Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09408/2018

THE IMMIGRATION ACTS

Heard remotely at Field House	**Decision & Reasons Promulgated**
On 22 September 2020 *via Skype for Business*	**On 06 October 2020**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MISS ALEXANDRA CAMPEAU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S. Hollywood, Solicitor, Andrew Russell & Co.
For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to / not objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing.

The documents that I was referred to included the appellant's bundle from the original hearing before the First-tier Tribunal, supplementary appellant's bundles served in April and September 2020, the contents of which I have recorded.

The order made is described at the end of these reasons.

The parties said this about the process: they were content that the hearing had been conducted fairly in its remote form.

1. This is an appeal against a decision of the respondent dated 10 April 2018 to refuse the appellant's human rights claim. The appellant originally appealed to the First-tier Tribunal. In a decision promulgated on 16 April 2019, Tribunal Judge ST Fox dismissed the appellant's appeal, following a hearing six months earlier. Sitting at the Royal Courts of Justice in Belfast on 13 February 2020, I found the decision of Judge Fox to have involved the making of an error of law, and set it aside in its entirety, with no findings of fact preserved. I directed that the matter be reheard in the Upper Tribunal, and it was in those circumstances that it returned to me for the appeal to be reheard. My error of law decision may be found in the **Annex** to this decision.

2. I informed the parties at the hearing that the appellant's appeal would be allowed. I now give my reasons for allowing the appeal.

Factual background

3. The appellant is Alexandra Campeau, a Canadian citizen born in 1985. She arrived in this the United Kingdom on a Tier 5 Youth Mobility visa in February 2013, valid until 7 January 2015. She was later granted leave as the partner of a settled person, valid until 15 July 2017. That relationship has since come to an end, and the appellant is not currently in a relationship. She applied for further leave to remain on 11 July 2017, based on her private life. The application was refused on the basis that the appellant could not meet any of the private life provisions contained in paragraph 276ADE of the Immigration Rules, and there were no exceptional circumstances outside the rules such that it would be unjustifiably harsh to expect the applicant to return to Canada.

The appellant's case

4. The appellant works in the film industry in Northern Ireland, specifically for a company which provides extras for filming. The role she performs features on the "shortage occupation list" under the category "3416 – arts officers, producers and directors", and is therefore exempt from the resident labour market test set out in paragraph 78A(a) of Appendix A of the Immigration Rules. She earns £30,000 per annum, and the company for which she works has recently secured Tier 2 sponsor status and has provided her with a certificate of sponsorship. She speaks English and meets the maintenance requirements. The case she now advances to resist removal on human rights grounds is that her current employment satisfies the criteria for leave to remain under Tier 2. It would not be in the public interest to remove her from the United Kingdom, given the inevitability of her making a successful application for entry clearance. Allied to that submission, she relies on the likelihood of encountering significant difficulties upon attempting to make such an application from overseas at the present time, in light of the travel restrictions which are, or could imminently be, imposed on international travel between the United Kingdom and Canada in response to the Covid-19 Pandemic. Given she meets the substantive requirements of the rules for leave to remain on a Tier 2 basis, her removal would be

disproportionate under Article 8 of the European Convention on Human Rights, she submits.

5. In support of the case she now advances, in her supplementary bundle served in April 2020 following the directions I gave in my error of law decision, the appellant provided six months' of payslips, bank statements, a copy of her certificate of sponsorship, and other details relating to her employer. She also provided an updated witness statement. At the hearing before me, she adopted her updated statements, and confirmed that she continues to work in the same capacity and to receive a salary of £30,000.

6. For the Secretary of State, Mr Tufan declined to engage with the case the appellant now advances. He had no cross-examination and did not seek to challenge the evidence that she relies upon to demonstrate her salary and employment details.

