



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

Appeal Number: HU/12544/2015

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 9 January 2018**

**Decision & Reasons  
Promulgated**

**On 17 January 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE FROMM**

**Between**

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

Appellant

**and**

**YAQIONG ZHAO**

(NO ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer

For the Respondent: Mr P Bonaverio, Counsel

**DECISION AND REASONS**

1. In this case it is the Secretary of State for the Home Department who has appealed against a decision of the First-tier Tribunal allowing the appeal on article 8 grounds of Ms Yaqiong Zhao. As Ms Zhao was the appellant before the First-tier Tribunal it is more convenient to continue to refer to her as “the appellant” and to the Secretary of State as “the respondent”.
2. The appellant entered the UK as long ago as 4 November 2001, a few weeks before her eighteenth birthday, with leave to enter as a student.

She successfully extended her leave in the same capacity until 17 March 2010, when her last application was rejected because she had not completed the application form fully. She resubmitted her application but it was refused without a right of appeal on 17 August 2010. Despite this, she was subsequently granted a period of leave as an entrepreneur from 1 June 2012 until 1 June 2015. Her application for an extension of leave in that capacity was refused and the time limit to apply for administrative review expired on 12 August 2015.

3. On 3 August 2015, she submitted an application for settlement on the basis of ten years' continuous lawful residence. In her application, she explained she had not been outside the UK for more than 60 days in any single year. She had resided in the UK for more than 13 years and was well integrated. She had opened two businesses. She lived with her spouse, Mr Ke Ou, whom she had married on 19 January 2013. The appellant had an English qualification and had no convictions.
4. The application also referred to the 2010 student applications. The covering letter submitted by the appellant's solicitors explained that, between the rejection of the application submitted in January and the resubmission of the application in April, the rules had changed and applicants were required to submit a Confirmation of Acceptance for Studies ("CAS"). However, at the date of posting the resubmitted application (which did not include a CAS) which must have been prior to 1 April 2010, the old rules still applied and there was no requirement to submit a CAS. The subsequent refusal of the application for the failure to enclose a CAS was wrongly made. After the refusal, on 16 August 2010, the appellant instructed lawyers to apply for judicial review but they did not follow up on her instructions. The appellant argued that, given the decision made on 16 August was unlawful, her leave had continued until the grant of leave as an entrepreneur. Alternatively, the gap in continuous lawful residence should be overlooked due to the exceptional circumstances.
5. Finally, the application acknowledged the appellant had not been able to submit a KOLL test certificate but the reason for that was the Home Office had retained her passport so she could not book a test.
6. The respondent refused the application on 17 November 2015 and the reasons for refusal can be summarised as follows:
  - There had been a gap in her lawful residence between 17 March 2010 and 1 June 2012, so the requirement in paragraph 276B(i) (a) to show ten years' continuous lawful residence was not met;
  - Discretion to overlook the gap because of exceptional circumstances was not exercised in the appellant's favour because she had not challenged the decision of 16 August 2010 and she had not submitted another application until 27 January 2012;

- The appellant had failed to submit evidence that she had passed a KOLL test so as to meet the requirements of paragraph 276B(iv);
  - The appellant had not shown she had a partner so as to satisfy the family life provisions of Appendix FM of the rules;
  - The appellant did not satisfy any of the requirements of paragraph 276ADE(1) of the rules on private life grounds and, in particular, she had not shown very significant obstacles to her integration into China; and
  - The application did not raise exceptional circumstances to justify a grant of leave outside the rules.
7. The appellant appealed to the First-tier Tribunal on human rights grounds, citing her private life established over 14 years in the UK. She also argued the decision not to accept the continuity of her residence was not in accordance with the respondent's policy.
8. The appeal was heard by Judge of the First-tier Tribunal Abebrese at Hatton Cross on 24 February 2017. The respondent was not represented at the hearing. In a brief decision, the Judge made the following findings:
- The appellant was credible as to her explanation of the lapse in leave between 2010 and 2012;
  - The lapse in her leave was not entirely her fault and she did make efforts to contact her legal advisors at the time, who failed to respond;
  - The appellant had established private life ties and removing her to China would have serious consequences for her;
  - The decision was in accordance with the Immigration Rules but removing her would not be in accordance with the law;
  - The appellant had established businesses in the UK and had adapted herself to life in the UK;
  - The appellant had had no recourse to public funds and was seeking to make a valuable contribution to society; and
  - The appellant's private interests outweighed the public interest.
9. The respondent applied for permission to appeal on the ground the Judge had erred in his approach to article 8. He had failed to apply paragraph 276ADE(1) and failed to identify reasons to justify leave outside the rules. The Judge had failed to give adequate reasons for his decision and, in particular, he had failed to explain his finding that the public interest had been assessed by reference to section 117B of the

