Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/46141/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25 March 2015	**On 25 June 2015**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

MS MA NADIA DEL CAMPO ESTARIS
(Anonymity Direction Not Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Nicholson, Counsel (instructed by Douglas Simon, Solicitors)
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DETERMINATION AND REASONS

1) This is an appeal against a decision by Judge of First-tier Tribunal Barker dismissing an appeal against a refusal to vary leave and a removal decision both made by the respondent on 16 October 2013.

2) The appellant was born in 1978 and is a national of the Philippines. She entered the UK in 2008 as a Tier 4 Student Migrant. Her leave was extended and she was subsequently granted leave to remain as a Tier 1 Post Study Work Migrant from 15 August 2011 until 15 August 2013. The

application giving rise to the present appeal was made prior to the expiry of her leave.

3) Since 2009 the appellant has worked for a firm known as Ladbroke Security Services Limited. She worked for this firm initially on a part-time basis but after having completed an MBA she worked full-time for the firm from 2011. It is clear from the evidence before the First-tier Tribunal that the appellant is regarded by the firm as a valuable employee and the firm is anxious to retain her services.

4) An obstacle emerged, however, in relation to the retention of the appellant by Ladbroke Security Services Limited because the firm did not have the required Tier 2 sponsor licence from the Home Office. The firm applied for a licence in July 2013, seemingly for the specific purpose of the appellant's application for further leave. The application for a sponsor licence had not been decided by the time the application for an extension of leave was made so the appellant applied for an extension for 60 days to allow the sponsorship issue to be resolved and for her then to apply as a Tier 2 (General) Migrant. The application for an extension was refused on 16 October 2013 under paragraph 322(1) of the Immigration Rules on the basis that the appellant had applied for a variation of leave to enter or remain for a purpose not covered by the Rules.

5) Meanwhile the employer's application for a sponsor licence was refused on 16 September 2013. A second application submitted in September 2013 was refused on 24 December 2013. Following the refusal of the second application a pre-action protocol letter dated 17 February 2014 was sent to the respondent with a view to pursuing judicial review. By the date of the hearing before the First-tier Tribunal, which was on 17 October 2014, no further action had been taken in relation to the sponsorship licence or the proposed judicial review. At the hearing before the First-tier Tribunal the position of the appellant and the witness who appeared on behalf of her employer was that they were critical of the way in which the Home Office had dealt with the sponsorship licence application but the sponsorship issue remained unresolved.

6) The issue for the First-tier Tribunal was whether the appellant should succeed in her appeal on the basis of her right to private life. There was no suggestion that the appellant had developed any family life in the UK. It was accepted that she did not meet the criteria for leave on the basis of private life as set out at paragraph 276ADE of the Immigration Rules. It was argued, however, that her circumstances were such that they should be considered outside the Immigration Rules.

7) At paragraph 25 of the determination of the Judge of the First-tier Tribunal it was found that the appellant's private life consisted of her employment with the firm Ladbroke Security Services Limited. No other specific private life was detailed in evidence though the Judge accepted that there would have been private life developed with friends and work colleagues over the time

that the appellant was residing in the UK. It was argued that the employer's operations would be radically affected by the loss of the appellant. In particular, the company would have difficulties with regard to its HR system and software, which had been developed by the appellant.

8) The Judge observed at paragraph 26 of the determination that the principal factor relied upon by the appellant in relation to her private life was the application for a sponsor licence and its refusal. The Judge noted that there had been two refusals and that the appellant had sought leave for a limited time while the issue was resolved. The Judge further noted that the sponsor had failed to make an application for the licence in good time but made the application only in July when the appellant's leave was due to expire in August. In the light of the two refusals of a Tier 2 sponsor licence the Judge considered it appropriate to consider whether the issue of the sponsor licence was likely to be resolved within a reasonable time. The Judge concluded, at paragraph 26 of the determination, that this was not the case and if the appellant was allowed to remain in the UK pending the resolution of the issue of the sponsor licence this was likely to be for some considerable time. It was possible furthermore that the employer would not be granted a Tier 2 sponsor licence in which case the appellant would not be able to fulfil the criteria required.

9) The Judge accepted that the refusal decision gave rise to some interference with the private life of the appellant due to the loss of her well paid employment. There was a public interest in effective immigration control as part of the economic well-being of the UK. It had been argued on behalf of the appellant that little weight should be attached to this aspect of the public interest as the appellant met the criteria for highly skilled persons who were recognised by the government in the Immigration Rules as persons the government wished to encourage to come and work here.

