



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/07182/2014

THE IMMIGRATION ACTS

Heard at Field House
On 28th January 2015

Determination & Reasons Promulgated
On 9th February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GAANASHREE WOOD

Respondent

Representation:

For the Appellant: Miss Isherwood, Home Office Presenting Officer

For the Respondent: Miss Smith, Counsel for Lewis Silkin, Solicitors, London

DETERMINATION AND REASONS

1. The Appellant in these proceedings is the Secretary of State, however for convenience I shall now refer to the parties as they were before the First-tier Tribunal.
2. The Appellant is a citizen of Singapore born on 1st June 1984. She appealed against the decision of the Respondent dated 21st January 2014 maintaining her original refusal dated 23rd May 2013 dismissing her application for indefinite leave to remain in the UK on the basis of her ten years continuous residence. Her appeal was heard by Judge of the First-tier Tribunal Russell on 7th October 2014. The appeal was allowed on human rights grounds in a determination promulgated on 23rd October 2014.
3. An application for permission to appeal was lodged by the Respondent and permission was granted by Judge of the First-tier Tribunal Lever on 11th December

2014. The grounds of application are that the judge has placed significant weight on the Appellant's relationship with Mr Kiss-Toth a European citizen and the fact that the decision to remove the Appellant from the United Kingdom would impact on his private life. The grounds state that this interference would be proportionate as neither party could hold a legitimate expectation of continuing their relationship in the United Kingdom outside of their ability to satisfy the relevant immigration control provisions. The grounds go on to state that the Appellant cannot satisfy the provisions of the Immigration Rules as she has not demonstrated continuous residence. In spite of this the judge considered that the Appellant's length of residence is pertinent to the overall assessment under Article 8. The grounds state that length of residence is encompassed in the Immigration Rules and failure under the Rules is a weighty factor against the Appellant. The grounds go on to refer to Article 8 and proportionality, stating that the Appellant's and Mr Kiss-Toth's private and family life could be continued outside the United Kingdom. They state that it is also open to the Appellant to make an application for entry clearance to the United Kingdom once she is able to satisfy the requirements as a partner under the Rules or the Regulations. They go on to state that the judge has failed to lawfully engage with this and has erred in allowing the appeal on Article 8 grounds.

4. A Rule 24 response was handed to me on the day of the hearing. This response states that the judge did not err in law in his assessment of Article 8 as at paragraph 45 he found that her private life engages Article 8, although her family life does not. The response states that the Appellant's relationship with her Hungarian partner was not a major determinative feature in Judge Russell's conclusion but was one of a number of factors that make up the Appellant's private life. It states that at paragraph 49 the judge refers to the Appellant's work, social connections and outside interests and her attachment to the United Kingdom as her home. The judge considered all of this before taking into account her relationship with Mr Kiss-Toth. The response goes on to state that the judge was entitled to take into account the length of time the Appellant has been in the United Kingdom but states that there is nothing in the determination to suggest that this was a significant factor in the judge's conclusion. The response then states that although the judge did not refer to Section 117B until paragraph 53 of the determination he applied the principles to his analysis. At paragraph 48 he referred to the Appellant paying tax and national insurance and speaking English and having studied to postgraduate level. The response states that these factors echo the statutory provisions of Section 117B(2) and (3). The response then states that the judge took into account Section 117B and the maintenance of effective immigration control. Finally the Rule 24 response states that the determination allowing the appeal should stand.

The Hearing

5. This is an error of law hearing and is the Secretary of State's appeal.
6. The Presenting Officer made her submissions. She submitted that it has not been challenged that the Appellant's application cannot meet the terms of the Immigration Rules on long residency. She submitted that the Secretary of State was therefore

correct to refuse the application. She submitted that the judge has allowed the appeal under human rights based on the Appellant entering the United Kingdom as a student and developing a relationship which at the date of the hearing was three months old.