7. Mr Tufan's primary submission was that the Secretary of State has not had the opportunity to consider whether the applicant does indeed meet the criteria for a Tier 2 grant of leave to remain, and it is the Secretary of State, as primary decision maker, who should take that decision in the first instance. It is open to the appellant to make the appropriate application to the Secretary of State, he contends. While acknowledging that the Presidential Panel in Birch (Precariousness and mistake; new matters) [2020] UKUT 00086 (IAC) held that the "new matter" regime applies only to the First-tier Tribunal, and not the Upper Tribunal, he contended, without providing any reasons or legal submissions, that that decision was wrong.

Legal framework

8. This appeal is brought under Article 8 of the European Convention on Human Rights. The essential issue for my consideration is whether it would be proportionate under the terms of Article 8(2) of the Convention for the appellant to be removed, in the light of the private life she claims to have established here. This issue is to be addressed primarily through the lens of the respondent's Immigration Rules and by reference to the requirements of Article 8 directly.

9. The relevant Immigration Rules may be found in paragraph 245HD (substantive requirements for Tier 2 (General) Migrants), paragraph 78A(a) of Appendix A (attributes for Tier 2 (General) Migrants), paragraph 78A (Resident Labour Market Test exemption), and Annex K, Table 1 (United Kingdom Shortage Occupation List).

Discussion

10. As this is an appeal brought on human rights grounds, the focus of my analysis must be whether it would be disproportionate to remove the appellant, in light of the requirements of Article 8 of the convention. It is for the appellant to establish her case, to the balance of probabilities standard.

11. I have no hesitation in finding that Article 8 would be engaged by the removal of the appellant. She has resided here since February 2013 and has during that time been in at least two relationships. She has been employed in the film industry for some time.

She has put down roots here. Mr Tufan accepted that Article 8(1) would be engaged by her removal. I accept that her removal would be in accordance with the law, in the sense that it is governed by an established legal framework, coupled with a right of appeal to this tribunal. It would, in principle, be capable of being regarded as necessary in a democratic society for the purposes of Article 8(2) of the Convention. The remaining question is whether the appellant's removal would be proportionate.

12. To assess the proportionality of the appellant's removal, it is necessary to address the issue primarily through the Immigration Rules, and then outside the rules if necessary.

13. The appellant does not contend that she would face very significant obstacles upon her return to Canada. She does not attempt to rely on the private life provisions of the rules.

14. Were this a hearing in the First-tier Tribunal, Mr Hollywood's reliance on Tier 2 of the Immigration Rules would be a "new matter", requiring the consent of the Secretary of State under section 85(5) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") . The appellant's employment *itself* is not a new matter; it was before the Secretary of State, and was the subject of discussion, albeit flawed, by the First-tier Tribunal. It is the appellant's reliance on Tier 2 of the rules which would be a "new matter" were this case before the FTT. However, in light of Birch, it is now clear that the "new matter" regime does not apply to the Upper Tribunal, as a superior court of record. Paragraph 2 of the Headnote reads as follows:

> "The prohibition on considering new matters in s 85 of the 2002 Act does not apply to proceedings in the Upper Tribunal."

See [22] and [23] of Birch for the Vice President's reasoning, which I adopt and incorporate.

15. While Mr Tufan clearly disagrees with the conclusions of the Upper Tribunal in Birch for policy reasons, he did not make any submissions contending that it was wrong in law. Such concerns cannot be a basis for me to depart from a decision of the President and Vice President of this tribunal.

