



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

Appeal Number: HU/27244/2016

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 11 January 2019

Promulgated

On 30 January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**REEZWANA [K]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Deepchand, Solicitor, Lambeth Solicitors

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals from the decision of the First-tier Tribunal (Judge Stedman sitting at Hatton Cross on 11 October 2018) dismissing her appeal against the decision of the Secretary of State for the Home Department (“the Department”) made on 29 November 2016, to refuse to grant her leave to remain on the grounds of family and private life established in the United Kingdom since her arrival in the UK as a student on 1 November 2008. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

Relevant Background

2. The appellant is a national of Mauritius, whose date of birth is [~] 1988. She was lawfully present in the UK as a student from the time of her entry on 1 November 2008 until the expiry of her last grant of leave to remain as a student on 4 August 2014. The evidence shows that she made an in-time application for further leave to remain on 1 August 2014 on the basis of family life established in the UK with a partner who was present and settled here.
3. On 29 November 2016 the Department gave its reasons for refusing her application for further leave to remain. The decision was made under the 10-year Partner route. It was accepted that she met the suitability requirements of Appendix FM, and also the eligibility (relationship) requirements of Appendix FM. However, she had not brought herself within the scope of EX.1. While she appeared to have a genuine and subsisting relationship with her partner, the Department was not satisfied that there were insurmountable obstacles preventing her from continuing their relationship in Mauritius. While she had undergone medical treatment for depression, this did not mean that they would be unable to live together in Mauritius.
4. The decision was also made under the 10-year Private Life route. As of the date of application, she had lived in the UK for 5 years and 9 months. Accordingly, it was not accepted that she had lived continuously in the UK for at least 20 years. It was also not accepted that there would be very significant obstacles to her reintegration into Mauritius, given that she had spent the majority of her life there, during which time she would have built up cultural and social ties to that country.
5. She had provided an NHS letter dated 14 November 2016. This stated that she was under the care of Mental Health Services in Newham as a consequence of her diagnosis of severe current depression with psychotic symptoms. The doctor mentioned that she would benefit from emotional and social support and being able to visit family abroad. The doctor did not have concerns about her fitness to travel.

The Hearing Before, and the Decision of, the First-tier Tribunal

6. Both parties were legally represented before Judge Stedman. Mr Deepchand appeared on behalf of the appellant.
7. In his subsequent decision, the Judge recorded at paragraph [5] that the appellant was a little nervous and tearful at the start of the hearing, although she was able to listen to his introductions and she responded to him when asked about how she was feeling. She said that she had not been feeling very well recently, and had seen someone at the Crisis Team who had increased her medication. She said she continued to hear voices at times, and this was a feature of her depression. She said that she was on a high dose of an anti-psychotic drug, and she was also taking a large

dose of Venlafaxine, which was a second-line anti-depressant. The Judge decided that the appellant should speak to her representative about giving evidence, and he informed the parties that, whatever her decision, he did not consider it appropriate, in line with the **Joint Presidential Guidance Note No.2 of 2010: Child, Vulnerable adult and Sensitive Appellants' Guidance**, that she should be cross-examined. After he had time to consider the matter in private, Mr Deepchand informed the Judge that the appellant was not going to give evidence. The Judge said that he had therefore decided the matter on the written evidence and the submissions made by both parties. At the conclusion of the hearing, he said that he was able to announce his decision and to give a short summary of his reasons.

