Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/24627/2018

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
on 14 August 2019	**on 29 August 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

FBSS
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person.
For the Respondent: Mr A McVeety Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Arullendran promulgated on the 21 March 2019 in which the Judge dismissed the appellants appeal on human rights grounds.

Background

2. The appellant applied for indefinite leave to remain on the basis of long residence in the UK. There was no dispute between the parties in relation to the dates the appellant has been in out of the UK. At [14] the Judge records the following:

> "14. The Appellant claims that she submitted her application for ILR on 1 September 2018 and that she had 581 days absence from the UK between 1 September 2008 to 1 September 2018, which exceeded the limit imposed by the respondent's Rules of 540 days in the sum of 41 days. However, the Appellant claims that the reason for the extended absence from the UK was out of her control in 2012/13 because she was compelled to stay in Saudi Arabia until her scholarship application and visa had been concluded and this resulted in an absence of 175 days on that occasion. The Appellant relies on pages 54 to 57 of her bundle which sets out in detail the dates of leaving and entering the UK and the reasons for the absence."

3. The Judge finds on the evidence that the appellant failed to show she met the requirements of paragraph 267B of the Immigration Rules and that the requisite period of continuous lawful residence had been broken [29]. At [30] the Judge recognises that the requirement for the 10-year period can be waived where there are sufficient compelling or compassionate reasons for the excessive absences from the UK.

4. The respondent in the reason for refusal stated:

> "When assessing your application the Home Office have been unable to identify a 10-year period in which the least number of absences have been taken which total less than 540 days. It is noted that over the period of your residence between 12 July 2004 and 22 June 2018 you have declared a total of 1050 days absence from the UK. Between 26 June 2009 and 16 September 2009 you have declared a total of 581 days absence from the UK.
>
> The amount of days you have been absent from the United Kingdom exceeds the maximum amount of 540 days allowed in any 10 year qualifying period, with this in mind you are considered to have broken your continuous residence and therefore you cannot satisfy the requirement to have completed at least 10 years continuous lawful residence under paragraph 276B(i)(a) of the immigration rules.
>
> For the reasons outlined above, your application for indefinite leave to remain on the grounds of long residence is refused as you have failed to meet the requirements of the Immigration Rules under paragraph 276D with reference to Paragraph 276B(i)(a) of HC 395 (as amended).
>
> The Secretary of State has in her power a discretionary element where if she feels fit, can wave a breach of the Immigration rules. With this in mind, the Secretary of State has given consideration to the break in your lawful residence mentioned above.

It is noted that you have stated that the reason for your excessive absences is because you had to acquire a scholarship from KSA's government, because you had to obtain admission with a Tier 4 sponsor and because you had to apply for Entry Clearance.

However, it is decided that it would not be appropriate to exercise discretion with regard to the absences accrued as it is considered that the permitted maximum of 540 days or 180 days in any one period of absence under the Immigration Rules is generous and designed to meet a number of eventualities, including having to obtain scholarship/sponsor/entry clearance.

You have provided no sufficiently compelling or compassionate reasons for your excessive absences from the UK or why you should be treated differently to any other student in this country. Therefore, it is not considered that yours is a case where exercise of discretion is appropriate.

5. The appellant was therefore fully aware of the issues at large in this appeal from the outset.

Error of law

6. The Judge sets out conclusions and findings from [28] which, in relation to the exercise of discretion, are set out at [30] in the following terms:

> "30. The breach of the Immigration Rules, with regard to the provisions of 10 years continuous residence, can be waived where there are sufficiently compelling or compassionate reasons for the excessive absence from the UK. In this case the Appellant has claimed the absence was due to missing paperwork for the scholarship application and delay in obtaining the ATAS certificate for the Visa application. The Appellant has not stated in her application or anywhere in her evidence what the missing paperwork was. I have considered the document at page 14 of the Appellants bundle which appears to show that the Appellant submitted her application for a scholarship on 30 July 2012 and it was returned to her on 1 August 2012 with a request for further information/documents, but as there had been no action by the Appellant it was rejected on 1 September 2012 and the Appellant resubmitted the application on 6 September 2012. The Appellant has not provided any evidence regarding the reasons for the delay between the return of her original application on 1 August and the resubmission of the application on 6 September 2012. In the circumstances, I am not satisfied, on the balance of probabilities, that the delay in processing the scholarship application was outside the control of the Appellant. Therefore, I find that there are insufficient compelling reasons to waive the requirement that the Appellant have no more than 540 days of absence in a 10-year period and, thus, her continuity of residence has

> been broken and she does not meet the requirements of paragraph 276B of the Immigration Rules."