16. There is a further reason why it would not be right to depart from Birch. As an appellate tribunal, it is necessary for me to ensure that my decision remaking the appeal is itself compatible with the requirements of the ECHR. So much is clear from the judgment of the Court of Appeal in GM (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1630 which held that an appellate court or tribunal seized of an issue must take into account the most up to date position, to ensure that *it* acts compatibly with the Convention. Green LJ addressed the necessity of taking a decision by reference to the contemporary position in these terms, at [7]:

> "This raises a point of principle. When a Court is required to address an issue relating to fundamental norms or human rights that Court must ensure that any order that *it* makes is also compliant with such rights. Under section 6 Human Rights Act 1998 all public bodies, *including courts*, must apply the Act and thereby the ECHR. It follows that if an appellate court finds that a lower court or tribunal acted lawfully by reference to the evidence before it but that based upon

> the facts now known to the appeal court to uphold the decision would violate fundamental norms, then the appellate court must ensure that the decision *it* takes is compliant with the law." (Emphasis original)

17. That leads to the Tier 2-based submissions made by Mr Hollywood, in which the appellant relies on the following extract of the judgement of the then Senior President of Tribunals in TZ (Pakistan) v Secretary of State for the Home Department [2018] EWCA Civ 1109, at [34]:

> "…where a person satisfies the [Immigration] Rules, **whether or not by reference to an article 8 informed requirement**, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed…" (emphasis added)

18. In Mr Hollywood's submission, if the appellant meets the requirements for leave to remain on a Tier 2 basis, it matters not that the Tier 2 regime is not an "article 8 informed requirement", in light of the approach of the Senior President in TZ.

19. Mr Tufan resists that reading of TZ. He submits that, read as a whole, the focus of TZ was the Article 8 informed requirements of the private and family life provisions of the rules, and that the emphasis above should be read in that context.

20. I accept Mr Hollywood's submissions concerning the import of TZ and the relevance of the non-Article 8 provisions of the Immigration Rules. The Senior President was addressing precisely this sort of situation by his use of the term, "whether or not by reference to an article 8 informed requirement". It happened that the focus of the remainder of the discussion in TZ related to the private and family life provisions of the rules, but that was because the facts of the case so demanded such an approach. By contrast, in the present matter, there has been no real challenge to the Secretary of State's decision on the basis that the appellant would face no "very significant obstacles" to her integration in Canada. The present focus of the appellant's case is that she meets the requirements of the rules, and it would, therefore, be disproportionate for her to be removed.

21. I find that the appellant meets the following requirements of the rules.

22. The appellant requires 70 points in total under paragraph 245HD(f) (requirements for leave to remain: Tier 2 (General)):

    a. She has a Certificate of Sponsorship in a field where the Resident Labour Market Test Exemption applies. This attracts 30 points.

    b. Her salary of £30,000 per annum, amply demonstrated by the unchallenged documentary evidence (bank statements and payslips) provided, attracts 20 points. Her unchallenged oral evidence was that she has continued to work in the same role, earning this figure, throughout the pandemic.

    c. As a citizen of a majority English speaking country (see Table 2, Appendix B) she is awarded 10 points.

d. She meets the maintenance requirements set out at paragraphs 4 and 5 of Appendix C of the rules. The unchallenged financial picture presented by the bank statements demonstrates a regular balance significantly in excess of £945.

The appellant enjoys a total of 70 points.

23. The appellant does not, however, meet the requirement at paragraph 245HD(b) to have, or have last been granted, entry clearance or leave to enter or leave to remain in one of the listed capacities. Her last grant of leave was on the basis of being the partner of a settled person. Her leave continues under section 3C of the Immigration Act 1971, but that does not cure this defect.

24. Under the Points Based System, there is no "near miss" doctrine. That is not necessarily fatal to this human rights appeal, however, as the question for my consideration is whether the appellant's removal would be proportionate. Relevant to that issue is whether the appellant would be successful in an application for entry clearance, were she to leave the country and apply from overseas.

25. There was some discussion at the hearing of the respondent's Covid-19 guidance, which suggests that, in some circumstances, it is not necessary to leave the country to make a visa application that would ordinarily fall to be made from outside the country. I was not provided with the current guidance by either party and so do not factor the guidance into my decision, although, of course, the impact of the pandemic on the necessity and utility of making an overseas application is a relevant consideration.

26. In order to address proportionality overall, I will conduct a balance sheet analysis, by reference to the remaining submissions which were advanced at the hearing.

