



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12037/2015

THE IMMIGRATION ACT

Heard at Field House
On 22 February 2017

Decision & Reasons Promulgated
On 6 December 2017

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS AIMEI SONG
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant (Secretary of State): Mr P Duffy, Senior Home Office Presenting Officer

For the Respondent (Ms Song): Mr M Adophy, Counsel, instructed by Saintta International Lawyers UK

DECISION AND REASONS

1. This was an appeal brought by the Secretary of State against a decision of First-tier Tribunal Judge Anthony, which had been promulgated on 31 August 2016 following a hearing at Birmingham Sheldon Court on 11 August 2016. For ease of reference I shall throughout this decision refer to Ms Song, who was the original appellant, as “the claimant” and to the Secretary of State, who was the original respondent, as “the Secretary of State”.

2. This appeal was before me on 22 February 2017, when, having heard submissions on behalf of both parties I gave an oral decision immediately following the hearing *ex tempore*. I stated within my decision (which would take effect on promulgation) that I intended to allow the appeal on the limited basis that the decision was not in accordance with the law, such that it would have to be reconsidered by the Secretary of State, but on further consideration I appreciated that because this was a post April 5 2015 decision, and the Rules had changed, this course was no longer open to the Tribunal.
3. Accordingly, I sent the parties a Note of Hearing and Directions, in which I indicated that for the reasons which were set out within that Note (which were essentially the reasons I had given within my *ex tempore* decision) I was minded to dismiss the Secretary of State's appeal, and affirm Judge Anthony's decision, on the basis that any errors which had been contained in that decision were not material. However, in light of the difference between what I had originally stated I had intended by way of disposal and how I now proposed to dispose of this appeal, I gave the Secretary of State an opportunity first of making any representations she might consider appropriate as to the course which I proposed to take before promulgating a decision. I directed that the Secretary of State could, if so advised, within 28 days of the date on which these Directions were sent to the parties, file with the Tribunal and serve on the claimant written submissions with regard to what I proposed. I directed that in the event that the Secretary of State sought to persuade the Tribunal to adopt a different course, further directions would be given, but in the absence of such submissions, it would be assumed that the Secretary of State had no objection to the Tribunal disposing of the appeal in the manner which I had indicated I intended in the Note of Hearing.
4. No submissions having been received on behalf of the Secretary of State, for the reasons set out within the Note of Hearing (which is appended to this decision) the Secretary of State's appeal against the decision of First-tier Tribunal Judge Anthony is dismissed, with the consequence that Judge Anthony's decision is affirmed.

Notice of Decision

The appeal of the Secretary of State against the decision of First-tier Tribunal Judge Anthony, which had allowed the claimant's appeal, is dismissed, and Judge Anthony's decision is affirmed.

No anonymity direction is made.

Signed:



Upper Tribunal Judge Craig

Dated: 5 December 2017



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UPPER TRIBUNAL JUDGE CRAIG

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS AIMEI SONG
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: (Secretary of State): Mr P Duffy, Senior Home Office Presenting Officer
For the Respondent: (Ms Song): Mr M Adophy, Counsel, instructed by Saintta International Lawyers UK

NOTE OF HEARING AND DIRECTIONS

1. This is an appeal brought by the Secretary of State against a decision of First-tier Tribunal Judge Anthony, which was promulgated on 31 August 2016 following a hearing at Birmingham Sheldon Court on 11 August 2016. For ease of reference I shall throughout this decision refer to Ms Song, who was the original appellant, as “the claimant” and to the Secretary of State, who was the original respondent, as “the Secretary of State”.

2. This appeal was before me on 22 February 2017, when, having heard submissions on behalf of both parties, I gave an oral decision immediately following the hearing *ex tempore*.
3. Regrettably, the file was then mislaid, but neither the claimant's representatives nor the Secretary of State has made any enquiry as to when my decision could be expected, and my obligation to promulgate my Decision with regards to this appeal was overlooked as the pressure of other work intervened.
4. Fortunately, the Administration at Field House has alerted me to my need to promulgate a Decision in this case and following a search I was able to locate the file. I am accordingly giving my Decision without further delay.
5. Regrettably also, although I had intended (and so stated within my *ex tempore* decision) to allow the appeal on the limited basis that the decision was not in accordance with the law (such that it would have to be reconsidered by the Secretary of State), on further consideration I now appreciate that because this is a post April 5 2015 decision, and the rules have changed, this course is no longer open to the Tribunal. Accordingly I have had to reconsider what is the appropriate course to follow having regard to the change in the rules and have amended the decision I had originally intended to give (which had been stated *ex tempore*). However, my essential findings remain unchanged. I apologise to both parties for the delay.
6. The claimant is a national of China who was born on 20 October 1958. She claims to have arrived in the UK on 26 April 2003 with leave to enter as a student valid from 10 February 2003 to 31 August 2004. She applied for various extensions of her leave which were granted. These included periods in which she claimed to be intending to study at Thames College, London. In one application she claimed that she was to study for a degree of Master of Business Administration and subsequently she claimed that she was intending to study for a doctorate at that college. On 20 March 2009 she made a further application for leave to remain as a student which it appears was not refused until 4 September 2014 when the decision was served on file. For the reasons which follow I do not propose to make a detailed examination of the intricacies of the applications which were made.
7. On 22 September 2015 the claimant applied for indefinite leave to remain on the basis that she had lawfully been in this country for over ten years. The application was made under paragraph 276B of the Immigration Rules which will be referred to in a little more detail below. This application was refused by the Secretary of State in a decision made on 6 November 2015. In that decision the Secretary of State referred to the claimant's immigration history but refused the application under the general grounds set out in paragraph 332(2) of the Rules which state as follows:

"In addition to the grounds for refusal of extension of stay set out in Parts 2-8 of these Rules, the following provisions apply in relation to the refusal of an application for variation of leave to enter or remain or, where appropriate, the curtailment of leave:

'322(2) the making of false representations or the failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave or in order to obtain documents from the Secretary of State or a third party required in support of the application for leave to enter or a previous variation of leave'."

8. The basis of the refusal was that the Secretary of State claimed that evidence from investigations which had been carried out on her behalf between July 2008 and December 2009 showed that Thames College was not a bona fide education establishment "and that it is reasonable to believe that this would be known to any person claiming to have studied or was applying to study there".
9. The Secretary of State also referred to a statement which had been given by the claimant to a police constable (Police Constable Stewart) on 27 October 2009 at Croydon Enforcement Unit, where, it is said in the refusal letter, "you confirmed that you have never undertaken study at Thames College London but that you agreed to sign FLR(s) application which gave evidence contrary to this".
10. The claimant appealed against this decision and her appeal was heard before First-tier Tribunal Judge Anthony, sitting at Birmingham Sheldon House on 11 August 2016, and as already noted her appeal was allowed in a Decision and Reasons promulgated on 31 August 2016.
11. By virtue of the change in the Immigration Rules (and this is common ground between the parties as it has to be) the only basis now upon which this claimant could appeal was on human rights grounds. There is no longer an appeal based simply against a decision under the Rules. However, Home Office guidance does acknowledge that applications under paragraph 276B (long residence) do contain human rights aspects such that it is very likely that an applicant would have a right of appeal against a decision on human rights grounds. Certainly the claimant did raise her Article 8 rights as a ground of appeal and in her statement which was before the First-tier Tribunal she concluded as follows, with regard to her Article 8 rights:

"5. Article 8 Rights:

- (i) I am advised by my representatives that I have right to have my family and private life respected. The action of the Respondent constitutes a bar to my enjoyment of the rights.
- (ii) I repeat and rely on the all averments above in respect of my Article 8 claim.
- (iii) I am further advised that there cannot be any public interest in my exclusion from the UK.
- (iv) I am not nor have I been reliant upon public funds in respect of my maintenance or accommodation."

12. The claimant's statement was apparently read back to her in Mandarin before she signed it.
13. Accordingly, the position when the appeal came before the First-tier Tribunal was that the judge had jurisdiction only to consider the appeal on human rights grounds. It is, obviously a factor and an important factor in considering whether an appeal should be allowed on Article 8 grounds whether or not an applicant has a right to remain under the Rules because clearly the public interest, if any in removal of a person who otherwise would have a right to remain cannot be a high one. Accordingly when considering whether or not the claimant in this case could lawfully be removed under Article 8, consideration would have to be given to what right she would have under the Rules to remain.
14. As already indicated Judge Anthony allowed the appeal. She first of all considered the statement which had been made by the claimant to the police and made a finding (at paragraph 19) that "having considered the statement the appellant gave to the police, I am unable to find any references in this statement to the appellant stating she had never undertaken studies at Thames College London".
15. She then found on the balance of probabilities that the claimant had been a genuine student even though it was accepted that she had never undertaken any studies at the college in respect of the PhD course which she had claimed she would be undertaking. The judge found with regard to the PhD course, that there had been no false representation made at the time of obtaining an extension of her leave to study this course because at that time she had intended to do so but changed her mind later.
16. The judge considered that the claimant had been in this country lawfully for ten years for the reasons which she gave and then found as follows at paragraph 37:

"As stated above, the respondent has not raised any other issues in the refusal letter. I can find no such evidence before me of any convictions. I find that in light of the information before me relating to the appellant's personal history, including her character, conduct, associations and employment record and having regard to the public interest, there are no reasons why it would be undesirable for the appellant to be given indefinite leave to remain. She therefore meets the requirements of paragraph 276B...."
17. The judge did not make any reference to Article 8 or indeed to human rights as such in the decision at all.
18. The respondent now appeals against this decision, leave having been granted by Designated First-tier Tribunal Judge Manuell on 24 November 2016. The grounds of appeal are very short indeed and are as follows:

"Ground: material misdirection in law

1. This is an application which was made on 22.9.15 and as it is an application after April 2015, it is asserted that the amended grounds of

appeal under sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002 applied. This only allows for an appeal in respect of a protection claim or a human rights claim.