10) The Judge then had regard to Section 117B of the 2002 Act as amended. The Judge concluded that the public interest criterion of effective immigration control had weight to be applied in the proportionality exercise. When the interference with the private life of the appellant was weighed against the public interest in effective immigration control, the interference with the appellant's private life was both proportionate and justified. The appellant did not fit the criteria for a grant of leave under the Immigration Rules and there was no certainty that she would fit the criteria within a reasonable time. The appeal was dismissed.

11) In the application for permission to appeal it was acknowledged that no third application for a Tier 2 sponsor licence had been submitted. It was argued that it was reasonable for the employer to await the outcome of the appellant's appeal to the Tribunal before incurring the cost of making a further application. The application then pointed out that at paragraphs 26 and 29 of the determination the Judge regarded it as a significant issue as to whether a Tier 2 sponsor licence would be available to the employer within a reasonable time. It appeared from the determination that the reason the

Judge refused the appeal under Article 8 was that it was unlikely that the sponsor licence would be granted in a reasonable time. In the view of the appellant this was not a relevant factor to the assessment of proportionality under Article 8 and the Judge erred in law in taking this factor into account.

12) According to the appellant, the question of the time it would take for a Tier 2 sponsor licence to be granted could only be relevant if this was detrimental to the economic well-being of the country. In this regard it was pointed out that the appellant gave rise to no expense to the public purse but was paying income tax and national insurance contributions. Even if a prolonged time was taken for the granting of a Tier 2 sponsor licence it was not argued by the Judge of the First-tier Tribunal that this would be to the detriment of the economic well-being of the country. Comparison was made with the case of *Mohan [2012] EWCA Civ 1363*, in which the entitlement to family life was affected by ongoing family proceedings. The length of those proceedings, which were expected to last for months if not years, did not detract from the appellant's Article 8 rights and were not pivotal in the proportionality assessment. The appellant had behaved impeccably. She was well-integrated and spoke perfect English. She was well qualified and had not breached any immigration laws.

13) In granting permission to appeal the Judge concerned noted that the decision and reasons by the Judge of the First-tier Tribunal were careful and well-reasoned and set out the pertinent issues, law and evidence. It was nonetheless arguable that the Judge had inappropriately considered time to be a pertinent factor in the assessment of proportionality. It was arguably an error for the Judge to have allowed the issue of time, and what was a reasonable time, to be given a greater priority than what was right and fair.

14) A rule 24 notice was submitted by the respondent. This disputed the view set out by the Judge that the length of time a fresh sponsor's licence might take to grant should be taken into account under Article 8 but nevertheless submitted that the Judge of the First-tier Tribunal had directed himself appropriately.

Submissions

15) At the hearing Mr Nicholson addressed me on behalf of the appellant, beginning by setting out the factual background. Mr Nicholson then referred to the grant of permission to appeal and the reasoning in the decision by the Judge of the First-tier Tribunal. He referred to the decision of the High Court in *Aliyu [2014] EWHC 3919 (Admin)*, in terms of which there was no threshold of arguability in relation to Article 8. Mr Nicholson submitted that the question of whether the Tier 2 sponsor licence would be granted should not have played any part in the assessment of proportionality. The Judge of the First-tier Tribunal had taken into account an irrelevant consideration in deciding the appeal.

16) In response to this point I asked Mr Nicholson what factors from the evidence the Judge should have referred to if he was to have allowed the appeal under Article 8. Mr Nicholson replied that the Judge recognised that the appellant enjoyed Article 8 rights in the UK. The appellant was here lawfully. There had been a delay by the decision-maker in deciding the second application for a Tier 2 sponsor licence. The appellant could not succeed under the Immigration Rules because of this delay. All she had sought was an extension for a short period of time to await the decision of the Secretary of State on the sponsor licence. There was no support for the Judge's position from section 117A of the 2002 Act. In terms of the decision of the European Court of Human Rights in *McMichael v United Kingdom (1995) 20 EHRR 205* the Secretary of State ought not to benefit from her own failure. If the Secretary of State was unable to decide the licence application quickly because of her lack of resources, this should not override the appellant's protected rights. The respondent sought to rely on the case of *Nasim [2013] UKUT 00610* but this applied to applications under the PBS system and this appeal did not concern a PBS case. The respondent sought also to rely on the Immigration Directorate Instructions at chapter 13, paragraph 2.3.8 as to when someone's immigration status was precarious. This was relevant to section 117B(5) of the 2002 Act. According to the respondent a person's immigration status was precarious if he or she was in the UK with limited leave to enter or remain but without settled or permanent status. This was not however supported by legal authority. Those who had leave should not be lumped together with those who did not.

