Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23960/2014

THE IMMIGRATION ACTS

Heard at: Columbus House, Newport
On 23 June 2015

Decision promulgated
On 7 July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TIANQI GAO

Respondent

Representation

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr R Roberts, Cromwell Wilkes

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the determination of First-tier Tribunal Judge Suffield-Thompson in which she allowed the appeal of Tianqi Gao, a citizen of China, against the Secretary of State's decision to refuse leave to remain and to remove him from the United Kingdom. I shall refer to Mr Gao

as the Applicant, although he was the Appellant in the proceedings below.

2. The Applicant arrived in the United Kingdom on 4 January 2003 (aged 13) with a valid student visa. This was subsequently extended on various occasions eventually expiring on 30 January 2014. On 26 January 2014 the Applicant applied for indefinite leave to remain on the basis of 10 years lawful residence in accordance with paragraph 276B of the Immigration Rules (HC395). His application was refused on 13 May 2014. The Applicant exercised his right of appeal to the First-tier Tribunal. This is the appeal which came before Judge Suffield-Thompson on 15 January 2015 and was allowed on human rights grounds. The Secretary of State applied for permission to appeal to the Upper Tribunal. The application was granted by First-tier Tribunal Judge Chambers on 19 March 2015 on the basis that having found that the Applicant did not meet the requirements of the Immigration Rules the reasons the Judge gave for undertaking the Article 8 ECHR assessment gave rise to an arguable error of law.

3. At the hearing before me Mr Richards appeared to represent the Secretary of State and Mr Roberts represented the Applicant. Mr Roberts submitted copies of the authorities of Sunassee [2015] EWHC 1604 (Admin), Singh [2015] EWCA Civ 74 and MM (Tier 1 PSW; Art 8; private life) Zimbabwe [2009] UKAIT 00037.

Background

4. The history of this appeal is detailed above. The facts, not challenged, are that the Applicant was born in China on 2 May 1989. He arrived in the United Kingdom on 4 January 2003 as a student and has remained studying firstly at school and later at university. The Applicant's last leave to remain expired on 30 January 2014 and just prior to its expiry he applied for indefinite leave to remain on the basis of 10 years lawful residence.

5. The Secretary of State refused the Applicant's application on the basis that he had not completed 10 years lawful residence and so did not meet the requirements of the Immigration Rules. The Secretary of State noted that there was a hiatus in the Applicant's lawful residence. His initial leave to remain expired on 31 October 2007 and two subsequent applications made out of time on 21 November 2007 and 1 December 2007 were rejected. The Applicant made a further application for leave to remain on 7 February 2008 and this was granted on 26 February 2008 valid until 30 November 2008 and his next application was not made until 27 March 2009 and was granted on 15 July 2009. The Secretary of State calculated that the Applicant was without lawful leave to remain from 31 October 2007 to 26 February 2008 and from 30 November 2008 to

15 July 2009. These periods broke the claimed 10 years of lawful residence. The Secretary of State went on to consider the application under the private and family life provisions of the Immigration Rules but decided that the Applicant did not meet those requirements and that there were no factors of a sufficiently compassionate or compelling nature to warrant the grant of leave outside the terms of the Immigration Rules.

6. The grounds of appeal to the First-tier Tribunal did not challenge the decision to refuse the application under the Immigration Rules but asserted that the decision was unlawful because it was incompatible with the Applicant's rights protected by Article 8 of the European Convention on Human Rights. At the hearing before the First-tier Tribunal the Applicant was represented by Mr Roberts who accepted that he did not meet the requirements of paragraph 276B of the Immigration Rules although he did not accept that there were two periods of unlawful residence. The Judge found that the Applicant did not meet the family and private life provisions of the Immigration Rules but went on to find that the Respondent's decision was a disproportionate interference in the Applicant's private life and allowed the appeal on that basis.

7. The grounds of appeal to the Upper Tribunal assert that the Judge made a material misdirection in law firstly in finding that the Applicant's claimed 10 years residence had only one gap rather than two and secondly by failing to identify compelling circumstances causing her to consider the appeal outside the family and private life provisions of the Immigration Rules. The grounds further assert that the Judge's Article 8 proportionality findings are perverse to the degree that they are irrational in respect of her finding that the Applicant had severed ties with China and considered himself British.

