Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/38435/2010

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd September 2015	**On 14th October 2015**

Before

THE PRESIDENT, THE HON. MR JUSTICE MCCLOSKEY
UPPER TRIBUNAL JUDGE LINDSLEY

Between

MISS BIBI NABEELAH FARAH JUMAN
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Harris, Counsel instructed by Raj Law Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Mauritius born on 23rd August 1985. She arrived in the United Kingdom on 24th December 2004 as a visitor. She made attempts to vary her leave to remain as a student to attend three different colleges which were unsuccessful and overstayed following refusal of the application to remain with the second college. She then made an application on the basis that to remove her would be a breach of her Article 8 ECHR rights, on 24th August 2010. On 7th

October 2010 this application was refused with a right of appeal which she exercised.

2. Her appeal was dismissed by Judge of the First-tier Tribunal K S H Miller in a determination promulgated on 28th February 2011. Permission to appeal was granted by Upper Tribunal Judge Chalkley on grounds limited to challenging the decision in respect of her private life. Upper Tribunal Judge Perkins found an error of law by the First-tier Tribunal but re-made the appeal dismissing it once again in a decision promulgated on 25th October 2011.

3. Permission to appeal to the Court of Appeal was refused by the Upper Tribunal but granted at an oral renewal hearing on 26th November 2012 by the Court of Appeal by Lord Justice Ward on the basis that as although he thought that "this still looks pretty hopeless to me" he was "troubled that there may have been serious maladministration by the Secretary of State that it would be wrong to have such weight placed on the applicant's failure since 2008 to do much about her position and to weigh that against the serious delay on the Home Secretary's part." The parties then agreed to an order by consent on 14th January 2013 that the appeal be allowed to the extent that the re-making decision of Upper Tribunal Judge Perkins be quashed and the matter remitted to the Upper Tribunal limited to consideration of the appellant's claim to remain in the UK on the basis of her private life pursuant to Article 8 ECHR.

4. The matter therefore comes before us to remake the appeal under Article 8 ECHR, limited to the matter of the appellant's private life, in accordance with the grant of permission by Upper Tribunal Judge Chalkley and the finding of an error of law by Upper Tribunal Judge Perkins.

Evidence & Submissions

5. Most of what we recite in the following section of our decision is uncontentious. In evidence, the appellant adopted her witness statement and confirmed it was true and correct. In her statement and in her oral evidence, and also relying on the history in the chronology provided by her solicitors her history is as follows.

6. The appellant had come to the UK aged 19 years in December 2004 with the intention of studying travel and tourism at Best Care College with a visit visa valid for six months. She applied to vary her leave to remain to study at this college on 22nd April 2005. However the college had misled her and the course she chose was not a degree course and so did not meet Home Office requirements and her application was rejected.

7. The appellant then made a second, in time, application to remain to study for a degree in travel tourism and hospitality at LUMT college on 8th June 2005. Her leave as a visitor expired on 23rd June 2005. This application was refused by the respondent on 13th July 2005 on the basis that she could not switch from visitor to student due to her nationality and she was given no right of appeal. This was a decision which the appellants says was wrong as she was not a visa national, and so could switch, however having sought legal advice from the Immigration

Advisory Service (IAS) she decided not to appeal as in fact LUMT did not have a certificate to show it had degree awarding powers so the appellant would have been unable to win her appeal under the Immigration Rules on that basis even had she been properly granted one.

8. Instead the appellant made a new application to remain with William Shakespeare College to study for a degree in travel, tourism and hospitality. She enrolled with them on 20th July 2005 and made an application to the respondent via IAS on 26th July 2005. Unfortunately this college was unsatisfactory from an educational perspective; and in any case the appellant was refused permission to remain to study on the basis of this third application by the Home Office. However the Home Office did not inform either the appellant or her representatives of the refusal (despite efforts by both to discover the fate of the application) but instead sent the refusal letter to her previous college LUMT. When the decision and what had happened to the refusal was eventually communicated to IAS in August 2008 the appellant tried to obtain her documents and discovered that LUMT had in fact been closed down.

9. Around the same time, August 2008, the appellant ceased to attend William Shakespeare College, whose licence was suspended after she left by the respondent. The appellant then found it impossible to register with any further colleges as she had no leave to remain and has not studied in the UK since this time as a result.

10. The appellant had understood that she was lawfully in the UK during the process described above; she had honestly attempted to resolve her status as a student, and felt her family had made a great sacrifice in terms of school fees and assisting her to sort out leave to remain in the UK on this basis. She estimated that they had spent about £6000 on her travel costs, school fees and application fees to the Home Office and all for nothing. She did not see why in these circumstances she should return to Mauritius to apply to remain as a student in the UK. She has reported to the Home Office regularly every month since 2010 from which time it was clear to her she was seen as an overstayer in the UK. She felt that the Home Office had subjected her to long delays.