27. Factors mitigating against the appellant's removal include:

a. An application for entry clearance is very likely to be successful. The applicant has a Certificate of Sponsorship from her employer in a shortage occupation field. She meets the substantive requirements of the rules. She can boast 70 points. There was no suggestion from the presenting officer that she did not meet the substantive requirements of the rules, nor did he provide any reasons as to why such an application would not be successful.

b. The appellant is economically self-sufficient with a relatively high salary. She speaks English.

c. The appellant is of impeccable character and currently holds leave to remain under section 3C of the Immigration Act 971. She has never been an overstayer.

d. Requiring the appellant to return to Canada at the present time could expose her to the real possibility of travel restrictions, visa delays, and significantly interrupted residence here. On the date of the hearing, the Westminster government announced that the incidence of the virus was increasing, imposing further restrictions, with the warning of more to come. Were the appellant to leave the country, aside from any risk arising from the travel itself, there is no

certainty that she could re-enter, or that her visa application would be processed in a timely manner.

28. Factors militating in favour of the appellant's removal include:

    a. The public interest in the maintenance of effective immigration controls, under section 117B(1) of the 2002 Act.

    b. There may be some public interest benefit to requiring the appellant to leave to make such an application. It could enable the Secretary of State to assume the role of primary decision maker in the application (in light of Mr Tufan's refusal to engage with the issue before me) and scrutinise the appellant's application in light of the Secretary of State's constitutional role and specialist expertise in the field of immigration.

    c. Aside from the Tier 2-based submissions, the appellant does not meet any other provisions of the immigration rules, in particular she does not meet the private life provisions, which have been made by the Secretary of State to cater for this sort of situation.

    d. The appellant's immigration status is precarious and attracts little weight accordingly.

    e. There is no near-miss doctrine under the Points Based System.

29. Weighing the factors in favour of the appellant's removal against those mitigating against it, I conclude that it would be disproportionate for her to be removed. She meets the substantive requirements of the Immigration Rules, save for being present in the wrong capacity, and would be highly likely, if not virtually certain, to succeed in an application for entry clearance. However, expecting her to leave the country at the present time would expose her to a considerable amount of uncertainty, with the potential for significant restrictions on her ability to return, and the potential for significantly delayed visa processing. While there is, in general terms, a public interest in expecting applicants to leave the country to make an application for entry clearance, in some cases it will be an empty formality, bringing with it the potential for significant interruptions to the appellant's private life, with no apparent justification. As the Presidential panel in Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 129 (IAC) put it at [96]:

> "In some cases, the fact that a person will be able to re-enter the UK means that there will be no public interest at all in his or her removal."

    This is one such case.

30. The appellant's shortage occupation role in Belfast is one which has been identified by the Secretary of State as being exempt from the resident Labour market test, reflecting the public interest in filling roles of this nature. The appellant herself as a woman of impeccable character, who has never been an overstayer, still less have there been any other suitability concerns raised in relation to her. Although her immigration status is precarious, in the sense that she is not settled, she has lived here with leave since 2013, and currently still holds leave to remain. There are degrees of precariousness: see, for example, CL v Secretary of State for the Home

Department [2019] EWCA Civ 1925 at [57]. She has lived her for seven and a half years and will have put down roots in that time. Eligibility for indefinite leave to remain on the basis of ten years' continuous lawful residence is within sight. While her leave is precarious, it is at the lesser end of the scale of precariousness. While the appellant's linguistic skills and economic independence are neutral factors, my overall proportionality assessment is that, under these circumstances, her removal would be disproportionate.

31. This appeal is allowed.

Notice of Decision

The appeal is allowed on human rights grounds.

No anonymity direction is made.

Signed *Stephen H Smith* Date 1 October 2020

Upper Tribunal Judge Stephen Smith

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award for the following reason. The appellant's appeal has succeeded on a wholly different basis to that originally considered by the Secretary of State rendering a fee award inappropriate.

