



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

Appeal Number: IA/49325/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 30 January 2015**

**Determination & Reasons Promulgated
On 21 April 2015**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHEEBA RUBINA MAURICE

Respondent

Representation:

For the Appellant: Mr I Jarvis, Home Office Presenting Officer

For the Respondent: Ms A Smith, Counsel instructed by Wesley Gryk Solicitors

DETERMINATION AND REASONS

1. The appellant in these proceedings is the Secretary of State. However, it is convenient to refer to the parties as they were before the First-tier Tribunal.
2. Thus, the appellant is a citizen of Pakistan born on 22 May 1974. She initially arrived in the UK on 2 August 2005 with valid leave as a student. The further background to her appeal is set out below.

3. On 13 November 2013 the respondent made a decision to remove the appellant under Section 10 of the Immigration and Asylum Act 1999. Her appeal against that decision was heard by First-tier Tribunal Judge Oliver on 12 August 2014, whereby he allowed the appeal on human rights grounds with reference to Article 8 of the ECHR. Permission to appeal having been granted against that decision, the appeal came before me.
4. Judge Oliver's determination contains a comprehensive statement of the appellant's immigration history, that history not having been disputed by either party. Taking the background facts as set out by Judge Oliver, it appears that on 7 June 2013 the appellant applied for leave to remain on Article 8 grounds outside the Immigration Rules. The application was returned on 11 June 2013 because an incorrect fee had been submitted. A further application with the correct fee was submitted on 14 June 2013. In the letter accompanying the application the appellant's solicitors explained that she was no longer qualified as a Tier 2 migrant because her employer had inadvertently lost his sponsorship licence, leading to the curtailment of her leave. The renewed application was refused on 23 July 2013 with no right of appeal because the appellant's leave had expired on 12 June 2013.
5. On 30 August 2013 a further application was made. Accompanying the application was a letter from the appellant's solicitors explaining that because of a clerical error the firm's cheque had been written out in the sum of £561 instead of the correct figure of £578, for which they took responsibility. The application of 30 August 2013 was refused on 15 September 2013. Given that her leave had expired on 12 June 2013, she did not have leave at the time of her application and therefore had no right of appeal.
6. Following a letter before (judicial review) action, the Section 10 decision dated 13 November 2013 was issued. After some disagreement between the appellant's solicitors and the Secretary of State about whether the appellant had an in-country right of appeal, it appears to have been accepted that the appellant did have an in-country right of appeal. It is not now suggested that Judge Oliver had no jurisdiction to hear the appeal.

The determination of the First-tier Tribunal

7. At [11] Judge Oliver stated as follows:

"The facts of the case are not in dispute. The appellant arrived in the United Kingdom on 2 August 2005 with leave as a student. She was unable to complete her studies because her father developed cancer and she devoted herself to looking after him. He died on 2 November 2006. She continued to live with her mother as the dependant of her brother, Asif, who was married to a French wife who was exercising treaty rights. The appellant was granted leave to remain to study for a Masters degree in marketing with leave valid to 23 June 2009, after which she was granted three years discretionary leave to remain as a post-study worker. In 2010 she was employed by Kappa Management as a Tier 2 general sponsored migrant and on 17 July 2012 was granted leave to remain to 15 August 2015. It was during the course of this period of leave, however, that Kappa Management, by now known as Khi Management International,

lost their sponsorship licence because the officer responsible for this left their employment and in error no one took over the role. The emails from the respondent, reminding the company of the need for renewal, had gone unnoticed. The sponsorship expired on 12 February 2013 and it was in these circumstances that the respondent took the decision to curtail the appellant's leave, because she no longer met the requirements of leave as a Tier 2 migrant. She was given 60 days grace until 12 June 2013."