8. In his written decision promulgated on 18 October 2018, the Judge explained in paragraphs [8]-[14] why he had accepted the Presenting Officer's submission that the only issue before him was the appellant's private life. This was because the relationship relied on in the application of 2014 had come to an end, and the appellant was now seeking to rely on family life established with someone else. Her new partner was Mohammad Azar, who was working full-time and who had dependent children by a previous relationship. The Judge accepted the submission of the Presenting Officer that because evidence of this relationship had only been presented to the Department on 9 October 2018, it was a new matter for the purposes of section 85(5) of the 2002 Act; and that therefore he should not consider it unless the Secretary of State had given the Tribunal consent to do so. At paragraph [12], the Judge held that this was a new matter which the Department had not previously considered, and that he was precluded from considering a new matter without consent, which had not been given: *"If the appellant wished to rely on her new relationship with Mohammad Azar, then she would need to make a new application. The remedy against the refusal to consent to a new matter was by way of judicial review."*
9. At paragraphs [18]-[23], the Judge gave his reasons for finding that there would not be very significant obstacles to the appellant's reintegration into Mauritius, applying the guidance given by the Court of Appeal in **SSHD -v- Kamara [2016] EWCA Civ 813**.
10. At paragraphs [26]-[35], the Judge gave his reasons for finding that there were not exceptional circumstances which justified the appellant being granted Article 8 relief outside the Rules. At paragraph [33], he said that he appreciated that the delay in the determination of her application, and the ongoing proceedings, had been the cause of considerable anxiety for the appellant and had resulted in her having panic attacks. While he gave appropriate weight to this and to the serious nature of the appellant's mental health problems as providing the backdrop to the entire case, he found that there were no exceptional circumstances that would breach Article 8 ECHR. The appellant might continue to receive medication in Mauritius and there would not be any detrimental break in the continuity of her treatment or care.

The Reasons for the Grant of Permission to Appeal

11. On 9 November 2018, First-tier Tribunal Judge Boyes granted permission to appeal as it was clearly arguable that the Judge had erred in the assessment of 10 years' continuous lawful residence, and had also erred in not treating the appellant properly as a vulnerable witness, thus making the hearing unfair. This was especially so in that he had given his decision *extempore* when the appellant was suffering from serious mental health problems.

The Rule 24 Response

12. On 29 November 2018 a member of the Specialist Appeals Team settled a Rule 24 response opposing the appeal. In summary, it was submitted that the Judge of the First-tier Tribunal had directed himself appropriately. It was not unfair for the Judge to announce the decision in Court with brief reasons. The Judge also set out in his written decision that he had looked at all the medical evidence in coming to the conclusion that he did. It was noteworthy that the appellant had a new partner, which was a matter for which the Department did not give her permission to rely on: "*In the circumstances the appellant's representative was clearly in a position to notify the appellant that she could apply relying on her relationship if she so chose.*"
13. In short, the view of the Specialist Appeals Team was that it was open to the appellant to make a fresh in-country application for leave to remain based on her relationship with her new partner.

The Hearing in the Upper Tribunal

14. At the hearing before me to determine whether an error of law was made out, Mr Deepchand developed the arguments advanced in the grounds of appeal. On behalf of the Department, Mr Clarke endorsed the Rule 24 response. He submitted that the appellant had not been prejudiced by the Judge announcing his decision at the conclusion of the hearing, and the factual inaccuracies identified by Mr Deepchand in the Judge's reasoning did not have a material bearing on the outcome. The appellant had not applied for ILR on the grounds of continuous lawful residence of at least 10 years, and it would not have been open to the Tribunal to allow her appeal on the grounds that she was about to reach the 10-year watershed, as a result of her enjoying section 3C leave since 4 August 2016.

Discussion

15. The first issue is whether the proceedings in the First-tier Tribunal were vitiated by procedural impropriety.
16. Mr Deepchand referred me to the **Presidential Guidance Note No.1 of 2014**, in which the President said as follows at paragraph 21): "*Notwithstanding that there is power in Rule 29 to give a decision notifying the parties of an outcome of an appeal orally at the hearing, the*

Tribunal will continue to reserve the substantive decision in an appeal and issue a notice of decision in the statement of reasons as a single document in every case. It would be inappropriate to give an ex tempore decision without giving a full statement of reasons at the same time. This is because the factual questions and other issues in dispute in appeals to the Immigration & Asylum Chamber are usually complex and the parties are entitled to receive a full statement of reasons for the decision."

