Neutral Citation No. [2013] NIQB 119 | *Ref:* **TRE9063**

Judgment: approved by the Court for handing down | *Delivered:* **26/11/2013**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Talalaev's (Constantine Sergevich) Application [2013] NIQB 119

IN THE MATTER OF AN APPLICATION BY CONSTANTINE SERGEVICH TALALAEV FOR JUDICIAL REVIEW

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TREACY J

Introduction

[1] The applicant is a Russian national living in Northern Ireland. He challenges a decision of the Home Office ("the respondent") dated 26 March 2013 that his leave to remain in the UK be curtailed to terminate on 25 May 2013 ("the first decision"). He also challenges the failure of the respondent to make a decision on an application by the South Eastern Regional College for a Tier 2 Certificate of Sponsorship to enable him to take up an offer of employment with that college thereby allowing him to apply for further leave to remain ("the second decision").

[2] He seeks to quash the impugned decision of 26 March 2013 as well as an order to compel the respondent to re-make the curtailment decision in order to extend the applicant's leave to remain for such a reasonable period as is required for the applicant to make a further application for leave to remain.

Background

[3] The applicant has been living lawfully in Northern Ireland since 2005 when he came here as a PhD student at Queen's University. He later secured full time employment with his Sponsor, Randox Laboratories Ltd, as a software engineer in July 2011. In April 2012 he applied for a Tier 2 visa to remain in the UK as a worker. This was granted on 30 October 2012 and permitted him to remain in the UK until July 2015. The applicant became involved in a dispute with his employer. The applicant was dismissed on 19 February as a result. The applicant disputes the

lawfulness of this dismissal. He had an internal right of appeal against this decision. On the same day that he was dismissed, Randox advised the respondent that the applicant's employment had been terminated. Anticipating his dismissal, he had earler applied for a job with the South Eastern Regional College ("SERC") in November 2012.

[4] By letter dated 26 March 2013 the respondent informed the applicant that in view of the fact that he had ceased employment with his Sponsor he no longer met the requirements of the immigration rules under which his leave to remain was granted. It states "having considered the exercise of her discretion, the Secretary of State has therefore decided, under para 323A(a)(i)(2) of the Immigration Rules, to restrict the limit on the duration of your leave to remain in the UK as a Tier 2 migrant so as to expire on 25th May 2013". This was contained in a section of the letter entitled "SECTION A: DECISION AND REASONS". The next section of the letter entitled "SECTION B: NO RIGHT OF APPEAL", true to its title, then informed the applicant that he was not entitled to appeal this decision.

[5] Prior to the making of this impugned decision the applicant was not invited to make any representations as to whether there existed any exceptional circumstances with regard to the appropriate length of the curtailment. The letter of the 26th was not a "minded to" letter providing the applicant with the opportunity to demonstrate exceptional circumstances. It was plainly a curtailment decision that his leave to remain would expire in 60 days on 25 May. The sole reason for the decision, both as to curtailment (which was mandatory) and its length (which was discretionary) was the cessation of employment with the Sponsor. Thus in exercising its discretion as to duration the respondent afforded the applicant no opportunity to make representations and consequently any discretion was exercised without any input from him.

[6] The decision letter did not draw the applicant's attention to the existence of any exceptional circumstances discretion much less invite any representations on that issue.

[7] Following receipt of the decision letter the applicant responded on 12 April 2013 drawing attention to some matters regarding the circumstances of his dismissal, his extant appeal against his dismissal, his intention if necessary to take unfair dismissal proceedings and his alleged victimization for having disclosed certain matters, he says, in the public interest. He refers to his 7 years in the UK, his 2 Masters degrees in physics and electrical and electronic engineering, his 7 years' overall software development and R&D experience and his ability to contribute his expertise to the UK high tech industry. He then requests that his stay in the UK be extended to enable him to exercise his right to represent himself in court a breach of contract action and, possibly, to challenge the dismissal decision before the Industrial Tribunal.

