



**Upper Tribunal
(Immigration and Asylum Chamber)**
IA/13685/2014

Appeal Number:

THE IMMIGRATION ACTS

Heard at Bradford
On 21st October 2014

**Decision & Reasons
Promulgated**
On 21st November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

**MR CHIN HSUN KUO
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Jagadesham, Howells Solicitors

For the Respondent: Mr Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant is a citizen of Taiwan, born on 1st January 1988 and he appeals against the respondent's decision dated 6th March 2014 to refuse his application which was dated 8th October 2013 for leave to remain on the basis of ten years lawful residence. The respondent did not accept that the

appellant fulfilled the requirements of paragraph 276B of the Immigration Rules HC 395.

2. The appellant entered the UK on 10th August 2003 with a student visa valid until 31st October 2004 and this visa was extended on application to 8th November 2005. The appellant submitted a further application for leave to remain on 15th December 2005 and this was granted until 3rd January 2006. This application was made out of time and there was a period when he was in the UK without leave of 34 days.
3. The appellant's leave was extended, however, until 30th September 2007 and he made a further application to extend his leave from 31st October 2007. That application was rejected and resubmitted on 4th December 2007 and again rejected on 31st December 2007. The leave was finally granted on 13th February 2008. It was submitted that he was without leave for a total of 135 days.
4. A further application was made on 3rd December 2007 which was granted on 13th February 2008, valid until 31st October 2008. The appellant made an in time application for a further extension but this was again rejected on 20th November 2008 and he submitted a third application on 12th December 2008 and this was refused with no right of appeal on 12th May 2009. However on 18th June 2009 the outcome was reconsidered and he was granted leave until 31st October 2011. He was in the UK without leave of a total of 229 days.
5. As the appellant had various gaps in his leave he was unable to provide evidence of continuous residence for ten years and his appeal was refused by the respondent both under the Immigration Rules and further to Article 8.
6. First-tier Tribunal Judge Hindson heard the appellant's appeal on 27th June 2014 and set out the history of the appellant's applications for leave to remain at paragraphs 10 to 18. He dismissed the appeal under the Immigration Rules and on human rights grounds.
7. An application for permission was made on the basis that the judge had stated he had considered the appeal outside the Immigration Rules but had failed to give reasons. He had given inadequate reasoning for finding that the matter could not be considered outside the immigration rules. Permission was granted by First Tier Tribunal Judge Levin who stated

'Given the appellant had clearly established a substantial private and family life in the UK then the Judge's failure to give adequate reasons as to why it was unnecessary to

consider Article outside of the Rules arguably amounted to an error of law on his part’.

8. At paragraph 19 the judge found the appellant to be a reliable witness who gave cogent evidence about his immigration history, much of which was not in issue. The judge found him to have been a conscientious student educated to a high level with a Degree in Genetics from the University of Sheffield.

9. The judge then went on to state:

“22. It may be that the respondent could have exercised discretion in favour of the appellant in the case of the first break. It is more than 28 days but the circumstances are perhaps sufficiently unusual to attract such a concession. The third application is a catalogue of errors by both the appellant and the respondent and it may be that this period of overstaying could be re-calculated and disregarded. However I am not satisfied that both the first and the third periods can be disregarded.

23. So far as the second period is concerned, there was again a catalogue of errors. The date that the application was correctly submitted to the Home Office was still within the 28 day period following the expiration of leave. However the application was again rejected for non-payment of fee and then again, for not submitting the required documents. I am not satisfied that there are any circumstances in which this period could be disregarded.

25. Looking at the appellant’s history in the round, it is clear that he is ultimately responsible for repeated failures to submit his application properly and in time.

26. In the circumstances I am not satisfied that the appellant can meet the requirement of 10 years lawful residence and the appeal is dismissed under the Rules.”

10. It is at this point that the judge then considered Article 8, having dismissed the appeal under the Rules.

11. The judge cited **Gulshan (Article 8 - new Rules - correct approach)** [2013] UKUT 640 at paragraph 28 but at paragraph 27 he stated *“I have considered the appellant’s situation outside the Rules.”* He then goes on to state at 29 that he was not satisfied that there were arguably good grounds for granting leave outside the Rules. The judge gave no reasoning to support this finding and indeed his reasoning at paragraph 22 would appear to contain some contradiction. On the one hand in reference to the first break of leave of the appellant the

judge stated “it is more than 28 days but the circumstances are perhaps *sufficiently unusual* to attract a concession”.