Submissions

8. On behalf of the Secretary of State Mr Richards said that there was little materiality in the grounds and that he relied on the Article 8 findings. They are wrong in law. The grounds point out that the Judge has considered Maslov v Austria (1638/03) [2008] ECHR 00046 (IAC) when this is not comparable being a deportation case where the applicant was to be excluded form the United Kingdom for 10 years. Maslov refers to a person who had been settled for all or a major part of his life. The Applicant has never held settled status in the United Kingdom and having arrived in the United Kingdom at the age of 13 had not spent the majority of his life here. The reasoning does not show that a meaningful balancing exercise was undertaken. There is no acknowledgment of the public interest

in maintaining effective immigration control. The Judge's conclusion refers to the Applicant as a *'bright, hardworking, law abiding young man'* but this is not an acceptable reason for the finding that returning to China would be disproportionate. There is no acknowledgment of the fact that he came here to study in the expectation that he would return to China. He has family in China. Mr Richards said that he struggled to come up with words to find any justification for the Judge's extraordinary conclusion. It cannot be that someone who comes here to study and is a thoroughly nice person merits being granted permission to stay on that basis alone. The findings are so unreasonable as to be perverse and irrational.

9. For the Applicant Mr Roberts confirmed that the Applicant was supported by his family and could not be said to be self-sufficient. Responding to Mr Richards he said that he could not see the Secretary of State's position. Where Mr Richards says that students should not expect to be granted permission to stay the Immigration Rules provide a route for settlement for students and it was under those rules that the Applicant honestly believed he could apply after 10 years residence. Mr Roberts agreed that Maslov was not an appropriate comparison. So far as the question of gaps in the 10 year period is concerned this did not mean that the Applicant met the requirements of the rules but it did reflect upon the substance of the Article 8 appeal. Mr Roberts referred to paragraphs 33-36 of the recent decision in Sunassee [2015] EWHC 1604 (Admin) and said that there is no test of exceptionality or compelling circumstances to be passed before it is permissible to consider an Article 8 appeal outside the terms of the Immigration Rules. Article 8 is engaged when the circumstances are not fully provided for within the rules. Mr Roberts pointed out that the Applicant has not simply been refused permission to remain. The Secretary of State has gone on to issue removal directions. This is entirely disproportionate.

Decision - Error of law

10. The grounds of appeal to the Upper Tribunal are two-fold asserting firstly that the Judge made a material misdirection in law and secondly that her findings are perverse or irrational.

11. The circumstances have been detailed above. In summary the Applicant is a young man who came to the United Kingdom to study in school and carried on to university and postgraduate level. Believing that he qualified for indefinite leave to remain following 10 years lawful residence he applied accordingly and this is the application that was refused and is now under appeal. It is now accepted that the Applicant did not meet the strict requirements of

the Rules having been without leave for a short period or periods during his claimed 10 years of lawful residence. Whether this was one or more periods does not in my judgment make any significant difference. The Applicant did not meet the requirements of the rules but there can be little reasonable doubt that his failure to meet the requirements of the rules was caused by the administrative error of either himself or those advising him. I do not attach any particular degree of culpability to the Applicant in this respect although I do note that the Judge (at paragraph 23) was under the incorrect impression that the Applicant was a minor at the time when in fact he achieved his legal majority on 2 May 2007 and the periods when he was without leave are said by the Secretary of State to be 31 October 2007 to 26 February 2008 and from 30 November 2008 to 15 July 2009. The latter period only is accepted by the Applicant and indeed was accepted by him in his application (D8).

12. It having been accepted by the Applicant that he did not meet the requirements of the Immigration Rules the Judge goes on to consider (at paragraph 25) whether he meets the family and private life provisions of the Immigration Rules and finds that he does not. The finding in this respect is not challenged. The Judge then considers whether she should deal with the matter outside the terms of the Immigration Rules and directs herself in the following way at paragraph 26

> "To make this assessment I first have to find that there are good reasons that lead me to consider the appellants case outside the Immigration Rules and I find that there are. A good reason is one that it compelling but it does not have to be anything extreme for me to move to Article 8. In this case I find that the Immigration Rules do not provide discretion to examine whether the decision is propionate (sic) in the light of this appellant's particular circumstances and I find that the decision is likely to have significant impact on the private life of this appellant"

13. In my judgement, and whereas the self direction may be a little convoluted conflating as it does the reason to go outside the Immigration Rules with the second stage of the Razgar test, it is not a misdirection in law. In Sunassee Edis J confirms the approach already prescribed by Deputy High Court Judge Grubb in R (Aliyu) v Secretary of State for the Home Department [2014] EWHC 3919 (Admin)

> With great respect to the Upper Tribunal which decided *Gulshan* it seems to me to go a little further than the source from which it purports to be derived. It is the origin of the problem with paragraph 55 of the decision in the present case, and I have already averted to the difficulty with it. It is unclear to me how a Tribunal could decide whether it was arguable that there may be good grounds for granting leave to remain outside the Rules without first considering whether there may be compelling circumstances not sufficiently recognised under them

14. In my judgement the Judge's reasoning in paragraph 26 is sufficient explanation of why she has gone on to consider Article 8 directly.

