



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/03167/2013

THE IMMIGRATION ACTS

Heard at Field House
On 27 January 2014
Extempore

Determination Promulgated
On 31 January 2014

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

TAMIWE TRACY MUSYANI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: in person
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals with permission against the determination of First-tier Tribunal Judge Fletcher-Hill promulgated on 6 September 2013. In that

determination Judge Fletcher-Hill dismissed the appellant's appeal against the decision of the respondent made on 2 November 2012 to refuse to grant her further leave to remain in the United Kingdom and to remove her from the United Kingdom by way of directions made under section 47 of the Immigration Asylum and Nationality Act 2006.

2. The appellant first arrived in the United Kingdom on 1 August 2002 and was granted leave to enter as a visitor until 30 August 2002. She later obtained further leave to remain as a visitor until January 2003 and on several occasions afterwards was granted leave to remain first as a student and subsequently under the Points-based scheme as a Tier 4 Student Migrant.
3. It is at this stage important to note that the appellant's leave to remain as a student expired on 30 June 2009. Prior to that she had made an application for further leave to remain as a Tier 4 Student Migrant which was refused on 21 August 2009. Although she was later granted further leave to remain as a Tier 4 (General) Student Migrant until 10 October 2011, the application which led to that was made at a time when she did not have extant leave to remain in the United Kingdom. That is a point to which I will turn later.
4. On 7 October 2011 the appellant made a further application for leave to remain as a Tier 4 (General) Student migrant which was refused on 2 November 2012, that decision giving rise to this appeal.
5. The reasons given by the Secretary of State for refusing the application are set out in the refusal letter of 2 November 2012. The Secretary of State was satisfied that the appellant was entitled to the 30 points claimed under Appendix A (Attributes) but was not satisfied that the appellant had provided evidence that she had sufficient funds to acquire the necessary 10 points under Appendix C. This is because she did not have evidence that she held £1,200 in her account over the relevant 28 day period prior to her application.
6. The appellant appealed against that decision on four principal grounds:
 - (i) That she was entitled under the immigration rules to further leave to remain as a Tier 4 (General) Student.
 - (ii) That the decision of the Secretary of State was not in accordance with the law on the basis that she had not properly applied the evidential flexibility policy;
 - (iii) That the decision to make a decision to remove her taken at the same time as the decision to make the appellant leave under Section 47 of the 2006 Act was incorrect; and,
 - (iv) That the decision to remove her was contrary to the United Kingdom's obligations pursuant to Article 8 of the Human Rights Convention.
7. In her determination First-tier Tribunal Judge Fletcher-Hill concluded:

- (i) that the respondent's decision under the Immigration Rules was correct as the appellant had not shown that she held the relevant funds for the relevant period;
 - (ii) that the evidential flexibility policy was not of benefit to the appellant; and,
 - (iii) that the appeal fell to be dismissed under paragraph 245ZXD of the Immigration Rules.
8. The appellant then applied for permission to appeal against that decision on the grounds:
 - (i) that the Immigration Judge had erred in not dealing with the Section 47 refusal;
 - (ii) that the judge had failed properly to deal with the respondent's failure to apply the evidential flexibility policy;
 - (iii) that the judge had failed to consider whether the appellant would have qualified for indefinite leave to remain pursuant to the long residence rule set out in paragraph 276B; and,
 - (iv) that the judge had failed to consider the Article 8 claim.
9. On 29 November 2013 First-tier Tribunal Judge Kamara granted permission, finding that the first ground was misconceived given that the respondent's representative had withdrawn the Section 47 decision at the hearing as was clear from paragraph 27. Second, that there was no error in the judge concluding that the evidential flexibility policy would have assisted the appellant given that the appellant was unable even at the date of hearing to show that she met the maintenance requirement, but Judge Kamara found that the judge had erred in failing to determine the Article 8 claim and failing to appreciate that the appellant had managed to accumulate ten years' lawful residence between the hearing and the date of the determination. All grounds were said to be arguable.
10. When the matter came before me the appellant was unrepresented. She explained that the solicitors whom she had instructed, Malik and Malik, were not in a position to represent her as she had been unable to meet their requests for payment. That was subsequently confirmed in a fax sent to the Tribunal by Malik and Malik. I was satisfied, given that the appellant had had the opportunity to instruct solicitors but had not done so and because she said that she was prepared to proceed, that it would be in all the circumstances unfair and unjust to proceed to determine the appeal.
11. I deal with the grounds in turn. There is no merit in the submission made in grounds that the judge erred with respect to the Section 47 decision. As Judge Kamara made clear, it is evident from the judge's determination that that decision had been withdrawn at the appeal by the Presenting Officer. Second, in terms of the long residence rule (paragraph 276B of the Immigration Rules), whilst it is fair that this was matter properly put before the judge, and is referred to in detail in the skeleton

arguments submitted to her at the appeal, when questioned the appellant accepted that her leave to remain had ceased in June 2009. It is clear that it was extended by virtue of Section 3C of the 1971 Act until the date at which the application was refused on 12 August 2009 but the appellant was without extant leave after that, and when she made her ultimately successful application for further leave to remain.