7. The Presenting Officer submitted that legitimate expectation is an important issue in this claim. The Appellant came to the United Kingdom as a student and therefore had no legitimate expectation of being able to stay here. She returned to Singapore and took an internship there. While she was doing this internship she broke her ankle and she states that this is the reason she was out of the United Kingdom for more than the permitted period resulting in her long residency in the United Kingdom being broken. She was out of the United Kingdom between October 2007 and June 2008. The Presenting Officer submitted that the judge did not find that the Appellant's evidence about this was credible but found that the Appellant was trying to guide the evidence to support her claim. The Presenting Officer submitted that this Appellant has no right to remain in the United Kingdom as her application does not meet the terms of the Rules.
8. I was asked to consider the Immigration Act of 2014 and find that the Appellant's private life should only be afforded little weight as her presence in the United Kingdom has been precarious by virtue of its impermanence and that her private life when balanced against the public interest in maintaining effective immigration control is not disproportionately breached by the refusal. I was referred to the case of Y Russia [2008] ECHR 1585, in that case the Appellant, from China, entered Russia and worked for a university and developed a family life. At paragraph 103 it is stated that the state must strike a fair balance between the competing interests of the individual and of the community as a whole and where immigration is concerned Article 8 cannot be considered to impose on a state a general obligation to respect a married couple's choice of country for their matrimonial residence. At paragraph 104 it is stated that an important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. The Presenting Officer submitted that that is the case here. She submitted that this case is much weaker as the couple are not married and this is a new relationship. She submitted that this Appellant is able to return to Singapore and make an application to enter the United Kingdom based on her relationship with an EEA national. She submitted that that is what should happen and that Article 8 should not be used to circumvent the terms of the Immigration Rules.
9. I was referred to paragraph 106 of the said case of Y Russia. In this it is stated that the court discerns no exceptional personal circumstances which would have precluded the first applicant's removal once his claims for both refugee status and territorial asylum had been rejected and the appeal process exhausted. This paragraph goes on to state that the applicant had never sought to obtain a residence permit as the spouse of a Russian national so the question of whether he would have received such a permit remains open. It goes on to state that the other matter which

remains open is whether the Appellant's husband could join his wife in China. Paragraph 107 states that it follows that this complaint is manifestly ill-founded and must be rejected.

10. The Presenting Officer submitted that there are no good grounds for why the Appellant should remain in the United Kingdom. She submitted that the judge in this case appears to have treated the application as a near miss application and she submitted that either the claim meets the Rules or does not meet the Rules and in this case it does not meet the Rules.
11. The Presenting Officer then went on to deal with Article 8 and referred me to the case of **Patel and Others [2013] UKSC 72** and paragraph 56 thereof. This deals with a near miss issue and states that a near miss under the Rules cannot provide substance to a human rights case which is otherwise lacking in merit. At paragraph 57 it is stated that Article 8 is not a general dispensing power and has to be distinguished from the Secretary of State's discretion to allow leave to remain outside the Rules which may be unrelated to any protected human right rule. The Presenting Officer submitted that in this case the Appellant wants to use her qualifications in the United Kingdom but she is not entitled to do that. She submitted that in the case of **Nasim and Others Pakistan [2014] UKUT 25 (IAC) Patel**, is referred to in the head note and the head note states that it has to be recognised that Article 8's limited utility in private life cases is far removed from the protection of an individual's moral and physical integrity. She submitted that this is a private life case. She referred me to the case of **Oludoyi and Others - R IJR [2014] UKUT 539 (IAC)**. This is a judicial review case and I was referred to paragraph 20 which states that a threshold test is not the way forward. The evidence has to be looked at to see if there is anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. The Presenting Officer submitted that everything has been adequately considered under the Rules so there is no Article 8 claim which can succeed. The Appellant's representative objected to this stating that this does not form part of the grounds of application but the Presenting Officer submitted that all she is stating is that everything has to be looked at cumulatively. She submitted that in this case the judge considered everything in terms of the Rules and found that the claim under the Rules could not succeed and so the claim should not succeed under Article 8. She referred to the second ground in the grounds of application and submitted that what she is submitting is an explanation of the case law.
12. The Presenting Officer referred to Judge Russell's determination at paragraph 40 which deals with the relevant case law as does paragraph 44 and she then referred me to paragraph 45 relating to the Appellant's family life which the judge refers to as having recently begun. She submitted that the Appellant's relationship had not even begun when the immigration decision was made and the judge deals with credibility issues at paragraph 48 and does not accept that the Appellant had to stay in Singapore for longer than the permitted period. In this paragraph the judge states there is nothing to suggest that the Appellant could not equally continue and develop such a life in Singapore or elsewhere. The judge does not accept that it

would be difficult for the Appellant to stay in Singapore. At paragraph 49 the judge refers to the Appellant's visits to Singapore becoming less frequent and refers to her new relationship with Mr Kiss-Toth who he finds to be a compelling witness. The Presenting Officer submitted that these are the sole reasons for the judge allowing the appeal.

