



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/15668/2014

THE IMMIGRATION ACTS

Heard at Field House
On 21 April 2015

Decision & Reasons Promulgated
On 22 May 2015

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS TIAN ZHANG
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin
For the Respondent: Ms L Appiah

DECISION AND REASONS

1. Although the appellant before me is the Secretary of State for the Home Department it is easier to refer to the parties as they were before the First-tier Tribunal so that hereafter Miss Zhang is referred to as the appellant and the Secretary of State for the Home Department as the respondent.

2. The appellant is a citizen of China who was born on 9 October 1989. She applied on 28 October 2013 for indefinite leave to remain on the basis of long residence. In essence this was refused because the appellant was unable to show that she could meet the requirements of paragraph 276B of the Immigration Rules. She had not provided evidence of continuous residence in the United Kingdom as defined in the Rules for a period of at least ten years. In particular the appellant had been absent from the United Kingdom between 12 July 2011 and 8 September 2012 – this being a total of 423 days. The relevant Rules state that a period shall not be considered to have been broken where an applicant is absent from the UK for a period of six months or less at any one time. The appellant, having been absent from the United Kingdom for more than that period did not comply with the relevant rule.
3. The appellant appealed the decision and the matter came before First-tier Tribunal Judge S Aziz. In a determination dated 6 November 2014 the judge dismissed the appeal under the Immigration Rules but allowed it under Article 8 ECHR.
4. The respondent sought permission and was granted leave to appeal that decision to the Upper Tribunal. It was found arguable that the judge failed to recognise the limited utility of Article 8 in private life cases that are far removed from the protection of an individual's moral and physical integrity as per **Patel and Others v Secretary of State for the Home Department [2013] UKSC 72**.
5. I heard argument from both representatives and having done so I announced that I found that there was a material error of law in the judge's decision such that it would be set aside.
6. The proper legal approach to be deployed in such a case as the present one is to identify the substantive content of the relevant Immigration Rules. This is necessary to establish whether an applicant for leave satisfies the conditions laid down in those Rules and also to assess the force of the public interest given expression in those Rules. This will be relevant to the balancing exercise under Article 8 in deciding whether leave to remain should be granted outside the substantive provisions set out in the Rules.
7. Secondly, if an applicant does not satisfy the requirements in the substantive part of the Rules they may seek to maintain a claim for grant of leave to remain outside the Rules, pursuant to Article 8. If there is a reasonably arguable case under Article 8 which has not already been sufficiently dealt with by consideration of the application under the substantive provisions of the Rules then in considering the case the individual interests of the applicant and others whose Article 8 rights are in issue should be balanced against the public interest, including as expressed in the Rules, in order to make an assessment whether refusal to grant leave to remain is disproportionate and hence unlawful by virtue of Section 6(1) of the Human Rights Act, read with Article 8.
8. The First-tier Judge has carefully considered the arguments both for and against allowing this appeal under Article 8 ECHR. However, I agree with the respondent

that the judge does not identify factors of the appellant's private life which are not catered for either with respect to Appendix FM or Immigration Rule 276ADE. In the alternative the judge does not reason sufficiently why the factors outlined at paragraph 46(i)-(vii) of the decision amount to good grounds for allowing the appeal outside the Rules.

9. This appeal revolved around the appellant's private life in the context of her work and studies, the judge noting that the appellant has no children or extended family in the United Kingdom. The judge found that the appellant has established "a very strong private life in the UK since she arrived here as a 13 year old child and that she has fully integrated into society here". The judge found that in light of all the material facts the matters which he took into account on behalf of the appellant "just" carry greater probative weight in the proportionality assessment. He appears to have come to that view because in paragraph 54 he found there were

"unique reasons why the appellant broke her period of continual lawful residence. The appellant only went abroad as part of a UK-based sandwich degree programme that the Secretary of State had given her permission to study. In other words, her time spent abroad was in pursuance of completing the work placement component of a degree course for which the respondent had granted her permission to study."

It is clear from the judge's finding at 46(vii) that the appellant had a discretion as to where she could have worked. Her statement of 1 May 2014 at paragraph 9 states "Even though places or countries were optional to choose from, I however chose to complete it in China ...". She then explained why she did so. These reasons were considered by the respondent at pages 2 and 3 of the Reasons for Refusal Letter. The respondent reasoned that the permitted maximum of 540 days or 180 days for any one period of absence under the Immigration Rules "is generous and designed to meet a number of eventualities."