11. Although the appellant had not managed to study whilst in the UK she had dedicated her time to helping her sister and brother-in-law with their three children who were three, four and eleven years old when she arrived, and who are now 14, 16 and 22 years old. She has always shared their bedroom and has become very close to them. She has taken them to school, helped with homework, shared holidays and taken them out. She has also helped with housework. Her closest family member is her sister: they grew up together and have spent the past 11 years living together. She has never worked in the UK and is financially dependent on her sister and brother-in-law. If she had work permission she is certain she could obtain employment as a carer with her brother-in-law's employer. She believes she would be an asset to the UK if she were allowed to remain.

12. In Mauritius the appellant's only relatives are her mother who lives in her own home and two sisters who are married and have separate lives, but who are there to care for her mother.

13. Mr Harris submitted that there had been what might be termed maladministration by the respondent. Wrong decisions had been made, such as refusing the second student application without a right of appeal on the basis the appellant was a visa national and sending the third refusal to the second college that had been closed down. In addition the respondent had failed to communicate the third and final student refusal effectively until August 2008, some three years after the application was made. He further contended that it is arguable that there never was good service of this decision. The appellant had shown persistence in her attempts to study in the UK and he argued, had been encouraged in her applications by the respondent. She had remained in the UK because she had invested in these attempts and formed progressively stronger bonds with her UK based family.

14. Mr Harris submitted that s.117B(4) and (5) of the Nationality, Immigration and Asylum Act 2002 (henceforth the 2002 Act) did not mean that mean that it was not possible to have regard to matters such as delay in accordance with EB(Kosovo) v SSHD [2008] UKHL 41 and the Chikwamba v SSHD [2008] UKHL 40 principle and that this is consistent with what is said in Deelah and others (section 117B – ambit) [2015] UKUT 00515 (IAC) at paragraph 20 where it is said that these provisions are drawing on existing Strasbourg and domestic jurisprudence.

15. Mr Melvin submitted that the appellant could not succeed under the Immigration Rules relating to Article 8 ECHR at paragraph 276ADE because she had not completed 20 years leave to remain and, alternatively, she had not shown that there would be very significant obstacles to her integration in Mauritius.

16. Mr Melvin submitted that there were no compelling circumstances which needed consideration outside of the Immigration Rules however even if an examination was undertaken she could not succeed in this way. The appellant had remained in the UK unlawfully since June 2005 when her leave to remain as a visitor expired. He submitted that little weight should be given to any private life she had established whilst her leave was precarious or she was remaining unlawfully in accordance with s.117B(4) & (5) the 2002 Act, and the Tribunal must also be guided by the decision of the Upper Tribunal in AM (s.117B) Malawi [2015] UKUT 260 in this respect. There was also insufficient evidence before the Tribunal that the appellant could succeed if regard was had to the other matters under s.117B of the 2002 Act such as her ability in English, integration into UK society and self-sufficiency.

17. Mr Melvin argued that it was doubtful that delay could be a significant factor given what was said in Dube (s.117A-s.117D) [2015] UKUT 90 in the context of the new legislative framework set out in s.117B of the 2002 Act. Mr Melvin stated that the Secretary of State did not accept that there was evidence of maladministration in this case. If colleges had let the appellant down that was a matter between her

and those colleges and not something which obliged the Secretary of State to compensate for: see EK (Ivory Coast) v SSHD [2014] EWCA 1517.

18. In conclusion Mr Melvin submitted that the appellant is a healthy, 30 year old citizen of Mauritius who could return to other family members in her country of nationality and if necessary be supported by her sister and brother-in-law in the UK. She had not undertaken any studies in the UK and has remained here unlawfully. It is clear that the public interest in immigration control outweighs the private life of this appellant.

Conclusions

19. The appellant cannot succeed under the only sub-paragraph 276ADE of the Immigration Rules which might apply to her, 276ADE(vi), and thus does not satisfy the private life provisions within the Rules. This is because although she has been in the UK for 11 years and nine months she has not shown that there would be very significant obstacles to her integration in Mauritius. Indeed she has indicated that her mother and two married sisters still live in that country and given no reasons why she would not be able to study or obtain work or re-establish her private life in that country.

