



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/24854/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 7 June 2018

Decision & Reasons Promulgated  
On 26 June 2018

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ELER MAZHITOV  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr T Wilding, Home Office Presenting Officer  
For the Respondent: Mr A Pipe, Counsel instructed by Arlington Crown Solicitors

**DECISION AND REASONS**

1. This is the Secretary of State's appeal in respect of a decision of First-tier Tribunal Judge Juss in which he had allowed the appeal of Mr Mazhitov against the Secretary of State's decision refusing to grant him leave to remain. For ease of convenience,

throughout this decision I shall refer to the Secretary of State who was the original respondent as “the Secretary of State” and to Mr Mazhitov who was the original appellant as “the claimant”.

2. The appellant in this case is a national of Kyrgystan who was born in March 1993. He arrived in this country in September 2009 having been sent over by his father together with his brother. They entered at the time lawfully as students; their father and other members of the family then entered the country clandestinely. Various asylum and human rights claims were made with a view to the family being permitted to remain in this country and ultimately it seems that the rest of the appellant’s family were granted leave but he was not. It seems that he had leave for a brief period of time but ultimately he was appeal rights exhausted in or about October 2011. That was around the time when he was convicted in the Crown Court for possession of a fraudulent credit card.
3. In July 2012 when the appellant turned 18 he was informed that he could no longer be regarded as a dependant of his father’s claim, but further consideration was given to his claim which was refused in August 2015. The appellant made a further application for leave to remain on Article 8 grounds, but this was refused by the respondent on 18 August 2016.
4. The appellant appealed against this decision and following a hearing at Birmingham Sheldon Court before First-tier Tribunal Judge Professor Juss on 23 November 2017, in a Decision and Reasons promulgated on 5 December 2017 Judge Juss allowed his appeal. The Secretary of State now appeals against that decision, leave having been granted by First-tier Tribunal Judge Pedro on 4 January 2018.
5. The grounds of challenge to Judge Juss’s decision can be summarised very briefly. It is effectively a reasons challenge because it is submitted Judge Juss failed to give any or any adequate reasons justifying his findings first that the appellant would face very significant obstacles to his reintegration in Kyrgystan, and secondly, with regard to his finding that there were circumstances so compelling that the weight to be given to his private life in this country overrode the public interest in his removal there were subsidiary complaints as well. In his judgment Judge Juss referred to his conviction in 2011 as “spent”, whereas as a matter of law that conviction, and indeed any conviction is not “spent” for immigration purposes. Also the judge at paragraph 27 of his decision had referred to the fact that the Secretary of State had failed to remove the claimant earlier as meaning that the public interest in his removal was reduced given his “tolerated presence” in the UK.
6. In a relatively short decision which was signed off within a week of the hearing Judge Juss set out some of the matters which had been set out in evidence but dealt with the question of very significant obstacles (with regard to paragraph 276ADE(1)(vi)) as follows, at paragraph 26:

“26. The appellant, I find, would face ‘very significant obstacles’ to his re-integration in Kyrgystan, such that he satisfies the requirements of para

276ADE(1)(vi), and the FCO advice with respect to travel to Kyrgystan is not one that engenders confidence (pp. 163-169). The Court of Appeal has given guidance in *Kamara* [2016] EWCA Civ 813 (at para 14) that ‘the idea of ‘integration’ calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that country is carried on and a capacity to participate in it ...’. On the facts of this case, I am not satisfied that that the appellant will be enough of an ‘insider’ or able to ‘participate’ in the life society in Kyrgystan.”

7. In my judgement while it is possible that the judge might have been able to give reasons justifying this finding, he did not do so within this decision. Of course a judge does not have to set out every piece of the evidence within his decision but he is required to give sufficient reasons such that someone reading the decision can understand why it was that that finding was made in this case. Although the judge had set out some of the evidence earlier, this finding is simply not adequately reasoned.
8. One of the complaints made in the grounds is that the judge also failed to have proper regard to Sections 117B(4) and (5) of the Nationality, Immigration and Asylum Act 2002 (inserted by Section 14 of the Immigration Act 2014) whereby a decision maker is required to give little weight to a private life established at a time when a claimant’s immigration position is precarious or when he is in this country unlawfully. Although there is reference to Section 117B(5), this is by reference only to the decision of Sales LJ in *Rhuppiah* [2016] EWCA Civ 803 which is referred to at paragraph 28 of the decision where the judge finds as follows:

“28. In short, this is a case where the appellant’s private and family life can be given significant weight, notwithstanding the fact the appellant had a precarious immigration status in the UK. This is because, as Sales LJ has explained in *Rhuppiah* ...:

‘Although a court or tribunal should have regard to the consideration that little weight should be given to private life established in such circumstances, it is possible without violence to the language to say that such generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question, where it is not appropriate in Article 8 terms to attach only little weight to private life.’”

9. Judge Juss then continued at paragraph 29 to cite the following part of the judgment in *Rhuppiah*, as follows:
- “29. Sales LJ continued that, ‘for a case falling within section 117B(5) little weight should be given to private life established in the circumstances specified, but that approach may be overridden where the private life in question has a special and compelling character.’ His Lordship further elaborated that,

‘[s]uch an interpretation is also necessary to prevent section 117B(5) being applied in a manner which would produce results in some cases which would be incompatible with Article 8 ...’ (at para 53). That, I find, to be the case here.”

10. Although in argument Mr Pipe referred the Tribunal to some of the evidence which had been set out earlier within the decision, in my judgement again the judge has not given any adequate reasons for his finding that the private life which this claimant has in the UK has such a “special and compelling character” as to override the duty to give very little weight to it.

11. In my judgement, the judge’s finding at paragraph 27 that:

“the failure of the respondent SSHD to remove the appellant earlier has meant that the ‘public interest’ against him is now reduced given his ‘tolerated presence’ in the UK because although the appellant has ‘failed to comply with the obligation to leave’ this country, his ‘presence was nevertheless tolerated for a considerable period of time by the authorities’ which has ‘enabled the applicant to establish and develop strong family, social and cultural ties’ in this country”

(with reference to paragraph 116 of the European Court of Human Rights decision in *Jeunesse v the Netherlands* [2016] 60 EHRR 17) is also unsustainable. The facts in that case were very far removed from the facts in this. In that case the claimant had been in the Netherlands for some sixteen years without leave during which time his presence had been known to the authorities. Although Mr Pipe submitted that the finding in *Jeunesse* was referred to by the Supreme Court in *Agyarko*, in this case the suggestion that the public interest in the removal of this appellant is reduced (as contrasted with the fact that he may well have a family life which is deserving of respect, and to which little weight would not necessarily be given by virtue of Section 117B) is not one which without more detailed reasons being given is sustainable.

12. With regard to the judge’s reference to the 2011 conviction being “spent”, were this the only ground made for challenging his decision I would have found on its own that that it did not have a material bearing on the decision but it was not.

13. For the reasons given above, the decision is not sustainable. There will have to be a rehearing.

14. Following representations which were made by Mr Pipe on behalf of the claimant, and also having heard Mr Wilding on behalf of the Secretary of State, it is considered that the appropriate course is to remit this appeal back to the First-tier Tribunal in Birmingham for a rehearing. I have in mind as I have been asked that the claimant had won his first appeal and were the rehearing now to be retained in the Upper Tribunal he would potentially be deprived of another appeal should that decision go against him unless the second appeals criteria were satisfied. I also have in mind that he and his family all live in Leicester and it is much more convenient logistically for there to be another hearing in Birmingham, (although that of itself is not a terribly weighty factor because if need be the Upper Tribunal could have sat in Birmingham).

15. Although the appeal will be heard afresh, I would expect the Secretary of State to think very hard before seeking to make a challenge to the judge's finding that there was still family life between the claimant and his family with whom he still lives, given that this aspect of his case was apparently not challenged before Judge Juss.
16. Accordingly, I make my decision as follows:

**Decision**

**The decision of Judge Juss, allowing the claimant's appeal is set aside and the appeal is remitted to the First-tier Tribunal, sitting at Birmingham, for rehearing by any judge other than Judge Juss.**

Signed:

A handwritten signature in black ink that reads "Ken Craig". The signature is written in a cursive style with a long, sweeping tail on the letter "g".

Upper Tribunal Judge Craig

Dated: 25 June 2018