17) For the respondent, Mr Clarke argued there was no material error of law. There were two refusals of a Tier 2 sponsor licence prior to the hearing before the First-tier Tribunal on 17 October 2014. The second refusal was made in December 2013 and in the following ten months there was no further attempt to obtain Tier 2 sponsor status. The Judge of the First-tier Tribunal was entitled to take into account the maintenance of effective immigration control. There was no application to this appellant either of Appendix FM or of paragraph 276ADE. There was no legitimate expectation, in terms of *Nasim*. Section 117B(5) was relevant. Section 117B distinguished between residence which was unlawful and that which was precarious. As the private life of the appellant was established when her status was precarious it carried very little weight. The Judge considered the appellant's private life and in essence this amounted to little more than a vain hope of the sponsor obtaining a licence successfully. The Judge was obliged to follow section 117B.

18) In response Mr Nicholson said the appellant had applied for a short period of leave until the question of the Tier 2 sponsor licence was resolved. This issue was outstanding from July 2013 for six months. The fact that no further application had been made was not relevant. A Judge of the First-tier Tribunal had heard detailed evidence from the appellant and from her employer regarding the circumstances surrounding the refusal of the Tier 2 licence. The Judge did not make findings on these matters.

19) It was put to Mr Nicholson that putting aside the question of the Tier 2 sponsor licence, could the Judge have reached any other decision under Article 8 other than to dismiss the appeal. In response Mr Nicholson submitted that the respondent's decision was a breach of Article 8 and was not proportionate. All the appellant needed was time while the respondent resolved the sponsorship application. The respondent now sought to rely on Section 117B of the 2002 Act but there was no definition of what was meant by "precarious" in the statute. The respondent's decision was disproportionate because it was unfair. At the time of the decision the respondent was relying on her own failure to make a decision on the Tier 2 licence. The Judge should have looked at whether the respondent's decision was in accordance with the law.

Discussion

20) The issue before the Judge of the First-tier Tribunal can be expressed as a straightforward question of whether the respondent's decisions to refuse leave and to remove her from the UK were a disproportionate interference with the appellant's right to private or family life under Article 8. The application for leave itself was refused under paragraph 322(1) and it has not been disputed that this refusal was made in accordance with the Immigration Rules. It has not been disputed that the appellant would not succeed under paragraph 276ADE or Appendix FM of the Rules.

21) How then should the Judge have approached consideration of Article 8 outside the Rules? As was pointed out in the decision of the Court of Appeal in *Singh [2015] EWCA Civ 74*, per Underhill LJ at 64, there is no "threshold" or "intermediary" test in considering Article 8 outside the Rules. If the appellant does not succeed under the Rules, the decision maker should "simply decide whether there was a good claim outside the Rules or not". Of course, where all the issues have been addressed in a consideration under the Rules there may be no need to conduct a full separate examination of Article 8 outside the Rules. In this appeal, however, consideration under the Rules by the Secretary of State turned on a rather narrow point as to whether the purpose of the application as made by the appellant was for a purpose covered by the Rules or not. In the reasons for refusal letter of 16 October 2013 the Secretary of State considered also whether the appellant fell under paragraph 276ADE and concluded that she did not.

22) To succeed outside the Rules it is not in general necessary for the appellant to satisfy a test of exceptionality but, where the Rules seek to strike a fair balance under Article 8, then any circumstances on which the appellant relies outside the Rules will need to be compelling if the appellant is to succeed. This point was considered by the Court of Appeal in *SS (Congo) [2015] EWCA Civ 387*.

23) When considering the application of Article 8 outside the Rules, however, the Tribunal must have regard to Section 117A of the 2002 Act as amended,

which requires courts or tribunals when considering the public interest to have regard in all cases to considerations listed in Section 117B. In the present appeal the Judge of the First-tier Tribunal was mindful of these provisions and set out the terms of Section 117B at paragraph 28 of the decision.

