



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003411

First-tier Tribunal No: HU/55907/2022
IA/08522/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 14th June 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Secretary of State for the Home Department

Applicant

and

Yiwa Wong
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr M. Mullen, Senior Home Office Presenting Officer

For the Respondent: In person

Heard at Royal Courts of Justice (Belfast) on 16 May 2024

DECISION AND REASONS

1. By a decision dated 18 July 2023, First-tier Tribunal Judge Gillespie (“the judge”) allowed an appeal against a decision of the Secretary of State dated 24 August 2022 to refuse a human rights claim made in the form of an application for indefinite leave to remain pursuant to paragraph 276B of the Immigration Rules. The judge heard the appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”). The Secretary of State now appeals against the decision of the judge with the permission of First-tier Tribunal Judge G. Clarke.
2. For ease of reference, I will refer to the parties as they were before the First-tier Tribunal.

Hearing before the Upper Tribunal

3. The appellant was not represented at the hearing before me due to the non-availability of her previous representative. The appellant told me that she did not want to apply for an adjournment, and that she wanted to proceed with the hearing representing herself.
4. I therefore ensured that I provided the appellant with an appropriate level of assistance, consistent with the guidance in the Equal Treatment Bench Book. I ensured that she had access to all relevant papers and explained the process to her. I am grateful to Mr Mullen for his constructive and cooperative approach to this issue at the hearing. I permitted the appellant's mother, who had accompanied her to court, to sit next to her and confer with her when necessary. Only the appellant addressed the tribunal.

Factual background

5. The appellant is a citizen of the Hong Kong Special Administrative Region of China. She was born in 1997. She has lived in the UK for most of the time since September 2011, which was when she arrived in the United Kingdom on a Tier 4 visa, to attend school. She has resided lawfully in the UK since then, completing her education and obtaining a degree from a prestigious Scottish university. She has had a number of lengthy absences from the UK, for reasons to which I shall return.
6. Her most recent grant of leave was in the form of a Hong Kong British National (Overseas) Household Member Entry visa ("BN(O) leave"), valid from 28 May 2021 until 28 May 2026. She continues to hold that status.
7. On 7 August 2022, the appellant applied for indefinite leave to remain under paragraph 276B of the Immigration Rules, on the basis of her claimed ten years' continuous lawful residence.
8. The Secretary of State refused the application due to the cumulative length of the appellant's absences from the United Kingdom. Para. 276A(a)(v) of the rules permits absences totalling 18 months, or 548 days, during the ten year period, with no single absence exceeding 180 days. By contrast, the Secretary of State concluded, the appellant had been absent for 1139 days in total. From 16 June 2014 until 18 February 2015, she was absent of 244 days; from 23 February 2015 to 26 August 2016, for 183 days; and from 8 January 2021 to 14 August 2021, for 217 days.
9. The Secretary of State concluded that there was no basis to exercise discretion in the appellant's favour, and refused the application. The decision did not require the appellant to leave the United Kingdom, in light of her BN(O) leave, but the Secretary of State treated the decision as the refusal of a human rights claim, and the appellant appealed to the First-tier Tribunal.

Decision of the First-tier Tribunal

10. In his decision allowing the appeal, the judge identified the central question as whether the refusal decision breached the appellant's right to respect for private and family life under Article 8 of the European Convention on Human Rights ("the ECHR"), concerning the right to private and family life (para. 6). The judge referred to the role played by the Immigration Rules in addressing the question of

whether the refusal of the human rights claim breached the appellant's rights under Article 8.

11. The judge set out the medical evidence relied upon by the appellant, and accepted that he could place weight upon it. He summarised some of the difficulties the appellant had experienced while studying boarding school as a child in the United Kingdom, and said the following at para. 11 in relation to the appellant's various absences between 2014 and 2016:

“The appellant at the time was a minor (15 or 16 years of age) living far from home and subject to her parents’ authority during her adolescence and I am in no doubt there were good reasons for her absence. Compelling and compassionate circumstances undoubtedly obtain when it comes to her application.”

12. The judge continued at paras 12 and 13:

“12. In regard to the second period of absence from January 2021 to August 2021 this was during the Covid 19 epidemic. At that time, she was required to undertake a period of study in Germany. Restrictions on travel interfered with her ability to reside in accordance with restrictions on being outside the jurisdiction.