15. The actual consideration of Article 8 is however another matter. Having properly self directed to Razgar [2004] UKHL 27 and there being no claim that the Applicant has family life in the United Kingdom the Judge finds (paragraph 29) that he has a private life in the United Kingdom. It is unclear whether the following paragraph is a justification for the finding that the Applicant has a private life in the United Kingdom or an examination of the qualitative aspects of that private life but this paragraph and the first three sentence of paragraph 33 are the sum of the Judges findings

> "The appellant is a 25 year old young man who came here at the age of 13 and has spent his formative years here in the UK. He has little contact with China now. His family have invested a huge amount of money into the system here by way of school and university fees. He is an exemplary student who has and will undoubtedly continue to contribute to the world of Science and I am assisted in finding this by virtue of the letter from Dr Wang who is the Professor of Electronic and Electrical Engineering at Bath University (contained within the appellant's bundle). It is abundantly clear that the appellant has integrated to such an extent that he has now, in his eyes, become British. He has moved away from China in all regards other than some phone contacts with his parents.
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> This appellant is bright, hardworking, law-abiding young man who had lived and studied here for almost 10 years of his life. He is studying and is self-funding that study, he is part way through his Master's and would be unable to complete it if her (sic) were removed. He has a girlfriend and a large network of friends and colleagues in the world of science."

16. There are in my judgement two issues that cause me to come to the conclusion that the Judge has materially erred in law. The first relates to the findings quoted above and the second to the balancing of those findings against the public interest.

17. So far as the first of these issues is concerned there are a number of findings that are either wrong or irrational. Firstly the finding that the Applicant has spent his formative years in the United Kingdom appears as a conclusion without an assessment in order to reach that conclusion. There is of course no definition, in age terms, of formative years. Such years, being the period that shapes the rest of a person's life, can vary from individual to individual. In this instance, without there being reasons behind the finding it is impossible to ascertain how the conclusion that the years spent in the United Kingdom are the Applicant's formative years rather than the earlier part of his childhood or indeed a combination of both. The finding that the Applicant has little contact with China now and the later finding that he has moved away from China in all regards other than some phone contact with his parents is contrary to the evidence. The Applicant's application for leave to remain details

(D3) nine separate visits to China between 2003 and 2011 with a cumulative total of 372 days, which is more than one year, spent in China. The Applicant's written witness statement refers to a *'contented and happy childhood in a comfortable middle-class background before being sent to be educated in England'* but is silent as to his contact with China. His oral evidence to the First-tier Tribunal was that his parents and grandparents remain in China along with his aunts and uncles. It was confirmed to me, and indeed it is implicit although so far as I can see not detailed in the evidence to the First-tier Tribunal, that the Applicant was at all times and still is wholly dependent on the financial support of his family in China. The finding that his family have invested a huge amount is no doubt correct but this was not a huge amount invested *'into the system here'* rather it was a huge amount invested in the Applicant's education. In my judgement this is clear evidence of continuous contact with his family in China. The finding that the Applicant *'has integrated to such an extent that he has now, in his eyes, become British'* again lacks reasoning and such a conclusion without detailed reasons is on the face of it perverse.

18. Turning to the second issue the only reference to a balancing exercise is the finding (paragraph 33) that the removal of the Applicant *'would be disproportionate to the legitimate public aims sought to be achieved (under 117B) by the Secretary of State'*. There is no self direction as to the provisions of section 117B of the Nationality Immigration and Asylum Act 2002 other than the reference at paragraph 3 to the Judge's awareness of its provisions. The Judge is considering this appeal under Article 8 ECHR with this being the only live issue before her. Section 117A of the 2002 requires the Judge in all cases to have regard to the provisions of section 117B when considering the public interest question. The decision does not show that the Judge has considered the public interest question or had regard to the provisions of section 117B in doing so. This is a manifest and material error of law. If the Judge had regard to the provisions of section 117B the following findings would, on the evidence before her, have been made.

    (i) The Applicant speaks English and therefore there is no negative factor in this regard (117B(2))

    (ii) The Applicant is not financially independent being wholly reliant upon his family in China (117B (3)).

    (iii) Little weight should be given to the Applicant's private life because it was established at a time when his immigration status was precarious (117B (5). In this respect I take guidance from the recent decision of the Upper Tribunal in AM (s.117B) Malawi [2015] UKUT 260 (IAC) to which I will refer in greater detail below.