[8] The Home Office responded on 1 May 2013 and said that the leave expiry date "cannot be extended" because he was no longer employed in the capacity for which his leave was granted. This was simply wrong as the policy guidance expressly recognises that the expiry date can, in exceptional circumstances, be extended beyond the standard 60 days provided for in the relevant guidance. The letter continues "granting a period of 60 days when curtailing leave is to enable you to make a further application or to make arrangements to return home. Should you wish to explore the possibility of making a further application full details can be found on the website ….".

[9] The applicant responded by letter dated 7 May 2013 referring to High Court proceedings initiated by his former employers, the nature of the litigation and his intention to challenge his dismissal in the Industrial Tribunal. He then states: "…I have made a relatively successful attempt to secure employment, which would allow me to stay in the UK. Having gone through the recruitment process with SERC (South Eastern Regional College) I was found to be the best suited candidate for the role of Software Consultant. At that stage SERC didn't hold the Tier 2 certificate of sponsorship, they therefore asked me to wait for this to be sorted out. As far as I am aware *SERC submitted the relevant application to the Home Office early in* ***January 2013***, however this hasn't yet been processed. I therefore cannot start working through no fault of mine, until the certification is complete. I am very disappointed with the Home Office decision in relation to the expected date of my departure from the UK. I therefore feel I am left with no other option but to apply to have this decision reviewed judicially".

[10] A detailed pre- action protocol letter was sent on 23 May 2013 challenging the restriction on the duration of his leave and the apparent failure of the Home Office to make a decision on the SERC application "which we understand has been pending with the UKBA since January 2013, which hiatus we understand has in turn prevented the transfer of his Tier 2 certificate of sponsorship from his previous employers, to these new prospective employers". Judicial review proceedings were issued on 24 May.

[11] The respondent replied on 31 May 2013. They pointed out that SERC had **not** applied to the Home Office in January (as the applicant had been told by SERC) for a Certificate of Sponsorship and that "in the absence of such an application there is at present nothing pending … if it can be established that such an application was made by SERC then consideration will be given to whether the CoS will be issued ...". The respondent's letter did not mention that SERC had only applied on 26 April and that it had been refused on 8 May because they had failed to include critical material with the application.

[12] Following this "bolt out of the blue" the applicant's solicitor wrote to SERC on 6 June seeking clarification. SERC then resubmitted their CoS application and by reply dated 12 June SERC confirmed the earlier refusal and advised that the application had been resubmitted on 10 June 2013.

[13] While SERC's application was under consideration the applicant wrote to the Home Office on 4 July. In this letter the applicant explained the ongoing difficulties in making a Tier 2 status application and asked for latitude to be shown in the circumstances. On 5 July SERC emailed the applicant that they had been issued with a CoS. Only at this stage could the applicant make application to renew his Tier 2 status so that he could take up his job with SERC. On 17 July the application was rejected as being invalid because the specified fee of £578 was not paid. By letter dated 13 September the Home Office responded to the 4 July with a letter which included the following paragraph: "Next you ask that the fact that your client is now an overstayer for more than 28 days is not held against him. Again, whilst not wishing to pre-empt the making of a valid application and any decision relating to it, paragraph 245HD(p)is also in mandatory language … Given that if your client's prospective employer had actually made a timeous and valid application for a sponsor licence an in-time application could have been made, along with the fact that your client was given a 60 day period to make such an application before his leave ended, it is at first glance difficult to see why *even if* discretion could be exercised in his favour why it should be."[my emphasis].

Grounds

[14] The grounds upon which the applicant relies are elaborately pleaded. They challenge the procedural fairness of the impugned exercise of discretion for want of the opportunity to make representations prior to its exercise. It is also contended at ground (g) that "the first impugned decision was unlawful as an unlawful fetter and/or improper exercise of the respondent's discretion within paragraph 323A(a)(i)(2) of the Immigration Rules in so far as the respondent failed to consider varying the duration of the applicant's leave beyond 25th May 2013 where the respondent was clearly required to do so by the applicant's circumstances as outlined in correspondence from the applicant to the respondent of 12th April 2013 and 7th May 2013. In the respondent's letter of 1st May 2013 they state that the relevant date [25th May 2013] *"is correct and <u>cannot</u> be extended"*. This is not correct …"

Legal Context

[15] Rule 323A of the Immigration Rules states:

> "323A. ... the leave to enter or remain of a Tier 2 Migrant...
>
> (a) is to be curtailed or its <u>duration</u> varied if...
>
> (i)(2) The migrant ceases to be employed by the Sponsor."