13. I have no doubt this young woman in undertaking her education was not outside the United Kingdom any longer than was necessary. The diligence with which she has pursued her studies at the several locations in the United Kingdom is self-evident in her qualifications to date. Covid was a challenge to people of her generation generally and again gives rise to compelling and compassionate circumstances. In my judgment discretion ought to have been exercised in her favour.”

13. The judge's operative conclusion was at para 15:

“15. In summary, the appellant’s total absences in the 10-year period prior to her application, including the two problematic periods of absence in 2014/2015 and 2021, amounted to 1062 days and should be seen in the context of the two genuine issues outlined...”

14. The judge allowed the appeal.

Issues on appeal to the Upper Tribunal

15. The central complaint of the Secretary of State is that the judge failed to provide sufficient reasons for allowing the appeal in relation to the appellant's absences from the UK between January 2021 and August 2021. There are two main facets to this ground of appeal.
 - a. First, the judge failed to explain the evidential basis for his conclusions that the appellant was prevented from returning to the United Kingdom from Germany during that time. While the judge referred to the Covid-19 restrictions that were then in force, the grounds contend that he failed to identify which restrictions prevented the appellant from returning to the United Kingdom at that time. (See paras (a) to (d) of the grounds of appeal).
 - b. Secondly, the judge failed to provide adequate reasons to support the finding that a refusal to grant indefinite leave to remain to the appellant would, “in light of her excessive absences”, be a disproportionate interference with her right to private or family life, particularly in light of

the appellant's extant leave BN(O) leave, which is valid until May 2026. The refusal of indefinite leave to remain would not require the appellant to leave the United Kingdom, thereby calling into question how the decision breached the appellant's Article 8 ECHR rights. (Para. (e) of the grounds of appeal).

16. Expanding upon the grounds of appeal, Mr Mullen drew my attention to a passage in the refusal letter which confirmed to the appellant that she would not be required to leave the United Kingdom following the refusal of her human rights claim. Faced with that, he submitted, it was not properly open to the judge to conclude that it would be disproportionate for the appellant not to be granted indefinitely to remain, on the basis of the reasons he provided. Mr Mullen submitted that the appellant simply could not demonstrate any interference with her private and family life arising from the decision under challenge. She would not be put at any immigration disadvantage in relation to her current immigration status on account of the application being refused, meaning that the reasons given by the judge for allowing the appeal were insufficient.
17. The appellant in response drew my attention to the fact that the grounds of appeal only challenged the judge's approach to her absence between January 2021 to August 2021, and had not challenged her other absences, when she was a child. In relation to her 2021 absence, the appellant explained that for a significant part of the period, 123 days, she did not have her passport. She had submitted it to the Entry Clearance Officer in Germany in order to obtain her present BN(O) leave as the dependent of her mother. Her mother held discretionary leave at the time which was about to expire, and the appellant had to apply as her dependent before it expired. That meant she had to submit the application from Germany, and in doing so had to wait to be granted an appointment to provide her passport to the British Consulate in Munich. On 7 June, she was notified that she could collect her passport, after which she had to book appointments to be vaccinated for Covid-19. Her first appointment was on 17 June, for the first dose, and the second dose, six weeks later, was on 29 July. She had to be vaccinated in order to be admitted to the United Kingdom. In order for the vaccines to take effect, a two-week period was required, which took her to 12 August 2021. She immediately returned as soon as she could, on 14 August 2021. Those matters were before the judge in her evidence, she explained.
18. The appellant also relied on the fact she had been in the United Kingdom for more than 10 years. She disagreed with Mr Mullen's submission that she had not been disadvantaged by the Secretary of State's decision not to grant indefinite leave to remain; as an international academic, she said, not holding indefinite leave to remain has placed a real barrier in front of academic opportunities that would otherwise have been open to her. She wants to remain in the United Kingdom with indefinite leave, and later naturalise as a British citizen.

