



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/03843/2020 (V)**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at a remote hearing  
On 25 February 2022**

**Decision & Reasons Promulgated  
On the 31<sup>st</sup> March 2022**

**Before**

**UPPER TRIBUNAL JUDGE REEDS**

**Between**

**MS FANNY ALEJANDRA GALLEGUILLOS MORENO  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**AND**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms G Brown, Counsel on behalf of the appellant ( acting by way of direct access)

For the Respondent: Mr M. Diwnycz, Senior Presenting Officer

**DECISION AND REASONS**

**Background:**

1. The appeal was listed for a resumed hearing. It is the appeal of Ms Fanny Alejandra Galleguillos Moreno, who is a national of Chile.
2. The appellant's immigration history is summarised as follows. The appellant entered the United Kingdom on 28 September 2006 with entry clearance as a student valid until to 24 November 2007. She

was subsequently granted further leave to remain in the same capacity valid until 31 January 2016. On 30 January 2016 she made an application for leave to remain outside the Immigration Rules, but which was refused under paragraph 322 (1) on 28 April 2016 on the basis with no right of appeal. An application for reconsideration of this decision was lodged on 12 May 2016 but this was refused on 28 June 2016.

3. Further representations raising human rights grounds were lodged on 13 July 2016 under section 120 of the Nationality, Immigration and Asylum Act 2002.
4. On 24 October 2016 the appellant applied for indefinite leave to remain on the grounds of long residence, but this was refused on 7 April 2017 with an out of country right of appeal.
5. A further application for indefinite leave to remain was made on 1 September 2017 which is refused on 9 January 2018. A pre-action protocol letter was lodged on 15 March 2018 and permission to apply for judicial review was granted on 6 September 2018. This was settled by consent on 5 November 2018, but after reconsidering the application the respondent issued a decision on 3 February 2020 which again refused the application.
6. The decision letter set out that on 1 September 2017 she had made an application for indefinite leave to remain on the basis of 10 years long residence and on the basis of her private life. The decision letter set out her immigration history and the respondent considered her application under the rules applicable to long residence. However the respondent concluded that the application was submitted whilst the appellant had no valid lawful leave to enter or remain in the United Kingdom. The respondent applied paragraph 276B (v) which required the appellant not to be in the UK in breach of immigration law and there were no good reasons beyond her control which prevented her from submitting an application on 1 September 2017 in line with paragraph 39E of the immigration rules. Whilst it was accepted that she had resided in the United Kingdom for a period of 13 years and 4 months, it was considered that she had not accrued 10 years continuous and lawful leave. The respondent set out the representations made from the appellant's solicitors in a letter dated 1 September 2017. It was said the reason the application dated 24 October 2016 was submitted out of time was due to bad representations from her previous solicitors.
7. The respondent concluded that when considering the application it was considered whether the exercise of discretion was appropriate. Reference was made to the email correspondence from the Office of the Immigration Service Commissioner and the appellant dated 3 July 2017. Full consideration was given to the OISC findings, but it was considered that the onus was on the applicant to ensure all

applications were submitted in time and also to ensure that she instructed a representative who would carry out her instructions. The fact that the representatives did not undertake the task sufficiently was just unfortunate and not considered “exceptional”.

8. As the appellant did not claim any family life in the UK the decision maker considered her application under the rules applicable to private life (under paragraph 276 ADE). It was noted that her application did not fall for refusal on grounds of suitability. As to her eligibility, it was noted that she was a national of Chile, who was over 18 years of age and who had entered the UK on 28 September 2006, but it was not accepted that she lived continuously in the UK for at least 20 years and therefore could not meet paragraph 276 ADE (1) (iii) or (iv) and (v). As regards paragraph 276 ADE (1) (vi), the respondent stated that it was not accepted that there would be very significant obstacles to her integration into Chile. The respondent considered whether there were any “exceptional circumstances” which would render refusal a breach of article 8 because it would result in unjustifiably harsh consequences for the appellant but concluded there were no “exceptional circumstances” in her case after taking account of the medical evidence and the OISC evidence and thus the application did not fall for a grant of leave to remain outside of the rules.
9. The appellant appealed that decision to the FtT on the 10 February 2021. In a decision promulgated on 26 February the FtTJ dismissed the appeal on human rights grounds, having found that the appellant could not meet the requirements of paragraph 276ADE (1) (vi) and that there were no “very significant obstacles to her integration” to Chile ( at paragraphs [70]-72]). When reaching that conclusion the FtTJ made factual findings on the obstacles that the appellant asserted would be “very significant” and these included her ability to obtain employment, her lack of ties to Chile, her medical condition and available treatment and her financial circumstances.
10. The FtTJ also addressed Article 8 and whether the refusal would result in an unjustifiably harsh consequences for the appellant taking into account the public interest factors set out in section 117B of the 2002 Act. In the assessment of the public interest, the appellant relied upon the misfeasance of a previous representatives relying on the decision in Mansur (immigration adviser’s failings: article 8 ) Bangladesh (2018) UKUT 00274 (IAC) and in the context of the determination dated 3 July 2017 of the OISC which had found that the appellant’s previous legal representatives had provided incompetent advice to the appellant. The FtTJ reached the conclusion that the appellant’s circumstances fell outside Mansur and that as a result the weight attached the public interest was not affected.
11. The appellant sought permission to appeal that decision and permission was granted was granted by the First-tier Tribunal (Judge Keane) on the 26 April 2021.

