OUTER HOUSE, COURT OF SESSION

[2022] CSOH 18

P339/21

OPINION OF LADY CARMICHAEL

In the petition by

SHAMSUDDEEN USMAN SANUSI

Petitioner

Pursuer: Forrest; Drummond Miller LLP
Defender: Maciver; Office of the Advocate General

15 February 2022

[1] Mr Sanusi was granted leave to remain as a student on three occasions. These were in August 2010, August 2012 and November 2014. In March 2017 he applied for a further period of leave to remain. That was an application for a Tier 4 Student visa.

[2] The Secretary of State refused the application on 13 September 2017. She withdrew that decision, and eventually made a fresh decision refusing the application on 4 July 2018. Following a successful application for administrative review she withdrew the decision of 4 July 2018, and on 19 December 2018 made another decision, again adverse to Mr Sanusi.

[3] The petitioner sought an administrative review of the decision of 19 December 2018. The Secretary of State declined to deal with it, on the basis that it was not submitted timeously. Mr Sanusi brought a petition for judicial review of that decision. The Secretary of State undertook to reconsider the application for administrative review.

[4] She made a decision on the application for administrative review on 1 August 2020. It was adverse to Mr Sanusi. She withdrew the decision, and undertook to reconsider the matter. She did so, making a further decision on 5 February 2021.

[5] This petition seeks a declarator that the respondent has unreasonably prolonged consideration of the application for further leave to remain. It seeks reduction on the basis that the Secretary of State erred in law in making the decision of 5 February 2021.

Delay

[6] The case so far as based on delay is not well-founded. As Mr Forrest accepted, in order to obtain a remedy of any sort, Mr Sanusi would have to identify delay that has resulted in unlawful decision making. He does not say that the result of his application would be any different had it been decided at an earlier date. His complaint is that he has been left in a state of uncertainty over a protracted period.

[7] The first point to observe is that he made an application in March 2017. It was determined in December 2018, after the respondent had already made, withdrawn, and remade her decision on two occasions. The time that has elapsed since then has been while an application for administrative review has been pending. During that period, there have been judicial review proceedings, a decision made and withdrawn, and then, finally, a further decision made. There has not been a lengthy period during which the Secretary of State has simply declined to make any decision. There is in any event no specified period within which an immigration decision must be made: *EB (Kosovo)* v *Secretary of State for the Home Department* [2009] 1 AC 1159, paragraph 13.

[8] Delay in a decision making process may be relevant to article 8 claims in the way envisaged by the House of Lords in *EB (Kosovo)* at paragraphs 14 and 15. It may also be

relevant in reducing the weight to be given to the requirements of firm and fair immigration, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes: *EB (Kosovo)* paragraph 16. Nothing in the circumstances of this case comes close to demonstrating either of those situations.

Error in law

[9] The decision of 5 February 2021 is a decision made on an application for administrative review made under Appendix AR of the Immigration Rules. The following are the relevant provisions:

> "Introduction
>
> Administrative review is available where an eligible decision has been made. Decisions eligible for administrative review are listed in paragraphs AR3.2, AR4.2 or AR5.2 of this Appendix.
>
> Administrative review will consider whether an eligible decision is wrong because of a case working error and, if it is considered to be wrong, the decision will be withdrawn or amended as set out in paragraph AR2.2 of this Appendix.
>
> Rules about how to make a valid application for administrative review are set out at paragraphs 34M to 34Y of these Rules.
>
> Definitions
>
> AR1.1 For the purpose of this Appendix the following definitions apply:
> …
> Case working error: an error in decision-making listed in paragraph AR2.11
>
> AR2.4 The Reviewer will not consider any evidence that was not before the original decision maker except where:
>
> > (a) evidence that was not before the original decision maker is submitted to demonstrate that a case working error as defined in paragraph AR2.11 (a), (b) or (c) has been made; or
> > (b) the evidence is submitted to demonstrate that the refusal of an application for permission to stay under paragraphs 9.7.1, 9.7.2 or 9.7.3 of Part 9 of these Rules was a case working error and the applicant has not previously been served with a decision to:

(i) refuse an application for entry clearance, leave to enter or leave to remain;
(ii) revoke entry clearance, leave to enter or leave to remain;
(iii) cancel leave to enter or leave to remain;
(iv) curtail leave to enter or leave to remain; or
(v) remove a person from the UK, with the effect of invalidating leave to enter or leave to remain,

which relied on the same findings of facts.

…

What is a case working error?