The law

The Immigration Rules

19. At the relevant time, para. 276B(i)(a) of the Immigration Rules provided that a person with ten years' continuous lawful residence is entitled to indefinite leave to remain. A certain number of absences are permitted, but the Secretary of State has the power to exercise discretion in relation to absences over the permitted level where they were a result of compelling or compassionate circumstances. Para. 276B has now been replaced by Appendix Long Residence, but it remains applicable to these proceedings.

Refusal of a human rights claim

20. The statutory jurisdiction of the First-tier Tribunal under section 82(1) of the 2002 Act is engaged where the Secretary of State has “decided to refuse a human rights claim” made by an applicant: see section 82(1)(b).
21. A “human rights claim” is defined in the following terms by section 113(1) of the 2002 Act:
- “‘human rights claim’ means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention) [...]”

Sufficiency of reasons

22. It is well established that the conclusion that a judge has given insufficient reasons will not readily be drawn: see *South Buckinghamshire District Council v Porter (No 2)* [2004] UKHL 33, at para. 36. See also *English v Emery Reimbold & Strick Ltd. (Practice Note)* [2002] EWCA Civ 605 at, for example, para. 118:
- “...an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the Judge has reached an adverse decision.”
23. In *English v Emery Reimbold & Strick Ltd. (Practice Note)* [2002] EWCA Civ 605 at para. 118, Lord Philips MR said, in relation to reasons-based challenges that:
- “...an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the Judge has reached an adverse decision...”
24. The grounds of appeal challenge an evaluative decision of a first instance judge. The approach of an appellate tribunal or court to a decision of that kind was described in *Re Sprintroom Limited* [2019] EWCA Civ 932 at para 76 in the following terms:
- “...on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, ‘such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion’.”

Issue (1): sufficient reasons given in relation to the appellant’s 2021 absence

25. Pausing here, the forensic focus of the grounds of appeal (see paras (a) to (d)) is the judge’s approach to the 2021 absence. While the Secretary of State’s refusal letter rejected the reasons relied upon by the appellant for her absences between 2014 to 2016 (when she was a child), the grounds of appeal do not challenge the judge’s approach to that issue, as Ms Wong pointed out. But for the Secretary of State’s global challenge to the judge’s overall reasoning in the

case (see para. (e) of the grounds of appeal), the judge's reasoning in relation to the 2014 to 2016 absences is effectively unchallenged.

26. In my judgment, the judge gave brief but sufficient reasons explaining why he considered the Covid-19 restrictions then in force to have prevented the appellant from returning to the United Kingdom. The appellant gave full reasons in her witness statement for the length of this absence; the judge's reasons should be viewed in that context. The appellant explained that she was unable to travel for 123 days of the period of this absence because she had applied for a visa under the BN(O) scheme. She submitted the application on 8 February 2021, very shortly after the route opened. The application process required the surrender of her passport, which was returned to her on 11 June 2021. It was then necessary for the appellant to receive Covid-19 vaccinations; she received the first dose on 17 June 2021, and her second dose on 29 July 2021. As explained in the appellant's witness statement, the vaccines took 14 days to have full effect from the final dose, which took her to 12 August 2021. She left for the UK on 14 August 2021.
27. In my judgment, there was sufficient material before the judge to merit the conclusion that Covid-19 restrictions were the cause of the delay in the appellant's return, and the reasons he gave for reaching that conclusion were sufficient. The appellant's absence in 2021 was for a total of 217 days, 37 days over the permitted 180 day period. When one factors in the time taken to arrange both courses of vaccination and a short period to the vaccine to reach full effectiveness (bearing in mind the history of health conditions with which the judge would have been fully familiar, based on the materials before him), there was both sufficient material before the judge to merit this conclusion, and the reasons given by the judge for reaching it were, in light of those materials, sufficient.
28. It was not necessary for the judge to find that the total length of the appellant's absence was attributable to Covid-19 restrictions in its entirety. The judge was concerned with the extent to which the appellant had exceeded the permitted 180 day maximum single period of absence. The premise of the judge's reasoning was that it was necessary to be vaccinated in order to travel to the United Kingdom. The Secretary of State has not challenged that aspect of his reasoning (for example, by contending that the judge made a mistake of fact, or reached irrational findings). Looking at the time taken for the appellant to arrange vaccination, from the receipt of her passport on 11 June, to her eventually being able to travel, on 14 August, the reasons given by the judge are sufficient. They are also rational. The approach of the judge was not infected by an error of the sort identified in *Re Sprintroom Limited* (see para. 24, above).
29. For these reasons, this aspect of the Secretary of State's appeal is without merit.

