Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32634/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 December 2017	**On 23 January 2018**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR BRIAN KIMANI KIBATA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Corban, Solicitor of Corban Solicitors
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant is a citizen of Kenya, born on 11 March 1993 and he entered the United Kingdom on 3 September 2005 at the age of 12 years as a student with limited leave to remain and which was periodically

extended. On 30 September 2015 he submitted an application for indefinite leave to remain on the grounds of long residence. That application was refused on 1 October 2015 (on the same date as the application was received) under paragraph 276B and 276ADE. It was concluded that although he claimed to have been absent for a period of 533 days in the ten years preceding his application, on examining his passport it was evident that he had been absent for a period of 537 days. His passport evidenced further absences from the UK in the form of entry stamps to the UK dated 8 January 2007, 25 September 2011 and 10 December 2012 as well as the United States entry stamp dated 20 March 2008 and a Kenyan exit stamp dated 8 August 2012. These stamps were said to be for dates that he had claimed to be in the UK. It was considered that he must therefore have been absent from the UK on these dates which brought his total days of absence from the UK to 542 days. He therefore failed to meet the requirements of paragraph 276B(i) and 176A(vi) of the Immigration Rules.

2. The Secretary of State also noted from his immigration history that following his leave to remain as a Tier 4 (General) Migrant valid from 3 September 2012 to 24 July 2013 he claimed to have left the UK on 26 August 2013 after his leave to remain had expired. He then made an application for entry clearance to the UK as a Tier 4 (General) Migrant on 22 August 2013, more than 28 days after his leave had expired on 24 July 2013. Additionally, he claimed to have been present in the UK on 27 August 2013. This was also the date that his application for entry clearance was made and therefore as stated above he must have been outside the UK to apply for the entry clearance visa. His application dated 22 August 2013 was therefore invalid. It was considered that on 22 August 2013 his previous visa had expired more than 28 days prior to his application for entry clearance and therefore his continuous residence was considered to have been broken as he was without valid leave from 24 July 2013 until 3 September 2013.

3. The matter came before Judge of the First-tier Tribunal Mulholland on 31 October 2016 and he dismissed the appeal on 21 November 2016.

4. An application for permission to appeal was made on the basis that the respondent's Immigration Directorate Instructions entitled 'Long Residence' made clear provision for the exercise of discretion where an applicant exceeded the total number of absences of 540 days in the ten year period preceding an application for settlement particularly where the excess is not significant. In this appeal the respondent stated that the appellant's total absence was 542 days which is only two days above the 540 allowed under the Rules. The grounds for permission referred to pages 10 and 11 of the Home Office Policy and which was said to be attached to the grounds and marked. It was clear therefore that the respondent ought to have considered the content of the Immigration Directorate Instructions and give reasons why discretion could not be exercised in favour of the appellant.

5. It was submitted that the Immigration Judge erred in law because he did not consider the discretion provided in the Immigration Directorate Instructions on Long Residence and did not address the issue of whether the discretion was considered at all by the respondent and if so whether the discretion ought to have been exercised differently. This was part of the function of the Immigration Judge.

6. Permission to appeal was granted on the basis that it was arguable that the reasoning for the Secretary of State not exercising her discretion and the exercise of discretion under the Policy Guidance on Long Residence in all the circumstances should have been addressed.

Rule 24 Response

7. The respondent opposed the appellant's appeal and in summary the respondent submitted that the Judge of the First-tier Tribunal directed himself appropriately. There was no basis on which the judge could have intruded into the respondent's exercise of discretion and as noted in **Ukus (discretion: when reviewable) [2012] UKUT 00307** the only basis upon which a judge may intervene on an issue over discretion is when the decision-maker had failed to exercise discretion.

8. It was clear from the refusal letter that the exercise of discretion was considered but not applied in the appellant's favour because of the issues in the application. The fact that issues were later found in favour of the appellant did not undermine the discretion which was properly exercised by the respondent. Because the discretion was not applied in the appellant's favour did not establish that the respondent failed to exercise discretion.

9. As noted by the judge the history of absence as provided by the appellant was incorrect and the appellant failed to provide any explanation as to why he had not included the missing dates from the passport (determination 17-24). As such it was open to the judge to refuse the appellant's application and there was no basis to challenge the decision. The grounds failed to establish what statutory power the judge had for exercising discretion on behalf of the respondent.

