



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

Appeal Number: IA/09082/2013

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham

Determination

Promulgated

On 30th May 2014

On 12th June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

NANCY MWENYA CHASHI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Vokes of Counsel instructed by Coventry Law Centre

For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction and Background

1. The Appellant appeals against a determination of Judge of the First-tier Tribunal Lloyd promulgated on 9th January 2014.

2. The Appellant is a female citizen of Zambia born 27th July 1987. She entered the United Kingdom on 8th February 2007 with valid leave as a student. Leave was subsequently extended until 8th October 2012.
3. On 27th September 2012 the Appellant applied for further leave to remain as a Tier 4 Student. That application was refused on 19th December 2012 with reference to paragraph 245ZX(d) of the Immigration Rules, as the Appellant did not satisfy the maintenance requirements.
4. The Appellant's subsequent appeal was heard on 26th June 2013 and dismissed with reference to paragraph 245ZX, but the judge at that hearing allowed the appeal with reference to section 47 of the Immigration, Asylum and Nationality Act 2006, and made no findings in relation to the Appellant's family and private life.
5. Permission to appeal against that decision was given, and the Upper Tribunal subsequently set aside the decision of the First-tier Tribunal and remitted the appeal back to the First-tier Tribunal for a further decision to be made. The Upper Tribunal found that the First-tier Tribunal had been wrong to allow the appeal with reference to section 47, as the removal decision was withdrawn by the Presenting Officer at the hearing, and the First-tier Tribunal had erred in failing to consider the Appellant's human rights. The appeal was remitted to be re-made only in relation to Article 8 of the 1950 European Convention on Human Rights.
6. The appeal was then heard by Judge Lloyd on 6th January 2014, and after hearing evidence from the Appellant, her husband and the Appellant's father, Judge Lloyd dismissed the appeal on human rights grounds.
7. The Appellant applied for permission to appeal to the Upper Tribunal and the grounds are summarised in the decision of Judge of the First-tier Tribunal Colyer dated 3rd April 2014, who granted permission to appeal on limited grounds. I set out below paragraphs 5 and 6 of Judge Colyer's grant of permission;
 - "5. The grounds and reasons for permission to appeal assert that the judge erred in failing to consider material matters such as the 'Chikwamba principles' or to consider the rights of the Appellant's husband. However, it is apparent that the judge has considered the Appellant's family life and that of her husband. These grounds amount to nothing more than a disagreement with the findings of the judge, findings which were properly open to the judge on the evidence before him.
 6. The grounds and reasons for permission to appeal contend that the judge has made a material misdirection of law. In particular that at paragraph 40 the judge states that the interference is lawful 'as she has no leave to remain'. It is argued that the judge had erred in failing to consider that the appeal related to an in time variation application and the Appellant had statutory extended leave. I note that the judge repeats this purported error at paragraph 48 'the Appellant is a mature adult who no longer has leave'. It is arguable that the judge may have made an error with regard to the Appellant's status in the United

Kingdom and that this purported mistake may have materially influenced the decision. The grounds disclose an arguable error of law on this aspect.”

8. Directions were subsequently issued making provision for there to be a hearing before the Upper Tribunal to decide whether the First-tier Tribunal determination should be set aside.

The Appellant’s Submissions

9. At the hearing before me Mr Vokes accepted that permission to appeal had been granted on limited grounds, and he therefore addressed me only in relation to the finding of the judge that the Appellant had no leave to remain. I was asked to conclude that this was a material error because the judge presumed that the Appellant was an overstayer which was not the case. The Appellant had applied for leave to remain prior to the expiry of her existing leave, and therefore her leave was extended by section 3C of the Immigration Act 1971 while her appeal was being determined.
10. Mr Vokes submitted that there was a real difference between the position of an overstayer, and the position of a person who had leave, and this would make a difference when a judge was considering Article 8.
11. The judge had referred in paragraph 40 of the determination to the Appellant not having leave, and had made further reference to this in paragraph 48. I was asked to accept that this was an error, and it was material, because this had influenced the judge when carrying out the balancing exercise required when considering proportionality. It was possible that the outcome would have been different if the judge had taken into account that the Appellant had leave.

The Respondent’s Submissions

12. Mr Smart contended that the judge was aware of the full circumstances of the Appellant’s case and the history of it. In paragraph 46 the judge had referred to the Appellant having completed the course, which was the reason why she had applied for further leave to remain as a Tier 4 Student.
13. Mr Smart submitted that in paragraph 40 the judge was in fact recording that the Appellant no longer had leave as a student because she had completed the course.
14. In any event the judge had properly considered all the appropriate case law in paragraphs 31 - 34 of the determination, and properly considered whether there were any good reasons to find compelling circumstances outside the rules which would make removal unjustifiably harsh, and this was demonstrated in paragraph 49 of the determination.
15. Mr Smart’s position was that if there was an error of law, then it was not material to the outcome.