13. The Presenting Officer then referred me to the Rule 24 response in which it is stated that the Appellant is financially independent. She submitted that there is no evidence of this. The Appellant's representative submitted that the Appellant has had a job since 2012. Again with regard to the Rule 24 response, the Presenting Officer submitted that the Appellant cannot choose where she wants to live. She submitted that apart from her relationship the Appellant's claim seems to be that she has been in the United Kingdom for a long time.
14. The Presenting Officer referred me to Section 117 of the 2002 Act which is referred to in the determination at paragraph 53. She referred to this being primary legislation and submitted that the Appellant's stay in the United Kingdom at the time her relationship started was precarious so little weight should be given to this. The judge states that the Appellant has an excellent immigration history and the Presenting Officer submitted that she does have a good immigration history but has been travelling to and from Singapore while she has been in the United Kingdom. She submitted that this Appellant is relying on a relationship with an EEA national and it is open to her to obtain entry clearance under the Rules on this basis if the relationship is as she claims. She submitted that this was not considered by the judge although it should have been and that the judge did not properly consider public interest when making his decision.
15. The Presenting Officer asked me to find that there is an error of law in the determination and that it should be set aside.
16. The Appellant's representative made her submissions, submitting that she is relying on the Rule 24 response. She submitted that the Respondent has failed to show that there is a material error in the determination. She submitted that all the Home Office is trying to do is undermine the proportionality decision which has been properly made by the judge who heard the evidence and saw the documents. She submitted that the terms of the application are purely a disagreement with the judge's decision.
17. I was referred to paragraph 40 of the determination and she submitted that she accepts that the judge did not accept the Appellant's reasons for remaining outside the United Kingdom for more than the permitted time but that the judge found that the Appellant had always been legally in the United Kingdom although he found that she had been outside the United Kingdom for more than the permitted period. The representative referred to Judge Phillips and her determination on the same issue which she sent back to the Secretary of State to see if she was prepared to exercise discretion on the time spent by the appellant outside the United Kingdom in 2007-2008. The Secretary of State decided not to exercise her discretion in favour of the Appellant but the representative submitted that the determination promulgated

on 23 October 2014 does not indicate that the judge finds the application to lack credibility per se. She submitted that the judge has accepted much of the Appellant's evidence and at paragraph 40 has set out the legal basis for allowing the appeal under Article 8. He referred to the correct case law and she submitted that the grounds of application do not contain an argument against the judge's decision to go ahead and deal with the claim under Article 8 after finding that there are arguably good grounds for doing so. She submitted that the judge's determination contains all the relevant case law and he considers the application under the Rules and then Article 8 is considered outside the Rules. She submitted that was the correct way to deal with the claim. She submitted that the judge made an Article 8 assessment on the evidence before him. She submitted that paragraphs 40 to 45 refer to the relevant case law and the judge is dealing with the Appellant's private life not her family life because the Appellant's relationship is only of short duration.

18. At paragraph 46 the representative submitted that the judge found that the Appellant retains strong links to Singapore but he goes on to consider the length of time the Appellant has been in the United Kingdom, the letters of support, the value of the Appellant's work and her friendships in the United Kingdom and the fact that she has been paying tax and national insurance. She submitted that the length of time the Appellant has been in the United Kingdom must be relevant and it cannot be an error to add this to the equation. I was referred to the letter from the Appellant's employer and her payslips and the fact that she is entitled to work here.
19. The representative referred to the judge's comments on the Appellant's visits to Singapore being less frequent than they used to be, to the fact that she now has roots in the United Kingdom and that she has a large private life here. The Appellant not only works but does voluntary work and she submitted that although the appellant may have had no legitimate expectation of remaining here, she has put down roots and the content of her private life has to be looked at. She submitted that the judge only takes into account her relationship at paragraph 50 of the determination and the judge did not take the relationship as the determinative factor. She considered all the other factors too. She submitted that the relationship is still part of the Appellant's private life and had to be taken into account.
20. The representative referred to the Appellant's partner's evidence and the fact that the judge found him to be genuine and the judge also found that removal would be a problem when the development of the Appellant's and Mr Kiss-Toth's relationship is considered.
21. The representative referred to paragraph 53 of the determination and the judge's reference to Section 117B of the 2002 Act. The judge referred to effective immigration control and public interest and she submitted that this Appellant can speak English, is well educated and is well integrated into life in the United Kingdom and the judge took all this into account. The Appellant will not be a burden on the taxpayer, she is financially independent, she works and pays national insurance and tax and she submitted that the judge has referred to all of this. The Appellant has never been in the United Kingdom unlawfully and she submitted that her time in the United

Kingdom was not precarious when she entered into her relationship with Mr Kiss-Toth. She was here legally.

