



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14562/2017

THE IMMIGRATION ACTS

Heard at Field House
On 6 September 2018

Decision & Reasons Promulgated
On 14 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MISS SHAHIDA BAGH ALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Juss, Counsel, instructed by Connaughts
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge Povey (the judge), promulgated on 22 May 2018, in which the Appellant's appeal against the Respondent's decision of 28 October 2017 was dismissed. The

Respondent's decision followed an application for indefinite leave to remain made by the Appellant on 2 June 2017 on the basis that she had accrued ten years' continuous lawful residence in the United Kingdom. The Respondent asserted that there were at least a couple of gaps in that lawful residence, thereby precluding her from succeeding, at least within the context of the Immigration Rules. A somewhat unusual feature of the Appellant's circumstances was the fact that she made her application whilst still having leave to remain in this country until February 2019.

The judge's decision

2. The judge considers the Appellant's evidence and deemed it to be plausible and consistent, and therefore credible [12]. In light of this evidence the judge makes a number of favourable findings in relation to the somewhat tortuous immigration history in this case. In essence, he finds that the Appellant had done all that she could to maintain lawful residence during her fairly significant time in the United Kingdom. Her efforts had been hampered by what the judge regarded as less than impressive conduct by the Respondent over the course of time. At [22] he concluded that there existed exceptional circumstances in the case, and at [23] found that the Appellant had developed a "significant and cogent private life" in this country. The judge then moves on to his conclusions. At [26] he concludes that the Appellant could not satisfy the requirements of paragraph 276B of the Rules, a conclusion that has not been challenged by the Appellant.
3. However, in his view there were good reasons to go on and consider the Appellant's case outside the context of the Rules and in light of wider Article 8 factors. As stated previously, the judge had found that a private life existed. The core passages in this appeal are contained within [29] and [30] of the decision. I set these out in full:

"29. Does the Respondent's decision sufficiently interfere with the private life, such that the provisions of Article 8(2) are engaged? The decision was to refuse an application for indefinite leave to remain. The decision letter confirmed that the Appellant continues to have leave to remain in the UK until February 2019 and continues to have the right to make further applications to extend that leave. It was not suggested by the Appellant or Mr Jaffar that the Appellant's ability to continue with the salient aspects of her private life between now and February 2019 would be materially affected. There would, understandably, be uncertainty and a need to apply again for further leave (whether limited or indefinite) but that has been a feature of the Appellant's life in the UK since she arrived in 2007. That had not prevented her from establishing or pursuing the private life she currently enjoys.

30. In my judgment, the decision before me does not constitute interference that would have consequences of such gravity as potentially to engage the operation of Article 8 (per Razgar). I reach that conclusion mindful that the threshold to be crossed is not especially high. However, the Respondent's

decision is an inconvenience to the Appellant more than it is an interference with her private life in the UK. Whilst the Respondent is open to criticism to some degree for causing that inconvenience, it is not a basis in law to advance the Appellant's appeal under Article 8. The issues explored above regarding the Appellant's immigration history, her entrepreneurial activity, the reasons why she failed to meet the requirements of the Immigration Rules and her integration into UK society are all factors relevant to assessing the proportionality of any interference. They are not relevant to determining whether the Respondent's decision constitutes the necessary interference in the Appellant's private life. Absent the requisite interference, her Article 8 claim cannot succeed".

4. On this basis the step-by-step Razgar approach ended at either the first or, more probably, on a holistic reading of the decision, the second question in that methodology. The appeal was duly dismissed.

The grounds of appeal and grant of permission

5. The grounds of appeal make reference to the various favourable matters found in the Appellant's favour by the judge. They go on to cite the decision in Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC). It is said that the fact of the Appellant's extant leave to remain until 2019 was not fatal to the success of her Article 8 claim. If, as is asserted, the Respondent's refusal of the Appellant's original claim was faulty and/or disproportionate, the judge should have gone on to allow the appeal.
6. Permission to appeal was granted by First-tier Tribunal Judge Mailer on 9 July 2018.

The hearing before me

7. Prior to the hearing I received a Rule 24 response from the Respondent and a skeleton argument from Mr Juss.
8. Mr Juss relied on his skeleton argument and emphasised the low threshold applicable to the question of whether the consequences of an interference with private life were sufficiently serious or not. He suggested that in light of the findings of fact made, the judge was bound to have concluded that an interference existed, and that it was sufficiently serious.
9. Mr Kotas suggested that under the statutory regime in existence before the amendments brought about by the Immigration Act 2014, the judge might have allowed the appeal on the basis that the decision of the Respondent was not otherwise in accordance with the law. However, no such jurisdiction now existed. He submitted that the judge was perfectly entitled to conclude that the Appellant's private life was simply not sufficiently adversely affected by the Respondent's decision: she can make

a new application in due course when her removal or requirement to leave the United Kingdom was a real prospect (unlike the position before the judge) and that in fact her own representative had not suggested that any adverse consequences flowed from the Respondent's decision. The Appellant had sought indefinite leave to remain, and to have obtained this would indeed have been an advantage to her. However, the refusal of this application had simply not led to sufficiently serious consequences. There was a genuine distinction between the Appellant's situation and that of either an overstayer or somebody who had applied for further leave towards the end of their current leave.

