



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

Appeal Number: IA/17723/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 20<sup>th</sup> January 2015**

**Determination Promulgated  
On 9<sup>th</sup> April 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MCCLURE**

**Between**

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

Appellant

**and**

**MISS THAI HAI HA TRAN  
(NO ANONYMITY DIRECTION MADE)**

Claimant

**Representation:**

For the Claimant: Ms Tran attended in person

For the Respondent: Mr Shilliday, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The claimant, Miss Thai Hai Ha Tran date of birth 11th of November 1981, is a citizen of Vietnam. I have considered whether or not any of the parties to the present proceedings requires the protection of an anonymity direction. Having considered all the circumstances I do not make such a direction.
2. This is an appeal by the Secretary of State against the decision by First-tier Tribunal Judge Hawden-Beal. For the purposes of the present proceedings I refer to Ms Tran as the claimant so as not to confuse the

parties in any reference to original determination, in which she was the appellant.

3. The claimant made application to remain in the United Kingdom on the basis of long residence and on the basis of Article 8 private life. By decision taken on 24 March 2014 the Secretary of State refused the claimant's application and made a decision to remove the claimant from the United Kingdom. The claimant appealed against the decisions taken by the Secretary of State. The appeal was heard by Judge Hawden-Beal on the 2<sup>nd</sup> October 2014.
4. By the determination promulgated on 17 October 2014 the judge allowed the claimant's appeal on Article 8 private life grounds only. The appeal on immigration grounds was dismissed.
5. By decision made on the 2 December 2014 leave to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge McDade to the Secretary of State. Thus the matter appears before me to determine in the first instance whether or not there is an error of law in the original determination.
6. The grounds of appeal seek to argue two issues, namely:
  - a) That the judge has misdirected himself in that he has allowed the appeal on Article 8 grounds on a near miss basis, that is, as the claimant in the main meets the requirements of the Immigration Rules the appeal should be allowed by reason thereof.
  - b) That the judge has failed to apply section 117 B of 2002 Act as amended correctly. It is asserted that the judge has considered the period of time that the claimant has been in the United Kingdom and has failed to notice that that period has all been whilst the immigration status of the claimant has either been unlawful or precarious and as such little weight should be given to the private life acquired during that period of time.
7. There is a rule 24 response. I have in coming to a decision in this matter considered all of the documents and evidence presented and examined with care the determination by the First-tier Tribunal Judge.
8. The claimant first arrived in the United Kingdom in 2003. She has not left the United Kingdom since that date. The claimant has had lawful leave to remain for most of that period. However for the period between June 2010 and 9 November 2011 there was a gap in her lawful leave to remain in the United Kingdom. I draw attention to paragraph 12 of the determination, in which detail is given to the circumstances.
9. As stated the claimant arrived as a student in 2003 and had her leave extended at various stages until July 2009. At that stage an application to extend was made but that application was refused and her appeal against that the refusal was dismissed in December 2009. It is indicated that there

were onward appeals but these were finally dismissed on June 11, 2010. As of 11 June 2010 the claimant had no leave to remain in the United Kingdom. For the period December 2009 to June 2010 the claimant's leave would be extended in accordance with Section 3C of the 1971 Immigration Act.

10. There is then a break of 16 months before the appellant was granted further leave.
11. It appears as set out in her statement that the claimant had been studying at college and there was no issue with regard to the claimant being a genuine student, attending diligently and working assiduously. However, after the claimant had made an application for further leave, the college, at which she was studying, was taken off the register of approved sponsors. The college having been taken off the register the claimant's application was refused. As set out below some responsibility for the break in lawful leave may lie with the claimant, who at material times may have submitted her application and documents late.
12. Subsequent to the appeal involving the claimant being dismissed, cases such as Thakur 2011 UKUT 151 and Patel 2011 UKUT 211 have dealt with similar issues, where through no fault of an applicant he or she found that they were no longer able to continue their studies. The applicants concerned were to be given a further short period of leave to enable them to make a fresh application. That course was not taken in the claimant's case, it may be in part because one or other application made by the claimant was late. Had that been done it may be that the period without leave would have been reduced.
13. In order to succeed on the basis of long residence under the immigration rules the claimant was required to have 10 years continuous lawful residence. Short breaks in such lawful residence were permitted but not breaks of 16 months. There was a discretion under the rules whereby the Secretary of State could consider whether or not in the circumstances to allow the application. The judge correctly within the determination has considered the application of the rules and the exercise of the discretion. The judge has come to the conclusion that the claimant does not meet the requirements of the rules and that the refusal to exercise the discretion was justified in the circumstances.
14. In coming to that decision the judge noted that during the period of the gap in lawful residence the claimant may have made applications late and may be in part responsible for the gap in lawful residence. Before me the claimant and her partner sought to explain that having had the application refused because the college lost its licence, other problems than arose with changes in the rules and the requirements of the rules as to the dates that bank statements had to cover, the dates and details on the CAS and other documentary requirements resulting in the claimant having to submit applications and supporting documents and then having to resubmit another application with different documents because of the

changes. The claimant indicated that she was receiving help from one or other college at which she had been studying and still the problems with the documentation because of the changes in the rules arose. It appears that even the colleges themselves were uncertain as to what documents were required.

