



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003322
First-tier Tribunal:
HU/55478/2021
IA/13694/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 19 May 2023

Before
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

RASHMI RAJESH KANDALKAR
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Ferguson, Counsel, instructed by Barclay Solicitors
For the Respondent: Mr A Basra, Senior Presenting Officer

Heard at Field House on 13 April 2023

DECISION AND REASONS

Introduction

1. The appellant appeals with permission against a decision of Judge of the First-tier Tribunal Grey ('the Judge') dismissing her human rights (article 8 ECHR) appeal. The Judge's decision was sent to the parties on 30 May 2022.

2. Before the First-tier Tribunal, the appellant unsuccessfully pursued an article 3 ECHR appeal. It has not been renewed before this Tribunal.

Relevant Facts

3. The appellant is a national of India and is presently aged 54.
4. She entered the United Kingdom on 1 October 2006 with entry clearance as a student and enjoyed leave to enter until 31 October 2008.
5. An in-time application for leave to remain on the International Graduate Scheme was made by the appellant, consequent to which her leave was varied by the respondent to expire on 4 July 2009.
6. The appellant made an in-time application for leave to remain as a Post-Study Worker, which was refused by the respondent on 16 July 2009. She appealed and her appeal was allowed by a decision of Immigration Judge Bryant dated 28 October 2009. The respondent subsequently granted her leave to remain from 12 February 2010 to 12 February 2011.
7. On 10 May 2011 the appellant was served with an IS151A as an overstayer. She exercised a right of appeal and Immigration Judge Harris concluded by a decision dated 29 June 2011 that the respondent had failed to undertake appropriate consideration of paragraph 395C of the Immigration Rules before issuing her decision under section 10 of the Immigration and Asylum Act 1999. Consequently, the appeal was allowed to the limited extent that there was no lawful decision concerned with the appellant's human rights application.
8. The appellant made further human rights submissions to the respondent, which were refused by a decision dated 20 October 2011. Judge of the First-tier Tribunal Doran dismissed her appeal by a decision dated 12 December 2011. Judge Doran determined that though the appellant had established a private life in this country, the decision to remove her was a proportionate exercise of immigration control.
9. The appellant applied for leave to remain as a Tier 2 (General) Migrant on 4 April 2012. The respondent granted her leave to remain in this category from 8 August 2012 to 6 April 2015. The respondent curtailed the appellant's leave on 22 July 2013, so that existing leave to remain expired on 21 September 2013. The appellant enjoyed no right of appeal against this decision.
10. On 19 September 2013, the appellant applied for leave to remain outside of the Immigration Rules on compassionate grounds. This application was withdrawn on 29 January 2014.
11. In the meantime, the appellant applied for leave to remain as a Tier 1 (Entrepreneur) on 20 November 2013. The respondent refused this application by a decision dated 20 November 2013. The appellant's appeal was dismissed by Judge of the First-tier Tribunal Harries, but subsequently

allowed on appeal by Deputy Upper Tribunal Judge Robertson on 21 November 2014, who found that the respondent had not considered documentary evidence provided to her by the appellant before the decision was issued in November 2013. The appeal was allowed to the limited extent that the respondent's November 2013 decision was not in accordance with the law and the application remained outstanding.

12. The respondent maintained her decision on 31 December 2014. The appellant's appeal was allowed by Judge of the First-tier Tribunal Price on 4 August 2015. Judge Price concluded that the respondent had failed to consider the exercise of her discretion under paragraph 245AA(d) of the Immigration Rules and so the decision was not in accordance with the law.
13. The respondent maintained her decision on 2 June 2016. The appellant appealed to the First-tier Tribunal, but subsequently withdrew her appeal on 28 June 2017.
14. In the meantime, the appellant applied for indefinite leave to remain on 5 October 2016. The respondent refused the application by means of a decision dated 13 February 2018, with an attendant out of country right of appeal. The appellant unsuccessfully challenged this decision by judicial review proceedings before the Upper Tribunal. The Court of Appeal refused permission to appeal by a decision dated 5 February 2019.
15. On 17 February 2019 the appellant applied for indefinite leave to remain on long residence grounds. The respondent refused the application with no attendant right of appeal by a decision dated 8 August 2019. The appellant's application for judicial review was refused by the Upper Tribunal at an oral renewal hearing held on 25 February 2020.
16. On 6 November 2020, the appellant applied for leave to remain on human rights (article 8) grounds. The respondent refused the application by a decision dated 7 September 2021 and these proceedings arise from that decision.