8. Judge Oliver made a number of findings of fact. He concluded at [20] that the appellant and her family were honest witnesses upon whose evidence he could rely. At [22] he concluded that her family life with her close family members in the UK involved more than the usual dependency among adult siblings and that removal to Pakistan would involve an interference with her family life sufficient to engage Article 8. In the same paragraph he concluded that her private life could not realistically be easily replicated in Pakistan.
9. Judge Oliver found that the appellant has a good command of English, is not a burden on the taxpayer and has clearly already integrated into society. She is not relying on a relationship formed while her status was precarious. He found that her status has always been lawful [23].
10. He dismissed the appeal on asylum and humanitarian protection grounds, as well as under the Immigration Rules. However the appeal was allowed on human rights grounds with reference to Article 8 of the ECHR.

Submissions

11. At the start of the hearing Mr Jarvis made an application to amend the grounds of appeal to include an argument to the effect that Judge Oliver had erred in law in treating the appellant's circumstances as one involving a 'near miss'. This was with reference to [24] of the determination where he had said that although there is no place for a near-miss, the re-application was a continuation of the original application, that it was in time and attracted an in-country right of appeal. I refused the application, taking into account that permission to appeal was granted as long ago as 16 December 2014 and the respondent was notified soon thereafter. I considered that if the point was thought to be of such importance it should have been the subject of an application to amend the grounds before the day of the hearing. It is important that in an appeal from a decision of the First-tier Tribunal, the parties know in advance of the hearing before the Upper Tribunal what points are to be argued or relied on. This was not an appropriate case in which to grant permission to amend the grounds.
12. Otherwise, Mr Jarvis relied on the written grounds. It was submitted that although the First-tier Judge did refer to Sections 117A-B of the Nationality, Immigration and Asylum Act 2002 as amended ("the 2002 Act") those provisions had not been applied properly. Section 117B(5) states that little weight should be given to private life where an appellant's status is "precarious". That includes a case where a person only has a temporary form of leave.

13. In accordance with Nasim and others (Article 8) Pakistan [2014] UKUT 00025 (IAC) the only expectation that the appellant could have had was to be given a further period of limited leave. The First-tier Judge had dealt with the appeal outside the Immigration Rules as a free-ranging exercise which was impermissible.
14. Mr Jarvis said that although perhaps surprising, the judge's finding that the appellant has family life in the UK had not been challenged.
15. In reply Ms Smith submitted that the respondent had failed to identify any error of law in relation to the assessment of proportionality. Judge Oliver had considered the documentary and oral evidence and the respondent's arguments amount only to disagreements with the judge's decision. Paragraphs 2-6 of the grounds are simply generic. The application by the appellant was made outside the Article 8 Immigration Rules and therefore the judge was right to look at Article 8 proper. The judge had considered relevant authorities.
16. If Section 117(B)(5) was meant to exclude any reliance on temporary leave, it was open to Parliament to have said so in the legislation. Furthermore, the expression "little weight" does not mean that no weight should be given to private life established at a time when the person's immigration status is precarious.
17. This is not a case which is comparable to the decision in Nasim and is not a near-miss case in terms of family or private life. There is no challenge to the judge's other factual findings. It was no fault of the appellant that her leave was curtailed. It was an administrative error by the management of the business that she worked for that the sponsor licence was not renewed. In addition, there was a clerical error by the appellant's solicitors in writing a cheque for the wrong amount in the earlier application. But for those circumstances, the appellant would have continued to enjoy lawful residence. This reduces the weight to be attached to immigration control in her case.
18. In reply Mr Jarvis submitted that if the judge was going to consider the matter outside the Immigration Rules he had to do that with reference to the fact that the appellant had failed to meet those rules under Appendix FM. Immigration control is not lessened by reason of the fact that there were matters outside the appellant's control.

My assessment

19. As already pointed out, Judge Oliver's conclusion that the appellant has family life in the UK has not been the subject of any challenge, albeit that on one view it might have been. Nevertheless, I proceed on the footing that there is no error of law in his assessment in that regard.
20. Although the First-tier Judge who granted permission to appeal considered that Judge Oliver had failed to have regard to the public interest considerations set out in Section 117B of the 2002 Act, in his assessment of proportionality, that is not correct.