Issue (2): no material error on account of the appellant's BN(O) leave

30. This aspect of the case highlights a consequence of the distinction that is now drawn by the Immigration Acts between the refusal of an immigration application, on the one hand, and the appealable refusal of a human rights claim, on the other.
31. Only the refusal of a human rights claim attracts a right of appeal under section 82(1)(b) of the 2002 Act. A human rights claim is defined by reference to an individual's prospective (even hypothetical) removal from the United Kingdom, and not necessarily by reference to the type or quality of leave held or sought by

the applicant. A human rights claim is a claim to the Secretary of State by an individual that *to remove* him or her from the United Kingdom would be unlawful under section 6 of the Human rights Act 1998: see section 113(1) of the 2002 Act. It is not a claim that to refuse to grant a particular form of leave is unlawful under the Human Rights Act in the particular circumstances of the appellant. I respectfully consider that the author of the grounds, and Mr Mullen's submissions, conflated the distinction between the Article 8 implications of the refusal of a particular type of leave with the Article 8 implications of the appellant's prospective removal.

32. The jurisdiction of the First-tier Tribunal as constituted to hear the appellant's appeal was contained in section 84(1)(c) of the 2002 Act, namely:

“...that **removal of the appellant** from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).” (Emphasis added)

33. Accordingly, the sole question for the judge's consideration was whether it would be unlawful under section 6 of the Human Rights Act 1996 *to remove* the appellant from the United Kingdom. The proportionality of an individual's prospective removal is to be judged by reference to the requirements of the Immigration Rules, and any exceptional circumstances such that it would be unjustifiably harsh outside the rules.

34. The judge therefore addressed the proportionality of the appellant's prospective removal by reference to the requirements of the Immigration Rules under which the appellant had made her human rights claim. That entailed determining whether the appellant met the requirements of para. 276B of the rules, or whether discretion should be exercised in her favour to enable her to be treated as though she did meet para. 276B. The position in relation to the exercise of discretion was summarised in the following terms in the refusal letter:

“Guidance set out under the long residency rules states that if an applicant is absent from the UK for more than 548 days overall during the 10-year qualifying period or is absent from the UK for more than 180 days (6 months) at any one time in the 10-year period, the application should normally be refused, unless [the] excess absences are a result of compelling or compassionate circumstances.”

35. The judge found that the appellant met the requirements of 276B, on the basis that discretion should be exercised in her favour, for the reasons he gave. The Secretary of State challenged a discreet aspect of that assessment concerning the appellant's 2021 absences, and I have dismissed that aspect of the appeal.

36. It follows that the judge was entitled – bound, even – to allow the appeal on Article 8 grounds on the basis that the appellant met the requirements of the Immigration Rules by reference to paragraph 276B and the accompanying guidance.

37. I also consider that the judge was bound to allow the appeal in any event, for different reasons. In *TZ (Pakistan) v Secretary of State for the Home Department* [2018] EWCA Civ 1109, the then Senior President of Tribunals held, at para. 34, 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.”

38. In these proceedings, the appellant not only (pursuant to the judge’s findings) met the requirements of paragraph 276B and the associated guidance, but she also meets the requirements for BN(O) leave. Her removal would be disproportionate on either view. However, the findings reached by the judge did not ascribe significance to the appellant’s leave in that capacity. He mentioned it only in passing at para. 14 (“I am told the appellant hold leave as a BNO Dependent Household Member...”). The judge allowed the appeal because, on his findings, the appellant met the requirements for indefinite leave to remain on the basis of her continuous long residence.