22. The representative submitted that the judge has given appropriate weight to the public interest considerations in his assessment of proportionality. She submitted that there is no error of law in the determination. What the Respondent is doing is carrying out a point-scoring exercise. She submitted that the relationship may have tipped the balance and this is referred to at paragraph 52 of the determination.
23. The representative submitted that this has been a careful determination and the judge has applied the legal principles to the facts and was entitled to reach the conclusion he did. She submitted that the Respondent is merely disagreeing with the judge's decision and that the determination should stand.
24. The Presenting Officer made further submissions referring to ground 3 paragraphs (b) and (c). She submitted that the Appellant can continue her relationship either in Singapore or Mr Kiss-Toth's member state. She submitted that although the Appellant's representative went through the Immigration Act and has stated that the Appellant has always been in the United Kingdom lawfully, what she has not taken into account is the fact that she has always been in the United Kingdom temporarily. She submitted that if the Article 8 claim succeeds in this case this would mean that any good student should be able to remain in the United Kingdom even if the terms of the Rules cannot be met and this is clearly not the case. She submitted that the said case of **Patel** has to be taken into account and the judge allowed this appeal based on the length of time the Appellant has been in the United Kingdom, her employment and her short relationship. She submitted that that is not enough. When public interest is taken into account this Appellant should go back to Singapore and if she wishes to continue her relationship with the EEA national she should make an application from there under the Rules. She submitted that Section 117B of the 2002 Act was not properly dealt with in the determination and the decision should be overturned.

Determination

25. I have to decide if there is a material error of law in the judge's determination when she allowed the appeal under Article 8 of ECHR. It was accepted by both parties that the application does not meet the terms of the Immigration Rules.
26. The judge has noted that when considering Article 8 the focus is on the Appellant's private life. The Appellant's representative clearly felt that when the Appellant entered into her relationship her situation in the United Kingdom was not precarious but what she did not take into account and what the judge did not take into account in his determination was the fact that the Appellant has only ever been temporarily in the United Kingdom. The Appellant was aware of this when she was developing her private life and as she has been here for quite a long time she clearly has quite a considerable private life in the United Kingdom. In spite of this she has never had a legitimate expectation of being able to remain here. This has to be taken into account when her relationship with Mr Kiss-Toth is considered and when his human rights

are considered as clearly he must also have been aware that the Appellant was only temporarily in the United Kingdom. I find therefore that the Appellant's situation in the United Kingdom is and was precarious because of its impermanence.

27. This is important when considering Section 117A to D of Part 5A of the 2002 Act. Paragraph 117B(5) states that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. That is the situation here. The appellant has never been in the United Kingdom unlawfully but her relationship has been formed when she has been here temporarily. This is what has to be balanced against public interest and the maintenance of effective immigration control.
28. When proportionality is assessed not only does this have to be taken into account but the fact that the application cannot meet the terms of the Immigration Rules must weigh against the Appellant. This is a public interest factor in favour of removal.
29. It is true that the judge has taken the whole of the Appellant's situation into account when considering Article 8 of ECHR including not only her relationship but her ability to speak English, her work, her friends and the fact that she has integrated well into the United Kingdom but that is not enough. There are many students in that position and they cannot all be allowed to remain in the UK under Article 8 of ECHR when the terms of the Immigration Rules cannot be satisfied. The Appellant cannot choose whether she wishes to live in the United Kingdom or in her own country. If this appeal is dismissed she will require to go back to Singapore. She has been travelling between the UK and Singapore and her family is in Singapore. This is not an unusual case with compelling or compassionate reasons for her remaining here. The judge has not properly taken into account the statutory position regarding private life as indicated in Section 117 of the 2002 Act. Although the judge has referred to this Section in paragraph 53 and has stated that the maintenance of an effective immigration control is in the public interest, he has found that the removal of the Appellant for this reason is not proportionate to the achievement of that legitimate aim bearing in mind the interference with the Appellant's relationship with Mr Kiss-Toth. This is clearly an error of law. A proportionality assessment has not been properly carried out as her particular status in the United Kingdom has not been considered.
30. The judge clearly found credibility issues in the Appellant's evidence and in Dr Li's evidence and at paragraph 30 states that he finds the Appellant's evidence not to be credible. At paragraph 31 he states that the Appellant is trying to fit the evidence about her ankle fracture and her subsequent internship in Singapore into a narrative that supports her claim to have been prevented from returning to the UK. He makes it clear why he finds there to be a lack of credibility and at paragraph 34 he states that it is a cause for some dismay that both Dr Li and Mrs Siva thought it helpful to contradict their earlier evidence to support the Appellant's evidence. It is clear that he believes that the Appellant found her internship in Singapore more important than her position in the United Kingdom and so tried to convolute her evidence to her advantage. In spite of this he went on to allow the claim under Article 8.

