



IAC-AH-VP-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/26300/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 10 February 2016**

**Decision & Reasons Promulgated
On 25 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

**MS SHOBNA DEVI BISSESSUR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Golchool of Counsel

For the Respondent: Mr L Tarlow, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the appellant against a decision of First-tier Tribunal Judge Fletcher-Hill promulgated in August 2015 in which she dismissed the appellant's appeal against the respondent's decision of 5 June 2014 refusing to vary the appellant's leave to remain.

Background

2. The appellant is a national of Mauritius born on 24 June 1978. The appellant entered the UK on 27 April 2005 with leave to enter as a student for six months valid to 27 October 2005. The appellant was subsequently granted an extension of stay as a student valid until 31 October 2006. A further extension was granted valid to 31 December 2007 and again to 31 March 2009. On 28 October 2009 the appellant was refused an extension of stay in the UK but after a successful appeal she was granted an extension of stay as a student valid until 31 July 2011. She was granted an extension of her stay in the UK as a Tier 4 Student valid to 1 November 2012. She was granted an extension as a Tier 4 Student valid until 20 April 2014. On 17 April 2014 she applied for leave to remain on the basis of private life and exceptional circumstances. The respondent refused that application. The Secretary of State considered private life under Rule 276ADE but considered that the appellant did not satisfy the Rules on the basis that it was not accepted that the appellant had lost ties to her home country. The respondent also considered whether or not there were any exceptional circumstances which would warrant a grant of leave to remain outside the Immigration Rules and Article 8 of the European Convention on Human Rights (ECHR). The appellant had requested at least one year's leave to remain in order to complete her studies on a part-time basis. The respondent did not consider that this was itself an exceptional circumstance the appellant having been unable to pass the course within the five years allowed under Tier 4. The respondent considered that the appellant could return to Mauritius and continue her studies there. The appellant relied on her strong emotional ties to her sister and other siblings in the UK. The respondent considered that the appellant entered the UK as a student and could have no reasonable expectation that she would be allowed to remain in the UK indefinitely. The respondent considered the appellant's assertion that she suffered from depression but noted that no details of treatment being undertaken had been given. The respondent considered that the appellant's condition is not life threatening and treatment for her condition is available in Mauritius. The respondent considered that the appellant did not qualify for leave as an adult dependent relative.

The Appeal to the First-tier Tribunal

3. The appellant appealed against the decision of the respondent to the First-tier Tribunal. The Tribunal proceeded to hear the appeal in the absence of the appellant as there was no appearance by the appellant or her representative and no explanation of the failure to attend had been provided. The judge noted that no appellant's bundle had been received by the Tribunal. The Tribunal having considered the evidence that was before it found that any interference with the appellant's private life was both necessary and proportionate to the wider interest of the maintenance of effective immigration policy and that the appellant's rights under Article 8 would not be breached if she were to return to Mauritius.

The Appeal to the Upper Tribunal

4. The appellant sought permission to appeal against the First-tier Tribunal's decision to the Upper Tribunal. The grounds of appeal assert that the appellant and her representative made a genuine mistake by attending the Tribunal on 5 March instead of 4 March. The representative submitted a bundle together with a letter to be forwarded to the Immigration Judge. It is asserted that that does not seem to have been taken into account and that it is therefore in the interest of justice to have the appeal relisted. It is also asserted that the judge acknowledged that a family life had been established between the appellant and her brother and his family but failed to apply the relevant principles. The grounds assert that at paragraph 21 the judge wrongly applied paragraph 117B contending that 117B is in favour of the appellant who has not precarious immigration history, has been here lawfully and speaks English and has no recourse to public funds. It is further asserted that the judge failed to apply Section 85(4) the Nationality, Immigration and Asylum Act 2002 as the judge failed to consider that the appellant has been present in the UK lawfully for a continuous period of ten years and therefore the appeal should have been allowed under paragraph 276B. On 11 December 2015 First-tier Tribunal Judge Colyer granted the appellant permission to appeal. The grant of permission sets out that there is a note on the file enclosing the appellant's bundle but there is no explanation as to why the judge did not consider that documentation which should have been received long before the decision was promulgated. The grant notes that there is no explanation on the file as to why there was a delay of six months before the decision was promulgated. The grant also sets out that it is arguable that the judge had made a material error of law in respect of the argument that the appellant has been in the UK for a continuous period of ten years at the date of the appeal.