Paragraph (a), which is in mandatory terms and requires curtailment or variation of leave, is not applied in the circumstances set out at rule 323A(b)(iv) and which include circumstances when:

> "(4) the migrant has been granted leave to enter or remain with another Sponsor or under another immigration category; or
>
> (5) the migrant has a pending application for leave to remain, or variation of leave, with the UK Border Agency, or has a pending appeal under section 82 of the Nationality, Immigration and Asylum Act 2002."

[16] The rule is plainly intended to ensure that those who are no longer employed by their Sponsor have their leave to remain curtailed or varied since the basis of their leave to remain within the United Kingdom has ceased. The rule also recognises exceptions, for example, that leave should *not* be curtailed or varied when a migrant has a pending application for leave to remain or variation of their leave to remain. The rule is not intended to curtail or severely reduce the leave of a person who has lost their job but who has a pending application for leave to remain such as when a person secures a new job and re-applies for Tier 2 worker status with the new employer as Sponsor. Indeed, even after a curtailment decision has been made under rule 323A(a)(i)(2) the Home Office acknowledge that a period of 60 days is granted so as to allow affected individuals to make any necessary further applications in order to try to regularise their status.

[17] Under the exhibited policy guidance the leave expiry date must be 60 days from the decision date unless there are grounds to curtail with immediate effect **or for a different duration** [see page 55 of Guidance]. In a section entitled "Curtailment of leave: Requesting further information before curtailing" it provides that a curtailment decision should be made on the basis of the available information "*providing that is sufficient to inform your decision.* In the majority of cases, you will be able to make a decision after reviewing the available information, such as a sponsor notification that sponsorship has been withdrawn. In some circumstances it may be appropriate for you to ask a migrant to provide additional information *before* making a curtailment notice. For example, if the Home Office is aware of circumstances which may mean it is appropriate to curtail leave for a period which is more than 60 days" [my emphasis**].** The Guidance then states "if you need further information before making a curtailment decision, you *must* send a "minded to curtail" letter." Later in the Guidance, in a section entitled "Curtailing leave so that the migrant has over 60 days remaining", it states "you can curtail leave so there are more than 60 days remaining, but you should only normally do so if there are exceptional circumstances that mean: [i] A migrant would be in a vulnerable position if leave was curtailed to 60 days or with immediate effect. [ii] More time is needed to protect the welfare of a child ….".

Discussion

[18] As this case demonstrates curtailment decisions have very serious consequences for the individual [see Patel (Revocation of sponsor licence – fairness) India [2011] UKUT 00211 (IAC) per Blake J at paragraph 20 *et seq*.] In making a curtailment/variation decision there is an obligation on the part of the respondent to act fairly [Patel at paragraph 13 *et seq*.]. The applicant submits that the Home Office's decision to vary his leave to the standard 60 days was not fair in the specific and perhaps somewhat unusual circumstances of his case. He contends that he ought to have been given an opportunity to make representations to the Home Office *prior* to the curtailment decision. Further the respondent improperly fettered/exercised its discretion by failing to consider varying the duration of the applicant's leave beyond 25 May in light of the applicant's circumstances as outlined in the correspondence from the applicant of 12 April and 7 May 2013, erroneously stating in its letter of 1 May that the expiry date was correct and "cannot be extended".

