



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

Appeal Number: HU/24209/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 4<sup>th</sup> June 2019**

**Decision & Reasons Promulgated  
On 24 June 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS**

**Between**

**MS XIMENG GUO  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Miss Jacqiss, Counsel

For the Respondent: Miss J Isherwood, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of China born on 7<sup>th</sup> September 1994. On 8<sup>th</sup> November 2018 the Appellant made an application based on human rights for indefinite leave to remain in the UK on the basis of ten years' continuous and lawful residence and on the basis of her family and private life in the UK. That application was refused by Notice of Refusal dated 15<sup>th</sup> November 2018.
2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal C H Bennett determining the matter without an oral hearing whereby the learned judge dismissed the Appellant's appeal.

3. I note that at that time the Appellant was not legally represented and the decision to ask for the appeal to be dealt with on the papers was taken by herself.
4. On 18<sup>th</sup> February 2019 Grounds of Appeal were lodged to the Upper Tribunal. Those grounds are made by legal representatives. They contend therein:-
  - (i) That the First-tier Tribunal Judge failed to exercise discretion based on Home Office policy language guidance: long residence, version 15.0.
  - (ii) Proportionality.
  - (iii) An Article 8 right to private and family life.
5. On 11<sup>th</sup> April 2019 Judge of the First-tier Tribunal P J M Hollingworth granted permission to appeal. Judge Hollingworth considered that it was arguable that insufficient weight had been attached to those factors identified in the permission application in the light of the chronology and the Appellant's personal circumstances and that any proportionality exercise has thereby been affected. He further considered that it was arguable that an insufficient analysis has been set out of the question as to whether or not there would be a breach of Article 8.
6. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by her instructed Counsel, Miss Jacqiss. Miss Jacqiss has also produced to me a most useful skeleton argument in support of the Appellant's appeal. The Secretary of State appears by her Home Office Presenting Officer, Miss Isherwood.

### **Submission/Discussion**

7. Mr Jacqiss relies on the Grounds of Appeal and her skeleton argument. She submits that the paramount question to be addressed is whether the judge had adequately assessed the Home Office long residence policy when considering proportionality. In addressing this issue she makes effectively three contentions.
  - (i) That the judge has failed to give adequate consideration to the time spent by the Appellant in the UK as a child.
  - (ii) To the absences spent by the Appellant when a minor.
  - (iii) A failure to adequately assess the medical absence issues.
8. She points out that the law is relatively straightforward in this matter. The Appellant sought to rely on having at least ten years' continuous lawful residence in the UK in support of her application pursuant to paragraph 276B of the Immigration Rules. It was noted both by the Secretary of State and by the First-tier Tribunal Judge that continuous residence is considered as broken if a person has been absent from the UK for a period of more than six months at any one time or a period of eighteen months in total throughout the ten year period. It was further noted by the Secretary

of State (and his figures differ slightly from those of the judge) that the Appellant's absence record indicated that she had been absent from the UK for 733 days and that stamps in her passport match this record.