20. Given the history of this matter we consider that it is appropriate to consider whether the appellant might succeed if Article 8 ECHR is examined outside of the Immigration Rules while having regard to all the matters set out in s.117B of the 2002 Act. We are satisfied that the appellant has private life in the UK having lived here for the past 11 years and having formed close bonds with her sister, brother-in-law and their three children. We are also satisfied that if she were to leave the UK this would interfere with that private life. As the appellant cannot meet the requirements of the Immigration Rules that interference would, of course, be in accordance with the law.

21. It remains to consider whether the inference would be proportionate. In this context and at this stage it is appropriate to consider whether the appellant has been treated unfairly by the respondent in any way. It is clear that the conduct of the colleges in having made misrepresentations about their degree-giving abilities or having been of a poor educational standard are not matters for which the Secretary of State can be held responsible: as was said by the Court of Appeal in EK (Ivory Coast) if the colleges failed the appellant then her remedy is against them.

22. In terms of the error made by the Secretary of State in not giving the appellant a right of appeal against her second student application she clearly acknowledges that that appeal would not have succeeded as her own advisers (the reputable IAS) had told her as much. It is therefore clear that the appellant overstays her leave and makes a third out-of-time student application due to no fault of the respondent.

23. It is argued that the third, out-of-time, application to remain as a student was pending for a very long period (three years) as far as the appellant was concerned,

as the refusal was wrongly sent to the second college. It is argued that this represents unreasonable delay by the Secretary of State and an element of maladministration. Ultimately even if the respondent had failed in the way argued for we find it had no real effect on the appellant with respect to her studies as she did not wish to continue to study at this third college due to their poor educational standards and was already an overstayer due to issues with her first two colleges. Even if the Secretary of State had dealt with the matter promptly and communicated the refusal effectively to the appellant and her representatives she would have still found herself an overstayer in the UK who was unable to enrol with another educational institution due to her lack of leave to remain.

24. It is notable that the appellant has not shown that she has any intention to resume her studies, in that she did not present an intention to continue a course of study if allowed to remain in the UK but instead suggests that she would work as a carer. Clearly her life has moved on in this respect. In these circumstances we are not persuaded that Chikwamba has any bearing on the situation. This is not a case where the appellant attended the Tribunal able to show that she would meet the Immigration Rules as a student with a freshly prepared application and was being forced to return on a pointless trip to Mauritius to obtain entry clearance as a Tier 4 (student) migrant which would inevitably be granted.

25. In relation to delay it is arguable that in accordance with the principles in EB (Kosovo) less weight should be given to immigration control in this case due to the respondent's dilatory approach to communicating the third refusal to the appellant and because this delay made the appellant feel that her situation was more stable than her status would otherwise have indicated. However, even assuming that these are factors that remain material, it is clear from Dube that consideration must be given to s.117B of the 2002 Act in full.

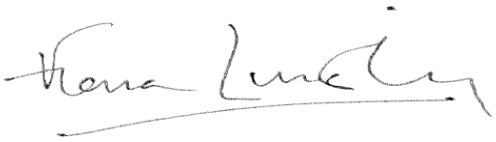
26. We therefore turn to s.117B of the 2002 Act as the starting point for the consideration of the proportionality discussion. We start from the proposition that effective immigration control is in the public interest and note that the appellant cannot meet the requirements of the Immigration Rules. It is clear that the appellant is able to speak excellent English, is not a burden on taxpayers and although not currently financially independent would be supported by her family and if allowed to remain would be likely to obtain employment. These are the positive factors on the Appellant's side of the scales. However, on the other hand, it is unarguable that the entire of the appellant's time in the UK has been with precarious leave (her initial visitor leave was for six months) or unlawful status (since the refusal of the second student application). As such in accordance with s.117B(4)(a) and (5) little weight should be given to her private life established in the UK. As set out at paragraph 21 of Deelah these are not simply matters to which this Tribunal must have regard but are factors which unanimously qualify for the allocation of little weight.

27. Whilst giving consideration to the strong private life bonds the appellant has to her UK based family having lived with them for the past 11 years; and whilst giving some weight to the fact that she may for a period of time between 2005 and

2008 have been given the impression that her status was less impermanent than it truly was due to the Respondent's inaction and the mistaken service of the third student refusal on her previous college the conclusion we reach is that the interference with the appellant's private life by requiring her now to leave the UK is proportionate. In short, the public interest in play prevails by some measure.

Decision:

1. The First-tier Tribunal erred in law.
2. The decision of the First-tier Tribunal is set aside.
3. We re-make the decision in the appeal by dismissing it under the Immigration Rules and on human rights grounds outside of these Rules.



Signed: Date: 6th October 2015
Upper Tribunal Judge Lindsley