2. As such, it is asserted that the FTTJ fundamentally erred in law by allowing this appeal under Immigration Rules 276B, rather than engaging with Article 8 within and outside the Rules....”.

19. The grounds do not contain any challenge to the findings of fact which had been made by the judge, although having myself read the witness statement which the claimant had given to the police officer the findings which the judge made with regard to this statement are surprising. In this statement she says with regard to a person called David who made her application to Thames College on her behalf that:

“I was always concerned from the beginning about the need to provide documented record of attendance for college [but] when I queried this with David he said to me that I worry too much and told me to let him do his job and I do mine”.

She later at the end of the statement says that:

“I believe David has misled me throughout the period I was involved with Virgil [the body David worked for through whom her visa applications were made] by abusing the Immigration law and using me to do it, as I did not know any different. I did not understand the Immigration system.”

20. Although it is arguable that the rational interpretation of these statements is that at the very least this claimant was aware that her applications were not legitimate, on behalf of the Secretary of State, Mr Duffy did not seek to advance an argument at this very late stage that the judge’s decision had been perverse on this point and in these circumstances I do not consider it is appropriate for this Tribunal now to raise this issue of its own volition. Accordingly, for the purposes of this appeal the findings of the judge that the claimant had not herself exercised deception in obtaining her periods of leave must stand as must her finding that her leave had never been curtailed and that accordingly at the time she made her application for indefinite leave to remain in 2015 she had been in this country lawfully for over ten years.

21. When granting permission to appeal Judge Manuell gave his reasons as follows:

- “1. The Appellant’s appeal against refusal of her 10 year long residence claim brought under paragraph 276B of the Immigration Rules was allowed by First-tier Tribunal Judge Anthony in a decision and reasons promulgated on 31 August 2016.
2. The Respondent’s in time grounds of onwards appeal dated 15 September 2016 contend that the judge erred fundamentally: the application was made on 22 September 2015 and so it argued that the tribunal’s jurisdiction was restricted to human rights matters only.

3. The grounds have substance and are arguable. In any event, the judge plainly erred by purporting to allow the appeal outright, as paragraph 276B is discretionary and the relevant discretion had not been exercised by the Secretary of State. Whether the transitional provisions applied may need to be considered. Unfortunately the judge was not referred to them...".
22. Before me, it was not suggested other than that there was only a right to appeal on human rights grounds.
23. I had in mind the guidance given by the Home Office to the effect that applications under paragraph 276B (long residence) have a human rights element to them and that clearly must be right. In this case, I know very little about the private life exercised by the claimant in this country but having been here for over ten years she clearly must have some and Mr Duffy did not seek to persuade the Tribunal that it is not a very relevant factor whether or not an applicant would have a right to remain under the Rules. Not only did the judge fail to consider Article 8 at all but in my judgment her consideration of the provisions of paragraph 276B(ii) and in particular how that applied to the Secretary of State's decision was arguably flawed. As I have already noted, this very important aspect of the Rules was only mentioned very briefly at paragraph 37 and it is clear that this aspect of the case had neither been considered by the Secretary of State and nor had it been argued properly or at all before her. Section 276B provides as follows:

“Requirements for Indefinite leave to remain on the grounds of long residence in the United Kingdom

276B: The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

- (i)(a) he has had at least ten years' continuous lawful residence in the United Kingdom.
- (ii) Having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:
- (a) age;
 - (b) strength of connection with the United Kingdom;
 - (c) personal history, including character, conduct, associations and employment record;
 - (d) domestic circumstances;
 - (e) compassionate circumstances; and
 - (f) any representations received on the person's behalf; and

- (iii) the applicant does not fall for refusal under the general grounds of refusal.
- (iv) The applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.
- (v) The applicant must not be in the UK in breach of Immigration Rules except that any period of overstaying for a period of 28 days or less will be disregarded, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days, and any period of overstaying pending the determination of an application made within that 28 day period.”