Nationality, Immigration and Asylum Act 2012. Permission to appeal was granted by the First-tier Tribunal on all grounds.

10. I heard submissions from the representatives as to whether the First-tier Tribunal Judge had made an error of law in his decision.
11. In brief, Ms Isherwood made submissions along the lines of the grounds seeking permission to appeal. The Judge had recorded that the appellant mainly argued her appeal on the basis of there having been a breach of article 8 outside the rules (see [8]). The appellant had always been in the UK with temporary leave. The Judge had failed to grapple with the point about the rule change in 2010. In relying on the fact the appellant had started two businesses as a positive factor, the Judge had failed to recognise that the appellant's last application as a Tier 1 entrepreneur had been refused. There was a lack of reasoning as to why the Judge had allowed the appeal outside the rules.
12. Mr Bonavero argued the decision does not contain a material error of law and should stand. The Judge had not ignored the rules but had considered paragraph 276B, which was the paragraph relied on in the application. He had given adequate consideration to the gap in the appellant's leave and her arguments as to why discretion should have been granted (see [14]), particularly as the reasons for refusal letter appeared to concede that the August 2010 decision was erroneous on that point. It was clear why the Judge found the decision disproportionate. He had noted the application of section 117B (see [15]). It was implicit on what he said that he had recognised the precariousness of the appellant's leave.
13. Ms Isherwood said the Judge's consideration of the facts was inadequate.
14. Having carefully read the decision and considered the arguments put forward by the representatives I have concluded that the decision of the First-tier Tribunal contains material errors of law such that it must be set aside. My reasons are as follows.
15. It is clear that the appellant's leave has always been precarious in the sense of section 117B(5) and, for some months, the appellant has had no leave. Consequently, the Judge was required to show he had taken into account the requirement that little weight should be given to the private life established by the appellant over the years. In my judgment, the Judge's decision does not contain sufficient reasoning to show the respondent why he nonetheless found the decision disproportionate. Of courses, it was open to him to reach that conclusion but he was required to explain how he did so.
16. As regards the application of section 117B, the test is one of substance over form, in line with *Dube (ss.117A-117D)* [2015] UKUT

00090 (IAC). However, it is not sufficient for the Judge to say he had considered section 117B but that, having established her businesses and been a “law-abiding citizen”, the appellant's private interest outweighed the public interest. In order to reach that point in a legally sustainable way, he had firstly to show he had recognised the impact of the appellant failing to meet the rules, which were enacted to give effect to the UK's obligations under article 8, and secondly that he had recognised the reduced weight which could be given to the appellant's private life when weighing it against the public interest in maintaining effective immigration controls.

