UTIJR6

JR/5128/2019

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of [J O]

Applicant

v

Secretary of State for the Home Department

Respondent

Before

Upper Tribunal Judge Pitt

Judgment

Having considered all documents lodged and having heard the parties' respective representatives, Mr P Turner, of Counsel, instructed by the Legal Resource Partnership, on behalf of the Applicant and Mr D Ruck-Keene, of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 20 August 2020

Upper Tribunal Judge Pitt:

Introduction

1. The applicant challenges a decision of the respondent of 5 July 2019 which was an Administrative Review upholding a decision dated 21 May 2019 which refused an application for indefinite leave to remain (ILR) as a Tier 2 (Minister of Religion) Migrant.

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Factual Background

2. The applicant is a citizen of Nigeria and was born on 3 May 1973. His wife, and their three minor children are dependents on the application.

3. On 28 August 2012 the applicant's wife was granted a visa as Tier 4 (General) student valid until 30 January 2014 and the family came to the UK with the applicant and the children as dependents.

4. On 29 January 2014 the applicant applied for further leave to remain as a Tier 2 (Minister of Religion) Migrant. He was granted leave in that category on 13 February 2014 until 16 February 2017 and the family were granted leave as his dependents.

5. On 8 February 2017 the applicant applied for further leave as a Tier 2 (Minister of Religion) Migrant. That leave was granted until 18 February 2019.

6. On 1 February 2019 the applicant applied for ILR as a Tier 2 (Minister of Religion) Migrant.

7. The applicant's Tier 2 sponsor was City Chapel. On 12 April 2019 the respondent revoked City Chapel's sponsor's licence.

8. On 21 May 2019 the respondent refused the applicant's ILR application with right to Administrative Review. The application was refused as City Chapel's licence had been revoked and there was no evidence to show that the organisation had made an application to renew their licence. The application was refused as the applicant did not meet the requirements of Paragraph 245HG(c)(i) of the Immigration Rules.

9. On 7 June 2019 the applicant applied for Administrative Review on the basis that as all requirements were met at the date of application (1 February 2019) and/or by 13 February 2019 when he met the 5 years' continuous residence requirement, otherwise and would cause detriment to the applicant for a reason entirely outside his control, that is, the revocation of the sponsor's licence.

10. On 5 July 2019 the respondent upheld the decision of 21 May 2019 maintaining that it was lawful where the applicant did not meet the Immigration Rules at the date of the decision. Further, there had been no unnecessary or undue delay in processing the ILR application.

11. This application was lodged on 4 October 2019. Permission was refused on the papers on 2 December 2019. The application was renewed and permission to apply for judicial review was granted on 31 January 2020 after an oral hearing.

12. The respondent lodged detailed grounds of defence on 22 June 2020. The applicant lodged a skeleton argument on 31 July 2020. The respondent lodged a skeleton argument on 7 August 2020. The application was listed for a substantive hearing on 20 August 2020. The applicant applied on 18 August 2020 to amend his grounds. That application was refused on 19 August 2020.

Legal and Policy Framework

13. The paragraphs of the Immigration Rules in question here state (with my emphasis in bold):

> 245HG. Requirements for indefinite leave to remain as a Tier 2 (Minister of Religion) Migrant
>
> **To qualify for indefinite leave to remain as a Tier 2 (Minister of Religion) Migrant, an applicant must meet the requirements listed below.** If the applicant meets these requirements, indefinite leave to remain will be granted. **If the applicant does not meet these requirements, the application will be refused.**
>
> Requirements:
>
> (a) The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant.
>
> (b) The applicant must have spent a continuous period of 5 years lawfully in the UK, of which the most recent period must have been spent with
>
> (c) **The Sponsor that issued the Certificate of Sponsorship that led to the applicant's last grant of leave must:**

(i) **still hold a Tier 2 Sponsor licence in the relevant category**, or have an application for a renewal of such a licence currently under consideration by the Home Office… .

14. The respondent's "Tier 2 Policy Guidance" for applicants states:

> "189. Where your application relies on a Certificate of Sponsorship that has been either withdrawn or cancelled, your application will be refused."

15. The "Tier 2 and 5: Guidance for Sponsors" states (with my emphasis in bold):

> "What happens to my sponsored migrants if my licence is revoked?
>
> 19.9 If your licence is revoked, any COS you have assigned automatically become invalid. This means that any application for entry clearance to the UK or leave to remain in the UK made on the basis of the COS will automatically be refused.
>
> 19.10 Where a migrant has already been granted entry clearance to the UK when we revoke your licence, if they have not yet travelled to the UK, their entry clearance will be cancelled under paragraph 30A (ii) of the Immigration Rules. If the migrant has travelled to the UK, they will be refused entry to the country under paragraph 321A(1) of the Immigration Rules.
>
> 19.11 **If your sponsor licence is suspended while we are considering an application for settlement, also called 'indefinite leave to remain' (ILR), from a Tier 2 or 5 migrant that you are sponsoring**, we will not make the decision on their settlement application until the outcome of the suspension is decided. **If the licence is revoked, we will then refuse the settlement application.**"

Discussion

16. The core challenge here is that the respondent acted unlawfully in refusing the application on 21 May 2019 where it is undisputed that on 13 February 2019 the applicant could have met the Immigration Rules, his sponsor's licence only being revoked on 12 April 2019.