Signed *Stephen H Smith* Date 1 October 2020

Upper Tribunal Judge Stephen Smith

Annex – Error of Law Decision

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09408/2018

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice, Belfast
On 13 February 2020

Decision & Reasons Promulgated

……

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MISS ALEXANDRIA CAMPEAU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S. Hollywood, Solicitor, Andrew Russell & Co.
For the Respondent: Mr A. Govan, Home Office Presenting Officer

ERROR OF LAW DECISION

1. The appellant, Alexandria Campeau, is a citizen of Canada, born on 30 December 1985. She appeals against a decision of First-tier Tribunal Judge ST Fox promulgated on 16 April 2019 dismissing her appeal Secretary of State's refusal of her human rights claim, dated 10 April 2018.

Factual background

2. The appellant arrived in this country on a Tier 5 Youth Mobility visa in February 2013, valid until 7 January 2015. She was later granted leave as the partner of a settled person, valid until 15 July 2017. She applied for further leave to remain on 11 July 2017, on the basis of her private life. Her relationship with her former partner had by then ended. The application was refused, and it was that refusal decision that was considered by Judge Fox. By the time Judge Fox heard the appeal in October 2018, the appellant had begun a new relationship with a different partner. Judge Fox ascribed minimal significance to that relationship, as it was in its "infancy" [21].

3. The judge addressed the private life the appellant had claimed to have developed while in this country. Much of the judge's analysis rotated around the appellant's role working in the TV and film industry in Northern Ireland, in relation to which she claimed to have secured an important role that was contributing to the regional economy. The judge considered that those skills would be useful in Canada where there was an "burgeoning" TV and film industry, writing that it was:

> "particularly centred in and around Ontario (where the popular series *Suits* is filmed) and Vancouver (in conjunction with Seattle) were [sic] quite a number of successful movies have been located, filmed and produced from."

The judge rejected the appellant's evidence that she was, to adopt his paraphrase, "an integral and important member of this industry Northern Ireland [sic]". She had been "lucky" to secure employment in that field in this country but was "pretty much on the lower rungs of the ladder". She was not "irreplaceable".

4. The judge did not consider that it was necessary to consider Article 8 of the ECHR outside the Immigration Rules. At [11], he said:

> "I am satisfied on the evidence before me today that there is not an arguable case for considering the Article 8 claim outside of the rules. The appellant does not meet the Immigration Rules."

5. Permission to appeal was granted by Upper Tribunal Judge Grubb on the basis that the six month delay between the hearing and promulgation of the decision may have resulted in the appellant's new relationship acquiring a new significance. Judge Grubb also considered that the judge had arguably erred in relation to the structure of his Article 8 analysis, by purporting not to have to consider Article 8 outside the rules.

6. Mr Hollywood informed me that the relationship the appellant was in at the time her appeal was heard before Judge Fox, and when the application for permission to appeal was made, had unfortunately come to an end. There was, therefore, no "family life" dimension to the appeal, and one of the bases upon which Judge Grubb had granted permission to appeal had accordingly fallen away.

Discussion

7. It was common ground at the hearing that the judge had erred with his approach to Article 8 by stating at [11] that there was no arguable case that Article 8 should be considered outside the Immigration Rules. It is now well established in this jurisdiction that, when addressing the proportionality of a person's prospective removal for the purposes of Article 8(2) of the European Convention on Human Rights, the assessment should be conducted, first, by reference to the Immigration Rules, and secondly, outside the rules, to ascertain whether there are exceptional circumstances or other compelling reasons which would render the individual's removal unjustifiably harsh and, therefore, disproportionate.

