Upper Tribunal
(Immigration and Asylum Chamber)

Ukus (discretion: when reviewable) [2012] UKUT 00307(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 March 2012	

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Before

Mr C.M.G. Ockelton, Vice President

Upper Tribunal Judge Jordan

Between

THE ENTRY CLEARANCE OFFICER, LAGOS

Appellant

and

IRIKWEFE CHAPSON UKUS

Respondent

Representation :

For the Appellant: Mr C. Avery, Senior Home Office Presenting Officer

For the Respondent: Ms H. Short, instructed by D.J. Webb & Co., Solicitors

1. If a decision maker in the purported exercise of a discretion vested in him noted his function and what was required to be done when fulfilling it and then proceeded to reach a decision on that basis, the decision is a lawful one and the Tribunal cannot intervene in the absence of a statutory power to decide that the discretion should have been exercised differently (see s 86(3)(b) of the Nationality, Immigration and Asylum Act 2002).

2. Where the decision maker has failed to exercise a discretion vested in him, the Tribunal's jurisdiction on appeal is limited to a decision that the failure renders the decision 'not in accordance with the law' (s 86(3)(a)). Because the discretion is vested in the Executive, the appropriate course will be for the Tribunal to require the decision maker to complete his task by reaching a lawful decision on the outstanding application, along the lines set out in SSHD v Abdi [1996] Imm AR 148. In such a case, it makes no difference whether there is such a statutory power as is mentioned in paragraph 1 above.

3. If the decision maker has lawfully exercised his discretion and the Tribunal has such a statutory power, the Tribunal must either (i) uphold the decision maker's decision (if the Tribunal is

unpersuaded that the decision maker's discretion should have been exercised differently); or (ii) reach a different decision in the exercise of its own discretion.

DETERMINATION AND REASONS

1.
The Entry Clearance Officer in Lagos appeals against the determination of Immigration Judge Nicholls promulgated on 18 May 2011 allowing the appeal of the respondent, Mr Ukus, against the decision refusing him entry clearance to the United Kingdom as a spouse. The application was refused on 28 October 2010. For the sake of consistency, we shall revert to the original titles of the parties: Mr Ukus is therefore "the appellant".

2.
The principal point taken by the Entry Clearance Officer in the grounds of appeal is in relation to paragraph 320(18) of the Immigration Rules, which forms one of a number of sub-paragraphs between 320(8) and (20) being grounds on which entry clearance or leave to enter the United Kingdom should ' normally be refused' :

Save where the Immigration Officer is satisfied that admission would be justified for strong compassionate reasons, conviction in any country including the United Kingdom of an offence which, if committed in the United Kingdom, is punishable with imprisonment for a term of 12 months or any greater punishment....

3.
The expression ' normally be refused' connotes a discretion to be exercised by the decision maker which, in this case, is the Entry Clearance Officer. In paragraph 15 of his determination, relying upon the reasoning found in the preceding paragraphs, the Judge concluded by finding that there were strong compassionate circumstances which the Entry Clearance Officer had failed to take into account sufficient for the discretion contained in paragraph 320(18) to have been exercised differently. He proceeded to allow the appeal under the Immigration Rules.

4.
The challenge made by the Entry Clearance Officer in the appeal before us is that, as paragraph 320(18) affords a discretion, the Judge, having concluded that the Entry Clearance Officer had failed to reach a decision in accordance with the law, should have " remitted the matter for reconsideration ". (Whilst this phraseology is common, we prefer to couch it in terms to the effect that the Entry Clearance Officer reached an unlawful decision and the appellant's application remains outstanding awaiting a lawful decision.) This process is a familiar one, identified as a function of the Tribunal in SSHD v Abdi [1996] Imm AR 148 at p. 160.

5.
The decision made by the Entry Clearance Officer concluded in these terms:

I have considered the compassionate circumstances of your application. However, I am not satisfied that they are of a sufficiently compelling nature for me to exercise the powers of discretion granted to me by paragraph 320(18) of the Immigration Rules. Therefore your application has been refused under paragraph 320(18) of HC 395.

6.
The basis upon which the Entry Clearance Officer reached this decision covered a consideration of whether the appellant and his wife were involved in a serious relationship in which they maintained

regular contact. In finding they were not, he was not therefore satisfied that the couple intended to live permanently with each other in a subsisting marriage. The Entry Clearance Officer considered whether the appellant had made a false representation and had failed to declare material facts. Having found that he did, he concluded this undermined his credibility in relation to the purpose and duration of his period of stay. He noted that the appellant had been convicted of at least one criminal offence that could have carried a custodial sentence of 12 months or more.