12. The judge then proceeded at the end of that paragraph to state “however I am not satisfied that both the first and third periods can be disregarded.”
13. Not least the judge stated “*I have considered the appellant’s situation outside the Rules*”. He did not. Indeed this was not a deportation case and the Immigration Rules are not a complete code. Bearing in mind this appeal was predicated on the basis of ten years lawful stay and the appellant had built a substantial private life, I find that the judge should have considered **MM v Secretary of State for the Home Department [2014] EWCA Civ 985** which states [129]

‘Nagre [and following that Gulshan] does not add anything to the [Article 8] debate save for the statement that if a particular person is outside the rule then he has to demonstrate as a preliminary to a consideration outside the rules that he has an arguable case that there may be good grounds for granting leave to remain outside the rules. I cannot see much utility in imposing this further, intermediary test. If the applicant cannot satisfy the rule, then there either is, or there is not a further Article 8 claim. That will have to be determined by the relevant decision maker’.

14. Indeed in **MF Nigeria v Secretary of State for the Home Department [2013] EWCA Civ 1192** at 44 it was held that “*the exceptional circumstances to be considered in the balancing exercise involved the application of a proportionality test as required by the Strasbourg jurisprudence*”.
15. I therefore find that there was an error of law and I preserve the findings made between paragraphs 19 and 20 and the first two sentences of paragraph 21. I have also had regard to the background as set out by the Judge at paragraphs 10 to 18 and the evidence the appellant gave therein.
16. I find that there are arguably good grounds for the matter to be considered outside the Immigration Rules as the judge set out in his determination there were a catalogue of errors attaching to the failure of the appellant’s applications to be put in in time but also as the judge stated “not all of this catalogue of errors is due to him personally” and further “even setting aside those incidents that can be blamed on the school and those for which the respondent may be responsible, the fact remains that for various reasons the appellant has repeatedly failed to submit a proper application”.

17. I find that it is clear that there have been substantial gaps in the appellant's leave but certainly in the first instance this was when the appellant was a minor and at school and it was an administrative error on behalf of the school. The appellant stated in relation to the first period of unlawful residence that he relied on the school to ensure that his immigration status was correctly maintained and the school missed the expiration of his leave and did not present him with the application form to sign until 15th December 2005 which contributed to a total of 34 days gap in his leave.
18. In relation to the second period of unlawful residence, the judge found that in relation to the second period of unlawful residence the appellant was in the UK without leave for a total of 135 days.
19. Although at this point he was not a minor, he was still in fact at school and that once again he entrusted his application to be sent off by the school and the judge accepted that:

"due to an administrative error however the school sent the application form to the appellant's parents in Taiwan ... by the time it was correctly submitted to the Home Office it was indeed out of time. The appellant had provided a letter sent by the school to the Home Office with the application form and dated 31st October 2007 which confirms that it was their error that led to the late submission of this application".
20. There was then a further delay because the payment was rejected but the appellant could not remember why.
21. In relation to the third period of unlawful residence the judge stated the following:

"16. On 13/02/2008 the appellant was given further leave valid until 31/10/2008. He made an in time application for further extension but this was rejected. The appellant resubmitted his application on 03/11/2008 but this was again rejected on 20/11/2008. The appellant submitted a third application on 12/12/2008 and this was refused with no right of appeal on 12/05/2009. However on 18/06/2009 the outcome was reconsidered and he was granted leave until 31/10/2011. He was in the UK without leave a total of 229 days.

17. The appellant says that his first application was rejected because his credit card had been damaged and he had requested a new one. In error, he had provided the details of his old card on the application form and therefore

payment was rejected by the credit card company. The Home Office notified him of this and asked him to submit correct payment details which he did. However the application was rejected again because he had failed to complete paragraph 8.7 of the application form. However there is no paragraph 8.7 on the [current version] of the application form and neither side has been able to provide a copy of the form the appellant actually Completed, or a blank version of the form in use at the time.

18. *He submitted a further application on 28/12/2008 he did not receive the Home Office response immediately because they had used the incorrect postcode. When he did finally get the letter he submitted the various documents and leave was then granted, in June 2009."*
22. What is clear are the following exceptional circumstances. It is not just the appellant who was in difficulty with the application but clearly the evidence discloses that the respondent also was at fault.
23. The appellant was a child when he came to the UK and has spent his formative, teenage and educational years and all of his adult life in the UK. He has completed secondary education, college and a university Degree in this country and has only rarely left the UK during the course of his residence. It is the appellant's claim that his ties are much stronger in the UK than in Taiwan and that he is fully integrated into the UK including socially, culturally and educationally.
24. I therefore consider that there are arguably good grounds outside the Immigration Rules to consider this matter and have done so. Indeed, Mr Diwnycz's submissions were that the appellant's case in **Gulshan** was a hopeless case but accepted this was not the case in this matter. The Guidance on Long Residence and Private Life dated May 2013 give examples of where gaps in lawful residence may be excused in exceptional circumstances such as hospitalisation or 'an administrative error made by the Home Office'.
25. I therefore apply the principles in **R (Razgar) v SSHD [2004] UKHL 27** and note that the appellant must have engaged a private life and the decision of removal would have consequences of such gravity as to engage that private life. From the above discussion clearly I accept that he has established a private life having integrated into the United Kingdom and he gave evidence that he was currently working which I accept.

