IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000729

First-tier Tribunal No: HU/53551/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 9th July 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

Miss KAMILLA MUSTAEVA
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Gajjar of counsel
For the Respondent: Ms S Cunha a Home Office Presenting Officer

Heard at Field House on 17 May 2023

DECISION AND REASONS

Introduction

1. The appellant is from Uzbekistan. She arrived in the UK on 11 September 2007 as tier 4 student. The relevant parts of her long immigration history thereafter will be considered, in so far as relevant, later.

2. She applied for indefinite leave to remain (ILR) on 8 December 2021 but this was refused and the appellant appealed to the First-tier Tribunal (FTT). FTT Judge Isaacs (the judge) dismissed her appeal.

3. The appellant appeals to the Upper Tribunal with permission of FTT Judge T Lawrence who identified potentially material errors of law in considering whether the respondent's interference with her protected human rights was justified under article 8 (2) or whether she ought to have considered the appellant's family life with her sister's children was an overriding consideration. All grounds were thought to be arguable, however.

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4. The appellant's principal argument seems to be that the periods when the appellant had been absent from the UK and whether these counted towards the appellant's total period of residence in the UK. Relying on **Asif (Paragraph 276B, disregard, previous overstaying) Pakistan [2021] UKUT 96 (IAC)** the appellant contended that even if she did not achieve the full 20 years of lawful residence, the respondent ought to have exercised her discretion in the appellant's favour and allowed the application under article 8. Accordingly, the judge erred in dismissing the appeal.

The hearing

5. At the hearing it was submitted by Mr Gajjar that the appellant had come to the UK lawfully and remained here lawfully subsequently but the judge had failed to make adequate credibility findings. The periods of the appellant's absence from the UK (719 days in total) were agreed but the reasons for that were in issue. It was the appellant's case that there were compelling reasons for the appellant's absence abroad for those days. In particular:

   (i) The first period of absence was from 30 November 2012 to 11 October 2013, when the appellant was away because of her grandmother's need for a career. Her grandmother had then died and the appellant was required to stay on;

   (ii) Mr Gajjar said that there was an additional point which the judge had failed to explore in paragraph 23 or elsewhere in her decision. Mr Gajjar said it was uncontroverted evidence that the university which the appellant attended had, due to administrative error, failed to provide the appellant/issue the appropriate documentation and she was therefore forced to take a year away from her studies. The appellant's skeleton argument (at pdf page 4) had made reference to this point and the judge might therefore to have picked up on it. The respondent had also been furnished with this information. The permitted period of absence was 548 days and the appellant's period of absence was 719-thus the excess was only 171 days. Accordingly, the total period of absence in 2013 was calculated to be 315 days. Therefore, if this point had been taken up by the judge it may have made a difference to the outcome of the appeal and in particular the application for leave to remain under rule 276B of the Immigration Rules.

6. Although the appellant was criticised for the evidence she had provided in relation to her grandmother's state of health there was circumstantial evidence to back it up and the appellant's evidence was credible and should have been accepted. There was a lack of palliative care in Uzbekistan and this explained the need for the appellant to provide her assistance to her family.

7. Although the appellant no longer considered the medical evidence of Dr Smyth to be helpful, there was the appellant's own evidence as to her painful leg condition. The judge had not made adequate fact findings in relation to these issues. Whatever the criticisms of Dr Smyth's report, this did not affect yet need for the judge to properly assess the evidence given by the appellant as to her condition.

8. Mr Gajjar then dealt with the second gap in the appellant's continuous period of residence in the UK pointing out that the appellant had left between 26th of October 2015 and 21st of June 2016. This had been dealt with at paragraph 24 of

the respect of the judge's decision. It was argued that the appellant that the judge may have been a procedurally unfair. Mr Gajjar relied on the case called **AM [2015] UKUT 656**, stating that a failure to put the concerns of the judge to an appellant may be an error of law where the appellant does not feel his had an opportunity to comment on them as this may be materially unfair (at (v) of the headnote).

9. Finally, Mr Gajjar turned to the appellant's relationship with her youngest niece, Robina, who was about to take her GCSEs. It was accepted by the respondent by the judge that there had been some family life in this country. I was referred to page 18 of the appellant's bundle. Although the appellant was not a parent, the appellant was close to her niece who was heavily reliant on her. I was referred to the assessment in paragraph 40 by the judge which, was said to have been inadequate.

10. Ms Cunha responded to say that paragraph 23 – 24 of the decision would have to be considered in the light of paragraphs 28 – 30 et seq. At paragraph 22 the judge had accepted a submission on behalf of the appellant that she had been absent for 719 days but that that this had been at least in part explained by other factors than those set out above. It was submitted that the judge had looked fully at the reasons for the absence at paragraph 24 and 28 but had made findings in respect of the allegation that she suffered from ill health and that this was an inadequate explanation for her absence. Significantly, Mr Smyth's report was unhelpful in that it exposed the fact that the appellant's condition was not as significant as she had claimed. The judge looked at the requirements of the Rules and the Guidance and noted that that her condition was not as serious as claimed. She based her conclusions on what she had said in cross examination before the judge, which was at odds with what Dr Smyth had said.