19. My conclusion from all of the above is that the decision of the First-tier Tribunal contains errors of law material to the decision to allow the appeal. The appeal of the Secretary of State is therefore allowed and the decision of the First-tier Tribunal is set aside.

Remaking the decision

20. Both representatives agreed that if an error of law was found I should remake the decision based upon the evidence that was before the First-tier Tribunal.

21. In remaking the decision I accept firstly that the Applicant having been in the United Kingdom for most of the time since the age of 13 has established a private life here. This private life has involved spending most of his adolescent years, and in this respect no doubt some if not all of his formative years, in this country. It has also involved being educated in this country up to Master's degree level. Indeed I note that, according to the Applicant's chronology of his student history, he has two Master's degrees from the University of Bath the one in Electrical Engineering (MEng) and the other in Power Engineering (MSc) and at the time of his witness statement was studying for a third Master's degree in Theoretical Physics at University College London with a view to carrying on thereafter to a PhD. I have no doubt that he has built up a wide network of friends in this country. I accept that the Respondent's decision will cause an interference in his private life of sufficient gravity to engage the Convention.

22. The Applicant dos not meet the requirements of the Immigration Rules either in respect of long residence or private life and he did not apply for leave to remain on the basis of his continuing studies. In these circumstances the Respondent's decision is lawful and in pursuance of the legitimate aim of immigration control. The issue becomes one of proportionality.

23. On the positive side of the proportionality balance I take into account the factors referred to in paragraph 21 above and add to those the Applicant's undoubted good character and academic achievements.

24. Against that I weigh the public interest in effective immigration control and in doing so I take no adverse account of any periods spent in the United Kingdom without leave. Whilst such periods prevent the Applicant from meeting the long residence

requirements of the Immigration Rules they are periods where the Applicant simply failed to make proper application to remain rather than periods during which he showed any disregard or disrespect for the law.

25. In weighing the public interest in the balance I am bound to have regard to section 117B of the 2002 Act (see paragraph 18 above). In doing so I note that the Applicant speaks English. I note also that he is not self-sufficient but is reliant on his family in China. Crucially I am required to give little weight to the private life that he has established in this country because it has been established at a time when his immigration status was precarious. In this regard I have regard to the Upper Tribunal authority of AM (s.117B) Malawi

> To put the matter shortly, it appears to us that a person's immigration status is "precarious" if their continued presence in the UK will be dependent upon their obtaining a further grant of leave. It is precisely because such a person has no indefinite right to be in the country that the relationships they form ought to be considered in the light of the potential need to leave the country should that grant of leave not be forthcoming. (paragraph 32)

26. The Applicant has held precarious immigration status throughout his stay in the United Kingdom because he has always held limited leave to remain and his continued presence has always been dependent upon obtaining a further grant of leave. The difficulty for this Applicant is that his case is based upon his private life and I am required by statute to afford little weight to that private life. Little weight does not however mean no weight and in this respect I consider whether there are other matters in the balance of either a positive or negative weight.

27. Having detailed all the positive factors above there is in my judgement nothing further that can usefully be added. So far as matters that must add to the negative weight there are considerations that are relevant. The first is that it is quite clear that the Applicant has family in China who being ready willing and able to support him throughout the time he has spent in the United Kingdom are clearly concerned as to his best interests and have the resources to look after him in China. It must be the case that the qualifications that he has obtained in this country will stand him in good stead upon a return to China. There is also nothing to stop the Applicant making an application to return to the United Kingdom to continue his studies or potentially to undertake employment using the qualifications that he has obtained.

28. Finally I must comment briefly on Mr Roberts' suggestion, both to the First-tier Tribunal and in submissions to the Upper Tribunal that even if the refusal of the application was justified the decision to

remove was a disproportionate response. In my judgement this is a facile submission. Where a decision is made that a person has no right to remain in the United Kingdom there can be nothing disproportionate in issuing removal directions to enforce their removal.

29. Taking account of all of the above it is my judgement that the proportionality balance is overwhelmingly weighed against the Applicant. His appeal against the Secretary of State's decision is dismissed.

Summary

30. The decision of the First-tier Tribunal involved the making of a material error of law. I allow the Secretary of State's appeal and set aside the decision of the First-tier Tribunal.

31. I remake the decision and I dismiss the Applicant's appeal against the Secretary of State's decision to refuse leave to remain and to issue directions for removal.

Signed: **Date:**

J F W Phillips
Deputy Judge of the Upper Tribunal