10. Unfortunately the judge failed to give the appropriate significant weight to be attached to public interest considerations. It is the Secretary of State and parliament who are in principle best placed to make judgments regarding the needs and resources of their societies see e.g. **Stec v United Kingdom [2006] 43 EHRR 47**, paragraph [52]. Where the Secretary of State has sought to fashion the content of the Rules so as to strike what she regards as the appropriate balance under Article 8 and any gap between the Rules and what Article 8 requires is comparatively narrow the Secretary of State's formulation of the Rules may allow the Tribunal to be more confident that she has brought a focused assessment of considerations of the public interest to bear on the matter. That will in turn allow the Tribunal to give weight more readily to that assessment when making its own decision pursuant to Article 8.
11. In this appeal the purpose of the Rule is to set out what are the requirements for indefinite leave to remain in the United Kingdom on the ground of long residence. There are allowances for absence. The appellant has never claimed that she was obliged to be out of the United Kingdom for the period that she was or that she could

not find a placement of suitable length elsewhere. This aspect I find has not been adequately dealt with by the judge and this is an error. Furthermore the judge has not reasoned sufficiently how he concludes in paragraph 54 that the appellant is fully integrated into society here when the appellant herself appreciated that she may have to leave the United Kingdom and all her family still remain in China. These errors amount to material errors of law.

12. For these reasons therefore the decision is set aside.
13. After a short break for Mr Melvin to read the appellant's updating statement dated 16 April 2015 we proceeded with the resumed hearing.

The Resumed Hearing

14. I heard evidence from the appellant who gave that evidence in English. Summarising that evidence the appellant wishes to stand on her own two feet in this country. She has relied on her parents financially up to now but she does not want to rely on them forever. Until the position with regard to the issue of a visa for her has been resolved she cannot be employed. As far as the compulsory course set up by the university is concerned she chose to undertake it abroad. She realises that her future lies in designing here in London which is a world leader in fashion. Working in that field in China would not progress her career.
15. In cross-examination the appellant said that the prospective employers to whom she was talking offered advice on work permits but no applications have been made and she did not take any professional advice as to how she might be allowed to work here.
16. Both representatives made submissions. I took a note of them and have taken them into account in this decision. Mr Melvin pointed out that the appellant could not meet the requirements of 276ADE of the Rules (these being the requirements to be met by an applicant for leave to remain on the grounds of private life) and although the appellant has been in the United Kingdom for a number of years and wishes to work here it is perfectly possible that she can make an application to remain under Tier 1 or Tier 2. There are no exceptional circumstances that can allow her to succeed under Article 8 ECHR. There are no good reasons why she could not apply under the Rules. She has worked in China and has not lost her ties with that country.
17. Ms Appiah pointed out that the appellant came to the United Kingdom at the age of 13. She has passed GCSE and A levels here and her parents have spent a huge amount on her education and living expenses and she views the United Kingdom as her home country. It is clear that she had to undertake a placement and chose to do it abroad as it would look good on her CV but she wished to return to London because it is the centre of fashion. If she had known that it would harm her career to take the placement abroad she would not have done it. When considering the five steps in **R (Razgar) v Secretary of State for the Home Department [2004] 2 AC 368** there are exceptional circumstances. She has not been in breach of the Rules and has

not remained here illegally. Although she has family in China that consideration needs to be balanced against the private life that she has accumulated in this country.

My Findings

18. The appellant has been perfectly straightforward in providing her evidence and there is no issue with her assertions. Stripped to their essentials I find that the facts are these:- The appellant arrived in the UK in 2003 age 13 years. She attended school and was thereafter accepted onto a Foundation Diploma Art and Design Course in London. She was then offered and took up a place at London College of Fashion where she studied. Although she states that the UK is her "home country" there is clearly no doubt that she retains considerable ties with China. For instance, it appears from her immigration history as set out in her application for leave to remain that she has been to China every year since she arrived in the UK and her family live there.
19. The appellant accepts that the placement abroad that she undertook was of her choosing rather than because it was compulsory for her to do so. I have no doubt that she has come to regret that decision because by doing so she infringed the relevant rules. I am unclear as to whether the placement could have been undertaken in the UK but in any event it was not and the appellant was out of the country far longer than the period allowed if she was to succeed in her application under the long residence route.
20. The Secretary of State has placed a cap upon the amount of time that an applicant may be outside the United Kingdom yet still comply with the Immigration Rules. That appears to be perfectly logical and sensible when considering the meaning of the words "long" and "residence" as referred to in the Rules. It would appear to offend common sense that an applicant should succeed under the "long residence" Rule where, for instance, an applicant had resided in the UK for a period of at least 10 years and yet had worked away for long periods of time during a 10 year period. It is logical that the "bar" had to be set somewhere and paragraph 276A sets the position of the bar.
21. The points made earlier in this decision about the width of the gap between what the Immigration Rules set out by way of entitlement to enter or remain in the United Kingdom and the requirement resulting from the application of a relevant Convention right is highly relevant in this context. The fair balance required to be struck pursuant to Article 8 between individual interests protected by that provision and the general public interest typically involves bringing into account certain public interest considerations in relation to which the Secretary of State has a legitimate role to fulfil by formulating an approach which gives them proper value and weight. The maintenance of effective immigration controls is in the public interest (see Section 117B(1) of the Nationality, Immigration and Asylum Act 2002).
22. In this case I find that the Secretary of State has sought to fashion the content of the Rules to strike what she regards as the appropriate balance under Article 8 and such gap as there may be between the Rules and what Article 8 requires is comparatively