First-Tier Tribunal Decision

17. The hearing of the appellant's appeal was conducted remotely before the Judge sitting at Hatton Cross on 18 May 2022. The appellant was represented by counsel, not Ms Ferguson who appeared on her behalf before this Tribunal.
18. The appellant attended with seven witnesses. The respondent's Presenting Officer confirmed that only the appellant was to be cross-examined.
19. The Judge found that the appellant did not satisfy the requirements of paragraph 276ADE(1)(vi) of the Rules as she had not shown that there would be very significant obstacles to her integration in India. No complaint is made by the appellant before this Tribunal as to the Judge's decision in respect of article 8 under the Rules.

20. The Judge proceeded to consider article 8 outside of the Rules:

‘50. The Appellant has a complex immigration history. At times she has had lawful, but limited leave to remain. At other times she has had no leave to remain and has resided in the UK unlawfully. I take account of the fact that her period of unlawful stay in 2011 may have been as a result of a fraud and that the Appellant believed she had leave to remain at that time. Nonetheless, at all times the Appellant’s immigration status has been precarious. Applying *Rhuppiah v SSHD* [2018] UKSC 58, a person has precarious immigration status if he or she has leave to remain in the UK which is other than indefinite. This is the case here. In accordance with section 117B(5) of the 2002 Act, I must therefore give limited weight to the private life of the Appellant.

51. On the Appellant’s account, she is not financially independent, and she presumably has enjoyed the benefit of free NHS treatment during times when she has not had a lawful basis of stay. This weighs against the Appellant in accordance with s.117B(3), although I find that there is no reason to believe the Appellant could not become financially independent were she given the opportunity to remain in the UK, in which event I find she would be able to find work to support herself and would not be a burden on the taxpayers.

...

56. As will be apparent from the detailed immigration history set out at [2] above, the Appellant has always been proactive in attempting to regularise her immigration status. At no time does she appear to have attempted to ‘pass under the radar’ in respect of the immigration authorities. This is undoubtedly to the Appellant’s credit, although I do not consider this sufficient in itself or combined with other matters weighing in her favour to outweigh the public interest considerations.

57. Whilst there are undoubtedly some factors that weigh in the Appellant’s favour, I am not persuaded that the Appellant’s case is sufficiently exceptional to outweigh the public interest in this case.’

21. The Judge concluded:

‘58. Having carefully evaluated - and considered together and cumulatively - the considerations weighing in the Appellant’s favour, I have reached the view that they are insufficient to outweigh the public interest in the maintenance of effective immigration controls. I do not consider the Appellant will face considerable challenges in returning to India. I am therefore satisfied that the Appellant’s removal would be proportionate under Article 8 ECHR and would not be unlawful under Section 6 of the Human Rights Act 1998.’

Grounds of Appeal

22. The appellant's grounds of appeal are not properly delineated into separate particularised complaints identifying legal error as required: *Nixon (permission to appeal: grounds)* [2014] UKUT 368 and *Harveye v Secretary of State for the Home Department* [2018] EWCA Civ 2848, at [55] - [58] (*obiter*).
23. Rather, the adopted approach is to present eighteen paragraphs over four pages with no clear identification as to where one complaint ends, and another begins.
24. When granting permission to appeal on 12 July 2022, Judge of the First-tier Tribunal Brannan identified three grounds of appeal:
 - '2. The grounds assert that the Judge erred in:
 - a. not considering the factors weighing in favour of the appellant in the proportionality balancing assessment with sufficient detail, in particular the past period of lawful residence;
 - b. failing to apply the respondent's guidance on gaps in lawful residence; and
 - c. finding the appellant not to be financially independent within the meaning of *Rhuppiah* [2018] UKSC 58.'
25. Judge Brannan reasoned, *inter alia*:
 - '3. Starting with c, the Judge says: 'On the Appellant's account, she is not financially independent, and she presumably has enjoyed the benefit of free NHS treatment during times when she has not had a lawful basis of stay.' This identifies two factors that the Judge considers: financial independence under section 117B(3) and use of the NHS without permission to be in the UK. However, there are two arguable errors of law in this consideration.
 4. First, under *Rhuppiah* at paragraph 55 the question is financial dependence upon the state. The Judge finds the appellant to be dependent on friends and would not be a burden on taxpayers if able to work. It is hard to see how financial dependence on the state is found against such fact finding.
 5. Second, use of the NHS is not an established factor under section 117B(3). If it were, it is unclear why someone's immigration status makes a difference to it. It is possible for a Judge to take into account negative factors outwith those in section 117B. But in this case the respondent does not appear to have claimed this factor against the appellant.
 6. Grounds a and b disclose no clear error of law but in line with established principles I grant permission on all grounds.'
26. The respondent filed a Rule 24 response, dated 22 August 2022.

Discussion

27. Ms Ferguson very helpfully identified the grounds that she relied upon at the outset of the hearing. She identified paragraphs 1 to 5 of the grounds of appeal as being introductory. Ground 1 could appropriately be read from paragraph 6 to paragraph 14. She confirmed that the first two grounds of appeal identified by Judge Brannan were properly to be considered as constituting one ground of appeal (ground 1). Ground 2 was to be read at paragraph 15 of the grounds.
28. She accepted as to paragraph 16 of the grounds that earlier judicial review applications conducted between 2018 and 2020 could not extend section 3C leave as they were made at a time when the appellant was an overstayer.

