IN THE UPPER TRIBUNAL

R(on the application of Shou Lin Xu)v Secretary of State for the Home Department (Legacy cases – "conclusion" issue) IJR [2014] UKUT 00375(IAC)

Monday, 21 July 2014

BEFORE

UPPER TRIBUNAL JUDGE GILL

Between

R (ON THE APPLICATION OF SHOU LIN XU)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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The applicant appeared in person at 11.00 a.m.

Mr J Lewis, instructed by the Treasury Solicitor appeared on behalf of the Respondent.

(1) *It is plainly wrong to contend that a case under the respondent's so-called "legacy programme" can be "concluded" only by the grant of leave or by actual removal, given that there was no amnesty that applied to such cases; they fell to be decided under the relevant Immigration Rule (para 395C or 353B, as the case may be) and the guidance in chapter 53 of the Enforcement Instructions and Guidance that applied as at the date of the review of the case under the legacy programme.*

(2) *It follows that, in the event that consideration of the relevant Immigration Rule and guidance produced a negative answer, the rationale of the Supreme Court at [25]-[35] of Patel v Secretary of State for the Home Department [2013] UKSC 72 applies, that is, the Secretary of State is entitled to proceed on the basis that those unlawfully in the UK will leave of their own accord; she is not obliged to remove an individual or issue a removal decision.*

(3) *It is unarguable that the expressed aim to "conclude" cases in the legacy programme by either the grant of leave or by removal was anything other an aim or aspiration to remove all individuals who had no basis of stay. In particular, it is unarguable that the expressed aim or aspiration was addressed to individuals and/or that it amounted to an irrevocable and unambiguous commitment to grant leave to anyone who did not meet the requirements of the relevant rule (395C/353B, as the case may be) and the applicable chapter 53 guidance and who was not removed.*

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APPLICATION FOR PERMISSION

JUDGMENT

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JUDGE GILL: It is 4:00pm. The applicant is not present, nor is anyone here to represent him. It is appropriate for me to narrate today's events.

2. At 11:00 a.m. this morning the applicant was present. With him was a Mr A Fouladvand of Migrant Advisory and Advocacy Service (MAAS). Mr Fouladvand did not have a right of audience nor is MAAS authorised to conduct litigation in the High Court, see rule 11(5A). I noted that MAAS had filed the renewal grounds when they were not authorised to conduct such litigation. The applicant did not speak English, although it was clear that he understood some limited English. It was therefore not possible for Mr. Fouladvand to act as a McKenzie friend. Thus, I was placed in the position whereby either I permitted Mr. Fouladvand to address the court and conduct litigation or I adjourn the hearing. Mr. Fouladvand then informed me that MAAS has two solicitors who are authorised to conduct litigation in the High Court. He said he may be able to arrange for one Ms. A to be present in two hours and that he would make some enquiries. However, having made such

enquiries, he informed me that Ms A had other professional engagements that morning as a consequence of which she would not be able to travel to the hearing centre. The second solicitor similarly could not attend the centre.

3. As Mr Fouladvand did not have a right of audience, I attempted to ascertain from the applicant what language he speaks so that I could make an informed decision as to how best to progress his case, including the options of the Tribunal adjourning the matter so that he could obtain representation by someone who had a right of audience or the applicant proceeding as a litigant in person or with Mr. Fouladvand's assistance as a McKenzie friend or otherwise. In response, the applicant said that he spoke Chinese but not from Hong Kong. As that was insufficiently precise, I said that that would not do. I asked him whether he spoke Mandarin. He would neither confirm nor deny, yet he clearly understood me when I asked him if he had paid for representation today, saying, without hesitation, that he had not done so. I said I would arrange an interpreter in the Mandarin language to be present today to assist the Tribunal in ascertaining what language interpreter was needed and how this claim was to be progressed.

4. Shortly afterwards, at about 12:45pm, the clerk was told by Mr Fouladvand with the applicant standing next to him, nodding, that the applicant wanted to withdraw his claim. The applicant said something about "cancelling" the case. It is not clear whether he was referring to a withdrawal of his claim or whether he was referring to "cancellation" of the hearing in the sense of an adjournment. The clerk explained to Mr Fouladvand and the applicant that the applicant should be present in court at 2:00pm.

5. At 2:00pm, the applicant did not attend. Mr. Fouladvand was not to be seen either. At 2:45pm there was still no sign of the applicant. At that point I came into the hearing room on account of the fact that Mr Lewis had a professional engagement elsewhere and needed to leave the hearing centre by 2:50pm. I released Mr. Lewis on the basis that, if the applicant attended later that afternoon and it transpired for any reason that I required the assistance of the respondent to fairly determine this claim, I would adjourn the hearing.

6. I then waited for the interpreter (who had by then been booked) to arrive.

7. After the interpreter arrived, the court re-convened to hear this case at 4:00pm. There was still no sign of the applicant who appears to be unwilling to be questioned by the Tribunal even to the extent of ascertaining what language he speaks. The applicant appears to be unwilling to co-operate with the Tribunal in this respect.

8. As it is, there is no appearance by the applicant at the hearing of this case at this time, i.e. 4pm. He appeared this morning but with someone who had no right of audience and had not requested an interpreter in advance of the hearing. In all of the circumstances, I have decided to exercise my discretion and proceed to decide this renewed application for permission in the absence of the applicant and any representation on his behalf. In reaching this decision, I have taken the underlying merits of the case into account.

