave expires.
14. The resolution of this issue turns upon the nature of the appellant’s leave after the express grant of discretionary leave expired on 1 July 2011. Had the application made on 30 April 2013 been made prior to 1 July 2011, the subsequent consideration of the application and the appeal that followed would undoubtedly have extended the period of Discretionary Leave by operation of s.3C of the Immigration Act 1971, effectively preventing a claimant becoming an overstayer (but also legitimising his presence) during the period during which a further application is under consideration, including an associated appeal.

15. Hence, it is to s.3C that I now turn:

**'Continuation of leave pending variation decision**

(1) This section applies if –

(a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave

(b) the application for variation is made before the leave expires,  
and

(c) the leave expires without the application for variation having been decided.

(2) The leave is extended by virtue of this section during any period when –

(a) the application for variation is neither decided nor withdrawn,

(b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought, while the appellant is in the United Kingdom against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission),  
...

(c) an appeal under that section against that decision, brought while the appellant is in the United Kingdom, is pending (within the meaning of section 104 of that Act).

(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.'

16. I have set out both subsections (1) and (2). They serve distinct functions. Subsection (1) provides the circumstances in which continuation leave will operate. Subsection (2) provides how it will operate. Although various submissions were made in relation to subsection (2), this is not the material provision. The issue is whether continuation leave operated at all and this is to be found in subsection (1) and, in particular, whether the application made by the appellant on 16 March 2016 was made before his leave expired. In short, Mr Lindsay on behalf of the Secretary of State submitted that the appellant's leave expired on 1 July 2011. Thereafter, no further leave was granted to the appellant. Accordingly, he never had the benefit of any continuation leave or any other sort of leave.

17. In doing so, Mr Lindsay does not seek to say that the two letters of August and December 2014 were not sent; merely that they did not have the effect of granting the appellant further leave.

18. The two letters can be seen as part of the same argument. *'Whilst your application for further leave to remain in the United Kingdom is pending, please be assured that all your rights and entitlements under the terms of your*

*previously awarded Discretionary Leave to Remain will continue and remain the same until your application has been considered.*' This letter speaks from 21 August 2014, slightly more than three years after the express grant of discretionary leave had expired in July 2011. Since it referred to the application made on 30 April 2013 and spoke of rights and entitlements continuing whilst the application is pending, it must at least refer back to the date of application on 30 April 2013. It does not, however, expressly deal with the period 1 July 2011 to 30 April 2013.

19. Notwithstanding this, it would be illogical to acknowledge a period of Discretionary Leave until 1 July 2011 and to acknowledge, as the letter does, an assurance that all the appellant's rights and entitlements under the terms of his previous Discretionary Leave will remain until the 2013 application is decided.
20. Further, since the application made on 30 April 2013 was an asylum claim, the practical effect was to permit the appellant to remain pending consideration of the claim without the need for the Secretary of State to acknowledge that his Discretionary Leave (or the rights and entitlements associated with it) would continue until the claim is considered and/or determined. An asylum claim does not require the claimant to be granted interim Discretionary Leave.
21. The fact that an express grant of leave was made in favour of the appellant is not disputed in the decision made on 2 December 2014. As I have set out above, paragraph 24 acknowledges that, during at least part of the relevant period, the appellant remained a minor and that his solicitors failed in their duty towards him, as a minor, to pursue his interests. An express acknowledgement is made that this suggested no-fault on the part of the appellant. Importantly, the respondent resolved the issue of fairness in favour of the appellant by stating that it would be unfair to disadvantage him in such circumstances. It concludes: *'therefore your application will be considered as in time'*.
22. An application made in time operates, in accordance with s.3C(1)(b), as the means of entitling the appellant to continuation leave. Continuation leave is not a separate category or specie of leave. Instead, it continues the pre-existing leave which, in the circumstances of this case, was Discretionary Leave. Had the appellant made the application in time he would have continued to enjoy Discretionary Leave not a different type of leave called Continuation Leave. The Secretary of State was treating the appellant as having the same benefits as would have accrued to the appellant had the application been made in time. It is not important to decide whether this was a grant of Discretionary Leave continued until the application was made in April 2013 or a concession that the application in fact made in April 2013 was to be treated for all purposes as having been made before 1 July 2011. Since it was open to the Secretary of

State to exercise her discretion to grant further leave, either alternative was a lawful operation of the respondent's powers.

23. On this basis, it cannot reasonably be said that the appellant was deprived of a continuing period because the application was not made before the leave expired.
24. Mr Lindsay submitted that the statutory words of s3C could not be overridden and the application had to be made before leave had expired and no decision-maker within the Home Office could derogate from the plain words of the subsection. However, for the reasons that I have given, the respondent in the two letters quoted above was extending the period of discretionary leave, as the Secretary of State is entitled to do so as to provide the appellant with an unbroken period of leave, the absence of which the respondent expressly acknowledged to unfairly disadvantage the appellant.
25. Mr Lindsay also submitted that the expression in the August 2014 letter that the appellant continue to benefit from '*all your rights and entitlements under the terms of your previously awarded Discretionary leave to Remain will continue in remain the same*' was confined to the rights and benefits (which he was unable to identify) attached to discretionary leave, such as the right to work or to claim benefits. The expression did not, he submitted, extend Discretionary Leave itself. I do not consider there is any warrant in the words used in this letter to distinguish between the associated rights provided to a holder of Discretionary Leave and Discretionary Leave itself. If, using discretionary powers, the appellant was being granted a right to remain pending the consideration of his application, he was being granted Discretionary Leave. It is not possible for the appellant to have been granted Discretionary Leave for some purposes but not for others.
26. Furthermore, for the reasons advanced by the appellant's solicitors in their submissions to the Secretary of State and for the reasons provided by the respondent in the decision of December 2014, this was a proper exercise of discretion. The vulnerability of an appellant would always be a fitting reason why the Secretary of State will overlook procedural failings, including a failure to comply with time limits. Indeed, in the case of a minor, such failings are likely to be viewed as a suitable subject for the exercise of discretion. The respondent himself pinpointed this by using the expression '*unfair to disadvantage*'. It may be that the Secretary of State took an overly indulgent view because the appellant reached his majority in January 2012 and the delay continued after this date. The fact remains, however, that the decision-maker undoubtedly exercised his or her discretion and it is immaterial if the result might have been different.
27. I acknowledge that in most circumstances errors made by an appellant's legal representatives will not operate by affording the appellant with a