AR2.11 (a) Where the original decision maker's decision to:

(i) refuse an application on the basis of paragraph 9.7.1, 9.7.2, 9.8.1 or 9.8.2 of Part 9 of these Rules; or
(ii) cancel leave to enter or remain which is in force under paragraph 9.7.3 of Part 9 of these Rules; or
(iii) refuse an application of the type specified in paragraph AR3.2(d) of these Rules on grounds of deception; or
(iv) cancel leave to enter or remain which is in force under paragraph A3.2(b) of Annex 3 to Appendix EU or paragraph A3.4(b) of Annex 3 to Appendix EU (Family Permit) of these Rules; or
(v) refuse permission to enter or stay which is in force under paragraph HV11.1(c) of Appendix S2 Healthcare Visitor; or
(vi) refuse permission to enter which is in force under paragraph SPS10.1(c) of Appendix Service Providers from Switzerland; is incorrect;

(b) Where the original decision maker's decision to refuse an application on the basis that the date of application was beyond any time limit in these Rules was incorrect;
(c) Where the original decision maker's decision not to request specified documents under paragraph 245AA of these Rules was incorrect;
(d) Where the original decision maker otherwise applied the Immigration Rules incorrectly; or
(e) Where the original decision maker failed to apply the Secretary of State's relevant published policy and guidance in relation to the application.

Decisions eligible for administrative review in the United Kingdom

AR3.1 Administrative review is only available where an eligible decision has been made.

AR3.2 An eligible decision is:

(a) A decision on an application where the application was made on or after 20th October 2014 for leave to remain as:
(i) a Tier 4 Migrant under the Points Based System"

[10] Paragraph AR 2.4 makes it explicit that the reviewer will not consider evidence that was not before the original decision maker, save in specified circumstances. These are, broadly, to show that a case working error, as defined in the rules, has been made. The relevant definition of "case working error" for the purposes of this case is that in paragraph AR 2.11(d). Administrative review is not a process to allow an applicant to submit additional material in support of his application after a decision adverse to him.

[11] At the time of the decision in December 2018, the Secretary of State was considering the application under paragraph 245ZX(d) of the Immigration Rules. That required Mr Sanusi to have 10 points under paragraphs 10 to 14 of Appendix C to the Immigration Rules. The difficulty that he has encountered with his application was in relation to his ability to obtain 10 points under Appendix C; that is, to satisfy the criteria relating to available funds for his maintenance. Appendix C made detailed provision about this. He had to provide specified documents that showed that funds were available to him: Appendix C, paragraph 1A(ca)(i). The specified documents are, broadly, personal bank or building society statements satisfying particular requirements: Paragraph 1B(a) of Appendix C.

[12] Paragraphs 13 and 13B of Appendix C provided:

> "13. Funds will be available to the applicant only where the specified documents show, or where permitted by these Rules, the applicant confirms that the funds are held or provided by:
> …
> (ii) the applicant's parent(s) or legal guardian(s) and the parent(s) or legal guardian(s) have provided written consent that their funds may be used by the applicant in order to study in the UK;
>
> 13B. If the applicant is relying on the provisions in paragraph 13(ii) above, they must provide:
> (a) one of the following documents:
> (i) their birth certificate showing names of their parents

> (ii) their certificate of adoption showing the names of both parent(s) or legal guardian, or
> (iii) a Court document naming their legal guardian"

[13] In March 2017 Mr Sanusi provided the Secretary of State with a letter which bore to be from Haruna Usman Sanusi, PhD, OON, FCMA. The author (whose gender is not explicit in the letter) said that Mr Sanusi was their younger brother and that they would "continue to be responsible for his tuition fees, up keep allowance and general care until completion of his studies in the UK". It attached a United Bank for Africa Statement in the name "Mrs Sanusi Haroun Usman".

[14] The decision of 13 September 2017 referred to Mr Sanusi's failure to provide evidence of relationship with his sponsor as required in paragraph 13B(a) of Appendix C to the Immigration Rules.

[15] In the application for administrative review of the decision of September 2017, Mr Sanusi referred to his sponsor as his brother. He also referred to a request to him by email of 6 May 2017 for a court document stating the relationship between him and his sponsor. He referred to the submission on or before 5 June 2017 of an affidavit from his sponsor confirming the relationship between them.

[16] A decision of 8 November 2017 contains the following:

> "The fact that your brother provided a court affidavit to confirm he is your legal guardian has not been questioned. However the bank statements provided to assess the maintenance funds were in the name of Mrs Sanusi Haroun Usman and not your legal guardian Dr Haruna Usman Sanusi".

[17] The decision of 4 July 2018 refers to communication about the affidavit by email on 17 May (year unspecified). A copy of an affidavit dated 29 September 2017 is 6/18.2 in this process. The email refers to internal guidance stating that an affidavit is not acceptable. The

guidance as quoted in the email is unhappily phrased, in that it says that an affidavit is simply a claim to relationship, and not evidence of that relationship. It is, however, reasonably clear that the caseworker was indicating that the Secretary of State did not consider that the affidavit satisfied the requirements of paragraph 13B(a)(iii) because it was not a court document of the sort contemplated in that paragraph.