Ground 1 - Failure to consider relevant factors

29. The appellant complains that at paragraph 50 of the Judge's decision there was a failure to properly record that she had acquired five years' continuous residence, as found by Judge Doran at paragraph 37 of his 2011 decision. I turn to this element of the challenge first, as Ms Ferguson accepted at the hearing that the relevant period of lawful leave was approximately four years and four months, and the appellant could not properly rely upon the more generous finding made by Judge Doran because the enjoyment of lawful leave between certain dates is subject to an accurate identification of fact.
30. The appellant further complains that the Judge undertook an 'insufficiently nuanced consideration' of her history. It was the appellant's case in writing that although the break in continuous residence in 2011 amounted to eighty-five (85) days in total, and so fifty-seven (57) days more than permitted, 'but for' this short break she would have secured indefinite leave to remain in October 2016. The appellant accepted that she cannot secure ten years' lawful residence grounds under the Immigration Rules. However, it was said that the failure to observe that 'but for' the short break she would have secured settlement was a factor the Judge should have weighed in her favour when assessing proportionality.
31. The calculation of eighty-five days is founded upon an ultimately successful application for leave to remain as a Tier 2 (General) Migrant being made on 4 April 2012.
32. Section 3C automatically extends an applicant's leave by operation of law, while they await determination of an in-time application for leave to remain. To benefit, a person must have existing leave to enter or remain at the time the application to vary is made. During the period between the making of an application to vary the leave and the date the respondent makes a decision on the application, it is possible by virtue of section 3C(5) to make a further application, which is capable of being treated as a variation of the first application for leave to remain, even if it is for a

different purpose: *JH (Zimbabwe) v Secretary of State for the Home Department* [2009] EWCA Civ 28, [2009] Imm AR 499 at [35].

33. Recently, the Court of Appeal confirmed in *Marepally v Secretary of State for the Home Department* [2022] EWCA Civ 855, per Lewis LJ, at [6], that the purpose of section 3C is to protect the immigration status of those with existing leave to remain who had applied for a variation of that leave and who were awaiting a decision on the application or who were exercising appeal or review rights in respect of that decision. The purpose of the section is not to enable persons to be able to rely upon continuation of leave for the purpose of building up ten years' continuous lawful residence to claim indefinite leave. Lewis LJ noted the judgment of Sir Stephen Richards in *Akinola v Secretary of State for the Home Department* [2021] EWCA Civ 1308, [2022] 1 WLR 1585, at [40] - [41].
34. Ms. Ferguson accepted before this Tribunal that the break in lawful leave between 12 February 2011, when the appellant overstayed, and the point in time when she would have been here for five years after entering the country, 1 October 2011, was significantly longer than eighty-five days. She refined the core of the appellant's case as the Judge erring in law by giving little weight to her private life, which was sufficiently well-established and so should have been given sufficient weight for that very reason.
35. The appellant enjoyed lawful leave at the time of her entry into the country on 1 October 2006 until 12 February 2011, a period of some four years and four months. She then overstayed until securing leave to remain on 8 August 2012, a period of almost one year and six months. No section 3C leave was enjoyed during this period of overstaying. She enjoyed leave to remain from 8 August 2012 to curtailment on 21 September 2013, a period of some thirteen months. As the appellant then made an in time application to vary leave, she enjoyed section 3C leave from 22 September 2013, which continued after she made her second application on 20 November 2013, such variation being permitted either to supplant the original purpose of the application, or to supplement the original purpose and thus sit behind it: *R (Chaparadza) v Secretary of State for the Home Department* [2017] EWHC 1209 (Admin). Her section 3C leave ran until the resulting appeal was withdrawn on 28 June 2017. Her application of 5 October 2016 did not enjoy section 3C protection.
36. The parties agreed at the hearing that appellant's period of lawful residence, combined, amounted to some nine years and eight months over the approximate fifteen years and seven months the appellant resided in this country before the First-tier Tribunal issued its decision.
37. Before this Tribunal Ms Ferguson was critical of paragraph 15 of the Judge's decision in respect of the Judge considering herself 'bound' by section 117B(5) of the Nationality, Immigration and Asylum 2002 and so giving little weight to the private life of the appellant. She contends that greater weight should have been given to the nine years and eight months

of lawful residence enjoyed by the appellant in this country. Ms Ferguson candidly acknowledged that she could not properly advance a near miss argument, and she was correct to do so. As confirmed by the Supreme Court in *Patel v Secretary of State for the Home Department* [2013] UKSC 72, [2014] AC 651, although the balance drawn by and the context of the Immigration Rules might be relevant to the consideration of proportionality of the interference with article 8 rights involved in removal, there is no principle that the closer a person has come to complying with the Rules the less proportionate such interference will be, and a near miss under the Rules cannot provide substance to a Convention rights case which otherwise lacks merit. I observe that article 8 is not a general dispensing power.