[19] The applicant's case was governed by the mandatory requirements of rule 323A(a)(i)(2) which vested the respondent with an important discretion as to the duration of the variation. Mr McQuitty emphasised the importance of what was at stake for the applicant and the potentially grave consequences. He submitted that notwithstanding the significance of the impugned first decision (which could not be appealed) the respondent's exercise of discretion (if it was exercised) was made without *any* input or contribution from the applicant. The decision had been promulgated without the applicant being invited to make any representations to inform the respondent's exercise of discretion. Although the decision letter appears to acknowledge that a discretion was being exercised, any such exercise was without *any* opportunity being afforded to the applicant to make representations. As has been recognised in other contexts, it is often the case in any situation involving a decision by an authority that, once a decision has been made, it can be difficult to change it. A simple 'minded to' letter could have been sent to the applicant informing him of the proposed decision and giving him the opportunity of drawing to the attention of the decision- maker any facts or circumstances relevant to the exercise of its discretion in relation to duration. As we have seen, the applicable guidance envisages the use of such a procedure if further information is needed before making a curtailment decision. Leave can be curtailed so there are over 60 days remaining but "only *normally* ... if there are exceptional circumstances ...". It is difficult to see how a decision- maker, acting consistently with his duty of fairness, can know in advance whether there are circumstances making it appropriate to curtail leave for more than 60 days without giving the recipient the opportunity to make representations on this point. No good reason has been advanced in the present case as to why this opportunity was not afforded to the applicant. This could have been achieved by sending out a 'minded to' letter. The Home Office was notified by Randox on 19 February 2013. The respondent did not, however, issue the impugned decision until 26 March 2013, more than one month after they had been

advised of the applicant's employment situation. Accordingly, there was nothing to prevent the respondent – during that intervening period – from putting the applicant on notice of the fact that they were minded to curtail/vary his leave in accordance with rule 323A and inviting him to make representations to them in respect of that prospective decision. There was ample time to do so and no good reason not to do so by the very straightforward means of a simple letter to the applicant. There was no evidence before the court that this simple safeguard would impose a disproportionate or unreasonable burden upon the decision- maker.

[20] I agree with the applicant that an obligation to provide an opportunity to be heard prior to curtailment/variation is strengthened when one considers that one of the express exceptions to rule 323A is when a person has a pending application to vary their leave notwithstanding that they are no longer employed by their Sponsor employer. The applicant recalls that Tier 2 workers – such as the applicant was – are those foreign workers employed in the UK from outside the resident workforce to fill particular jobs that cannot be filled by settled workers. By definition, it is submitted, such persons are skilled workers whose skills and experience are <u>needed</u> within the UK economy. [The applicant, for example, holds a BSc in Physics, a MSc in Physics [Rostov State University, Russia] and an MPhil [QUB] in Electronic Engineering].

[21] The rules recognise that even when such people lose their jobs with their sponsoring employers that it makes sense not to summarily remove them but to give them the opportunity to secure alternative skilled employment in order to continue to meet the skills deficit within the UK workforce. While the standard 60 days may frequently be sufficient I accept the applicant's contention that there will undoubtedly be situations [of which the present case might be thought to be an example] when that standard approach will not do justice to the individual concerned. The administration of the rules governing cases of this kind should make allowance for the fact that delays may arise within the administrative machinery of a new prospective employer – especially if that employer is not familiar with immigration procedures. Such delays may be entirely beyond the control of the skilled worker who seeks to remain and it is not in the interest of either these workers, or of the UK companies which need their skills, to administer the immigration rules in an inflexible manner. Rules systems should always be administered in a way which is mindful of the balance of policy objectives they seek to achieve. Here the policy is to facilitate the employment and retention of skilled migrant workers whose presence in the UK fills skills gaps within our own labour force. It is my view that the rules have not been applied in a manner conducive to these policy objectives in this case. On the contrary, despite the existence of a discretion to provide a curtailment period that facilitates new (and possibly inexperienced) sponsors to benefit from access to migrant workers' skills, that discretion was not applied in this case. The result is that an administrative hurdle has been placed in the way of SERC fulfilling its needs by employing this applicant. This could result in his skills being lost to SERC and to the broader UK economy and it may have seriously unfair consequences for the applicant himself by forcing him

to leave Northern Ireland against his will and at a point in time when he still has significant unfinished business pending here. As counsel contended, if the Home Office does not curtail/vary leave when a migrant worker has an application pending, then it is "not too far a leap" to suggest that a similar approach or some other means of flexibility might be warranted when an unemployed skilled worker has found another appropriate job but cannot actually apply until the new employer has secured a sponsor licence. That is a preliminary requirement for falling within the pending application category under the rules and it would, as Mr McQuitty submitted, be unusual if those who could apply [but not just yet] were deemed "beyond the pale" of the rules in those circumstances. Such flexibility, he submitted, can be found in the discretion to grant periods of longer than 60 days in *"exceptional circumstances"*.