17. This Guidance must be set alongside the guidance on giving decisions contained in the **Joint Presidential Guidance Note No.2 of 2010**. Paragraph 11 of this Guidance simply provides that an appellant is entitled to a "*clear decision with reasons*".
18. According to the grounds of appeal, the Judge asked the appellant and her partner to come forward, and said as follows: "*I am sure what I am going to say will have a serious impact on you and your future, but I have to tell you of my decision today so you don't need to wait. I am going to dismiss your appeal*".
19. If the Judge said that what he was going to say to the appellant was going to have a serious impact on her future, this was regrettably bleak and it was an observation which sat uneasily with the Judge's earlier ruling, or at least indication, that he was not going to deal with the implications of the appellant's relationship with her partner as it was a new matter - and hence it provided the appellant with a fall-back position if her appeal on private life grounds failed.
20. Mr Deepchand submits that the Judge breached his duty to protect the appellant, and that he should have been aware that his conduct in announcing his decision on the day would simply make matters worse for her, and cause her to suffer more. It is unlikely that the Judge suspected that his conduct might make matters worse for the appellant from a psychological perspective. On the contrary, he appears to have been of the view that having to wait for his written decision would increase the appellant's anxiety, and therefore it was better to give his decision immediately, accompanied by a brief summary of his reasons for reaching his adverse decision.
21. While the course of action taken by the Judge breaches the guidance given in the Presidential Guidance No.1 of 2014, I do not consider that the proceedings in the First-tier Tribunal were thereby vitiated by procedural impropriety or procedural unfairness. It is not suggested that the detailed reasons which the Judge gave in his written decision are inconsistent with the summary of the reasons which he gave orally at the hearing. Further, as the appellant was legally represented at the hearing, her legal representative was in a position to advise her immediately after the hearing about the implications of the Judge's ruling on the "*new matter*", and the fact that the appellant could, if she so wished, immediately make a fresh application for leave to remain on the basis of family life established with her new partner and his dependent children. In addition,

as the written decision was promulgated only a few weeks before the ten year anniversary of her lawful entry to the UK and continuous lawful residence thereafter, Mr Deepchand was also in a position to advise the appellant that she had a second string to her bow, which was to apply for ILR, or at least further leave to remain, on the grounds of 10 years' continuous lawful residence.

22. The second ground of appeal identified as being arguable by Judge Boyes is that the Judge's assessment of proportionality was flawed because it did not take into account that the appellant had completed nearly 10 years' continuous lawful residence, and indeed wrongly asserted that the appellant had only accumulated 8 years of residence in the UK.
23. It is undoubtedly the case that the Judge made some factual errors. At paragraph [4], he said that the appellant had been living in the UK for a period of 5 years and 8 months at the time of decision. In fact, this was the appellant's period of residence at the date of application. At paragraph [13], the Judge said that the appellant had spent the first 30 years of her life in Mauritius, but in fact the appellant had spent the first 25 years of her life in Mauritius. At paragraph [22], the Judge said that the appellant had spent the first 30 out of 35 years of her life in Mauritius. In fact, she had spent the first 20 out of 30 years of her life in Mauritius.
24. However, I do not consider that these factual errors were material to the outcome of the proportionality assessment. At the date of application, the appellant was well short of accruing 10 years' continuous lawful residence. Her period of residence was less than 6 years. The Judge erroneously took 1 August 2016, rather than 1 August 2014, as the date of application because this was the date of application given incorrectly in the refusal decision. But this is academic as the decision to refuse the application was made on 29 November 2016, which is only just over 8 years since the appellant first entered the UK as a student.
25. At the hearing before Judge Stedman, Mr Deepchand did not seek to rely on the proposition that the appellant was about to reach the watershed of 10 years' continuous lawful residence, and that therefore her appeal should be allowed on this alternative basis. But even if he had advanced an argument on these lines, it would not have assisted the appellant in the proportionality assessment.
26. Firstly, the appellant needed to make an application for leave to remain under Rule 276B before an appealable decision could be generated in the event of the refusal of such an application. Secondly, the very fact that it was open to the appellant to make a fresh in-country application for leave to remain under Rule 276B weakened, rather than enhanced, the appellant's case on proportionality. The consequences of the maintenance of the refusal decision of November 2016 were not now - as at the date of the hearing - going to lead to the appellant having to leave the country. Instead, she had the option of not only applying for leave to remain on

account of the new matter of her relationship with a new partner, but she also could apply for leave to remain under Rule 276B.

27. For the above reasons, I consider that the Judge gave adequate reasons for dismissing the appeal on the case that was put before him. The appellant was not prejudiced by the Judge failing to take account in the proportionality assessment that she was about to reach the 10-year threshold which would enable her to apply for ILR, or at least further leave to remain, under Rule 276B.
28. As Mr Clarke acknowledged, it remains open to the appellant to apply in-country for further leave to remain/ILR.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed

Date 15 January 2019

Deputy Upper Tribunal Judge Monson