9. The Appellant asked for discretion to be authorised and for the Home Office to wholly excuse absences from 12<sup>th</sup> December 2014 to 10<sup>th</sup> January 2015, from 16<sup>th</sup> June 2015 to 11<sup>th</sup> September 2015 and from 31<sup>st</sup> May 2016 to 10<sup>th</sup> July 2016, a period of 215 days. The Appellant stated that she returned to China to seek medical treatment for endometrial hyperplasia. The Secretary of State noted that he was unable to locate any supporting medical letters or records but nevertheless continued to review the absences to determine whether discretion would be appropriate. He concluded that even if he were to authorise a discretion for 71 days absence which is what is in excess of the Appellant's normal routine absences for remaining in China to seek medical treatment, it would still mean that the Appellant had been absent for 662 days and that that would still be 122 days over the required limit for residence history. In addition, the Secretary of State considered and rejected that there were exceptional circumstances which would render a breach of Article 8 of the European Convention of Human Rights on the basis that it would result in unjustifiably harsh consequences to the Appellant.
10. Miss Jacqiss takes me to both her skeleton argument and to the First-tier Tribunal Judge's decision. I think at this stage it is appropriate to make reference to that decision for it is a fairly extraordinary one. Albeit that the decision was made on the papers the decision extends to some 36 pages with numerous paragraphs and sub-clauses and even more surprisingly references to numerous footnotes. It is in anyone's consideration a very substantial document and shows a very substantial consideration of the issues albeit that the length of the decision does not in itself mean that the clarity and reasoning of the decision is correct. What it does do however is to expose the decision to greater scrutiny because of the constant references therein.
11. Firstly, I am taken to paragraph 20(c). That paragraph sets out the reasons for which the Appellant returned to China for her treatment. Paragraph 20 in its entirety sets out the factual matrix which is accepted by the judge. Miss Jacqiss takes me then to paragraph 36(f). This is an immensely extensive paragraph which runs to some six pages in the decision. The part however which she particularly asked me to consider is the judge's analysis as to why he reaches conclusions that the Appellant would not suffer unjustifiably harsh consequences as a result of the refusal of her application such as to render the refusal disproportionate and a breach of the United Kingdom's obligations under Article 8. He analyses at paragraph 36(f) that scenario with regard to exceptional circumstances when considered alongside the basis upon which the Appellant received treatment in China for endometrial hyperplasia. Miss Jacqiss points out to me that it is not a requirement of the Immigration Rules for an overseas applicant to take out insurance cover which would enable medical treatment to be undertaken in the UK and further points out that unlike

EEA nationals non-EEA nationals are not entitled as of right to medical treatment on the NHS. What consequently happened here is that the Appellant therefore returns to China for her medical treatment where she would be entitled to receive it paid by the state. The judge concludes that this does not mean that the Appellant was not prevented from returning to the United Kingdom through unavoidable circumstances and that the evidence does not show that the Appellant could not travel back and that it was her choice to remain in China for the full duration of her treatment. She submits that that finding is at odds with the finding made at paragraph 20(c) as to the reason that she returned to China in particular, that if she had not undergone treatment there were particularly serious adverse consequences over and above the immediate pain and discomfort. It is Miss Jacqiss' argument that in reaching that finding the judge erred in law and that it is material.

12. She then turns to the issue of the policy submitting and considering whether there are compelling and compassionate circumstances by which the Appellant should be allowed to stay and she takes me to paragraph 36(g) which apart from other matters sets out a detailed analysis as to how the judge has come to a conclusion as to the number of days that the Appellant had spent outside the UK and goes on to analyse the Appellant's absence from the UK and conclude that she would not have spent time outside the UK during the summer of 2015 or additional time over and above the ten days she spent in Malaysia in July 2016 if she had not suffered from, and required, treatment for her condition. Consequently, he was not satisfied as set out at paragraph 36(7) that the Appellant's cause for treatment was not justifying an absence in excess of the eighteen months. Miss Jacqiss contends that whether or not the judge has analysed the issue under the policy she submits that he had failed to address proportionality along with time spent when a minor and whether for medical reasons it was appropriate for her to be absent. On that basis she submits that there are material errors of law.
13. Miss Isherwood submits that the grounds do no more than seek to re-argue the case on different parameters to that looked at by the First-tier Tribunal. She reminds me that at first instance the Secretary of State considered the Appellant's absence based on medical grounds and the findings that the Secretary of State made regarding same. She takes me to the decision of the First-tier Tribunal Judge at paragraph 15 where the judge sets out the facts and points out that this is not a finding of the judge. What is in issue she submits is the lack of evidence that is available regarding medical treatment and the question as to whether or not the Appellant is prevented from travelling back to the UK. She submits that the history set out at page 15 of the judge's decision is purely factual and I am specifically referred to the footnote therein and the historical basis which thereafter sets out the total number of days in which the Appellant is, on the judge's calculations, absent from the UK.
14. She takes me through the determination pointing out that at paragraph 17 Dr Liu has given his factual account of the Appellant's condition and

treatment and reminds me that the judge has found that Dr Liu had no apparent motive to misrepresent the facts of what had occurred and what he did was merely correct within his course of practice. She thereafter takes me through paragraphs 20(h), 22 and 23 where the judge refers to Home Office guidance and looks at compelling and compassionate circumstances and that of her general circumstances in the UK and then to paragraph 32 where the judge considers the Immigration Rules and the case law and points out that none of these issues are actually challenged.

