OUTER HOUSE, COURT OF SESSION

[2019] CSOH 74

P1138/18

OPINION OF LORD BOYD OF DUNCANSBY

In the cause

SAJAD KARIMI

Petitioner

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuer: Caskie; Drummond Miller LLP
Defender: MacIver; Office of the Advocate General

3 October 2019

[1] This is a judicial review of a decision of the Upper Tribunal (UT) dated 3 August 2018 to refuse permission to appeal from a decision of the First-tier Tribunal (FTT). I have decided to refuse the petition. This opinion records my reasons.

[2] The petitioner appealed against a decision of the Secretary of State to refuse an application for extension of discretionary leave to remain (DLR). The Secretary of State promulgated a new policy which took effect on 9 July 2012. The first issue is whether or not the application fell to be dealt with under the new policy or the old policy. There are significant advantages to being dealt with under the old policy, the details of which are immaterial for these purposes.

[3] The petitioner was first granted DLR on 19 April 2012 for a period of three years. The leave expired on 19 April 2015. On 9 October 2015 the petitioner made an application to extend the DLR. This was refused. A further application was made on 16 December 2015 but was rejected. On 23 March 2016 he again applied for DLR. That was refused on 3 August 2016. It is against this refusal that the appeal was taken to the FTT.

[4] The Home Office Policy Instruction: Discretionary Leave contains transitional arrangements set out in section 10. It includes the following:

> "Those granted DL before 9 July 2012 may apply to extend that leave when their period of DL expires. All such applications …must be made on the appropriate application form no more than 28 days before their existing leave expires."

[5] The FTT interpreted that to mean that the application must be made no more than 28 days before the expiry of the existing leave (paragraph 30). As the application had been made after the expiry of DLR the FTT held that the application should be dealt with under the new policy. That was endorsed by the UT judge in refusing permission to appeal.

[6] Mr Caskie submitted that it was arguable that the FTT and the UT had erred in their interpretation of the policy. He submitted that the policy read properly meant that the application could not be made until after DLR expired. The application could be made in the 28 days prior to the expiry but there was no end date. Accordingly an application made after the expiry would fall to be considered under the old policy if the original DLR had been granted prior to 9 July 2012 as in this case.

[7] Mr Caskie also submitted that the Secretary of State had already conceded the point in the petition of Nasratullah Khan. The Answers in that case were lodged as a production. This case was virtually on all fours with Khan and no explanation had been given for the difference in treatment. At the very least it showed that the Secretary of State was unsure

about the interpretation of the policy. That in itself showed that the UT was wrong not to accept that the point was arguable.

[8] Mr MacIver submitted that the FTT's interpretation was correct. The focus is on the word "extend". The application to be made is for the extension of the existing DLR once it has expired. Any other interpretation could not sit with the next sentence which starts "All such applications". So far as Khan was concerned there was a difference between the cases in particular because Mr Khan had made an application within time, albeit that it was not accepted because the correct fee had not been paid.

[9] I do not pretend to fully understand the Secretary of State's position in the Khan case but in my opinion it is immaterial for the disposal of this case. It is for the tribunal and court to interpret the policy and the fact that a case-worker may have misinterpreted the policy in one case does not bind the Secretary of State, far less the courts, in the proper application of the policy in another case.

[10] The question for me is whether it was arguable that the FTT had misinterpreted the policy. In my opinion it did not; the policy is clear beyond peradventure. The application to be made is one to extend the existing DLR beyond the date of its expiry. That is what is meant by the first sentence. Any ambiguity is swept away by the words "All such applications" ie an application to extend DLR. They are to be made no more than 28 days before the expiry of their existing leave.

[11] Such an interpretation is also consistent with wider considerations of immigration law. Once DLR has expired the person holding DLR becomes an overstayer and liable to prosecution. Section 3C of the Immigration Act 1971 provides for continuation of leave pending a variation decision but only where the application for leave is made before the leave expires.

[12] The second issue arises out of the petitioner's convictions. He has three convictions; one was involving racial abuse, the second was for interfering with the police in the execution of their duty and the third involved him impeding emergency workers. The first two took place outside a night club and the third outside a hospital. They all arose on the same day 12 February 2013. He also has a conviction for failing to obtemper bail conditions. He was sentenced to a community payback order with a requirement of 135 hours of work related service to be completed within four months. The FTT Judge said that it was clearly the case that he was being seriously considered for a period of imprisonment.

[13] The FTT judge dealt with this at paragraph 26 of his decision. Although he does not refer specifically to the immigration rules it is clear that he is seeking to apply them. Paragraph 322 (1C) sets out mandatory grounds for refusal of leave to remain on the basis of criminal behaviour. Subparagraph (iv) is the closest to the present case. Leave must be refused if the applicant has been convicted of an offence within the previous 24 months for which they received a non-custodial sentence. This paragraph does not apply in this case as the conviction was outwith 24 months. Paragraph 322(5) however does apply. It deals with the undesirability of permitting the person concerned to remain in the UK in the light of his conduct (including convictions which do not fall within paragraph 322(1C)), character or association.

[14] Section 3.6 of the policy on discretionary leave states that caseworkers must consider the impact of any criminal history before granting DL having regard as appropriate to Part 9 (General Grounds of Refusal). It continues, "Criminals and extremists should not normally benefit from leave on a discretionary basis under this policy because it is a Home Office priority to remove them from the UK." The FTT judge then considered the guidance in the General Grounds for Refusal which relates to what are called "low-level criminal

offending", a term which appears not to be defined. The policy states that 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 timeframe.

[15] Mr Caskie accepted that section 3.6 of the policy on discretionary leave applied. However he submitted that the FTT judge was wrong to consider that a conviction which resulted in a non-custodial sentence was a serious one justifying refusal of the application. The judge appeared to have gone beyond the sentence itself to look at the nature of the offences and speculate on whether or not the sentence imposed was an alternative to prison.

[16] Mr McIver relied on the terms of the policy to the effect that criminals should not normally benefit from leave on a discretionary basis because it is a Home Office policy to remove criminals from the UK.

[17] I did not consider Mr McIver's reliance on that phrase to be helpful. It is not a policy but a political justification for the policies which are to be found in the Immigration rules and supporting guidance. However I reject the submission that the only consideration for the FTT judge was whether a sentence of imprisonment had been imposed. It is clear from the rules that non-custodial disposals are relevant and can result in mandatory refusal. I also reject the submission that the judge was not entitled to look at the nature of the offences. Paragraph 322(5) relates to the conduct of the applicant including convictions, character and associations. It is therefore an exercise which looks at what the applicant did and that can only mean looking at the nature of the offences where these are prayed in aid. I should add that Mr Caskie did not suggest that the FTT judge should have considered the convictions as one conviction for the application of the policy on low-level criminal offending.

[18] This is a judicial review of the UT's decision not to grant leave to appeal. It is I suppose possible that a different FTT judge would come to a different decision on the facts but it cannot be said that he was not entitled to reach the decision he did. There was no error of law in the UT's decision to refuse leave to appeal.

[19] I shall sustain the second plea in law for the respondent and refuse the petition.