8. Should any authority be necessary to establish this, I can do no better than rely on the position as summarised by the Senior President of Tribunals in TZ (Pakistan) v Secretary of State for the Home Department [2018] EWCA Civ 1109 at, for example, [34], when addressing the "insurmountable obstacles" in the Immigration Rules which was under consideration in that matter:

> "Accordingly, the tribunal should undertake an evaluation of the insurmountable obstacles test within the Rules in order to inform an evaluation outside the Rules because that formulates the strength of the public policy in immigration control 'in the case before it', which is what the Supreme Court in Hesham Ali (at [50]) held was to be taken into account. That has the benefit that where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed."

9. It was, therefore, an error for the judge to conclude at [11] that it was not necessary for Article 8 outside the rules to be considered.

10. Mr Govan submitted that the error was immaterial. The judge's analysis of Article 8 was flawed, but it was difficult to see how the appellant's appeal could succeed in any event, he submitted. There was no challenge to the matters set out in [29], he observed, in which the judge considered the appellant's private life in the United Kingdom, concluding that the appellant would be able to maintain relationships through modern means of communication, and the friends that she has made while living in Northern Ireland would be able to visit her in Canada.

11. While there is force in that submission, the difficulty is that the judge based his findings concerning the appellant's private life on irrelevant considerations that had not been part of the appellant's evidence in the case. His discussion at [23] of the "burgeoning movie and TV industry in Canada" was entirely of his own motion and was based on evidence or materials other than those which were before the tribunal. The judge took into account immaterial factors.

12. The judge's findings at [24] concerning the nature of the appellant's current role were reached against the background of his findings at [23] which were based on

immaterial matters. He dismissed evidence from the appellant's current employer as self-serving: [26]. The absence of supporting witnesses with nothing to gain from the appellant remaining in the United Kingdom was "notable".

13. In R (on the application of SS) v Secretary of State for the Home Department ("self-serving" statements) [2017] UKUT 00164 (IAC) Upper Tribunal Judge Peter Lane, as he then was, held the following at [1] of the headnote:

> "The expression self-serving is, to a large extent, a protean one. The expression itself tells us little or nothing. What is needed is a reason, however brief, for that designation. For example, a letter written by a third party to an applicant for international protection may be 'self-serving' because it bears the hallmarks of being written to order, in circumstances where the applicant's case is that the letter was a spontaneous warning."

14. Taken to its logical conclusion, the judge's description of the appellant's supporting evidence as "self-serving" would prevent any appellant from ever being able to adduce evidence supporting their case for leave to remain in the United Kingdom, unless they were able to obtain evidence from a person with no connection in the case. The judge did not engage in any analysis of the reasons why he considered the evidence of the appellant's employer, and others who had worked with her, to be self-serving. The use of the term "self-serving" by the judge appears to be a technique he deployed the discount the weight to be ascribed to the evidence, without engaging in any detailed analysis of the evidence, or the reasons why it attracts less weight.

15. I am, therefore, unable to accept Mr Govan's submissions that the judge's error was immaterial. The appellant's appeal was decided on the basis of a flawed credibility assessment, which took into account irrelevant factual matters that were not capable of being established by the evidence in the case, assessed through the lens of a defective Article 8 analysis. Some sixteen months have elapsed since the matter was considered by the First-tier Tribunal. A contemporary assessment is required. Indeed, Mr Hollywood submitted that the appellant's role could be capable of meeting the requirements of the Immigration Rules, quite apart from her own private life (see the direction below).

Conclusion

16. I set aside the decision of Judge Fox with no findings preserved. The matter is to be reheard in the Upper Tribunal at the first available date.

Notice of Decision

The decision of Judge Fox involved the making of an error of law and is set aside with no findings preserved. I direct that the matter be reheard in the Upper Tribunal.

I give the following direction:

Within 28 days of being sent this decision, the appellant must serve (i) any updated evidence upon which she seeks to rely at the remaking hearing; and (ii) written submissions setting out the basis upon which she contends the appeal should be allowed, by reference to the Immigration Rules, and Article 8 outside the rules.

No anonymity direction is made.

Signed *Stephen H Smith* Date 2 March 2020

Upper Tribunal Judge Stephen Smith