7.
There are some significant points to be made in relation to this decision. First, the Entry Clearance Officer clearly recognised that he was considering para. 320(18) of the Immigration Rules by his express reference to it and the factors contained within it, that is, criminal offending and compassionate circumstances. Secondly, he expressly referred to his function as exercising a discretion. The Judge also noted the discretionary effect of the sub-paragraph. Thirdly, the factors upon which the Entry Clearance Officer relied in his decision were all material, though not determinative, in the exercise of that discretion. Accordingly, it can neither properly be said that the Entry Clearance Officer failed to recognise the discretionary power that he was exercising, nor that he failed to exercise it.

8.
Pursuant to s. 84 of the Nationality, Immigration and Asylum Act, 2002, grounds of challenge to an immigration decision not only include at s.84(i)(e) that

the decision is otherwise not in accordance with the law

but also at s.84(i)(f) that

the person taking the decision should have exercised differently a discretion conferred by immigration rules....

9.
These provisions make clear that where the decision maker has a discretion which is vested in him under the Immigration Rules, the exercise of that discretion is appealable before the Tribunal. However, the appeal on this specific ground arises, and only arises, once the decision maker has lawfully exercised his discretion in the making of the decision. If the decision maker fails to exercise his discretion, that failure renders his decision ' not in accordance with the law' and, because it is a discretion which is primarily vested in the Secretary of State, the Immigration Officer or the Entry Clearance Officer, the appropriate course is to require the decision maker to complete his task by reaching a lawful decision on the outstanding application.

10.
In cases where this issue arises, it is for the Tribunal to determine whether the respondent is required to make a fresh and lawful decision or whether to remake the decision itself by exercising the discretion vested in the Tribunal. This requires the original decision to be examined by the Tribunal, not as to whether the Judge agrees or disagrees with the outcome, but to distinguish between those cases where the decision maker has not exercised his discretion at all and those where he has done so but in a manner that permits the discretion to be exercised differently.

11.
There are a number of ways in which this distinction can be approached and, in particular, whether the impugned decision has been lawfully made. This may be done:

(i)
by reference to the criteria by which a decision is susceptible to a successful application for judicial review;

(ii)
by considering whether the decision maker has appreciated the powers vested in him by reaching a decision that properly recognises them, or

(iii)
put simply, by considering whether the decision maker has done the job required of him regardless of whether, in the appeal, the Judge agrees or disagrees with his decision.

12.
For the reasons that we have given, we are satisfied the Entry Clearance Officer (a) recognised the part of the Immigration Rules that he was applying; (b) acknowledged that this involved him in the exercise of a discretion; (c) identified the factors that he was required to take into account in reaching his decision which, in this case, included compassionate circumstances and the relevance of a period of imprisonment. He then (d) balanced those factors one against the other and (e) reached a conclusion that they were not of a sufficiently compelling nature for the exercise of the discretion in favour of the appellant. This was a classic example of the lawful exercise of a discretion. Whatever the merits of the decision, the process by which it was made would not have been susceptible to judicial review, because the decision maker properly noted his function and what he was required to do when fulfilling it and then proceeded to reach a decision on that basis.

13.
The lawful decision that was made incorporated the outcome of the consideration of a discretion under the Immigration Rules. It was, therefore, open to the Judge to determine that the discretion should have been exercised differently, that is to say to review the exercise of the discretion. He did so, with the result as it happened in this case, that he reversed the decision of the Entry Clearance Officer.

14.
It follows that the respondent is misconceived in his contention in the grounds of appeal that the correct course of action was for the Judge to conclude the decision was not in accordance with the law thereby requiring the Entry Clearance Officer to make a fresh decision.

15.
We go on to consider the Entry Clearance Officer's further challenge in the renewed grounds of appeal. In refusing permission to appeal in the First-tier Tribunal, the Judge did so on the basis that the determination relied upon by the Entry Clearance Officer in his grounds of appeal, PS (para. 320 (11) discretion: care needed) [2010] UKUT 440 (IAC), was ' plainly inconsistent ' with s. 86 (3)(b) of the 2002 Act.

16.
Section 86(3)(b) provides:

The Tribunal must allow the appeal in so far as it thinks that -

(b)
a discretion exercised in making a decision against which the appeal is brought…should have been exercised differently.

17.
In PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC), the Tribunal (Kenneth Parker J and SIJ Spencer) considered the discretionary bar contained within paragraph 320(11) of the Rules and its application in the uncertain circumstances there identified, only partially relieved by the promulgation of guidance which provided for refusal of entry clearance or leave to enter where an applicant has been an immigration offender or in breach of the UK immigration or other law and where there are aggravating circumstances. The guidance set out a non-exhaustive list of aggravating circumstances which included absconding. T he decision of the Entry Clearance Officer had simply recited that the appellant had illegally entered and had sought to remain in the United Kingdom indefinitely:

" Given that you entered as a clandestine and sought to remain indefinitely (which was refused) I am satisfied that you have significantly sought to frustrate the intentions of the immigration rules."