10. In reply, Mr Juss wondered why an individual with extant leave to remain should be in a worse position than a person without any leave at all. In addition, he emphasised the importance of obtaining indefinite leave to remain: this constituted a significant benefit to an individual. The refusal of such an application must be sufficiently serious, he submitted.
11. At the end of submissions Mr Kotas accepted that if the judge had made a material error in respect of the narrow point now in issue, on the findings of fact made, it was highly likely that the appeal would have been allowed and I could re-make the decision myself on the evidence before me.
12. I reserved my decision on error of law.

Decision on error of law

13. Having thought very carefully about this decision and its somewhat unusual circumstances, I conclude that there are no material errors of law here.
14. In so doing I have proceeded from the premise that the judge was in all likelihood concluding that the decision was "an interference" of sorts, but that its consequences were simply not of sufficient severity for Article 8 to be engaged. In other words, we are dealing with the second Razgar question, not the first.
15. Initially, and having considered the way in which the statutory appellate regime now operates, I had thought that the existence of extant leave to remain might be an irrelevant factor when considering the issue of sufficiently serious consequences. There might have been an analogy with the jurisdictional issue raised years ago in the Court of Appeal judgment of JM [2006] EWCA Civ 1402 where it was ultimately decided that the absence of a specific removal decision should not preclude the Tribunal from considering Article 8 arguments on appeal. In essence, this was because it could properly be said that the appealable decision by the Respondent had the consequence of requiring the Appellant to leave the United Kingdom.
16. However, on further reflection there is no valid comparison. This is primarily because there is no jurisdictional issue in the present case: I am concerned with the substantive structure of Article 8 itself. Further, whilst the Appellant's application for indefinite

leave to remain was deemed to be a “human rights claim” by the Respondent, thereby leading to a refusal thereof and a consequent right of appeal to the First-tier Tribunal, the *substance* of the application was in fact for indefinite leave to remain, a status going beyond the current limited leave which the Appellant enjoys until February 2019. The reality is that the consequence of the Respondent’s decision was not that the Appellant would be removed, nor that she be required to leave the United Kingdom. This much was recognised at the end of the reasons for refusal letter. Throughout, the Appellant has had her extant leave. At all material times she has been able to pursue her private life: the Respondent’s refusal simply did not inhibit the enjoyment of that life in any material way, as acknowledged by her representative before the judge. Mr Juss has not suggested any such material prejudice either. One can contemplate a scenario where adverse consequences might arise notwithstanding extant leave to remain, perhaps where indefinite leave is required to undertake a particular course of action. However, this has not arisen in this appeal.

17. It is right that the refusal denied the Appellant the immediate advantage of obtaining indefinite leave to remain, but in my view the judge was entitled to conclude, at least implicitly, that this did not constitute an interference of sufficiently serious gravity, notwithstanding the applicable low threshold. The Appellant would indeed need to make a further application nearer to the expiry of her current leave, but it was open to the judge to conclude that this would constitute an inconvenience, not a sufficiently grave consequence. Whilst Mr Juss has argued that there is no concept of “inconvenience” in this area of the law, that is, with respect, rather missing the point. There is a concept, indeed the express requirement, for an Appellant to demonstrate that any interference with private/family life leads to consequences of sufficient seriousness: the threshold may be low, but it still exists. In my view, the judge was entitled to conclude that given the fact of her extant leave and the absence of any material adverse impact on her private life, the Appellant had simply failed to cross this mandatory threshold.
18. The favourable findings made in respect of the Appellant’s immigration history and the Respondent’s conduct might indeed have been relevant to an assessment of proportionality, but the judge was right to have said that they did not assist her because the step-by-step Razgar approach ceased at the second question: she could not get herself to the fifth question. Their existence could not circumvent the need to follow the Article 8 structure in a methodical way. In my view the “faulty” approach by the Respondent towards the Appellant in the past did not, in and of itself, require the judge to conclude that the decision under appeal constituted a sufficiently serious interference at the stage with which he was concerned.
19. In respect of the rhetorical question posed by Mr Juss (see paragraph 10, above), the answer may be as follows. The hypothetical overstayer is not in fact in a better position than the Appellant: the former is being told to leave the United Kingdom forthwith; the Appellant was not, as she had leave to remain for many months hence.
20. A final point is this. If the very act of making an application (deemed to be “a human rights claim”) *automatically* led to an individual being able to show that a subsequent

refusal constituted a sufficiently serious interference, it would have the effect of entirely negating the second Razgar question. I can see no justification for this position.

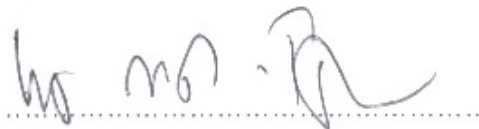
21. Whilst I certainly have sympathy for the Appellant in general terms, the judge was entitled to conclude as he did. It seems to me as though were the Appellant to make a further application in due course, she would be fully entitled to arm herself with the judge's decision, and indeed my own, when doing so, and to request that the Respondent look with particular care at her case, given the overall circumstances. One might hope that the Respondent would take a sensible and sympathetic view of such an application.

Notice of Decision

The decision of the First-tier Tribunal does not contain errors of law. That decision shall therefore stand.

The Appellant's appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.



Signed

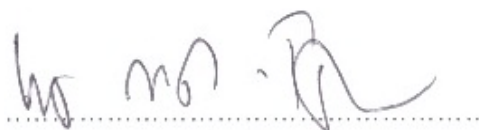
Date: 10 September 2018

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.



Signed

Date: 10 September 2018