12. The appeal came before the Upper Tribunal on 1 September 2021. The appellant was represented by Counsel, Ms Brown ( by way of direct access) and the respondent by Mr Bates, Senior Presenting Officer. By a decision promulgated on 27 October 2021, I concluded that the First-tier tribunal had erred in law on Ground 5 of the grounds of challenge. I found no error of law in the other 4 grounds for the reasons set out on my decision and this decision should be read alongside the “error of law decision.”
13. I set out that the FtTJ’s findings set out at [11]-[32] should be preserved for the purposes of the remaking of the decision but that evidence relevant to the appellant’s updated circumstances should be filed and also that the appellant would be at liberty to give oral evidence concerning those issues if so advised.

The remaking of the appeal:

14. The hearing took place on 25 February 2022 by means of *Microsoft teams* which has been consented to and not objected to by the parties. A face- to- face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video as did the appellant who was able to see and hear the proceedings. She gave oral evidence in English as she did before the First-tier Tribunal. Both Ms Brown and the appellant confirmed that she did not require the assistance of a court interpreter. There were no issues raised by the parties that the appellant was able to give evidence by this medium. There were no problematic technical problems were encountered during the hearing, and I am satisfied that the appellant was able to give her evidence without any difficulties and both advocates were able to make their respective cases by the chosen means.
15. At the hearing on the 25 February 2022, the evidence before the tribunal consisted of the original bundle of documents and in addition documentation sent by the appellant by email consisting of a letter written by her, and a copy of a discharge letter and photographs. It was confirmed that no other documentation had been sent or would be relied upon. Ms Brown was asked whether there was any medical report available from her GP or the hospital to confirm any prognosis or further treatment. It was stated that no other evidence had been filed and the appellant would give oral evidence about this aspect. The tribunal had a copy of the previous bundle provided on behalf of the respondent.
16. I heard oral evidence from the appellant. In her oral evidence she confirmed that she adopted as her evidence her earlier witness statements including witness statement dated 12<sup>th</sup> February 2021. As to events since February 2021, she confirmed that the main difference related to her medical condition. She stated that she had

recently undergone surgery in December 2021 where she underwent a stealth guided parietal craniotomy and a resection and biopsy of her skull. She explained that the reason for the surgery was that there had been a mass on her brain and penetrating the organ. She gave evidence about her symptoms. She stated that she had not completely recovered and that she was still undergoing tests and a further referral to a specialist. She had not been able to obtain the referral yet as the GP had not received the letter.

17. As regards the circumstances in 2016, she was asked if she had remembered what she had said to her former representatives. The appellant stated that she had been refused an extension of visa but had passed all the subjects she needed for her dissertation; she was unwell, and she required an extension. She made an application, but it was refused and as a result she went to her legal advisers and asked what the best thing was to do and asked what other visas could she apply for or to appeal because her immigration history before this had been impeccable. She was asked about the OISC findings and looking back what did she think she could have done? The appellant said that she understood that she could have left the UK and applied for another Visa or applied for indefinite leave to remain that that even if refused her section 3C leave would have followed on but that had not taken place.
18. Mr Diwnycz on behalf of the respondent stated that he had no questions of the appellant and indicated that having read the OISC report there was no disparity between that in the report and her evidence and that he did not dispute her factual claim.
19. At the conclusion of the evidence I heard oral submissions from the parties beginning with Ms Brown on behalf of the appellant and then from Mr Diwnycz on behalf of the respondent. After hearing the evidence of the appellant and the submissions from Ms Brown, Mr Diwnycz informed the tribunal that he did not seek to make any submissions contrary to those made by Ms Brown and that he accepted that the appellant had made out her case that it would be disproportionate to remove her from the UK as refusal of leave to remain would result in unjustifiably harsh consequences for the appellant.
20. In the light of the concession made that the appellant has made out the factual claim that to remove the appellant would be disproportionate, it is only necessary to set out in brief terms why that concession was made.
21. In the earlier decision, I preserved the factual findings made by the FtTJ relating to the issue of whether there were “very significant obstacles” to the appellant’s reintegration to Chile. When applying the broad evaluative assessment , the following factors were identified. Firstly, whilst the appellant had spent a lengthy period of