12. Whilst the appellant was granted further leave to remain in the United Kingdom, that does not have the effect of granting her leave to remain retrospectively. The position is that because no valid application had been made whilst the appellant had extant leave to remain in the United Kingdom her presence here was unlawful and accordingly there was a period in excess of the year when she was present here without leave. That breaks the continuity of residence. Accordingly, while Judge Fletcher-Hill erred in failing to consider this issue that error could not have been material as it would have been inevitable that the appeal would have been dismissed on that point as the appellant could not meet the requirements of the Rules to have had ten years continuous' lawful residence.
13. Turning to the issue of evidential flexibility, as the judge noted in her determination [51], there had never been any suggestion that the additional evidence which it is said would have been available had it been asked for, that is, evidence from her brother or evidence that she met the funds at the relevant date, was in fact available. The judge also noted also, as she was entitled to do, that the relevant period for which availability of funds needed to be shown was not covered by the brother's on line statement which did not in any event meet the evidential requirements of the rules; further, as her brother he did not fall into the category of those permitted to sponsor Tier 4 migrants financially. Given the decision of the Court of Appeal in **Secretary of State for the Home Department v Rodriguez** [2014] EWCA Civ 2 it cannot properly be argued that the judge's approach to evidential flexibility was incorrect. The ground of appeal on this point does not identify any error on the part of the judge.
14. With respect to the failure to consider Article 8 of the Human Rights Convention, Mr Whitwell quite properly conceded that the judge had not considered that issue and whilst I accept there is perhaps some merit in his submission that it would have made no difference, the issue was live before her and it could not be said that there was an inevitable outcome as the evidence from the appellant raises the issue of private life and family life and it she has been living in the United Kingdom, albeit for periods without leave, for a substantial period.
15. For that reason I consider that the error was capable of being material and that the decision required to be remade. I asked the appellant if she was prepared to deal with that and she indicated that she was.
16. I then heard evidence from the appellant who relied partly on her witness statement. She explained that she has a brother in this country who is a diplomat. She does not live with him but he does support her financially. She has some family in Malawi - a sister, a brother and mother. She has friends in the United Kingdom but she said

that she had not been studying since 2011 as she was unable to do as she did not have a proper visa. She said that it would be easier for her to return to Malawi if she had a qualification and that is the reason she wished to remain in the United Kingdom, and that it was her intention to return if she had a qualification.

17. In cross-examination the appellant said that she had wished to obtain a Bachelors degree. It was put to her that it had taken her eight years of study yet she had not yet obtained one, despite it usually only taking three years. It was also put to her that she did not have a family life with her brother.
18. I then heard submissions.
19. I am not satisfied that the appellant has established a family life with her brother. They do not live together and whilst he does, on the appellant's evidence, support her financially he did not provide a witness statement for the hearing. They are both adults and lead independent lives. There is insufficient evidence of dependency to show that their relationship is such as to constitute family life for the purposes of Article 8.
20. I am satisfied that the appellant does have a private life in this country but the contents of this are limited. I accept that she has a number of friends here, but equally there appears to be no good reason why she would be unable to maintain those friendships from abroad by, for example, email, telephone and similar electronic means. The appellant has had the opportunity to study here but she is not currently following any particular course and I note that she has been unable to explain why, despite the number of years she has spent here, she has not obtained the Bachelors degree she wished to obtain. Further, I consider that the appellant has been unable to explain properly why she needed to remain here, over and above a wish to study.
21. Bearing in **Patel and Others v Secretary of State [2013] UKSC 72**, and **Nasim and Others (Article 8) Pakistan [2014] UKUT 25**. I am not satisfied, given that the appellant has no course to follow, has only ever had temporary permission to be here in a limited capacity that could not have given her the expectation that she would be allowed to remain here permanently, and bearing in mind Article 8's limited utility in private life, that any interference caused by removal of the appellant to Malawi is sufficient to engage Article 8 of the Human Rights Convention given that the interference if it be such relates solely to her private life.
22. Further and in the alternative, I am satisfied that any such interference would be proportionate given the need to maintain immigration control and accordingly I remake the decision of the First-tier Tribunal by dismissing the appeal on all grounds.

SUMMARY OF DECISIONS

1. The decision of the First-tier Tribunal did involve the making of an error of law, and I set it aside.

2. The decision to remove the appellant by way of directions pursuant to section 47 of the 2006 Act was withdrawn before the First-tier Tribunal. The appeal against that decision to the First-tier Tribunal is therefore no longer in issue.
3. I remake the decision by dismissing the appeal against the decision to refuse to vary the appellant's leave on all grounds.

Signed

Date: 30 January 2014

Upper Tribunal Judge Rintoul