24) Of particular relevance to this appeal is Section 117B(5), which states that little weight should be given to private life established by a person at a time when the person's immigration status is precarious. The significance of this for the appellant is, as already noted, that the Judge of the First-tier Tribunal found that she had not established family life in the UK but only private life.

25) Before me Mr Nicholson argued strenuously that the appellant should not be regarded as having established private life in the UK at a time when her immigration status was precarious because at all times she had been residing here lawfully. The Secretary of State takes a different view in the Immigration Directorate Instructions, in which a distinction is made between those who are here unlawfully and those whose residence in the UK is precarious. In the view of the Secretary of State, those whose immigration status is precarious include those who have leave for only a limited period and are not settled here.

26) There was no authority before me on this point at the date of the hearing but there is now a reported decision of the Upper Tribunal on this issue in *AM (s117B) Malawi [2015] UKUT 0260*. This decision supports the view of the Secretary of State that there is a distinction between a person who has been in the UK unlawfully and a person whose immigration status in the UK was precarious. 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.

27) As I have pointed out, this decision was not available at the date of the hearing of this appeal before the Upper Tribunal. There was nothing, however, in Mr Nicholson's arguments before me that would persuade me to depart from the reasoning in *AM Malawi*, which was a decision of a panel of the Upper Tribunal including the Vice President.

28) Accordingly, accepting that the private life established by the appellant in the UK is subject to section 117B(5) and therefore little weight should be attached to it, this re-enforces the decision of the Judge of the First-tier Tribunal to the effect that the public interest in effective immigration control outweighed the interference with the appellant's private life arising from the decisions appealed against.

29) On the question of public interest, it was argued before the Judge of the First-tier Tribunal that the appellant's presence in the UK was not detrimental to the economic well-being of the UK, in terms of Article 8(2), but could be regarded on the contrary as contributing to the economic well-being of the UK. I do not regard this as a material issue. It is for the

Secretary of State to show that any interference with private or family life serves a policy aim or purpose recognised by Article 8(2). It is the position of the Secretary of State that fair and effective immigration control contributes to the economic well-being of the UK and the prevention of disorder and this is sufficient to show that the interference serves a recognised purpose under Article 8(2).

30) Another issue argued before me was the alleged failure by the Judge to assess whether the Secretary of State's decision to refuse the employer a Tier 2 sponsor licence was justified. In fact the Judge of the First-tier Tribunal did address this question at paragraph 22 of the decision. The Judge noted the criticisms expressed of the Secretary of State's decision in respect of the sponsor licence but rightly pointed out that it was not the role of the Tribunal in an appeal such as this to review the rights and wrongs of the decision in respect of the sponsorship licence. This view was entirely correct. If the employer wished to challenge the decision in relation to the sponsor licence there were no doubt other avenues through which this might have been pursued. It was not pursued. From the point of view of this appeal the essential fact is that the employer did not have a Tier 2 sponsor licence and therefore the appellant was unable to make an application for leave to remain under Tier 2.

31) Instead, of course, the appellant applied for a short extension of stay while the issue of the Tier 2 sponsor licence was resolved. It is this application which was refused as being for a purpose not recognised by the Immigration Rules. It was accepted before the First-tier Tribunal that the appellant could not succeed under the Immigration Rules but only by reliance upon Article 8.

32) The reason why permission to appeal to the Upper Tribunal was granted was on the question of whether the Judge of the First-tier Tribunal had given proper reasons for finding that the refusal by the Secretary of State of a short extension of stay was not disproportionate in terms of Article 8.

33) Looking at this question from a narrow point of view, it is very difficult to perceive how the refusal of an extension of stay of 60 days could, without more, constitute a disproportionate interference with the appellant's private life. Looking at the question from a broader point of view, it is argued that the refusal of this extension for reasons which were unfair and disproportionate had consequences of such severity for the appellant that she was unable to continue her career in the UK. Even taking the broader view, however, the issue arises of the extent to which reliance on private life can be used to continue with a career, particularly where that career was established by a person who did not have settled status in the UK. Regardless of whether the appellant's status was precarious in terms of the statute, it is important to note that she was not settled. She knew that continuation of her career depended upon her leave being extended. She had no expectation of necessarily being allowed to remain indefinitely in the UK.