time in the United Kingdom she retained some family ties to Chile being in communication with her sister. She had attained educational qualifications in the United Kingdom and had proficiency in Spanish. As regards her potential employment prospects, the judge took into account that she had worked as a nanny 2007 until 2014/15 but there had been an absence of evidence relating to whether she could obtain work as a nanny but there was no reason to believe that she would be unable to obtain employment either as a translator, or tutor. There was no dispute as to the medical evidence advanced on behalf of the appellant which accurately set out the medical conditions suffered by the appellant and included evidence from a consultant, a specialist nurse and a GPs records relating to her mental health condition. The FtTJ found that notwithstanding the appellant's medical condition that she would have some access to medical treatment and that if in employment she would be able to access medical treatment by the provision of private treatment if she could not access the government health system because she had not contributed to the public health system via insurance payments due to her absence from Chile. Whilst there were identifiable obstacles ( lack of residence, her medical conditions, no source of employment) they were not significant in the sense that she would not be someone who had no subsisting links to Chile.

22. The real issue relates to the assessment of article 8 outside the rules and in particular whether the refusal of leave to remain would result in unjustifiably harsh consequences for the appellant in the light of the particular factors identified, including those set out in the public interest considerations under section 117B of the 2002 Act.
23. The case on behalf of the appellant related to the weight to be given to the public interest based on the factual circumstances of the appellant. The relevant factors that the appellant relied upon have been summarised by Ms Brown on behalf of the appellant at paragraph 18 of her skeleton argument. They are summarised as follows. The appellant entered UK lawfully and had a long period of lawful residence in the UK for 9 years and 7 months from the date of entry. The application that was made on 30 January 2016 for leave outside immigration rules been made because the appellant was unable at that time to continue with her studies due to ill health. It is said that the appellant was not someone who had given no reason for being able to continue with her studies but had given good reasons for making the application. The application was refused on 28 April 2016 but that as a result of the lack of competent advice if she had been advised to leave the UK and return with 180 days she would not have become an overstayer but would have retained s3c leave and it would not have affected any later application to have satisfied paragraph 276B(rules on long residence). Thus she failed to satisfy the requirements due to the advice that she has received. She submits that there is no dispute that the findings made by the OISC supported the appellant's claim and that they had failed to advise the

appellant as to the available legal options and that the avenue that they pursued was one that was bound to fail. Thus the appellant did not intentionally overstay nor was she aware that she had become an overstayer until receipt of the respondent's decision of 7 April 2017. There is some speculation as to the steps the appellant would have taken had she been competently advised however it is accepted on behalf of the respondent at the hearing that the only reason that she failed to meet the requirements was due to lack of competent advice as set out in the OISC investigation at paragraphs 15-18.

24. A further factor relevant factor is that the appellant acted expeditiously at all times following the receipt of the decision of 7 April 2017 having made a complaint to the OISC on 6 June 2017.
25. As a result of those circumstances, the delay in dealing with her claim after it had been agreed via the consent order that a reconsideration would take place had led to the appellant suffering from anxiety low mood and stress.
26. The appellant's medical circumstances are a further relevant consideration. The medical evidence as it stands currently is not in dispute and the discharge documentation demonstrates that in December 2021 the appellant underwent a stealth guided parietal craniotomy and underwent resection biopsy of her skull. The discharge letter refers to the mass that had been removed as "non-malignant". The appellant did not present with any neurological or cognitive difficulties following the surgery but that since that time, her oral evidence suggests that she requires a further assistance and has referred to further tests are being undertaken. It is not possible to state at the present time what further medical treatment she requires in the light of the recent surgery and ongoing problems she has identified in her evidence.
27. Ms Brown in her submissions referred to the factors on the respondent's side of the balance and that the requirement to maintain effective immigration control was outweighed by the cumulative nature of the relevant factors that she identified at paragraph 18 of her skeleton argument and substantially by the OISC decision.
28. The core issue in this appeal is that of proportionality and whether the respondent's decision strikes a fair balance between, on the one hand, the appellant's right to respect for her private life and, on the other, the important public interest in maintaining effective immigration control.
29. Both advocates agree that the primary focus is on the decision in Mansur (immigration adviser's failings: article 8 ) Bangladesh (2018) UKUT 00274 (IAC) and in the context of the determination dated 3 July 2017 of the OISC which had found that the appellant's previous legal

representatives had not provided the appellant with competent advice in breach of code 5 of the code of standards. The conclusions are set out at paragraphs 15-18 of the determination dated 3 July 2017.