9. The applicant seeks permission to challenge what he asserts is the respondent's excessive delay in granting him leave to remain under what has now become known as the respondent's legacy programme.

10. The first ground is that the decision to refuse leave under the legacy programme is unlawful because the applicant's case could only be "concluded" under the legacy programme by either the grant of leave or by removal. The applicant has had four letters from the respondent informing him that he had no outstanding decisions and no further submissions that required consideration or reconsideration. The letters are dated 24 March 2011, 14 June 2011, 9 August 2013 and 30 August 2013.

11. The term "concluded" was considered by Simler J in *R (Hamzeh) v Secretary of State for the Home Department* [2013] EWHC 4113 (Admin) at [41]-[46] and Ouseley J in *R (Jaku & Others) v Secretary of State for the Home Department* [2014] EWHC 605 (Admin) at [14]-[16]. The applicant's submission that a case can only be "concluded" by the grant of leave or by actual removal ignores the fact that there was no amnesty that applied to cases dealt with under the legacy programme as has been made clear in a line of cases: *R (Hakemi) v Secretary of State for the Home Department* [2012] EWHC 1967 (Admin), *R (Geraldo) v Secretary of State for the Home Department* [2013] EWHC 2763 (Admin), *Hamzeh*, *Jaku & Others* and recently *RN (Sri Lanka) v Secretary of State for the Home Department* [2014] EWCA Civ 938.

12. As there was no amnesty, it follows that cases under the legacy programme fell to be decided under the relevant Immigration Rule (para 395C or 353B, as the case may be) and the guidance in chapter 53 of the Enforcement Instructions and Guidance that applied at the date of the review of the case under the legacy programme.

13. It also follows that, in the event that consideration of the relevant Immigration Rule and guidance produced a negative

answer, the rationale of the Supreme Court at [25]-[35] of the judgment in *Patel v Secretary of State for the Home Department* [2013] UKSC 72 applies, that is, the Secretary of State is entitled to proceed on the basis that those unlawfully in the UK will leave of their own accord; she is not obliged to remove an individual or issue a removal decision.

14. This applicant has had four letters informing him that he had no basis of stay. To suggest that he should nevertheless have been granted leave solely because he had not been removed is to ignore the fact that there was no amnesty.

15. Furthermore, the expressed aim to conclude cases by July 2011 has been held not to amount to an irrevocable and unambiguous commitment to do so in respect of any particular individual by a particular date such as to give rise to a legitimate expectation to that effect on the part of the individual (see *Geraldo*). Similarly, it is unarguable that the expressed aim to "conclude" cases in the legacy programme by either the grant of leave or by removal was anything other an aim or aspiration to remove all individuals who had no basis of stay. In particular, it is unarguable that the expressed aim or aspiration was addressed to individuals and/or that it amounted to an irrevocable and unambiguous commitment to grant leave to anyone who did not meet the requirements of the relevant rule (395C/353B, as the case may be) and the applicable chapter 53 guidance and who was not removed.

16. I am aware of the grant of permission by Elias LJ in *R (Aberaham) v Secretary of State for the Home Department* (aka *BA (Ethiopia)*) on the issue as to what might constitute a "conclusion" for the purposes of the legacy programme. I am also aware that the Court of Appeal considered the renewed applications for permission in *R (Hamzeh & Others) v Secretary*

of State for the Home Department [2014] EWCA Civ 956. The Court of Appeal decided to list the *Hamzeh* case for hearing on a rolled-up basis with *BA (Ethiopia)* and to stay the *Ghlam* case on the same issue pending a decision in *BA (Ethiopia).*

17. However, I do not consider that the grant of permission in *BA (Ethiopia)* means that the "conclusion" ground is arguable. Elias LJ did not have the benefit of the decision of the Court of Appeal to refuse permission in *Geraldo*. Secondly, *Geraldo* applies unless and until the Court of Appeal decides that it is wrong. Thirdly, the Court of Appeal said at [9] of the permission decision in *Hamzeh & Others*:

> "9. In order to emphasise that we have not ourselves reached a positive view that the issues in question are arguable I would not grant permission and would make the direction on a rolled-up basis. (That may also go some way to address a concern expressed by Ms Anderson that claimants in pending cases in the Administrative Court would exploit any grant of permission in these cases as an indication that the issues apparently now put to bed in *Geraldo* might be free to stalk the corridors again.)"

18. I turn to the second ground, which is that the respondent has unlawfully failed to apply her policy of granting indefinite leave to individuals whose cases were considered under the legacy programme if they have resided in the UK for six years or more. This ground is also unarguable. It ignores the fact that there was no such policy and no amnesty, as *Hakemi* and *Geraldo* make clear.

19. The final ground is that the respondent has acted unlawfully in failing to grant the applicant indefinite leave to remain because she has granted indefinite leave to remain to other individuals whose cases were progressed under the legacy programme. Again, this ground ignores the reasoning in the judgments I have referred to. The "consistency" argument was rejected by the Court of Appeal in the permission decision in *Hamzeh & Others* as hopeless ([16]).

20. Rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008 requires me to consider whether to grant permission to appeal to the Court of Appeal. I have done so. I refuse permission to appeal to the Court of Appeal because there is no arguable error of law in my decision. ~~~~0~~~~