17. I decided to remake the decision myself and I preserved Judge Abebrese's findings of fact. Therefore, although the appellant was in attendance at the hearing, there was no need to call her to give evidence. The only additional matter was the passage of time since the First-tier Tribunal's decision. She has now resided in the UK for over 16 years. She is 34 years of age. I was told her husband has limited leave as a student until 2019.
18. As noted, one of the issues which Judge Abebrese did not tackle with any or sufficient depth was the question of the gap in the appellant's leave following the rejection of her renewed application in August 2010. With the assistance of the representatives, who were in agreement with each other about this point, it was possible to arrive at the following conclusions.
19. The appellant had continuous grants of leave to enter/remain as a student from 4 November 2001 until 31 October 2010. On 29 January 2010, she submitted an application for further leave in order to continue her studies at the London College of Accounting and Finance. Her application was rejected on 17 March 2010 for reasons which are not entirely clear but which are not now important. I proceed on the assumption the defect in the application would have been pointed out to the appellant and she was invited to resubmit her application within a time limit. It is clear she did so.
20. The reasons for refusal dated 16 August 2010 records that she sent the application on 1 April 2010 but the appellant disputes this. I accept the appellant must have posted her application before 1 April 2010 for two reasons. Firstly, she made this assertion to Judge Abebrese, who found her credible. His findings on credibility have not been challenged and I have preserved his findings of fact. Secondly, the reasons for refusal letter of 17 November 2015, while continuing to record the date of application as 1 April 2010 in the chronology, stated on page 5/9, in respect of the decision not to exercise discretion in the appellant's favour regarding the gap in her leave, as follows:

“Furthermore, consideration has been given to your representations. You stated that in January 2010 you submitted an application which was rejected on 17 March 2010 due to the application being incomplete. You then

resubmitted an application which was received by the Home Office on 1 April 2010. This application was refused on 17 August 2010 under the new immigration rules.

Whilst the Home Office may accept that the application should be decided prior to the change of the new immigration rules in April 2010 and therefore the application could have been decided wrongly by the Home Office you never challenged the decision. Furthermore, your next application for further leave was not submitted until 27 January 2012, a period of 527 days later.”

21. The second paragraph set out above comes extremely close to accepting that an error was made in line with the appellant's solicitors' submissions. It can be read as meaning that an error was made but there were other reasons why discretion should not be exercised in favour of the appellant.
22. An application is made on the date of posting in accordance with paragraph 34G(i) of the rules. It is more likely than not that the respondent has erroneously recorded the date of receipt as the date of application. The date of receipt was, I find, 1 April 2010 and therefore the application was made (posted) prior to that.
23. I raised with the representatives the issue of whether the requirement in Appendix A of the rules to submit a CAS did in fact only come into force on 1 April 2010 given the reference in section B of the reasons for refusal letter, dated 16 August 2010, to a mandatory requirement to submit a CAS applying to applications from 22 February 2010. However, neither representative could provide me with a copy of the rules as at the end of March 2010 and the archive on the respondent's website does not go back beyond 2012.
24. Ms Isherwood did not argue against the appellant's point that there was no requirement for a CAS when the application was resubmitted. I accept there was no such requirement for the following reason. The appellant's solicitors made the argument to the respondent and, as seen, the respondent's response was to accept an error may have been made in the August 2010 decision. If there had been a requirement for a CAS in March 2010 then this would have been stated as a reason to reject the appellant's argument.
25. I now consider the consequences of the mistake.
26. As a matter of fact, it remains the case that the appellant's leave expired because the respondent refused to extend it. There was a gap in the appellant's continuous lawful residence until she was granted leave on 1 June 2012. As her student leave did not expire until 31 October 2010, the length of the gap has been overstated in the refusal of 17 November 2015. However, it exceeded the 28 days allowed for by

paragraph 276B(v) by a considerable margin. It is clear why paragraph 276B(i)(a) was not met by the appellant.