17. It is well understood that the respondent acts lawfully in applying the law in force at the date of her decision and not the law pertaining at an earlier date, for example the date of an application. This principle was set down by the House of Lords in Odelola v SSHD [2009] UKHL 25. It has been approved consistently by the higher courts since then. In BB (Algeria) v SSHD [2016] EWCA Civ 25 at [32], for example:

> "In *Odelola* the House of Lords clearly established the principle that, absent an express transitional provision which provides otherwise, immigration decisions are to be taken by the Secretary of State in accordance with the Immigration Rules in force at the time the decision is made."

18. The Court of Appeal in BB (Algeria) went on in paragraphs 33 to 46 to set out equally clearly that as of the date of the decision, an applicant does not retain "any kind of vested, or other, right" arising from the fact that at some earlier point, including the date of the application, he may have met the Immigration Rules.

19. Following this principle, the respondent acted lawfully in applying the law as it stood at the date of the decision on 21 May 2019.

20. The applicant seeks to distinguish the principle set out in Odelola arguing that it only applies where there has been a change in the Immigration Rules after an application is made, the particular facts in Odelola. He maintains that the situation here was different as the Rules at the date of the application, during the period that the application was outstanding and at the date of the decision were the same. I was not taken to anything in Odelola that suggests that the principles set out therein were intended to be limited only to situations where the Immigration Rules changed after an application was made and before the respondent makes a decision and would not applicable here. Indeed, Odelola, and all of the case law that I was taken to that affirms it, is predicated on the date of the decision being the relevant date for the respondent to apply the current law to the applicant's circumstances. If that were not so, the arguments in that line of case law as to what iteration of the Immigration Rules should be applied at the date of the decision would not have arisen.

21. The applicant maintains that the ordinary reading of paragraph 245HG is that ILR should have been granted here as by 13 February 2019 the applicant had met the Rule indicated that he needed to do more in order to be granted ILR, regardless of what followed in the period thereafter prior to the decision actually being made.

22. That argument does not have merit. The applicant's submission is that the wording of paragraph 245HG is sufficiently clear so as to indicate that if the applicant "still" has a sponsor with a Tier 2 licence or a sponsor applying for such a licence on the date that the applicant meets the 5 years' continuous residence requirement, then, whatever follows, and whatever the circumstances pertain when the respondent comes to make a decision, he is still entitled to ILR. In my judgment nothing in the wording of the Rule provides for the specific meaning argued for the applicant. A great deal would have to be read into it for that to be so. There is nothing approaching the "express" provision referred to in paragraph 32 of BB (Algeria) to allow for the interpretation argued for the applicant and for that interpretation to have legal force capable of displacing the Odelola principle.

23. Secondly, it does not, in my view, reflect the ordinary meaning of the wording of paragraph 245HG when construed against the relevant background, that is, the Immigration Rules taken as a whole and the function they serve in the administration of immigration policy; Mahad v ECO [2009] UKSC 16 at [10] applied. The higher courts have confirmed consistently that the Points Based System is intended to simplify the procedure for applying for leave in certain classes of case, such as economic migrants and students, and have recognised that "hard" cases can arise as the price of securing consistency and predictability; see EK (Ivory coast) v SSHD [2014] EWCA Civ 1517.

24. The "bright line" provisions of the Tier 2 Migrant category and the situation when a sponsor's licence is revoked after an application is made were considered in the case of Pathan v SSHD [2018] EWCA Civ 2103. In that case, it was found that the respondent acted lawfully in simply refusing a Tier 2 application where the sponsor's licence had been revoked after the application for leave had been made. As indicated by Singh LJ at [73]:

> "… no-one who is given leave as a Tier 2 Migrant can have any reasonable expectation that they will be permitted to remain in this country if the particular employer who is their sponsor has its licence revoked. This is because, as I have already said, the Tier 2 scheme is closely tied to there being a particular vacancy in the labour market which cannot otherwise be filled. It is

> not a general permission to come to this country for the purposes of work, still less for the purposes of looking for work."

25. The Court of Appeal also found support for the "bright line" operation of the Tier 2 Migrant system in the respondent's guidance to Tier 2 applicants and sponsors. As shown in the extracts set out in paragraphs 14 and 15 above, the guidance informs a Tier 2 applicant and sponsor expressly that if the licence is revoked then an application will be refused. The respondent's "Tier 2 Policy Guidance" for applicants at paragraph 189 states that in the circumstances that arose here, the application fell to be refused. These paragraphs in the guidance documents are consistent with an interpretation of paragraph 245HG requiring there to be a valid Tier 2 sponsor or a sponsor applying for a Tier 2 licence as of the date of the decision. Singh LJ indicated at [72] of Pathan that:

> "I do not consider there to be any unfairness, certainly not such as to be irrational, in circumstances where fair notice was given to everyone concerned, including these appellants, that the regime which would apply would be exactly the one which was applied to them. This was made particularly clear in para 190 of the guidance for applicants which I have quoted earlier."