[18] The decision of 19 December 2018 includes the following:

> " … as evidence of maintenance you have submitted a bank statement belonging to Mrs Sanusi Haroun Usman, and in view of the fact that Mrs Sanusi Haroun Usman does not meet any of the requirements as specified in paragraph 13 of Appendix C of the Immigration Rules, your proposed sponsorship is not acceptable.
> …
>
> A letter of consent from Mrs Sanusi Haroun Usman has not been provided for you to use her funds thus the decision has been made not to request the additional documentation as it is not anticipated that addressing the above omission or error would lead to a grant of leave.
> …
> Additionally you provided an affidavit by Dr Haruna Usman Sanusi who states to be your biological brother and confirming his willingness to provide financial assistance … Evidence of funds which is not in the applicant's own name must be in the name or names of people with parental responsibility for them.
> …
> As Mrs Sanusi Haroun Usman along with Dr Haruna Usman Sanusi do not meet any of the above requirements, they are not allowed to act as your financial sponsor …
> … the affidavit from the High Court of Justice in Abuja this can also not be used as form of evidence of maintenance."

[19] On 12 October 2020 Mr Sanusi's solicitors submitted further material on his behalf. This was a letter from his financial sponsor, and an up-to-date bank statement in the name Sanusi Haroun Usman (without the prefix, "Mrs").

[20] The administrative review decision of 5 February 2021 gives reasons which are generally consistent with those given in the decision of 19 December 2018. There was no information to show that Mrs Sanusi Haroun Usman was allowing Mr Sanusi to use her funds for maintenance; Mrs Sanusi Haroun Usman and Dr Haruna Usman Sanusi were not

parents, legal guardians or in any other permitted category of sponsor; and the Secretary of State did not accept the affidavit as proof that Dr Haruna Usman Sanusi was Mr Sanusi's legal guardian.

Irrationality

[21] Mr Forrest maintained that the decision of 5 February 2021 was irrational because in the series of withdrawn decisions preceding it, the Secretary of State had given different reasons for rejecting the application. Some of the withdrawn decisions did not mention any deficiency in the bank statements, but instead focused on a lack of satisfactory evidence that the sponsor was Mr Sanusi's legal guardian, and could be read as accepting the sufficiency or quality of that evidence. Others focused on the bank statements.

[22] All the decisions apart from those of 5 February 2021 and 19 December 2018 have been withdrawn by the Secretary of State in the face of Mr Sanusi's requests for review and challenges by way of judicial review. The need, or perceived need, for their withdrawal may not reflect particularly well on the decisions or decision-making in question. It means, however, that there is little that can be safely drawn from the reasons given in them. The focus in this petition must be on the administrative review decision of 5 February 2021. The application under review in that decision was the one of 19 December 2018. It was in respect of that decision that Mr Sanusi required to show, in his application for administrative review, that there had been a case working error. The detail of the other decisions is irrelevant. If the Secretary of State has in one or more of the earlier, withdrawn decisions erroneously failed to notice a deficiency in the application on which she was entitled to rely, she is not bound by her earlier approach.

[23] In particular, she is not bound by any acceptance by her in the withdrawn decision of 8 November 2017 that the affidavit was sufficient to satisfy the requirements of paragraph 13B(a)(iii). I express no view as to whether the decision should be read as indicating that she did accept that.

Failure to take into account relevant material

[24] Mr Forrest's submission was that the reviewer should have considered evidence that was not before the original decision maker, namely the additional material submitted in October 2020. He did not submit that the rules required the reviewer to do so because the new material showed that a case working error, as defined, had occurred. The decision making was irrational because it had failed to take into account that circumstances had changed during the period when decision making was taking place. The Immigration Rules relevant to students had themselves changed during the period, on 22 October 2020. There were grounds for departing from the usual rule that only information before the original decision-maker was relevant.

[25] The Immigration Rules relating to administrative review preclude the consideration of new material, unless the new material demonstrates a case working error. The Secretary of State was correct to leave the new material out of account in determining the application for administrative review. It does not matter that the Immigration Rules had changed in the meantime. The question was whether there had been a case working error in the decision of 19 December 2018, on the rules that applied at the time: cf *EB (Kosovo)*, paragraph 13.

[26] In the course of submission Mr Forrest touched on a further point, not mentioned in his note of argument, to the effect that the Secretary of State had not been entitled to approach the affidavit submitted in 2017 in the way that she did, having regard to

paragraph 13B(a)(iii). He did not challenge the lawfulness of that provision. Paragraph 13B(a)(iii) contemplates something of the nature of an order of the court appointing a person who is not a natural parent as a guardian, or giving such a person parental rights and responsibilities. In the present case what Mr Sanusi provided to the Secretary of State was a statement, albeit a sworn statement, by a lay person providing no explanation as to the legal basis on which the status of guardian was said to arise. She was entitled to conclude that it did not satisfy the requirements of paragraph 13B(a)(iii).

Disposal

[27] I therefore sustain the third plea in law for the Secretary of State and refuse the petition.