38. It was Parliament's intention when enacting section 117B(5) of the 2002 Act that a decision maker is required to give limited weight to the private life of an appellant. The United Kingdom authorities enjoy a margin of appreciation when setting the weighting to be applied to various factors in the proportionality assessment: *GM (Sri Lanka) v. Secretary of State for the Home Department* [2019] EWCA Civ 1630, [2020] INLR 32, at [28].
39. This appellant has never enjoyed settled status and therefore has only ever enjoyed precarious leave when lawfully present in this country: *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11, [2017] 1 WLR 823.
40. The little weight provision of section 117B(5) involves a spectrum that within its self-contained boundaries will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case: *Kaur (children's best interests/public interest interface)* [2017] UKUT 14 (IAC), [2017] Imm AR 814. The Judge clearly noted that the appellant had enjoyed lawful leave to remain in this country, as well as noting that she had spent time here unlawfully. She gave the benefit of the doubt to the appellant as to why she had some period of unlawful leave after 2011. However, she correctly noted that the appellant had only ever enjoyed precarious leave and identified Parliament's intentions as to the weight to be given to the appellant's private life. The Judge was clearly mindful of the guidance provided by the Supreme Court in *Rhuppiah v. Secretary of State for the Home Department* [2018] UKSC 58, [2018] 1 W.L.R. 5536 in her assessment and having noted the statutory requirement as to little weight, she proceeded to consider whether there were particularly strong features to the appellant's private life in this country that would permit the flexibility identified in *Rhuppiah* as to exceptional cases. She concluded that there were not.
41. As observed by Mr. Basra, the question for this Tribunal is whether the Judge's approach to the period of lawful leave and the weight given to it was reasonable. The appellant did not assert perversity when advancing her argument. I am satisfied that being mindful of Parliament's intentions the Judge gave appropriate weight to the appellant's lawful residence in this country and provided cogent reasons for concluding that an

exceptional case had not been established to permit flexibility in the application of the statutory requirement.

42. The appellant's challenge seeks to redraw the self-contained boundary established by section 117B(5), by replacing 'little' with 'sufficient' - amounting to necessary or desirable - when assessing weight. If that had been Parliament's intention, the word 'sufficient' would have been used in sections 117B(4) and (5).
43. Ultimately, the question for this Tribunal is whether the conclusion reached by the Judge is reasonable on the facts and the only proper conclusion is that it undoubtedly was.
44. I observe the second limb of ground 1 which was concerned with whether the Judge properly considered the respondent's guidance concerning post-2016 short gaps in lawful residence. This was not pursued with any vigour by Ms Ferguson, who properly noted that the gap in lawful residence between 2011 and 2012 was some eighteen months, and further that this point had not been raised before the First-tier Tribunal Judge. It is wholly inappropriate to raise before the Upper Tribunal a point now said to be of importance that was not raised either in the appeal skeleton argument or identified before the First-tier Tribunal as being an issue either at the commencement of a hearing or during closing submissions.
45. In the circumstances there is no merit to either limb of ground 1.

Ground 2 - 'Financially independent'

46. The appellant asserts that the Judge erred at paragraph 51 in concluding that she had not been financially independent for a period of time in this country.
47. Mr Basra accepted that there was an error of law in the first sentence of paragraph 51, with the Judge relying upon a presumption as to events, in circumstances where there is no record of the appellant being asked at the hearing as to whether she obtained NHS treatment during periods when she was unlawfully present in this country. I accept that that is an error of law.
48. The Judge then makes a positive finding for the appellant, that if she were to secure leave she would be financially independent. The Judge does not correctly identify this is a neutral issue. I am therefore satisfied that paragraph 51 is subject to an error of law.
49. However, for the reasons detailed at the hearing, I have concluded that the error was not material. As all other elements of the Judge's reasoning are cogent and lawful, the question for me is as to whether the appellant being financial independent could permit her to succeed on article 8 grounds outside of the Immigration Rules. As financial independence is a neutral matter, and the Judge has otherwise found the appellant's personal circumstance to be insufficient to outweigh the public interest in

the maintenance of effective immigration control, I am satisfied that the only conclusion reasonably open to a decision-maker on the present evidence is that the identified error of law is not material.

50. In these circumstances the appeal must properly be dismissed.

Notice of Decision

51. The decision of the First-tier Tribunal sent to the parties on 30 May 2022 does not contain a material error of law.

52. The appellant's appeal is dismissed.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber
24 April 2023