34) This brings me to the crux of the issue in this appeal. Was the refusal decision a disproportionate interference with the appellant's private life, of which the main elements were her employment and career in the UK established a time when she had only limited leave to remain? When the question is posed in this way, there can only be one answer, which is no. The interference with the appellant's continued employment in the UK, including the consequent inconvenience to her employer, would not constitute such a serious interference with her right to respect for her private life as to outweigh the public interest in effective immigration control. Whatever way the issues in this appeal were presented in terms of Article 8, there was only one answer that the Judge of the First-tier Tribunal could have reached and this was to dismiss the appeal.

35) It is in this context that the appellant has sought to argue first of all that the decision of the Secretary of State was unfair and not in accordance with the law and, secondly, that the Judge took into account an irrelevant consideration in dismissing the appeal, namely the length of time it might take to resolve the issue of the Tier 2 sponsor licence. The appellant argued that the Secretary of State's decision was not in accordance with the law because the refusal of leave was based on the Secretary of State's own failure to make a decision on issuing a Tier 2 sponsor licence. It should be observed, however, that the first application for a Tier 2 sponsor licence was refused a month before the refusal of the application for leave. Furthermore, both the appellant and her employer were aware that a Tier 2 sponsor licence was required for the appellant's leave to be extended but the application for a licence was not made until July 2013. In refusing the appellant leave there is no sense in which the Secretary of State was relying upon a failure by her to make a decision on the licence. There are no grounds for finding that the respondent's decision to refuse the appellant leave was not in accordance with the law. In relation to the allegation of unfairness, it is clear that in making her decision the Secretary of State followed the Immigration Rules both in relation to the substantive application and any resulting interference with private life. Although the appellant feels aggrieved by the outcome of the application to the Secretary of State, there is no basis for finding the Secretary of State's decision was so unfair, if indeed it was unfair at all, that on this basis it is a disproportionate interference with the appellant's right to respect for her private life.

36) This leaves the question of whether the Judge had regard to an irrelevant consideration in dismissing the appeal under Article 8. The reference in the Judge's reasoning to the time it would take for the Tier 2 sponsorship application to be resolved arises from the grounds on which the appellant's application to vary leave was refused. In theory the basis on which an application was made to the Secretary of State and the grounds on which it was refused might be relevant to an Article 8 claim. In the circumstances of this appeal, however, the grounds on which the variation of leave was refused were unlikely to be determinative of the Article 8 claim. Indeed, on a proper reading of paragraph 29 of the Judge's decision the grounds were not determinative. The Judge observed that the appellant did not fit the

criteria for leave under the Immigration Rules and added that "there is no certainty that she would fit the criteria within a reasonable time". In the same paragraph, however, the Judge makes it clear that the failure by the appellant to satisfy the Immigration Rules was only one factor which was taken into account along with the other arguments in the appeal. There is no basis for saying that if the Judge had not referred to this consideration in the reason for dismissing the appeal under Article 8 his decision would have been different.

37) In this context, I was also referred to paragraph 26, in which the Judge said that if the appellant was allowed to remain in the UK on discretionary leave while the question of the Tier 2 sponsor licence was resolved this was likely to take some considerable time and it might not be resolved in favour of the appellant. This seems to me an observation which the Judge was entitled to make. The Judge was doing no more than commenting on the circumstances underlying the Secretary of State's decision and the possible consequences of the decision for the appellant. It was not a factor of such significance it led the Judge to dismiss the appeal under Article 8, but it was part of the overall circumstances of the case to which the Judge was entitled to have regard.

38) In conclusion, the position is that on the facts of this appeal, as fully set out by the Judge of the First-tier Tribunal, there was no realistic prospect of the appellant showing that the decisions appealed against were a disproportionate interference with her Article 8 right to respect for private life. In paragraph 29 the Judge referred to the appellant's inability to satisfy the Immigration Rules but this was not an essential part of the Judge's reasoning under Article 8 and did not amount to taking into account an irrelevant factor. If the Judge had not mentioned this point at this juncture the outcome would have been the same – the appeal would have been dismissed. Accordingly I am not satisfied that the Judge of the First-tier Tribunal made any error of law or that any such error as alleged would have affected the outcome of the appeal.

Conclusions

39) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

40) I do not set aside the decision.

Anonymity

41) The First-tier Tribunal did not make an order for anonymity. I have not been asked to make such an order and I see no reason of substance for making one.

Signed Date

Judge of the Upper Tribunal