30. The relevant paragraphs of the decision in Mansur are set out at [28]-[33]. The point made by the President and set out at paragraph [28] of Mansur was to ask whether in the particular circumstances the misfeasance affected the weight that otherwise would be given to the importance of maintaining the respondent's policy of immigration control.
31. Mr Diwnycz on behalf of the respondent accepts that this is a case which falls within those described as "rare cases" and has accepted the appellant's evidence that she had sought legal advice and for an application to be made. As the OISC determination sets out, the appellant had several options available, but none were explained to the appellant ( paragraph 20). Whilst I consider there is an element of speculation in this, the appellant is not required to establish conclusively the nature of the application and Ms Brown has set out in her submissions a number of applications that she could have made and in particular that she could have left the UK and re-entered within 180 days so that there would not have been a break in her leave. As a result the appellant lost her hitherto impeccable immigration history and it resulted in a break in her leave.
32. As part of the adoption of the structured approach, and the consideration of proportionality at stage 5, I am required to consider the statutory provisions of Part V of the 2002 Act. Section 117B (1) confirms that the maintenance of immigration control is in the public interest. From the outset I place in the balance that the appellant is unable to meet the requirements of article 8 under the Rules and so cannot meet the weight to be addressed to those identified elements.
33. I observe that section 117B, which is relevant to my enquiry in this matter, must be construed to ensure consistency with article 8 and so there must be injected into it a limited degree of flexibility so that the application of the statutory provisions will always lead to an end result consistent with article 8: *Rhuppiah v. Secretary of State for the Home Department* [2008] UKSC 58, [\[2018\] 1 WLR 5536](#), at [36], [49]. Consequently, the limited degree of flexibility may permit an appellant to succeed in establishing exceptional circumstances though they have been unable to satisfy the relevant provisions of the Rules as here.
34. The appellant speaks English and has been financially independent. Whilst the appellant does not obtain a positive right from these factors, they are not ones that count against her: *AM (s117B) Malawi* [\[2015\] UKUT 260 \(IAC\)](#), [2015] Imm AR 1019.



35. As to section 117B (4) and (5) I place in the balance that the appellant was lawfully present with lawful leave for a period of 9 years and 7 months, but that during such time her immigration status was precarious and thus attracts little weight (see *Rhuppiah*, at [44]). however, “little weight” does not mean “no weight” and some weight is given to the lengthy period of time that the appellant has been present in the United Kingdom since her entry in 2006. A further factor weighing on the balance on the appellant’s side is her recent medical condition (alongside her other medical conditions previously summarized) which requires further treatment which at the date of the hearing has not been ascertained.
36. The fact specific nature of the proportionality enquiry requires me to consider whether the personal facts arising in this matter are such as to lessen the public interest in removal. It is in this respect that the decision of *Mansur* applies. It is accepted by Mr Diwnycz that on the particular facts of the case they disclose very compelling reasons in favour of her Article 8 claim. In the light of the concession made on the half of the respondent that this factor should be given substantial weight and that it follows as a consequence that the public interest in the maintenance of effective immigration control is therefore given less weight than it ordinarily might under S117B (1) and when considering the overall balance proportionality, it falls in favour of the appellant. It is accepted by the respondent that on the facts of this particular appeal that it falls into one of the categories of cases where the public interest identified at section 117B (1) can properly be lessened and is outweighed by the factors in favour of the appellant.
37. For those reasons it is common ground between the advocates that that the respondent's refusal of the appellant's human rights claim does not strike a fair balance between her right to respect for private life and the public interest. That decision and any consequential removal from United Kingdom constitutes a disproportionate interference with the appellant's private life and is therefore unlawful under section 6 of the Human Rights Act 1998.
38. The appeal is remade as follows; the appeal is allowed on Article 8 grounds.

**Notice of decision:**

39. The decision of the First-tier Tribunal involved the making of an error on a point of law and therefore the decision of the FtT shall be set aside.

The appeal is remade as follows: the appeal is allowed on Article 8 grounds.

Signed Upper Tribunal Judge Reeds

Dated 16 /3/ 2022.

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**NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days if the notice of decision is sent electronically).
3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).
4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days if the notice of decision is sent electronically).
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email.