7. The application for permission to appeal is supported by documents which the appellant confirmed during the course of the hearing were not before the decision-maker and not before the Judge. It also transpired that the documents submitted in April 2019 had not even been served upon the respondent although copies were provided to Mr McVeety at the hearing enabling him to consider the same during the course of the hearing. The documents are copy emails sent and received regarding what occurred in relation to the application and in support of her claim that any delay was beyond her control.
8. The appellant was handed a copy of a summary of Ladd v Marshall [1954] EWCA Civ 1, which set out the test to be applied when a party relies on fresh evidence not before a court or tribunal. In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled:

> First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial:
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> Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive:
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> Thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.
>
> — Lord Denning.

9. It is not made out the extra material the appellant seeks to rely upon in establishing an error of law was not available to her and/or could not have been obtained with due diligence for use in the hearing before the First-Tier Tribunal. The dates clearly show this material was in existence some time ago and was in the personal control of the appellant as there are emails both received and sent by her. It is therefore arguable that what the appellant is attempting to do is to claim the Judge erred in law on the basis of material which had not been disclosed. The appellant also stated in her application for permission to appeal that she has email she can provide to show reasons for delay in the second application. Whilst the same may exist they have not been disclosed either and do not, arguably, assist.
10. The reality of this case is that the Judge made the decision on the basis of the evidence that had been made available. Both the decision-maker and the Judge acknowledged the existence of discretion in a case where an applicant had exceeded the maximum permitted threshold of absences and is not made out the decision-maker's conclusion that it was not appropriate to exercise discretion in the applicant's favour, on the basis of the information made available with the application for leave, is irrational. It has not been made out that the Judge's conclusion there was insufficient evidence provided to explain the reason for the delay following the return of the

original application on 1 August and resubmission on 6 September 2012 is outside the range of findings reasonably open to the Judge. It is not made out the Judge's conclusion there are insufficient compelling reasons established to waive the requirement is a decision that is irrational. It is not made out the exercise of discretion by the decision-maker or consideration of the same by the Judge was not a lawful exercise of the discretionary power.

11. Even if there was some explanation for the delay between 1 August and 6 September 2012, it appears that on 30 July 2012 the applicant submitted an incomplete or invalid application resulting it being returned to her on 1 August 2012 with a request for further information/documents. No explanation was before the Judge to explain why the applicant failed to file a valid application containing all the requisite information on the first occasion.

12. Although the appellant pleads a fairness point it is not made out the Judge committed a procedurally regularity sufficient to amount to an error of law in proceedings which are by their nature adversarial and in which the Judge considered all the evidence made available. Directions given following the lodging of the appeal made it clear to the appellant that she was required to file all the evidence upon which she was seeking to rely by a specified date. It also appears from the respondent's decision under challenge and application that the appellant has had the benefit of legal representation. It is not made out there is an acceptable explanation for why the appellant did not file the evidence later disclosed in accordance with those directions, which are binding on the appellant even though she may be a litigant in person. The appellant is an intelligent woman of considerable academic achievement holding both a BSC with first class honours in Nanotechnology and a PhD as a Doctor of Philosophy.

13. Permission was also granted on the basis the decision disclosed inadequate reasoning in relation to the proportionality balancing exercise. The Judge finds at [34] it was not disputed the appellant has a private life in the United Kingdom with no finding that those elements the appellant sought to rely upon we disputed. The Judge notes the appellant has lived in the United Kingdom since the age of 11 and identifies at [34] that the issue in relation to the human rights aspect is the proportionality of the respondent's decision. The Judge finds the decision proportionate having considered the matters listed in section 117B the 2002 Act and the fact that little weight should be given to a private life established by a person at a time their immigration status is precarious. The Judge considers Rhuppiah [2018] UKSC 58 finding that there are a number of matters that weigh in the balance in the respondent's favour. Whilst the section dealing with this aspect is relatively brief it is not made out the Judge failed to consider appropriate facts or legal provisions. As the appellant was unable to succeed under the Immigration Rules it was necessary for her to establish something in her case that warranted a grant of leave outside the Rules which outweighed the public interest in her removal. The Judge's finding that the appellant failed to establish any element

to which sufficient weight could be given to outweigh the public interest has not been shown to be a finding outside the range of those available to the Judge on the facts of this case. The appellant's disagreement with the outcome and desire to remain in the United Kingdom, whilst understandable, does not establish that the conclusion on proportionality is outside the range of findings open to the judge on the law and evidence.

14. As the appellant fails to establish arguable legal error material to the decision to dismiss the appeal the determination shall stand.

Decision

15. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

16. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……
Upper Tribunal Judge Hanson
Dated the 22 August 2019