narrow. Thus the Secretary of State's formulation of the Rules allows me to be more confident that she has brought a focused assessment of considerations of the public interest to bear on the matter. That in turn allows me more readily to give weight to that assessment when making the decision pursuant to Article 8.

23. I find it surprising that the appellant has not sought specialist advice as to whether there is any route open to her to remain in the United Kingdom other than to rely on Article 8 ECHR. It is unclear to me why she has not done so but that appears to be an avenue open to her. It is not of course an answer to a meritorious Article 8 claim that she has failed to seek such advice and/or make an application. If she is entitled to succeed under Article 8 then so be it.
24. Looking at the five step process in Razgar as in so many appeals the real issue is whether the proposed interference by the respondent in the private life that the appellant undoubtedly enjoys in the UK is proportionate to the legitimate aim which (in this appeal) is the importance of maintaining a credible and coherent system of immigration control.
25. At this point I refer to paragraphs 18 and onwards of the Upper Tribunal decision of Nasim and Others (Article 8) [2014] UKUT 00025 (IAC). In R (on the application of the Countryside Alliance) v AG and Others [2007] UKHL 52. Lord Bingham, having described the concept of private life in Article 8 as elusive, said that:-

“... the purpose of the Article is in my view clear. It is to protect the individual against intrusion by agents of the state, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose” [10].

26. At paragraphs 19-20:-

“It is important to bear in mind that the ‘good reason’, which the state must invoke is not a fixity. British citizens may enjoy friendships, employment and studies that are in all essential respects the same as those enjoyed by persons here who are subject to such controls. The fact that the government cannot arbitrarily interfere with a British citizen's enjoyment of those things, replicable though they may be, and that, in practice, interference is likely to be justified only by strong reasons, such as imprisonment for a criminal offence, cannot be used to restrict the government's ability to rely on the enforcement of immigration controls as a reason for interfering with friendships, employment and studies enjoyed by a person who is subject to immigration controls.

We therefore agree with Mr Jarvis that [57] of Patel and Others is a significant exhortation from the Supreme Court to re-focus attention on the nature and purpose of Article 8 and, in particular, to recognise its limited utility to an individual where one has moved along the continuum, from that Article's core area of operation towards what might be described as its fuzzy penumbra. The limitation arises, both from what will at that point normally be the tangential effect on the individual of the proposed interference and from the fact that,

unless there are particular reasons to reduce the public interest of enforcing immigration controls, that interest will consequently prevail in striking the proportionality balance (even assuming that stage is reached).”

27. The appellant has a private life in the United Kingdom that she has enjoyed for many years. Much of this revolves around her work. She has quite naturally integrated into society here but she has by no means severed her connections with China and she has her family there. Her private life may be enjoyed in China, albeit private life of a different nature in some respects than she enjoys in the UK.
28. Having taken into account all the relevant factors and the case law surrounding the relevant Rules as well as Article 8 considerations I find that the issue of proportionality is resolved decisively in favour of the respondent. I am unable to identify or find that there are any compelling or exceptional circumstances that exist in this appeal that require the grant of leave to remain to this appellant outside the rules. Those rules lay down substantive conditions, which, if satisfied, would lead to the grant of leave to remain but the appellant cannot meet those conditions.
29. The rules coupled with the public interest in the maintenance of effective immigration controls as set out in s. 117B of the 2002 Act give strong expression to the force of the public interest and there is insufficient in the balance in favour of the appellant that requires me to find that the decision is a disproportionate interference in the private life of the appellant. The decision is therefore lawful.
30. For the above reasons this appeal fails.

Notice of Decision

31. The decision of the First-tier Tribunal Judge is set aside.
32. Miss Zhang’s appeal is dismissed under the Immigration Rules and under Article 8 ECHR.
33. I was not addressed on the matter of anonymity but this is not an appeal which appears to require an anonymity direction and therefore I do not make one.

Signed

Date

Upper Tribunal Judge Pinkerton