27. The Tribunal has no jurisdiction to exercise discretion for itself regarding the manner in which the gap was caused, although this is plainly a relevant matter when giving weight to the fact the rules were not met and the proportionality of the decision. I simply note that the respondent's reasons for refusing to exercise discretion in the appellant's favour given in the paragraph of the refusal letter set out above are unimpressive. The appellant was not given a right to appeal the decision and therefore the point taken against her that she failed to "challenge" the erroneous decision must be a reference to her failure to bring an action for judicial review. As seen, Judge Abebrese accepted her evidence that she did instruct lawyers to do just that, although they failed to pursue the matter. As seen, the period of the gap was miscalculated.
28. In my judgment, the respondent's error is highly significant in this case when assessing the weight to be given to the public interest in the proportionality balancing exercise. Had the error with regard to the application of the requirement for a CAS to be submitted not been made in August 2010, it can be assumed the appellant would have been granted a further period of leave as a student in order to complete her studies. Given the stage the appellant's studies had reached by then, it is highly likely the grant of leave which should have been made would have taken her past 4 November 2011, at which point she would have fulfilled the requirement of paragraph 276B(i)(a) to show ten years' continuous lawful residence in the UK and she would have been entitled to apply for settlement.
29. No countervailing factors have been raised against the appellant's character. I am not sure whether the requirements for a KOLL qualification were in the rules at that point but, given the appellant would have had possession of her passport and she was studying at a high level, there is no reason not to assume she would have been able to meet this requirement as well. She plainly speaks English. None of this is unduly speculative. The respondent's error, which has to all intents and purposes been accepted, was unfair and has had a severe impact on the appellant's ability to settle in the UK.
30. The appellant has not argued that she can bring herself within any of the requirements of paragraph 276ADE(1) of the rules. I find these rules are not met.
31. It is common ground the appellant has established a significant private life in the UK, as found by Judge Abebrese. It is not necessary to set out its elements here. The stark fact is she has lived here since she was 17 and she is now 34. She has started up two businesses and lives independently with her husband. She has made the UK her home. Her

removal would interfere significantly with the strong ties she has made and I therefore move straight to the question of proportionality.

32. I start by acknowledging the rules are not met in this case. In the large majority of cases, the correct application of the rules will be sufficient to dispose of the question of proportionality. Paragraph 276ADE(1) is designed to encompass the main situations in which article 8 might succeed on private life grounds. Paragraph 276B has remained in the rules since before the rules were redrawn in order to reflect the UK's obligations under article 8. However, it is clearly a relevant benchmark when considering whether lengthy lawful residence would result in removal being regarded as a disproportionate interference with the enjoyment of private life. I have already given reasons why, in the unique circumstances of this case, the public interest in maintaining effective immigration controls is weakened by the fact the rules were wrongly applied to the appellant's application in the summer of 2010 and this error led to her losing the possibility of applying for settlement six years ago.
33. Similarly, the application of the requirement to give little weight to the appellant's private life in accordance with sections 117B(4) and (5) must be adjusted in this case in order to recognise that, but for the respondent's error, the appellant was likely to have been able to apply for settlement six years ago. Put another way, the precariousness of the appellant's position since August 2010 has been caused by the respondent's error and it would be unfair to leave this out of the assessment.
34. As explained by Sales LJ in *Rhuppiah* [2016] EWCA Civ 803, Part 5A of the 2002 Act was intended to provide for a structured approach to the application of article 8 which would produce in all cases a final result which was compatible with article 8 (see paragraph 45). However, it was common ground in that case that it was possible to conceive of cases caught by sections 117B(4) and (5) in which a private or family life of an especially strong kind had been established such that it should be accorded great weight (see paragraph 46). Where Parliament has declared that something is in the public interest, that is definitive as to that aspect of the public interest (see paragraph 49). It might still be outweighed by other relevant considerations (see paragraph 53) but,
- “[i]n order to identify an exceptional case in which a departure from that approach would be justified, compelling reasons would have to be shown...” (paragraph 54)
35. In my judgment, this is one of the rare cases in which compelling reasons have been shown to justify a finding that the decision is disproportionate.
36. I therefore allow the appeal on article 8 grounds.



37. It is a matter for the respondent how to give effect to this decision. However, I would like to point out that it might be appropriate for the respondent now to revisit the question of the exercise of discretion regarding the gap in the appellant's continuous lawful residence and to consider granting the appellant settlement. If not, she would have to wait until November 2021 at the earliest before she became eligible to apply again (under paragraph 276ADE(1)(iii)) or June 2022 (under paragraph 276B).

### **NOTICE OF DECISION**

The Judge of the First-tier Tribunal made a material error of law and his decision allowing the appeal is set aside.

The following decision is substituted:

The appeal is allowed on human rights grounds (article 8).

No anonymity direction is made.

Signed

Date 10 January 2018

**Deputy Upper Tribunal Judge Froom**