stronger form of protected private or family life than he would otherwise have. By parity of reasoning, this probably applies in other circumstances. See *Mansur (Immigration adviser's failings: Article 8)* Bangladesh [2018] UKUT 274 (IAC). The principle in *Mansur* does not apply in the circumstances of this case. It is not the Tribunal who is being asked to adopt a more lenient approach arising from failings of the appellant's former solicitors. Rather, it was the Secretary of State was being asked to adopt a more lenient approach and, as he was entitled to do, doing so.

28. This leaves only to deal with how this principle comes before the Upper Tribunal as an error of law. First, notwithstanding submissions made about the application of s. 3C to the Secretary of State, the decision-maker did not address them properly. The issue was dealt with summarily in paragraphs 9 to 11 of the Secretary of State's decision letter of 29 January 2019. In paragraph 10, the writer acknowledges the appellant was granted Discretionary Leave as a minor until 1 July 2011 but then simply recorded that the application for further Discretionary Leave was made on 30 April 2013 and was out of time, thereby depriving the appellant of the eligibility to rely upon s. 3C leave. In paragraph 11, the writer asserts that full consideration was given to the appellant's claim when the application was refused on 2 December 2014 and this decision was upheld by the Immigration Judge dismissing the appeal on 22 May 2015. This misunderstands the nature of those earlier proceedings. They were not then a claim for indefinite leave to remain based upon six years continuous Discretionary Leave. Indeed, as a matter of fact, the period of six years had not then elapsed at the date of the hearing and it is apparent that the parties were then oblivious to its impending significance. Consequently, the decision letter did not address the crucial issue of whether the respondent's letters of August and December 2014 were sufficient to extend the appellant's Discretionary Leave.
29. In the determination, the First-tier Tribunal Judge approaches the issue in a different way. He stated in paragraph 37:

"The simple fact is that had the appellant renewed his Discretionary Leave on 1 July 2011, he may have been granted up to a further three years Discretionary Leave under the respondent's policy until 1 July 2014 and therefore would have accrued at that time just over five years and one month continuous Discretionary Leave. On 1 July 2014 the appellant would have been aged 20 ½ years. He would accordingly not have been entitled to a further extension of his Discretionary Leave because it was originally based solely on the fact that he was an unaccompanied minor. Section 10.1 of the respondent's policy clearly states that an applicant will only continue to be dealt with under the respondent's policy if they qualify for further leave on the same basis as their original Discretionary Leave. Clearly, at age 20, the appellant could not possibly be granted Discretionary Leave based on the fact that he was a minor and therefore he simply does not satisfy the requirements of the

respondent's policy. Accordingly, the respondent was not acting unreasonably in failing to grant him further Discretionary Leave. Furthermore, as the appellant was aged 17 ½ at the date of his original Discretionary Leave, it is highly unlikely the respondent would have exercised its discretion to grant further Discretionary Leave on 1 July 2011. It is not usually the respondent's practice to grant Discretionary Leave when a minor is about to reach the age of 18 and therefore become liable to removal. The appellant's s. 3C leave claim was not sustainable in law or within the respondent's policy and therefore does not engage Article 8 in this respect. Accordingly, I do not consider that headnote (4) of *Mansur* applies to the appellant."

30. This process of reasoning is based upon what might have happened if an application had been made in 2011 and what the consequences might have been if a further happen application had been made in July 2014. It may well be that the consequences identified by the Judge were reasonable ones. Nevertheless, they are based upon a series of hypotheses. Unfortunately, they do not address what *actually* happened. In particular, they do not address whether in the circumstances that I have I outlined above, the appellant enjoyed a period of Discretionary Leave which exceeded six years. This, in turn, required the Judge to construe the effect of the respondent's letters of August and December 2014 which the Judge did not do.
31. This amounts to a material error on the part of the First-tier Tribunal. I set aside the decision. I have already stated why the appellant had the benefit of a grant of Discretionary Leave for a period that exceeded six years. Consequently, I re-make the decision allowing the appeal on the basis that he met the requirements of the policy under which Discretionary Leave will lead to the grant of indefinite leave to remain.
32. This decision renders the other grounds of appeal immaterial. No oral argument was addressed to me that the Judge erred in his treatment of the asylum claim or its associated Article 8 claim. Suffice it to say that, had the appellant been unsuccessful in his claim to meet the requirements for indefinite leave to remain, his presence in the United Kingdom as an overstayer would not have engaged Article 8.

ANDREW JORDAN  
DEPUTY UPPER TRIBUNAL JUDGE  
6 June 2019