Jurisdiction

39. As I conclude, it is necessary to address the question of jurisdiction in light of the relatively unique circumstances of this case.
40. I have considered whether the fact that the appellant already held leave to remain, albeit limited non-Article 8 informed leave to remain, meant that the First-tier Tribunal did not have jurisdiction to hear her appeal. This is because, notwithstanding what I have set out above, whatever the outcome of this appeal the appellant is not at risk of removal, and is on a route to settlement pursuant to her BN (O) leave in any event.
41. I have concluded that the First-tier Tribunal did have jurisdiction to hear the appeal, and that there was no jurisdictional bar to the appeal being heard. The reasons for this are as follows.
42. First, holding limited leave to remain at the time a human rights claim is made is not an automatic bar to making a “human rights claim” for the purposes of section 113(1) of the 2002 Act. Many human rights claimants hold limited leave to remain which has not yet expired when they make a human rights claim. Making an in-time application has the effect of extending the applicant’s limited leave, pursuant to section 3C of the Immigration Act 1971. Such leave will be extended while any appeal proceedings remain pending: see section 3C(2)(b). It is well established that holding limited leave extended by section 3C is compatible with exercising a right of appeal under section 82(1) of the 2002 Act.
43. By contrast, when leave to remain “is granted” after the institution of proceedings, the proceedings are to be treated as abandoned: see section 104(4A) of the 2002 Act. There is no equivalent provision in relation to pre-existing leave. Sequencing is key to the operation of section 104(4A); the leave must be granted *after* the institution of proceedings.
44. The mere fact that the appellant held BN(O) leave cannot, therefore, have acted as a barrier to the refusal of the appellant’s para. 276B application amounting to the refusal of a human rights claim.
45. Secondly, the Secretary of State’s published guidance accepts that an individual in the circumstances of this appellant would enjoy a right of appeal. *Rights of appeal, version 15.0*, 11 December 2023, states at page 10 under the heading *How to identify a human rights claim*:

“The applications listed in this section and made under the Immigration Rules are human rights applications and the starting position is that there is a right of appeal against refusal:

[...]

Paragraph 276B (long residence)..."

46. Page 18 of the guidance addresses the position where an individual already holds limited leave to remain. It states:
- “...where an applicant has extant immigration leave then whether they have made a human rights claim will depend on:
- the basis of the grant of their extant immigration leave
 - the basis on which they are seeking leave of a different duration”.
47. The leave the appellant held at the date of the hearing below was not based on the requirements of Article 8 ECHR, but rather by the United Kingdom’s domestic immigration policy, arising from considerations of its international relations with China (see the forward to the *Hong Kong British National (Overseas) Visa* – *Policy Statement, July 2020* by the then Home Secretary, The Rt Hon. Priti Patel MP, at page 16 of the appellant’s bundle before the First-tier Tribunal). Further, the appellant’s leave was limited and not indefinite.
48. While the Secretary of State’s guidance is not binding on this tribunal, I consider that it accurately represents the legal position.
49. Thirdly, if any further clarity be needed, the appellant’s human rights claim to the Secretary of State amounted to a claim that it would be unlawful for her to *be removed* from the United Kingdom under section 6 of the Human Rights Act. This appellant had never previously made such a claim to the Secretary of State, and the Secretary of State had never previously considered, still less accepted, that the requirements of Article 8 of the ECHR required the appellant not to be removed from the UK. This point had simply not been adjudicated before.
50. It follows, therefore, that the First-tier Tribunal had the jurisdiction to hear the appellant’s appeal, and this tribunal is able to hear the Secretary of State’s onward appeal from that decision. For the reasons set out above, I have dismissed the Secretary of State’s appeal.

Conclusion

51. The judge was entitled to conclude that the appellant met the requirements for indefinite leave to remain on a long residence basis in light of the requirements of paragraph 276B of the Immigration Rules. That being so, it was not an error of law for him to find that it would be unlawful under section 6 of the human rights act 1998 for the appellant to be removed.
52. While the First-tier Tribunal no longer has the power to direct the Secretary of State to act in a particular way, the basis on which the appellant’s appeal was allowed was that she met the requirements of paragraph 276B. It would appear that in light of the Secretary of State’s guidance on the implementation of allowed appeals (*Implementing allowed appeals, version 1.0, 4 August 2020*, see page 5, “Granting leave”), the most appropriate course would be for the appellant to be granted leave which corresponds to the basis upon which the appeal was allowed, namely indefinite leave to remain.

Notice of Decision

This appeal is dismissed.

The decision of the First-tier Tribunal did not involve the making of an error of law such that it must be set aside.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 May 2024