24. The judge was satisfied that the claimant had provided sufficient evidence of life in the United Kingdom and as already noted that the application did not fall to be refused under general grounds for refusal, but as I have already noted, in order for a decision to be made under paragraph 276B(ii) it is necessary for the decision maker to actually consider this aspect of the application in light of a correct finding of fact. The view I originally expressed immediately following the hearing was that before a Tribunal has jurisdiction to consider an appeal on the merits against the exercise of a discretion by the Secretary of State, it was necessary first for that discretion to have been exercised. In this case I considered that the Secretary of State had never considered whether or not the discretion which she is granted under paragraph 276B(ii) should be exercised in the claimant’s favour because the decision was made on the basis that the leave to remain had been obtained fraudulently and thus the application fell for refusal under the general grounds of refusal. That decision has been found by the First-tier Tribunal to be wrong and accordingly I intended to find that it was now for the Secretary of State to consider whether or not she should exercise her discretion under paragraph 276B(ii) but on the basis that the objection which she originally took which was that the application should be refused under the general grounds of refusal had been found to be wrong.

25. Accordingly, I intended to decide that the decision of Judge Anthony allowing the appeal outright should be set aside, but the findings of fact which she had made that the claimant had been in this country lawfully for over ten years must be retained. The effect would be that because the Secretary of State had not exercised her discretion one way or the other under paragraph 276B(ii) there was still an outstanding decision which needed to be made. I had then intended to allow the appeal in part on the basis that before a decision was taken under Article 8 the Secretary of State first had to exercise her discretion to consider whether or not this claimant would be granted leave under the Rules, and in light of that decision she must then consider whether or not to grant the application. I expressed the view that if the Secretary of State decided to maintain the original refusal, unless the claim was then certified as clearly unfounded (which on the facts of this case would be hard to maintain) the claimant would have a right of appeal to the First-tier Tribunal under Article 8. I accordingly stated my

intention to allow the appeal to the limited extent that the decision made was not in accordance with the law.

26. However, having considered this appeal further in light of the new rules, I appreciate that it is not now open to this Tribunal to allow an appeal on the limited basis that the decision was “not in accordance with the law”. Further, I have had regard to the recent decision of this Tribunal in *SF and others (Guidance, post-2014 Act) Albania* [2017] UKUT 00120, a decision of a panel presided over by the Vice-President, in which he gave guidance essentially that where the Secretary of State’s guidance pointed clearly to a particular outcome, in order to obtain consistency between those cases which come before the Tribunal and those which do not, the Tribunal could itself make the decision in an appropriate case. In my judgement, this guidance of the Vice-President is equally applicable where on the facts as found, the decision can only be made one way.
27. In this case the only reasons why the Secretary of State had decided not to allow the application were first that she did not accept that the Claimant had had 10 years lawful residence and secondly that because she had fraudulently claimed to have attended a college when she had not done so, her application must fail on suitability grounds. Both these reasons have been found to be unsustainable (and Mr Duffy does not seek to challenge either of them now). Although Judge Anthony had not considered in any detail precisely what private life this Claimant had in this country, and as I have found, her article 8 consideration may arguably have been flawed, in light of the Claimant’s 10 years’ lawful residence, as found, and the further finding that her application did not fall for refusal under suitability grounds, which is not now challenged, and also that the appellant was found to have provided sufficient evidence of life in the UK, on the basis of these findings there does not appear to be any good reason why her claim should not have been allowed under the rules. In these circumstances, on the facts of this case, it is my provisional view that this Claimant’s appeal under article 8 must ultimately succeed.
28. It would accordingly follow that whatever errors there may have been in Judge Anthony's decision, these were not material, as on her findings, which are not now challenged, and in light of the decision of the Tribunal in *SF*, the appeal was bound to succeed.
29. For the reasons I have given, I am minded to dismiss the Secretary of State appeal, and affirm Judge Anthony’s decision, on the basis that any errors in that decision were not material. However, in light of the difference between what I had originally stated I had intended by way of disposal and how I now propose to dispose of this appeal, it is appropriate to give the Secretary of State the opportunity first of making any representations she may consider appropriate as to the course which I propose to take. I accordingly make the following Directions:

Directions

- 1) The Secretary of State may, if so advised, within 28 days of the date on which these directions are sent to the parties, file with the Tribunal and serve on the

Claimant written submissions as to the manner in which the Tribunal has stated it intends to dispose of this appeal.

- 2) In the event that the Secretary of State seeks to persuade the Tribunal to adopt a different course, the Tribunal will then give such further directions as may be appropriate.
- 3) In the absence of such submissions, it shall be assumed that the Secretary of State has no objection to the Tribunal disposing of this appeal in the manner indicated above.

Signed:

A handwritten signature in black ink that reads "Ken Craig". The signature is written in a cursive style with a long, vertical tail on the letter 'p'.

Upper Tribunal Judge Craig

Dated: 26 September 2017