Discussion

11. At the end of the hearing I reserved my decision. The extent of the appellant's absence from the UK (719 days) appears to have been agreed between the parties. Mr Gajjar points out that this was only 171 days in excess of the permitted period of absence (548 days according to the respondent- which also appears to be agreed). If she had been absent for the permitted period it would have been an error of law for the judge not to allow the appeal, even though this was an appeal on the ground that the respondent's decision had been contrary to her human rights and in particular her right to respect for her family or private life under article 8 of the ECHR. This is because the respondent's decision would not have been proportionate and in accordance with a legitimate aim (immigration control). The appellant would still have been able to apply for leave to remain under the Immigration Rules in any event. It is also common ground that the appellant was not able to establish her absence was only 548 days within the ten year period.

12. The principal issue in the oral argument before ethe Upper Tribunal related to the explanation for her periods of absence. In particular:

    (i) Was the judge entitled to reject the appellant's explanations for her excessive absences from the UK-i.e. :

        i. problems with university administration leading her to defer one of her courses;

ii. her grandmother's care needs, illness and death;

iii. her own physical and mental ill-health.

(ii) Given those findings, whether the judge was entitled to conclude that there were no exceptional compassionate factors which would have required the respondent to exercise her discretion under article 8 in the appellant's favour, given her good immigration history;

(iii) Whether in all the circumstances the appellant's failure to satisfy the Immigration Rules should nevertheless not have proved fatal given that overall there was no obvious strong public interest in her removal.

13. The appellant says that her absence from the UK was largely explained by other factors than her own free choice and there was no strong reason for her removal and her failure to satisfy the requirements of the Immigration Rules should have been ignored, if indeed the tribunal was satisfied as to the reasons for the absences. The respondent says that the judge fully considered the appellant's explanation for her absence but reached conclusions which are sustainable in this appeal.

(i) The appellant's explanation for the excessive absences

14. The judge fully dealt with these at paragraph 23 et seq. Mr Gajjar pointed out that there was the failure of the institution where the appellant was studying to complete documentation in time, which prevented her enrolling on one of the courses. She therefore had to defer the commencement of that course for one of the years of that course. The judge had not fully dealt with this issue, he said. It was common ground between the parties that this had been the reason (the fault of the institution concerned) but this had not been challenged. Indeed, the respondent had been furnished with this information as an explanation for the first period of absence abroad.

15. The judge did make reference to this in paragraph 23 but she did not go on and explain the reason for the absence of the appellant from her course for the academic year in question (2012-13). Mr Gajjar suggested the fault of the university the appellant was attending at that time (on a hospitality management degree) adequately explained the difference between 548 and 719 days of absence – a total of 171 days. I am not persuaded that the appellant established that the entire 171 days was caused by an error on the part of the University and note that her grounds of appeal do not specifically advance this as a reason why the judge had erred. The attack on the judge's findings fundamentally focus on the lack of adverse credibility findings and the lack of proper findings on the best interests of her niece.

16. Whilst I agree with Mr Gajjar that there does not appear to be an explicit reference to the fault of the university being a reason for the appellant having to defer a year and that this may have contributed to the total period of absence from the UK, I am not persuaded this was material to the outcome. In broad terms the judge rejected the appellant's explanation for her periods of absence, noting that she had clearly wished to remain living in Uzbekistan well after her grandmother's death. The explanation arising out of her physical injuries in an accident was also rejected by the judge. She found a great deal of the evidence presented was inadequate and did not support the appellant's case, including the

report of Dr Smyth which the appellant's representative largely repudiated at the hearing before me.

(ii) Article 8 and exceptional circumstances

17. The appellant claims that there were strong ties with the UK, she had established a private or family life with her sister and his husband and has a close relationship with one of their children in particular. She has been of invaluable help to that daughter and the other children, who are now grown-up.

18. I will now consider this aspect in greater detail.

19. Her relationship with Robina is not qualitatively of a particularly elevated level. She has a good relationship with her niece and provides child care on a regular basis. But on her removal, Robina would be well cared for by her parents, who, if necessary would be able to seek outside paid help. Robina is now a teenager and will no doubt go into higher education in due course.

20. As the judge pointed out, the appellant had maintained her links with Uzbekistan where she had a number of family members. Her parents were there. She had worked there as recently as 2016. She continued to go back and forth on a regular basis. She had achieved qualifications here which would help to find employment there. There were therefore no "very significant obstacles" for the purposes of paragraph 276 ADE (1) (iv) of the Immigration Rules.

(iii) Whether overall the decision was a proportionate one

21. The judge had full regard to the large body of case law under article 8 as well as to section 117B of the Nationality Immigration and Asylum Act 2002 (see paragraph 40) which she applied to the facts as she found them to be. The appellant had an excellent immigration history but that was a neutral factor. Overall the judge fully considered article 8.

22. The judge concluded that the respondent's decision was proportionate in the circumstances and although the scales only just tipped in favour of the respondent, nevertheless this was a conclusion open to her.

Conclusion

23. I sympathise with the appellant, who has an excellent immigration history, has studied since she arrived in the UK and established a private life here as well as contributing to a strong family life with her sister and her family. These are matters of weight but they have to be balanced against the need to enforce proper immigration control. I am satisfied that the judge had regard to the need for the necessary balance it to be struck when she carried out her assessment of the evidence and reached clear conclusions on the basis of that assessment. Accordingly there is no material error of law.

Notice of Decision

I have decided to dismiss the appeal against the FTT's decision

W.E.Hanbury

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated this 15 June 2023