The Hearing

10. At the hearing before me Mr Corban submitted that the respondent had accepted that the appellant was only over the 540 days by two days. I raised the issue of the rights of appeal before the First-tier Tribunal Judge and Mr Corban confirmed that it was the same day application made on 1 October 2015 which would have been after the amendment to the rights of appeal under the Immigration Act 2014. Mr Corban submitted that the Secretary of State did not consider discretion properly and omitted to consider whether the appellant was a minor when much of the time had been spent in the UK and had not considered the reasons for the absences. For example five of the days were when he was on a school

trip. The Secretary of State needed to take into account the Long Residence policy. The judge did not consider whether discretion was exercised properly or at all. The relevant factors had not been taken into account. The appellant had spent all his relevant life here and when he had left on holiday these had been for trips to Sweden to visit his parents. He suggested the matter should be remitted to the respondent for reconsideration of her decision. This matter was also relevant to the assessment under Article 8.

11. Mr Nath agreed that the application was made after the wholesale change to the rights of appeal under the Immigration Act. He acknowledged the decision of **Zheng IA/00094/2015 IAC** but said that this was not on all fours with this case. There was no basis to intrude into the exercise of discretion. The Secretary of State had considered discretion and he relied on the Rule 24 notice. The judge had considered the matter adequately and I was referred to paragraphs 37, 38 and 44 of the decision. It was clear the judge had not just glanced at the facts in this case but had taken careful note of all the relevant issues. If one considered the judge's findings under Section 117B, looking at the appeal in the round there was no challenge to the Article 8 claim.

12. Mr Corban responded that the appellant had been deprived of an administrative review decision and this was a breach of his Section 6 rights. The court did have jurisdiction to consider whether the discretion had been exercised appropriately. The Rules in relation to paragraph 276B were a starting point and the Secretary of State had not considered her policy correctly. It should be evident that she had considered her discretion properly and that was the point made in **Zheng**. The Secretary of State had not addressed it properly. He disagreed and found that **Zheng** did assist.

Conclusion

13. I have carefully considered the evidence submitted. There were various points in the appeal that the First-tier Tribunal Judge found in the appellant's favour, not least that when his leave was granted on 23 August 2013 that the leave granted was valid because the appellant was indeed outside the United Kingdom when he made his application for leave. As the judge stated, at paragraph 12:

> *"As before, in order for this appellant to be successful he had to demonstrate that he was outwith the UK when he made the application. The respondent has alleged that the appellant was not outside the United Kingdom when his leave was granted on 23 August 2013. This is because the appellant declared in his application that he left the UK on 26 August 2014. The appellant now asserts that he left the United Kingdom on 14 July 2013 and not 26 August 2013. He left on 14 July 2013 to make an application for entry clearance in Geneva. He asserts that he was fingerprinted at the British Embassy at Geneva on 23 August 2013. The appellant has produced an e-*

> *ticket receipt which could be found in the first bundle which I hereinafter call 'AB1' at pages 57-60. This shows that the appellant and his parents booked a flight leaving London Heathrow on 14 July 2013. This information was not provided with the application and was not before the decision maker*."

14. The judge went on in the remainder part of that paragraph to find that the appellant had indeed left the UK on 14 July 2013 and had made a valid application.

15. This however in turn raises two points which are quite evident from the decision. The first is that the dates given by the appellant to the Secretary of State in the application were not reliable and, secondly, the appellant clearly asserted that he had left the United Kingdom earlier than declared in his application to the Secretary of State. His leave expired on 24 July but he claimed in his appeal that he had left ten days earlier on 14 July 2013. Thus there were a further ten days when the appellant was not in the UK bearing in mind the judge accepted that he had indeed left on 14 July.

16. The judge did not accept that leave had been broken because the appellant did not have leave for the period of 24 July 2013 to 3 September 2013 but it remains the case that the appellant had been out of the UK for a further ten days than claimed in his record. As the judge stated at paragraph 17:

> "*The appellant provided information about absences from the UK in form SET (LR), a copy of which can be found in the Home Office bundle. He accepts that some of the information recorded there is wrong or incomplete: for example he now asserts that he left the UK on 14 July 2013 which is not recorded there. Instead he records he left on 26 August 2013. The record provided by him therefore is unreliable*."

17. The respondent also noted that the appellant's passport stamps showed further absences from the UK in the form of entry stamps to the UK dated 8 January 2007, 25 September 2011 and 10 December 2012 as well as the United States entry stamp dated 20 March 2008 and a Kenyan exit stamp dated 8 August 2012. According to the respondent these stamps are the dates he claims to have been *in the UK*.

18. The judge proceeded to note at paragraph 18:

> "*The schedule of absences found in AB1/54-56 and AB2/4-5 records that he was in the UK from 29 October 2006 until 26 January* ***2007****. The appellant has failed to address this issue in any way. Having examined the photocopy of the passports I could only find a date stamp on 8 January* ***2008*** *for entry at Heathrow. It is possible that the respondent had made a typographical error here. Even if that were so, the appellant declared in the application form and in the*

*schedule of absences that he left the UK on 9 December 2007 and returned on **4 January 2008 [my emphasis]** [AB1/14] AB2/4]. He has not provided an explanation why there is an entry stamp for 4 January 2008*."