[22] Even if there is no such public law obligation to allow for representations to be made in advance of the decision, matters do not end there because the decision-maker must conscientiously review the exercise of its discretion in the light of new material which might legitimately bear upon its exercise. This necessitates, in the first instance, a proper understanding of the nature and scope of the discretion being exercised. As is now clear, SERC only submitted the application for a sponsorship licence to the Home Office in April 2013 which was rejected as invalid on 8 May because relevant documentation had not been included. Despite the representations in the applicant's correspondence of 7 May and 23 May referring to the SERC application of January 2013 and complaining about the apparent Home Office delay in processing it, the Home Office never informed him that an invalid application had been lodged in April and rejected in May. As is apparent from the terms of the Home Office letter of 1 May, they expressed the view that the expiry time [of 60 days] "cannot be extended". This clearly indicates that the nature and extent of the discretion under the guidance was not appreciated fully or at all. [Nor did the respondent give consideration then (or later) to varying leave outside the Immigration Rules; see MacDonald's Immigration Law & Practice (Eighth Edition, vol.1) at paragraph 4.39 and the cases cited therein]. Whether they fully appreciated the parameters of their discretion, it is in any event plain that they ignored or failed to take into account a series of factors which were plainly relevant to the question whether time should be extended. Here the recipient of the curtailment decision was not given the opportunity of making representations in advance, thus alerting the Home Office to circumstances which might require some flexibility as to the expiry limit so as to avoid potential injustice. There is no appeal against such a decision. In the absence of either advance representations or an appeal it is particularly important that when facts are brought to the attention of the decision- maker that are, or may be, relevant as to whether time should be extended, that they be properly explored and considered. That did not happen in this case. The decision- maker wrongly stated that time "cannot be extended" and either because of that erroneous understanding or otherwise failed to explore and consider new factors which had been brought to its attention and which were material to a proper exercise or review of discretion.

[23] The applicant submitted there were many factors that would have justified allowing him a greater period of leave to remain in order to sort out his immigration/employment status – especially given the overarching purpose of the Tier 2 scheme. These included:

(a) The circumstances of the applicant's dismissal, including any public interest issues.

(b) The actual date of dismissal along with any period for internal appeal – being some weeks after the date of dismissal as notified by Randox.

(c) Whether or not a dismissal was being challenged through the Industrial Tribunal.

(d) The length of prior residence in the United Kingdom.

(e) The work history in the United Kingdom including the status of the worker – skilled in this case.

(f) Whether or not the migrant had secured alternative employment.

(g) The status of that prospective new employer and what stage any required application [eg for sponsorship licensing].

[24] These issues were raised by the applicant in his initial correspondence with the respondent *after* they had made the impugned decision in the letters of 12 April 2013 and 7 May 2013. I accept that these are factors potentially relevant to the exercise of the relevant discretion to extend time, including the question of whether or not a particular individual would be placed in a *"vulnerable position"* by curtailment/variation of leave, so as to justify a longer curtailment period beyond the usual 60 days. Mr McQuitty contended that a migrant with no family in the UK who has just lost his job and who is being sued by his former employer, a very large company, is in a vulnerable position on any objective assessment of that concept.

[25] Factor (g) above is of particular significance given the unfortunate history of this case. Not only was this factor not considered prior to the impugned decision being made; it was also ignored even after it was specifically brought to the attention of the Home Office, when it could have decided to grant a further period of leave to the applicant at that late stage.

Conclusion

[26] For the above reasons the application for judicial review is allowed and I will hear the parties as to the appropriate relief.