Summary of Submissions

The Appellant's Submissions

5. The grounds set out four grounds of appeal. Ground 1. There was a genuine mistake made by the appellant and her representative in attending the Tribunal on 5 March instead of 4 March the date the hearing was listed for. It is submitted that after noticing that the appeal was heard on 4 March the representative submitted a bundle together with a letter to be forwarded to the judge. It is asserted that this does not seem to have been forwarded to the judge and therefore it is in the interest of justice to have the appeal relisted. It is submitted that no contact was made with the appellant or her representative to check the reason why they were not present. All the contact details were available to the Tribunal.
6. Ground 2. It is asserted that the judge acknowledged that a family life has been established between the appellant and her brother and his family but failed to apply the principles set out in **Kugathas v SSHD [2003] EWCA Civ 31** where family life does exist when there is more than emotional ties.

7. Ground 3. It is asserted that the judge wrongly applied paragraph 117B. It is contended that 117B is in favour of the appellant as she has no precarious immigration history, she has been here lawfully, she speaks English, she has no recourse to public funds and has no criminal convictions.
8. Ground 4. The judge made the determination on 4 August 2015 even though the appeal was listed on 4 March 2014 (sic). It is asserted that the judge failed to apply Section 85(4) of the NIAA2002 which is relevant postdecision. The judge has failed to consider that at the time of determining the appeal the appellant had been present in the UK lawfully for a continuous period of ten years and therefore the appeal should have been allowed under paragraph 276B the ten-year lawful residence route.
9. Mr Golchool indicated that the appellant had made an application under paragraph 276B of the Immigration Rules that has a real prospect of being granted indefinite leave to remain. However, that application has been classed as invalid because she has an ongoing appeal. He submitted that the case should be remitted to the Secretary of State in order to make a decision on that application. Mr Golchool submitted that as the judge failed to take into account the documents submitted there was a material error of law. I asked Mr Golchool what difference the evidence and information in the bundle of documents have made to the outcome of the appeal. He submitted that the evidence referred to ties between the appellant and her brother that were more than merely emotional ties. He referred to the case of **Kugathas**. He submitted that in this case there was family life between the appellant and her brother. This was not raised in the Reasons for Refusal Letter. The appellant had established more than emotional ties and the judge should therefore have found that there was family life. I asked Mr Golchool why a finding of family life would have made a difference to the assessment of proportionality. His submissions were that once family life has been established the judge has to consider proportionality and how the brother who plays an important role would be affected if the appellant were removed. He submitted that the matter should be remitted to the Secretary of State to consider the application under the ten-year Rule and provide a decision.
10. Mr Golchool submitted that the principle in the case of Kugathas should have been applied. There is family life between the brother and the appellant and maintenance of effective immigration control cannot outweigh the appellant's interest. She has lawfully remained in the UK for nine years. He submitted that Section 117B should be in the appellant's favour.

The Respondent's Submissions

11. The respondent served a Rule 24 notice. It is asserted that it is unclear from the grounds of appeal what the bundle of documents contained and why it would have made any difference to the outcome of the appeal if the judge had taken it into account. It is also asserted that in relation to the error of law the grounds now seek to place reliance on Rule 276B. At the

date of the hearing the appellant had not yet been in the UK for ten years. It is asserted that this was not an issue that the judge could have dealt with even when he wrote the decision in August 2015. The respondent asserts that an appellant is required to seek the permission of the First-tier Tribunal on appeal if one wishes to amend add to the Statement of Additional Grounds. This was not a matter raised before the judge at the hearing or the date of determination. It is also said that the appellant is required to make an application on the specified form and pay the relevant fee if she now wishes to seek to rely on 276B of the Immigration Rules.

12. Mr Tarlow relied on the Rule 24 response. He submitted that consideration of the bundle of documents would not have made a difference as the judge was faced with the situation where the appellant did not turn up and no representative arrived for the hearing. In essence he submitted the case concerned proportionality. The Secretary of State had dealt with the ties between the brother and the appellant in the Reasons for Refusal Letter. This was supported by the judge at paragraph 24. The finding of the judge was entirely open to him. He indicated that he could not see anything in the documents that would have caused the judge to come to a different conclusion.