15. Ultimately, having marshalled the documents needed for the application, a valid application was made, the claimant was given leave and commenced studying on a degree course at the University of Bedfordshire. At the time of the grant, the claimant was in the second year of her three-year degree course having lodged an application which was granted in November 2011.
16. It appears to be accepted that the total period without leave was 16 months.
17. The judge having considered all the circumstances, as stated, found that the claimant did not meet the requirements to be granted leave on the basis of long residence and found that the refusal to exercise discretion in favour of the claimant was justified.
18. The judge thereafter went on to consider Article 8 outside the rules on the basis of private life. It is at this point that it is suggested that the judge has applied a near-miss principle to the case. The judge in the course of the determination makes reference to the fact that the appellant had some nine years and seven months lawful leave and that by comparison the 16 months without leave was relatively a short period.
19. There was a skeleton argument on behalf of the Secretary of State before the judge and that issue was specifically addressed.
20. I do not accept that the judge has applied a near miss principle. The judge has not merely stated that because the claimant has nearly met the requirements of the rules and there is a relatively short period of time for which the appellant did not have valid leave, she was allowing the appeal. The judge has considered all of the circumstances in assessing article 8. The length of time that the claimant has been in the United Kingdom and the lawfulness of that length of time is a material factor. It is a fact that the judge is required to take into account, albeit in accordance with section 117B of the 2002 Act, it may be that little weight has to be given to such. However it is certainly a factor that has to be taken into account. The judge has gone on to consider other factors such as the commitment that the claimant had to her education; the relationship that the claimant had with her partner; the business that the claimant has established; the work that she has undertaken in establishing that business. The judge has also considered various references from people, who know the claimant, with regard to the claimant's integration into the United Kingdom.
21. Besides the factors set out in 117 B (4) section 117 also requires consideration to be given to other factors such as the ability of an

individual to speak English and the ability to maintain oneself, the judge has considered such factors. In such circumstances I do not accept the judge has applied a near miss principal. The judge has considered many other factors in considering the Article 8 exercise, as she was obliged to do.

22. The second point raised relates to paragraph 29 of the determination and section 117A - B of the 2002 Act as amended [specifically subparagraphs (B) (4) and (5)]. Section 117 provides: --

117A Application of this part

- 1) This part applies where a Court or Tribunal is required to determine whether a decision made under the Immigration Acts-
  - a) breaches a person's right to respect for private and family life under Article 8 , and
  - b) as a result would be unlawful under section 6 of the Human Rights Act 1998
- 2) In considering the public interest in question, the court or tribunal must (in particular) have regard-
  - a) in all cases, to the considerations listed in section 117B,  
...
- 3) In subsection (2), “ the public interest question” means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8 (2)

117B Article 8: public interest considerations applicable in all cases

- 1) The maintenance of effective immigration control is in the public interest.
- 2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, the persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English-
  - a) are less of a burden on taxpayers, and
  - b) a better able to integrate into society.
- 3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent because such persons-
  - a) are not a burden on taxpayers, and
  - b) a better able to integrate into society

4) Little weight should be given to-

a) a private life,

b) a relationship formed with the qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully

5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

6) .....

23. Firstly in respect of section 117B (1-3) the judge is required to take into account specific factors. It is clear from the determination that the judge has taken those factors into account.

24. It is argued on behalf of the Secretary of State that in paragraph 29 of the determination the judge has failed properly to apply the provisions of section 117B.

25. The material part of Paragraph 29 deals with the issue of proportionality and Section 117 provides:-

... But is it proportionate? She was here lawfully for 2003-10 and from 2011 to date which, excluding the 16 months when she was without leave amounts to 9 years and seven months. She has studied throughout almost all of that time and has now started a business. She is not dependent upon public funds can speak English which are the considerations under the public interest question now posed in section 117B of the 2002 Nationality, Asylum and Immigration Act. I accept that her private life during the 16 months when she had no leave to be here, was continuing when her status was precarious accordingly I am obliged to place little weight on that period of time but that 16 month period is a drop in the ocean when compared to the 115 months she has been here lawfully.