26. I have considered whether the appellant has made a decision in accordance with the law and note that the Policy Guidance as identified above which considers the approach to gaps in leave and the guidance indicates quite strongly at page 17 that gaps in lawful residence of more than 28 days should be considered by a senior caseworker. The official from the Home Office, Leanne Walsh, who appeared to have considered the case made no reference to her own position within the Home Office and made no indication that she herself had referred this matter to a senior caseworker. As such I find that there is no confirmation that this matter has been considered in accordance with the policy. There are clearly exceptional circumstances identified as being a consideration when applying the discretion and these are not described (as I have highlighted above) as being exhaustive.
27. With the qualification that I question the application of the discretion exercised with reference to the Policy Guidance and whether the policy should have been followed, I consider that the refusal and removal proposed *was on the face of it* in accordance with the Immigration Rules. I have noted the possible defect in the refusal consideration. The Immigration Rules have a legitimate purpose; that is the economic wellbeing of the UK and the protection of rights and freedoms of others through the maintenance of firm immigration control.
28. Even if that were the case and that had been undertaken I have considered whether the decision is necessary and proportionate to the legitimate aim. To that end I take into account Section 117A of the Nationality Immigration and Asylum Act 2002 inserted by Section 19 of the Immigration Act 2014 and accord weight to the public interest when assessing the proportionality of the decision to remove the appellant. The appellant is not an economic burden on the United Kingdom he has obtained a Degree in Genetics from Sheffield University and has been working in the UK in order to maintain himself. His parents have contributed substantial sums to his education and thus to date he would be a net contributor. Indeed there was evidence within the bundle to underscore the contribution of non EEA students to the economy referenced from the Migration Advisory Committee. Nonetheless he could with his science degree make a contribution to the UK economy rather than be a drain and he is clearly integrated in the UK.
29. The question of whether he has developed a private life in the knowledge that his life was precarious should also be considered. I can accept that the appellant has only had temporary leave to date but this could not be described as 'precarious' save for the periods when he was here without leave and these he always attempted to regularise. I do not

consider that obtaining leave to study could be described as risky or unpredictable in general terms. Until his last refusal he was granted subsequent leave to remain. This is a boy who had come to the UK without his parents and was reliant on the school and even though in the second period of unlawful residence he was 19 he was still at school in a foreign country and there is no bright line in respect of the maturity of a minor and whilst at school I can accept that the appellant would have expected the school to have administered such formalities on his behalf. As a minor and was effectively attempting to conduct his personal affairs himself or at a distance from his parents or through the medium of a third party, that is the school. Indeed the appellant did not have a choice when he was sent to the UK to study initially and once here, it was reasonable for him to complete an education in format in which he started.

30. I do not find that the *entire length of time* suggested that he has been without leave has been shown to be his fault or that there was close inspection of the factors or close enquiry of the factors behind the rejection by a senior caseworker. The third period of residence indicated that he was without leave for a total of 229 days which is a substantial period but on close consideration it was not possible to understand what the period of delay was during this period which was attributable to the Home Office. I find this is an important factor and the evidence produced at court was that an application was rejected but “neither side has been able to provide a copy of the form itself the appellant actually completed or a blank version of the form in use at the time”. I find this to be significant because the periods of delay were not only through the fault of the appellant but also through the delay of the Home Office.
31. Nonetheless the appellant has family in Taiwan and can speak the language there and he grew up there until he came to the UK. However, he maintains that his social, cultural and educational ties are such that he is now fully integrated into the UK. Certainly he has been taught in English and has obtained a Degree in English and therefore there is no question as to his ability to be able to speak English with reference to Section 117.
32. There was a wealth of statements on the file in support of the appellant’s continued residence in the UK from friends and they appeared at the First Tier Tribunal and I place some weight on these documents.
33. I have considered in the light of **Huang v Secretary of State for the Home Department [2007] UKHL 11** and with all the above factors in mind consider that the decision to remove the

appellant would in these very particular circumstances be disproportionate. Taking full account of all considerations, I did consider that the private life of the appellant, in these particular circumstances would be prejudiced in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. I find the appellant has shown that the immigration policy is not a proportionate response to the interference in this case. I consider that his removal would not be proportionate.

34. Further to Section 12(2) (a) of the Tribunals Courts and Enforcement Act 2007 I set aside the decision of the First Tier Tribunal to the extent that I have set out above because of errors of law and further to Section 12(2) (b) of the Tribunals Courts and Enforcement Act 2007 I remake the decision.

Notice of Decision

35. I allow the appeal on human rights grounds.

Signed

Date 21st November 2014

Deputy Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

In the light of the decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007. I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011). I make no fee award as the appellant has only been successful in part of his appeal and the matter was complex.

Signed

Date 21st November 2014

Upper Tribunal Judge Rimington