18.
The Entry Clearance Officer, in making his decision, failed to refer to the guidance under paragraph 320(11) and it was unclear whether he had addressed his mind to the relevant question, namely whether the appellant's breach of UK immigration law was sufficiently aggravated so as to justify the refusal. By not addressing the correct question, the Entry Clearance Officer did not carry out an adequate balancing exercise required by the guidelines. Whilst the Judge endorsed this approach, his decision was vitiated by the same legal error.

19.
Hence, the Upper Tribunal in PS found that the Entry Clearance Officer had failed to make a lawful decision. In those circumstances, the remedy available was clear: the Entry Clearance Officer was required to reach a lawful decision on the outstanding application and the appeal was allowed to that limited extent.

20.
It follows that the decision in PS is not inconsistent with s.86(3)(b); rather, it complements it by providing the remedy in a case where the Tribunal finds the decision-making process had not even reached the stage of there being a (lawful) decision. It is only after this stage has been reached, and an appeal on a discretionary basis arises, that s. 86(3)(b) comes into play.

21.
Not all discretionary powers open to the Secretary of State are appealable in the Tribunal. Before its deletion on 13 February 2012, paragraph 395C afforded a discretion to a decision maker when considering removal. If the decision to remove was made under s. 10 of the Immigration and Asylum Act 1999 (or, latterly, s. 47 of the 2006 Act), the Immigration Rules provided the appellant with a decision that was appealable to the Tribunal. We understand that the Secretary of State also applied the paragraph 395C criteria to removal decisions which were not made under ss. 10 or 47. These decisions, however, were made outside the Immigration Rules and did not give rise to a decision appealable to the Tribunal. Where, for example, the Secretary of State has decided to consider paragraph 395C in the context of an illegal entrant, (whose removal does not involve the operation of s.10), the Tribunal has no power to review the exercise of the discretion.

22.
There are thus four possible situations where the Tribunal is considering an appeal arising from the exercise of a discretionary power:

(i)
the decision maker has failed to make a lawful decision in the purported exercise of the discretionary power vested in him and a lawful decision is required;

(ii)
the decision maker has lawfully exercised his discretion and the Tribunal has no jurisdiction to intervene;

(iii)
the decision maker has lawfully exercised his discretion and the Tribunal upholds the exercise of his discretion;

(iv)
the decision maker has lawfully exercised his discretion and the Tribunal reaches its decision exercising its discretion differently.

23.
It is for a Tribunal to decide into which of those four a decision falls to be determined. It is only if (i) applies that the Judge is required, on Abdi lines, to allow the appeal to the extent of deciding the respondent needs to make a fresh decision. Under this head alone, it makes no difference whether the discretion is one the exercise of which the Tribunal has power to review. In the present appeal, the Entry Clearance Officer made a lawful decision and the Immigration Judge was, on appeal, permitted to make his own decision by the exercise of his discretion and, in doing so, to reach a conclusion different from that of the Entry Clearance Officer. In so deciding, the Judge made no error on a point of law.

24.
None of the other grounds of appeal was pursued before us and for good reason. The Entry Clearance Officer relied on r. 26 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 which permits the Tribunal, on receipt of an application for permission to appeal, to review a decision of the First-tier Tribunal if it is satisfied there was an error of law in the decision. Review was not appropriate in a case such as this where, as we have found, the determination did not contain an error of law. Further, s. 11(5)(d)(i) of the Tribunals, Courts and Enforcement Act 2007 provides that a decision of the First-tier Tribunal to review, or not to review, an earlier decision of the Tribunal, is an excluded decision for the purposes of an appeal to the Upper Tribunal. With the greatest respect to the draftsman of the grounds of appeal, the suggestion that r. 26 ought to have led the First-tier Tribunal to review its decision is simply unarguable. The Judge made a direction, as he was permitted to do, that the appellant be granted entry clearance. Given his findings that this was a subsisting marriage, that the appellant's wife gave unchallenged evidence that the appellant was permitted to reside with her in accommodation she rented and was only required to register his presence there and that his wife's earnings were substantially in excess of the minimum income support level so that there was nothing to show that she would not be able to support both herself and the appellant after his arrival in the United Kingdom without recourse to public funds, the requirements of para. 281 of the Rules were met. This justified the direction being made. Nor was the Judge in error in commenting upon “ one other small factor ” being what he described as a developing official attitude directed away from the prosecution of foreign nationals who agree to administrative removal. It was clearly of only marginal significance, if any, and could not reasonably have affected the outcome of the appeal.

DECISION

The Entry Clearance Officer’s appeal is dismissed.

Signed

ANDREW JORDAN

JUDGE OF THE UPPER TRIBUNAL

31 July 2012