15. She concludes by submitting that the judge has dealt with all factors and made findings regarding the calculation and has taken into account the medical issues that were before him and the Appellant's current circumstances in coming to his conclusion. To such extent she submits that there are no material errors in law in the decision and she asks me to dismiss the appeal.
16. In brief response Miss Jacqiss submits again that the judge had failed to give appropriate weight to the time that the Appellant spent in the UK as a minor and that there was evidence referring me to the letter from Dr Liu as to when the Appellant's treatment stopped and that the judge has failed to criticise or dispute the contents of those letters. She submits that there are material errors of law and asked me to set aside the decision.

## **The Law**

17. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
18. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

## **Findings on Error of Law**

19. Part of the problem of this appeal stems from the manner in which the First-tier Tribunal Judge has written his decision. This was a paper appeal. The judge's decision extends to some 36 pages and is in many respects repetitive and sets out an analysis that is hard to follow purely and simply because of the length and detail into which he has gone. Having said that, that does not mean that as a matter of law the judge has erred. The thrust of the Appellant's appeal is that the judge has failed initially to take into account the periods that the Appellant spent in the UK as a minor. That submission is quite simply unsustainable. It is clear from the decision that the judge was well aware of the period of time that the Appellant was in the UK as a minor and has given detailed consideration to the Appellant's immigration history. He has noted the date when the Appellant came to the UK in September 2008 and that at that stage she was a child visitor three days prior to her 14<sup>th</sup> birthday. He accepts in its entirety the Appellant's immigration history. Secondly there is the issue of the periods that the Appellant spent out of the UK and this is inextricably linked to the medical evidence. Much is made of the finding of the judge at paragraph 36(f)(ii) where the judge concludes firstly that had the Appellant obtained medical insurance she would have been able to obtain the treatment in the United Kingdom and would not have been obliged to return to China to obtain it and secondly that the judge was not satisfied that the absences during which she received treatment between December 2014 and September 2016 were not in reality attributable to her not having obtained medical insurance cover and that she was not prevented from returning to the United Kingdom through "unavoidable circumstances".
20. I have read the letter from Dr Liu. Perhaps more importantly it is clear from the detailed decision that that had been read by the First-tier Tribunal Judge. The fact remains that it was the Appellant's choice not to take out private medical insurance. The Rules are absolutely clear. The Appellant perhaps understandably having not taken out that insurance opted to return to China for treatment. It is also clear that she decided to stay in China waiting reviews and further follow up check-ups rather than merely returning immediately after she had had the treatment. That was her choice. It is difficult to criticise the judge for making his conclusion that the Appellant was not prevented from returning to the United Kingdom through unavoidable circumstances. These unavoidable circumstances were brought about by the failure of the Appellant to take out health insurance or alternatively to pay for her treatment in the UK or to stay in China between medical checkups. If that were to be accepted as an unavoidable circumstance it would seemingly open the flood gate to foreign nationals flaunting the requirement of obtaining health insurance for treatment in this country as a basis for being out of the country in excess of the Home Office guideline when making applications based under this Rule. That cannot clearly be the intention of the legislation or the case law.
21. Despite the convoluting nature of the decision the fact remains that this is a judge who has ultimately very carefully indeed analysed the basis upon

which the Appellant's claim is made and has given very detailed reasoned findings as to his conclusions. Consequently, I am satisfied that this is not a decision that shows any material errors of law and as such the arguments made on behalf of the Appellant amount, as Miss Isherwood has pointed out, is an attempt to re-argue the decision and the case generally. In such circumstances and for all the above reasons the findings of the First-tier Tribunal Judge are sustainable, the decision discloses no material errors of law and the Appellant's appeal is dismissed and the decision of the First-tier Tribunal Judge is maintained.

### **Notice of Decision**

The decision of the First-tier Tribunal Judge contains no material errors of law. The appeal is dismissed and the decision of the First-tier Tribunal Judge is maintained.

No anonymity direction is made.

Signed

Date 21 June 2019

Deputy Upper Tribunal Judge D N Harris

### **TO THE RESPONDENT FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date 21 June 2019

Deputy Upper Tribunal Judge D N Harris