Judge Oliver expressly referred to Sections 117A-B and considered them, at [23] of the determination.

21. I do not consider that it could be said that Judge Oliver did not have proper regard to the relevant provisions of the amended 2002 Act, contained in Sections 117A-B. Aside, as I have already mentioned, from the fact that he referred specifically to those sections, he noted that the appellant has a good command of English, is not a burden on the taxpayer and has clearly already integrated into society. He was thus entitled to conclude, to use his words, that “the appellant emerges very well from the application of the principles set out” in the amendments to the 2002 Act.
22. Mr Jarvis submitted that the word “precarious” in Section 117B(5) includes persons with temporary leave. Section 117B(5) provides that:

“Little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.”
23. Ms Smith on the other hand contended that if it was intended that this should include persons with temporary leave, the statute would say so. There is some merit in that submission in my view, although it does not provide a complete answer to the question of whether persons with temporary leave are to be considered within Section 117B(5) as persons whose “immigration status is precarious.”
24. The Oxford English dictionary defines “precarious” as meaning ‘held at the pleasure of another; uncertain or dependent on chance; insecure; unstable’. Further meanings are: ‘assumed gratuitously; unfounded; doubtful’. I note that S.117B(4) provides as follows:

“Little weight should be given to -

 - (a) a private life, or
 - (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.”
25. Thus, the word “precarious” in sub-section (5) does not mean, or does not relate solely to, persons who are in the United Kingdom unlawfully. That is dealt with already in S.117B(4). “Precarious” must therefore mean something either different from, or additional to, unlawful status.
26. I do not accept the proposition advanced by Mr Jarvis to the effect that it means persons who have temporary leave, insofar as Mr Jarvis sought to suggest that all such persons are to be considered as persons whose immigration status is precarious. Some individuals who have purely temporary leave may be in a more precarious position than others. Thus, a person with leave to remain as a partner who unquestionably is able to meet all the requirements of the Immigration Rules for indefinite leave to remain, is arguably not a person whose immigration status is precarious. To take another example, a person who has accrued almost ten years’ lawful residence and who has been granted another period of leave to bring them up to ten years, without any countervailing considerations, again is not someone whose

status could be said to be precarious. On the other hand, a student who has failed examinations and needs to re-take, or whose place on a new course is doubtful, could be said to be someone whose immigration status is precarious.

27. In my judgement the question of whether a person's immigration status is precarious is to be assessed on a case-by-case basis, depending on the circumstances.
28. Furthermore, in relation to this appeal, it is to be remembered that S.117B(5) is limited to a *private* life established when a person's immigration status is precarious. It does not refer to family life. Although Judge Oliver did base his decision on proportionality in part on the appellant's private life, her family life in the UK seems to me to have been the most significant feature of her Article 8 rights that he took into account.
29. There has been no specific complaint on behalf of the respondent in relation to Judge Oliver's conclusions at [23] and [24] that the appellant's status in the UK has always been lawful. At [23] he expressed the view that the appellant's status had always been lawful "since I shall now go on to find that her application was made in time." There then followed the reasoning at [24] where he said this:

"Her initial application was made in time on 7 June 2013. The respondent's assertion that it was invalid because the fee paid on her behalf by her solicitors was in the sum of £561 and not £578, a trivial mistake which the solicitors have conceded, and the further assertion that because the corrected application with a cheque in the correct sum was received 2 days after her leave had expired is unworthy of any properly-functioning administrative system. Although there is no place for a near miss I find that the re-application was a continuation of the original application, that it was in time and attracted an in-country right of appeal against the subsequent refusal."
30. I do consider that Judge Oliver was wrong to conclude that the appellant's status in the UK had always been lawful. Regardless of the fact that the application made on 7 June 2013 was invalid through no fault of hers, because her solicitors sent a cheque for the wrong amount, the application was correctly regarded by the respondent as invalid. The requisite fee had not been paid. Her leave had been curtailed to 12 June 2013, and thus the further application with the correct fee made by her solicitors on 14 June 2013 was out of time. From 12 June 2013 the appellant has had no leave to remain.
31. Although no complaint was made on behalf of the respondent in relation to the judge's finding that the appellant had always had lawful leave, I am nevertheless satisfied that he erred in law in his conclusion in this regard.
32. However, it could not be said that her private life, for the most part, was established at a time when she was in the UK unlawfully. Her private life was substantially established during her lawful residence. In any event, as I have already pointed out, the major focus for Judge Oliver's decision was the appellant's family life in the UK. His error of law in terms of the finding that the appellant has always had lawful status in the UK is not material on the facts of this appeal.

33. Although the decision in Nasim and others was cited in argument before me, it was specifically referred to by Judge Oliver at [21], referring to [11] of Nasim and others which itself quotes from the decision in Patel and Others v Secretary of State for the Home Department [2013] UKSC 72 as follows:
- “57. It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the rules are not reviewable on appeal: section 86(6). One may sympathise with Sedley LJ's call in *Pankina* for ‘common sense’ in the application of the rules to graduates who have been studying in the UK for some years... However, such considerations do not by themselves provide grounds of appeal under article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8.”
34. Judge Oliver also referred to the decisions in Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) and Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin). He therefore recognised that the appellant needed to establish that there were exceptional circumstances not adequately addressed under the Article 8 immigration rules in order to be able to succeed under Article 8 proper. He then went on to make an assessment of what those circumstances were. I do not accept the submission made by Mr Jarvis to the effect that Judge Oliver had failed to take into account that the appellant did not meet the requirements of the Immigration Rules. That he did take that matter into account is at least implicit in [22] of the determination where he stated that the appellant's removal would be in accordance with the law as represented by Appendix FM and paragraph 276ADE, going on to refer to the need for there to be exceptional circumstances not adequately addressed under the new Article 8 immigration rules. At [25] he concluded that the appellant's circumstances had not been adequately addressed with reference to the Article 8 Immigration Rules.
35. He took into account, as he was entitled to do, that the appellant's leave was curtailed through no fault of her own, she no longer being qualified as a Tier 2 migrant because her employer had inadvertently lost its sponsorship licence. A further error, not of the appellant's making, was that her solicitors sent a cheque for the wrong amount in respect of the application for leave to remain made whilst she still had leave. But for those errors the appellant would have accrued ten years' lawful residence by 15 August 2015 which was the date on which her leave originally expired, before it was curtailed because of the loss of the sponsorship licence. For the avoidance of doubt, I am not satisfied that Judge Oliver considered this as a near-miss case. He simply took into account the appellant's circumstances and what would have been likely to result had the errors not been made.
36. The legitimate aim in this case was, in shorthand, the maintenance of effective immigration control. Judge Oliver noted at [26] that the respondent was content to give the appellant leave which would have resulted in her having spent ten years

lawfully in the UK, a matter which reflected on the issue of immigration control. He concluded that the legitimate aim was weakened for that reason, but he did not say that it was extinguished. He balanced the legitimate aim against the appellant's family and private life.

37. Whilst it could be said that there was room for a different outcome in the proportionality assessment, I am not satisfied that it could be said that there is any error of law in Judge Oliver's conclusion in relation to proportionality, excepting the error to which I have already referred.
38. In conclusion, I am not satisfied that there is any material error of law in Judge Oliver's decision.

Decision

39. The decision of the First-tier Tribunal did not involve the making of an error on a point of law such as to require the decision to be set aside. The decision to allow the appeal on Article 8 grounds therefore stands.

Upper Tribunal Judge Kopieczek

15/04/15