Discussion

13. With regard to the first ground of appeal (that the bundle of documents submitted on the day following the appeal hearing was not taken into consideration by the judge and that therefore it is in the interest of justice to have the appeal relisted) the real issue is whether or not that bundle of documents could have potentially made a difference to the outcome of the appeal. I have considered the documents submitted by the appellant on 5 March 2015. The bundle comprises of three witness statements namely, that of the appellant, her brother, Mr Navin Nishcal Bissessur, and the appellant's sister-in-law Mrs Sabitree Kumari Bissessur. There was a skeleton argument and copies of the appellant's sister-in-law's passport and residence permit of her brother. In her witness statement the appellant sets out:

- "3. That I entered the UK on 27th April 2005 as a student at the age of 27 years old. I have been dependent of my brother and his wife in the UK.
4. That I completed my foundation course in information system in the UK and went to college here in the UK. After that I started my degree course which I could not finish as the last place I was studying was closed down by the respondent.
5. That during my stay in the UK I have made a lot of friends and I have created a private life in the UK. I have lost contacts with my friends in Mauritius. Since I left Mauritius has changed and it will be impossible to start again in Mauritius since I did not manage to complete my degree and will not be able to secure employment if I am forced to return back to Mauritius.

6. That I sought legal advice to renew my leave at the beginning of this year from my previous solicitor. My solicitor advised me that I cannot renew my student visa since I have been in the UK as a student for more than five years, I will not be granted leave as a Tier 4 General Student as the law has changed on 6th April 2012. I told him that I wanted to complete my degree. He advised me to apply for discretionary leave which will entitle me to continue to study in the UK as well as allow me working. I followed my solicitor's advice and submitted this current application on 17th April 2014 which was refused on 5th June 2014 with a right of appeal.
 7. That I do not have any place to go back to and cannot see myself living anywhere except the UK.
 8. That I am fully integrated into the British society.
 9. That I have built up a private life and I live with my family here in the UK.
 10. That I cannot leave my brother and his wife to go back to Mauritius. They are my only family as I have lost my father and mother in Mauritius".
14. Mr Navin Nishcal Bissessur the appellant's brother in his witness statement sets out, at paragraph 3, that he has been looking after his sister for the past ten years even when she was in Mauritius, that when he moved to the UK the appellant moved in with him and that he and his wife are responsible for her. His evidence is that they have created a family life together. The appellant's sister-in-law in her witness statement says that the appellant moved in with her and her husband when he arrived in the UK, that she has been supporting the appellant in the UK.
15. The appellant's application was for discretionary leave to remain in the UK under paragraph 276ADE(vi) of the Immigration Rules and under Human Rights under Article 8 of the ECHR. In that application the appellant asserts that she has been maintaining herself in the UK without recourse to public funds with the help of her sister and brother in the UK and that she is entirely dependent on her siblings. She indicated that she intended to complete her studies and requested the Secretary of State to consider her application under exceptional circumstances to grant leave for at least one year to complete her course on a part-time basis. The appellant also indicated that she *'has been living with his (sic) sister for the past nine years in the UK. We have continued to strengthen our family tie, the ties between my sister and I are more than just mere emotional ties'*. She set out in that application that she had been in the UK for nine years. She arrived here in the UK with the clear intention of obtaining a UK qualification which is worldwide recognised especially in Mauritius. However, she had not been able to complete her studies and has lost her money. She has no place to go back to in Mauritius. Her parents have passed away in Mauritius. She suffers from depression and it is *'her sister who supports me emotionally and financially. All my friends and close relatives are living in the UK. I have my brother and his wife living in the*

UK. I have my brother-in-law and niece in the UK.' She was not able to complete her studies and therefore it will be impossible for her to secure a job if she is forced to return to Mauritius.

16. There is a clear discrepancy between the appellant's assertions in her application to the Secretary of State and the witness statements submitted in support of the appeal. As set out above the appellant asserted at the time of her application that she was living with her sister and that it was her relationship with her sister that satisfied the ties required to create a family life under Article 8. It was her sister she asserted she had been living with for the past nine years in the UK. This is entirely contrary to the witness evidence of her brother and her sister-in-law. I do not consider that it was an error in her statement in support of her application to the Secretary of State as she clearly also refers to the fact that her brother and sister-in-law are living in the UK. It was set out in the Reasons for Refusal Letter that:

"You state that you have strong emotional ties to your sister, who you have lived with whilst in the UK. You also state that you have a close relationship with your other siblings in the UK, your brother, and that all your friends and close relatives are in the UK. However, your relationship with your siblings does not constitute family life as determined by Appendix FM of the Immigration Rules".