31. At paragraph 40 the judge deals with the relevant case law relating to Article 8 and finds that there are good arguable grounds for considering the claim under Article 8 of ECHR. He refers to compelling and compassionate reasons for the Appellant remaining in the United Kingdom. At paragraph 43 he states that the right of States to control the entry of non-nationals is that Article 8 does not impose on a State any general obligation to respect the choice of residence of a foreigner but that immigration control has to be exercised consistently with Convention rights. He refers in that paragraph to insurmountable obstacles and goes on to make his proportionality assessment relying on the case of Razgar [2004] UKHL 27. The judge then goes on to deal with the appellant's private life, finding that her family life is so recently begun that it cannot be given much weight. At paragraph 46 the judge finds that the Appellant has strong links to Singapore. She spent five months there in 2011. At paragraph 47 it is clear that the judge knows that she has been in the United Kingdom as a student which means that she has a temporary right to remain until her visa is at an end. At paragraph 48 he states that there is nothing to suggest that the Appellant could not equally continue and develop her life in Singapore or elsewhere. At paragraph 49 he accepts that as a student she has no legitimate expectation of being allowed to remain in the United Kingdom. He refers to her putting down roots here but she has done so knowing she was only here on a temporary basis. At paragraph 50 the judge refers to her relationship with Mr Kiss-Toth and I find that this is the tipping point when the judge makes his decision relating to Article 8. I have noted that when the application was made the Appellant did not know Mr Kiss-Toth. This is a very short-term relationship and at paragraph 51 the judge states that he needs to set aside any sympathy for the Appellant or find her attributes to be more deserving than those of others. This however seems to be what he has done. He refers to the case of Nasim and Others (Article 8) [2014] UKUT 25 (IAC).
32. This is not an unusual case. This is the case of a student in the United Kingdom having completed her studies and having started to work here and wishing to remain here. She does not have that choice. She comes from Singapore and she requires to return there at the end of her visa. There was no legitimate expectation on her part to remain here.
33. I have also taken into account No 3 of the grounds of application. I accept 3(a) and find that the essential elements of the Appellant's protected rights could reasonably be continued outside the United Kingdom. With regard to 3(b) it is clear that the Appellant wishes to continue her relationship with Mr Kiss-Toth. She can do so in Singapore or within the EEA or it is open to her to make an application for entry clearance to the United Kingdom once she is able to satisfy the requirements as a partner under the Rules or the Regulations. This is something that has not been properly considered by the judge in his determination and remains open. The Appellant's evidence is that she and Mr Kiss-Toth are already making wedding plans. There clearly will be an interference to both of their private lives if she returns to Singapore but the judge recognises that Mr Kiss-Toth, a Hungarian national is exercising Community law rights in the United Kingdom. At paragraph 52 the judge states that the forming of this relationship tips the balance in deciding whether the

interference with her right to private life is serious. What the judge should have found was that the Appellant could return to Singapore and make an application to return to the United Kingdom as an unmarried partner or a fiancée and may well succeed under the Rules. Because of this, this application cannot succeed under Article 8 of ECHR.

34. Public interest has been mentioned by the judge at paragraph 53 but I find it has not been properly dealt with in the proportionality assessment. The judge has gone against the decision in the said case of Nasim and I find he has not set aside his sympathy for the Appellant and has found her attributes to be more deserving than those of others. This is a material error of law.

Notice of Decision

35. I find that there is a material error of law in the judge's determination when he allowed the appeal under Article 8 of ECHR.
36. The appeal cannot succeed under the Immigration Rules.
37. I am setting aside Judge Russell's determination allowing the appeal under Article 8 of ECHR. I have heard the submissions of both parties. A second stage hearing is not required.
38. I dismiss the appellant's application for leave to remain in the United Kingdom under the Immigration Rules and under ECHR.
39. No anonymity direction is made.

Signed

Date 06.02.2015

Deputy Upper Tribunal Judge Murray