26. First and foremost in dealing with the period of leave that the claimant had the judge has failed to notice that part of the period falls into subparagraph (4) as the appellant did not have any lawful leave to be in the United Kingdom for a period of 16 months. The judge has miscategorised that as precarious, when in fact it should be considered to be unlawful. Whether that makes any difference is doubtful as in either case the statutory provision requires that little weight is to be given to such.

27. It is submitted that the judge has failed to take account of subparagraph (5) in looking at the whole of the period that the claimant was in the United Kingdom. It is argued that the statutory provisions mean that little weight should be given to any private life acquired during the whole of the period in the United Kingdom as the claimant's status was for the

remaining period to be categorised as “precarious”. Whilst the claimant was in the UK for the period of 115 months in total, adding together the periods of leave before and after the break in the leave, it is submitted that her status was precarious throughout the whole of that period. .

28. It is the Secretary of States argument that the claimant clearly had been in the United Kingdom since 2003 and that her status was precarious throughout. On behalf of the Secretary of State it was contended that the intention of the section was that only a person with indefinite leave to remain or with a right to reside as a citizen had a status that was not precarious and that anything less than that meant that the person's immigration status was precarious.
29. Arguably if it had been the intention of the Parliament that only a person with indefinite leave or more permanent status than that should have account or weight given to any private life acquired during that period of time, the statutory provision could have stated such in specific terms. Instead the term used was precarious. In one sense any status is precarious in that it can be brought to an end or maybe terminated or deportation proceedings commenced or the leave revoked.
30. However it is argued that the immigration status of an individual being defined to a set period, such as a student with three years leave to study on a degree level course, is defined and therefore not precarious. Unless action is taken the student will be entitled to remain for three years and complete his degree course. From that point of view his immigration leave as a student is fixed.
31. Precarious indicates that something is not securely held or not securely in position or alternatively is dangerously likely to fail or collapse or uncertain or dependent on chance.
32. It is a person’s status that is precarious and not the leave that they have. The provisions in Section 117B are related to the immigration status and clearly intended to look to the prospect of having a right to remain at the end of any period of leave because of the establishment of private life in the UK. Where in the normal course of events a person’s leave would have to be renewed and is therefore of limited duration the prospects of being able to remain are uncertain and therefore precarious. The term status requires that one looks at the prospects of an individual having a right to remain. Anything less than a continuing right to remain is not secure and is precarious.
33. In that context I take the term precarious to mean that anything less than indefinite leave would subject a person to the need to apply to renew and continue their immigration leave and therefore any leave less than indefinite leave renders a person’s status as precarious.
34. In failing to treat the claimant’s status as precarious and therefore apply the provisions of section 117B to it the judge has made a material error of

law in assessing Article 8 of the ECHR. The assessment of article 8 has to take account of the impact of section 117B and the section is applicable to the whole of the period that the claimant was in the UK.

35. At the hearing before me I invited submission as to how, if I found that there was an error of law, the case should be disposed of.
36. It was accepted that I had all the evidence before me upon which an assessment of Article 8 private life would be made. I am satisfied in the circumstances that I can justly determine the appeal on the basis of the evidence before me.
37. I note the information recorded in the determination. I note in paragraphs 15 and 17 the claimant's friends, her relationships in the UK and the degree of integration. I note the information in paragraph 16. It is to be noted that the claimant commenced her business after her last application was refused. The claimant commenced her business knowing that at that time she had no status. I take account of the evidence before the First-tier Tribunal.
38. In assessing Article 8 there is clearly no family life in the UK. The claimant has to rely upon private life. Her business was established at a time when she was aware that she had no status or right to remain. Whilst otherwise the claimant refers to friends and the difficulty that she would have in keeping in touch, that would always be the case where an individual has been in a country for such a length of time. Whilst the claimant is in a relationship with a Mr Taylor, they do not live together and they are not married. I take account of the fact that the claimant has been running her business for some time.
39. The claimant clearly has established a private life in the UK. The decisions will clearly interfere with that private life. For the reasons set out in the original determination the decisions are in accordance with the law and for the purpose of maintaining immigration control, as an aspect of the economic well-being of the country.
40. The issue finally to be determined is whether the decision is proportionately justified. Taking account of all the evidence submitted and taking account of section 117B, I find that the decision by the Secretary of State is proportionately justified. In coming to the decision indicated I take account of all the evidence advanced on the claimant's behalf and section 117 of the 2002 Act.

#### Decision

41. The First-tier Tribunal Judge made a material error of law and I substitute the following decision:
  - a) I dismiss this appeal on Immigration Rules grounds.
  - b) I dismiss this appeal on Human Rights grounds.



- c) I make no fee award.
- d) I make no anonymity direction.

Signed

Date **1<sup>st</sup> April 2015**

Deputy Upper Tribunal Judge McClure