17. In the grounds of appeal, the appellant did not seek to clarify who she had been living with in the UK and no reference was made to the Reasons for Refusal Letter where it set out that the Secretary of State's understanding was that she had been living in the UK with her sister.
18. In any event whether or not the judge had considered that family life existed between the appellant and her brother would not have made a material difference to the outcome of this case as in the assessment of proportionality the factors to be examined are likely to be the same in a case such as this regardless of whether family or private life is engaged. In the case of **Singh & Anor v Secretary of State for the Home Department [2015] EWCA Civ 630** the court considered:

"25. However, the debate as to the whether an applicant has or has not a family life for the purposes of Article 8 is liable to be arid and academic. In the present case, in agreement with Sullivan LJ's comment when refusing permission to appeal, the issue is indeed academic, and clearly so. As the European Court of Human Rights pointed out in AA, in a judgment which I have found most helpful, the factors to be examined in order to assess proportionality are the same regardless of whether family or private life is engaged. The question for the Secretary of State, the Tribunal and the Court is whether those factors lead to the conclusion that it would be disproportionate to remove the applicant from the United Kingdom. I reject Mr Malik's submission that the Upper Tribunal Judge's assessment of proportionality was flawed because she, on his case wrongly, based it on the Appellants' private life rather than their family and private life. In my judgment, she took all relevant factors into account, and her conclusion on proportionality is not open to challenge. Indeed, I would go further. In my judgment, no reasonable Tribunal, on the facts found, could properly have come to a different conclusion.

19. Had the judge considered the bundle of documents there would have been no material difference to the outcome in this appeal as the judge accepted that the interference with the appellant's private life was both necessary and proportionate to the wider interests if the maintenance of effective immigration policy.
20. In relation to the ground of appeal that the judge ought to have considered paragraph 276B – the ten-year lawful residence route, there was no error of law in the judge's failure to consider that provision, the case was never put on that basis and as set out in the respondent's Rule 24 response the appellant was required to make an application under those provisions.
21. With regard to the ground of appeal that the judge wrongly applied paragraph 117B there was no error of law in the judge's application. Section 117B cannot provide any positive right to a grant of leave to remain in the United Kingdom on the basis that the appellant speaks English and is not a financial burden on the taxpayer. In **AM (S117B) Malawi [2015] UKUT 0260 (IAC)** it was held, as enunciated in the head note of the determination that:
 - "2) An appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources."
22. In the case of **Forman (ss117A to C considerations) [2015] UKUT 412 (IAC)** it is set out in the headnote that:
 - "(i) the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely the significance of these factors is that where they are not present the public interest is fortified"
23. The appellant has only ever been in the UK on a temporary basis. It was submitted that she has 'no precarious immigration history'. Her leave to remain in the United Kingdom has always been precarious. As set out in **AM Malawi** in the headnote:
 - "(4) Those who at any given date held a precarious immigration status must have held at that date an otherwise lawful grant of leave to enter or to remain. A person's immigration status is 'precarious' if their continued presence in the UK will be dependent upon their obtaining a further grant of leave"
24. There is no positive right to any form of leave to be derived from s117B. Little weight would be afforded to her private life as it was formed at a time when her immigration status was precarious. The judge correctly applied s117B.
25. The judge concluded that there was insufficient evidence of any relevant compassionate circumstances to justify any concession on the grounds of any of the factors raised or that any of them was of a sufficiently compelling nature to justify allowing leave to remain exceptionally. The circumstances of the appellant's case do not give rise to factors that would outweigh the public interest in effective immigration control when the

appellant was here in the UK on a temporary basis from the outset. Her position within the United Kingdom has always been precarious.

26. The decision of the First-tier Tribunal contains no material error of law such that the decision should be set aside. The decision of the Secretary of State stands

Notice of Decision

The appeal is dismissed. The Secretary of State's decision stands.

No anonymity direction is made.

Signed P M Ramshaw

Date 21 February 2016

Deputy Upper Tribunal Judge Ramshaw