The Appellant's Response

16. Mr Vokes contended that Mr Smart was inviting me to read into the determination words that were not there. Mr Vokes' position was that the judge had clearly recorded that the Appellant had no leave to remain, and that was wrong.
17. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

18. The criticisms of Judge Lloyd relate to paragraphs 40 and 48 of the determination which I set out below for ease of reference;
 - “40. I find she has established private/family life with which removal would interfere albeit lawfully as she has no leave to remain and necessarily in the interests of the maintenance of immigration control.
 48. I take into account all the evidence including the years in the UK where she studied and has community and family ties but I note also that the Appellant is a mature adult who no longer has leave, whose husband's limited leave expires in just over a year and who also has family links to Zambia where she married in August 2012.”
19. The judge erred in recording that the Appellant did not have leave. The Appellant no longer had leave as a student, as her leave expired on 8th October 2012, but the Appellant submitted her application for further leave to remain on 26th September 2012, before the expiry of her leave. The correct position is as submitted by Mr Vokes, that the Appellant therefore had leave extended by section 3C of the Immigration Act 1971, while her appeal was being considered.
20. I do not find that the judge erred materially. In my view, it is clear from reading the determination that the judge was well aware of the correct position.
21. In paragraph 26 the judge recorded submissions made on behalf of the Appellant in which her representative referred to factors that should be taken into account in the Appellant's favour, and made reference to there being no illegality or criminality. In paragraph 28 the judge recorded that she found no material discrepancy in the facts which she accepted save 2 points. Those 2 points did not relate to the Appellant being an overstayer or being in the United Kingdom without leave. This therefore is an indication that the judge accepted that the Appellant had not remained in the United Kingdom illegally.
22. The judge in paragraph 30 referred to the Appellant's application form, and it is apparent that she had considered that form carefully. The application form at page 11, which is page A7 of the Respondent's bundle,

indicated that the Appellant had valid leave until 8th October 2012. I am satisfied that the judge was aware of that.

23. The judge had clearly considered the Respondent's Notice of Refusal dated 19th December 2012, in which the Respondent confirmed that the Appellant on 8th December 2009 was granted further leave to remain in the United Kingdom as a student until 8th October 2012, and on 26th September 2012 the Appellant had made an application for further leave to remain in the United Kingdom. It was therefore clear from the Respondent's decision that the Appellant was not regarded as an overstayer, and had made her application for leave to remain prior to the expiry of her existing leave.
24. I take Mr Vokes' point that this was not what the judge recorded in paragraph 40 but I am satisfied that although the judge erred in phraseology, she was aware of the true position, in that the Appellant, although she no longer had leave to remain as a student, had leave extended by section 3C of the Immigration Act 1971.
25. In my view the judge in paragraph 40 was considering the third question in the five stage approach advocated in Razgar [2004] UKHL 27, when considering whether interference with family and/or private life was in accordance with the law. The Respondent's decision was in accordance with the law because the Appellant, and this was accepted on the Appellant's behalf, could not satisfy the Immigration Rules. Although this was not correctly recorded by the judge, I do not conclude that the judge regarded the Appellant as an overstayer.
26. The judge went on to consider the fourth and fifth stages of the Razgar guidance and considered whether the proposed interference with the Appellant's private and family life was necessary for the reasons set out in Article 8(2) of the 1950 Convention, and went on to consider proportionality in paragraphs 41 - 49. In my view the judge carried out a comprehensive proportionality assessment. In paragraph 48 she made the same mistake as in paragraph 40 by referring to the Appellant no longer having leave, but on reading the determination as a whole, I am satisfied that the judge was referring to the Appellant no longer having leave as a student, and the judge noted in paragraph 46, that the Appellant had completed her masters degree which was the reason why she had applied for further leave as a student.
27. The judge considered the appropriate case law, and did not omit to consider any material factors, and did not take into account immaterial factors. I am satisfied that the judge in conducting the proportionality assessment was aware that the Appellant had not overstayed in the United Kingdom illegally, and did not make any adverse inference against the Appellant on this issue.
28. The determination is comprehensive and adequately reasoned and contains no material error of law.

Decision

The making the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that it must be set aside.

I do not set aside the decision. The appeal is dismissed.

Anonymity

No order for anonymity was made by the First-tier Tribunal. There has been no request for anonymity and the Upper Tribunal makes no anonymity direction.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

9th June 2014

**TO THE RESPONDENT
FEE AWARD**

The appeal is dismissed. There is no fee award.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

9th June 2014