19. Therefore the judge clearly identifies a further four days when the appellant is not in the UK.

20. The judge, in addition, identifies the following:

> "*19. The respondent asserts that there is an entry stamp for the US on 20 March 2008 yet his application records that he was present in the UK from 24 Feb 2008 until 26 March 2008. Again, no explanation has been forthcoming.*
>
> *20. According to the respondent there is an entry stamp to the UK dated 25 September 2011. According to the information supplied by the appellant in his application he was in the UK from 3 September 2011 until 28 October 2011. Again, he has failed to provide an explanation to account for this.*
>
> *21. There is an entry stamp to the UK on 10 December 2012 yet his application records that he was in the UK from 2 December until 26 December 2012. Again, no explanation has been forthcoming.*
>
> *22. A Kenyan exit stamp is dated 8 Aug 2012 yet his application records that he was in the UK from 10 July 2013 until 26 Aug 2013. Again, no explanation has been forthcoming*.
>
> 23. *I am satisfied that the appellant has failed to explain why his passport has entry and exit stamps for dates he claims to have been in the UK. He did not add anything to his statement which is in broad terms and makes no reference to the respondent's points made in the refusal letter. I am not satisfied that the appellant has provided an accurate and reliable account of the dates he has been outwith the UK. His mother has provided a statement at AB1/23-25. Again, no details have been provided as to the dates the appellant was absent from the UK and all that is stated is that the appellant has not spent a total of 18 months outwith the UK. I am of the view that more is required to address the points made by the respondent in the refusal letter. Accordingly I am not satisfied that the appellant has discharged the burden of proof to establish that he has not been absent from the UK for a period less than 540 days. Accordingly this part of his claim must fail.*"

21. Clearly the judge was not satisfied that the appellant had provided an accurate and reliable account of the dates he has been outside the UK and although his mother provided a statement no details were provided as to

the dates the appellant was absent from the UK. The judge was of the view that more was required to address the points made by the respondent in the refusal letter and in sum

> *"accordingly he was not satisfied that the appellant had discharged the burden of proof to establish that he had not been absent from the UK for a period less than 540 days and that his claim should fail".*

22. It was open to the judge to conclude that there were numerous dates that had not been accounted for by the appellant and that no reliable record had been presented. On a careful analysis of the record supplied by the appellant t is clearly littered with inaccuracies and this was as set out by the judge. Indeed the record was altered subsequent to the application and in the appeal evidence presented to the judge. It is clear that the altered record would, however, add at least a further ten days' absence from the UK and this is just an example.

23. In the light of the above despite the judge findings in the appellant's favour, the judge simply did not accept the days claimed in the UK because the record provided did not accord with the datestamps.

24. Of critical importance is that contrary to the appeal grounds that are recorded in the decision the application was only challengeable on human rights grounds. It was not challengeable on the grounds of the Secretary of State exercising her discretion or on the basis that it was not in accordance with the law.

25. The judge makes no reference to the exercise of discretion by the Secretary of State but the decision letter clearly states, "as noted above and as you were without lawful leave from 24 July 2013 until 3 September 2013 it is considered that it is not appropriate to exercise discretion in your circumstances". The Rule 24 notice or response makes the point that albeit that the Secretary of State's finding on that matter was overturned it did not mean that the exercise of discretion was not considered. I have noted the case of **Zheng** which is not reported and not binding on me, but nonetheless in the view of the particular circumstances of this case and the essential findings of the judge, albeit there may have been some scope for the judge to address the exercise of discretion by the Secretary of State which may in turn affect the proportionality exercise under Article 8, there was no error of law in the judge's decision to refuse to interfere with the Secretary of State's decision in this particular case. In the light of the findings by the judge, particularly with regard to the state of the record put before the Secretary of State and before the judge himself, I am not satisfied that there are any grounds on which to challenge the exercise of the discretion by the Secretary of State. She clearly addressed her mind to this issue and there was no indication that the Secretary of State did not consider the policy.

26. The appellant did challenge the decision on Article 8 grounds but this was not strictly subject to the grant of permission for appeal. However in the light of the very full findings by the judge in relation to paragraph 276B and the detailed assessment made by him from paragraphs 29 to 49, specifically at paragraph 37, the judge addressed the question of the length of time of the appellant in the UK and that he had spent the majority of his life in Kenya. The judge rightly applied Section 117B and **AM (S 117B) Malawi [2015] UKUT 0260 (IAC)** and it was open to him to find that the refusal decision was a proportionate interference into the appellant's private life.

Notice of Decision

27. As such I find that there is no error of law in the decision and the decision of the First-tier Tribunal Judge shall stand.

No anonymity direction is made.

Signed *Helen Rimington* Date 10th January 2018

Upper Tribunal Judge Rimington