26. The applicant seeks to draw a distinction between the application in Pathan being one for an extension of Tier 2 leave rather than ILR but, in my view, the issues are the same. When construed against the purpose of the Points Based System, the ordinary meaning of "still" in paragraph 245HG(c)(i) of the Immigration Rules is that a sponsor must still be a valid sponsor at the point the decision is made on an application for ILR.

27. There is a reference in one iteration of the applicant's grounds to public law error arising from delay but this was not pursued at the hearing. It is sufficient to indicate that where the decision was made within 4 months of the application and nothing required the respondent to make a decision at any earlier time, any argument on the basis of delay has no merit; FH and Ors v SSHD [2007] EWHC 157 applied.

28. It was accepted at the hearing that the application that was made to the respondent was not an Article 8 ECHR application but only one for ILR under paragraph 245HG of the Immigration Rules. Any arguments put forward on Article 8 ECHR

human rights grounds and referring to the best interests of the children do not have merit where no Article 8 ECHR application was made. It remains open to the applicant to make such an application now to the respondent in the usual manner. It is at that point that the respondent can be expected to address any difficulties concerning the applicant's ability to pay the fee for a further application.

Conclusion

29. For these reasons, the application is refused.

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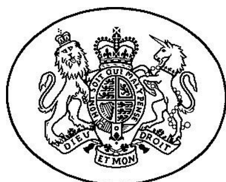

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Upper Tribunal
Immigration and Asylum Chamber

Judicial Review

The Queen on the application of [J O]

Applicant

v

Secretary of State for the Home Department

Respondent

Before

Upper Tribunal Judge Pitt

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Mr P Turner, of Counsel, instructed by the Legal Resource Partnership, on behalf of the Applicant and Mr D Ruck-Keene, of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 20 August 2020

Decision

1. The application for judicial review is refused for the reasons given in the judgement attached.

Order

2. The judicial review application is dismissed.

Permission to appeal to the Court of Appeal

3. The applicant provided written grounds dated 21 September 2020 in support of an application for permission to appeal to the Court of Appeal.

4. Paragraph 6 of the grounds is highly misleading. It seeks to re-assert that the applicant qualified for indefinite leave to remain (ILR) on 17 January 2019. This was not a point argued before the Upper Tribunal. An application to admit amended grounds which included this assertion was refused with full reasons given in a decision issued on 19 August 2020, the day before the oral renewal hearing. That decision indicated clearly that the argument concerning qualification for ILR on 17 January 2020 was not admitted and was wrong in law in any event. The applicant cannot seek to argue the point now or rely on this assertion in the grounds for permission to appeal to the Court of Appeal.

5. Paragraph 7 of the grounds repeats a speculative argument that if he had made a premium service application the revocation of his sponsor's licence would not have occurred so he would have been granted ILR. This ignores the basic facts. He did not apply for premium service. It was in no way certain that even had he done so he would have been granted ILR.

6. The grounds at 14 only seek to re-argue the case made before the Upper Tribunal. They make almost entirely unparticularised submissions. In 14a., for example, how or where in the judgment did the Upper Tribunal misapply the Immigration Rules? Or in 14c., where in the judgment did the Upper Tribunal give precedence to guidance over the Rules?

7. The Upper Tribunal applied an ordinary and proper reading of the Rules to the facts and was correct to find that respondent acted lawfully in applying the law as it stood at the date that the decision on leave was made. The Upper Tribunal addressed BB (Algeria) at [18] and Pathan at [24]-[26] and did so correctly, setting out why they were applicable here. The Upper Tribunal considered the allegation of unlawful delay correctly in [27].

8. For these reasons the application for permission to appeal to the Court of Appeal does not have merit and is refused.

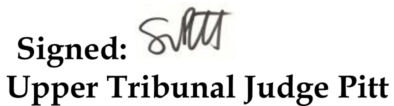
Costs

9. The applicant has not been successful and nothing in the materials indicates that he should not be expected to bear the respondent's reasonable costs.

10. The applicant will pay the respondent's reasonable costs to be assessed if not agreed.

11. This order is maintained following the applicant's application dated 18 September 2020 for costs to be "reduced and spread out" as he is not "in a financially strong position." He enclosed a schedule of income which showed a

monthly income of £5,632 and expenditure of approximately £3,000. These figures do not support a claim to be unable to pay the respondent's costs where income exceeds outgoings by over £2,000.

Signed: 

Upper Tribunal Judge Pitt **Signed on: 24 September 2020**

Dated: 24 September 2020

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on: 24.09.2020

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).