



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/02417/2020  
(V)

**THE IMMIGRATION ACTS**

**Heard remotely from Field House**

**On 7 July 2021**

**Decision & Reasons  
Promulgated  
On 23 July 2021**

**Before**

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**MS NEETU SHARMA  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms A Allen, Counsel, instructed by PSA McKenzie Solicitors  
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

**DECISION AND REASONS**

This is an appeal against the decision of First-tier Tribunal Judge Lever (“the judge”), promulgated on 3 March 2020, by which he dismissed the Appellant’s appeal against the Respondent’s refusal of her human rights claim.

The Appellant, a citizen of India, had come to the United Kingdom as a student in October 2011 and had remained with leave in that category until an appeal was dismissed and she became appeal rights exhausted on 23 January 2017. A number of further applications were made, all without success. The most recent application (treated as a human rights claim) was made on 14 April 2019 and refused by the Respondent on 29 January 2020. The Appellant asserted that she wished to undertake further studies in the United Kingdom (in the form of a Master's degree) prior to returning to India. She claimed to have established a private life in the United Kingdom over the course of time. She also claimed to have been in a relationship with a Mr Kumar.

### **The decision of the First-tier Tribunal**

The judge went through the Appellant's immigration history in the United Kingdom and, it is fair to say, was unimpressed by certain aspects relating to it. He found that the Appellant had been an overstayer since becoming appeal rights exhausted in January 2017. At [15] the judge addressed an issue which had been raised in cross-examination but had not featured in the Respondent's decision letter. In oral evidence the Appellant had been asked about how she was financially supported in the United Kingdom. She had said that friends of her father who travelled to and from India would bring cash back with them from her father and pass it on to her. This method was used not only in terms of financial support for her but also for the payment of fees in the past. The judge found this explanation to be "highly unlikely" and rejected it. He went on to state that:

"Whilst the method of her financing does not go to any particular issue in this case it reflects on the credibility of the Appellant's evidence generally. I find in general terms therefore that the Appellant is not motivated as she claims to simply remain in the UK for a further year of study before returning to India but rather her motivation is to remain indefinitely within the UK by one means or another."

The judge then considered the position of Mr Kumar and found that he was an Indian citizen without any status in the United Kingdom.

At [17] the judge considered relevant factors in respect of the overall Article 8 balancing exercise including those set out in section 117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). He noted the Appellant's previous precarious status and then her overstaying from 2017. He regarded that the private life established over time attracted little weight and went on to state that "there is no right to study and there is clear case law indicating that refusing a person leave to remain to study is not tantamount to a disproportionate breach of their Article 8 rights." The final sentence of [17] reads as follows:

"There is a public interest in maintaining immigration control and to some extent it could be said that where a person deliberately and unlawfully remains in the UK submitting on a regular basis applications which are almost bound to fail that the public interest is enhanced."

The alleged family life with Mr Kumar was considered, but regarded as of no assistance to the Appellant's case. The appeal was duly dismissed.

### **The grounds of appeal and grant of permission**

The grounds of appeal are divided into two, although they are clearly interrelated: first, it is said that the judge made an error of fact by finding the Appellant's explanation as to how she received funds to be incredible, whereas new evidence (submitted with the application for permission and pursuant to Rule 15(2A) of the Upper Tribunal's Procedure Rules) showed that the cash method had in fact been used; second, the judge acted with procedural unfairness by failing to raise his concern as to the Appellant's evidence at the hearing itself.

Permission to appeal was granted by First-tier Tribunal Judge O'Keeffe on 21 January 2021.

### **The hearing**

Ms Allen focussed her submissions on the procedural unfairness issue. She acknowledged that the issue had been raised in cross-examination, but it had not appeared in the Respondent's decision letter and therefore the Appellant had not adduced evidence on the point. The judge had on the one hand stated that this issue did not go to a particular matter, whilst on the other found that it adversely affected the Appellant's overall credibility. Ms Allen (who had appeared below) submitted that if a concern over the explanation had been raised at the hearing, an application for an adjournment in order to adduce further and better evidence would have been made. She submitted that the judge's error was material because he had stated in terms that the incredible explanation as to finances reflected poorly on the Appellant's evidence as a whole. Ms Allen submitted that as procedural unfairness had occurred the appeal should be remitted to the First-tier Tribunal.

Ms Everett submitted that the judge had been entitled to find as he did, but even if there had been procedural unfairness the Appellant simply could not succeed in respect of her Article 8 claim in light of the facts as a whole. Therefore, Ms Everett submitted, any error was immaterial. If on the other hand the judge's decision should be set aside the decision could be re-made in the Upper Tribunal.

### **Conclusions on error of law**

With a fair degree of hesitation, I have concluded that there was procedural unfairness. The hesitation arises because this is not an example of a judge taking a point against an appellant which had not in any way been canvassed at a hearing: the financial support issue had been raised in cross-examination and the Appellant was given the opportunity to provide an explanation. Having said that, it is the case that the issue of how the Appellant received financial support was not raised in the Respondent's decision letter and I am satisfied

that this was the reason why further evidence on this issue had not been provided by the Appellant in advance of the hearing.

Whilst it is undoubtedly the case that a judge is not obliged to inform a party of their concluded view as to a particular evidential issue, if a new matter is raised during a hearing and there is, in the judge's mind, at least a provisional concern on the evidence given, fairness may require the concern to be ventilated in order that the Appellant and/or their representative has an opportunity to make specific submissions on it, lead further evidence at the hearing, or, as Ms Allen said would have happened in the present case, seek an adjournment in order to provide further and better evidence from other sources. In all the circumstances, I am satisfied that the failure of the judge to adopt this course of action did lead to procedural unfairness, albeit only to a limited extent.

The question then is whether the error is such that the judge's decision should be set aside, having regard to the discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

Whilst Ms Allen put forward a perfectly respectable argument as to why the judge's error was material to the outcome of the Appellant's appeal, in all the circumstances I disagree and have concluded that, absent the specific procedural unfairness, the result would have inevitably been the same. In other words, I do not accept that the error might have made a difference to the judge's overall conclusion on the appeal. My reasons for this are as follows.

First, as highlighted previously, the error I have identified was only in respect of a narrow evidential issue, namely the method by which the Appellant was being financially supported. It is relevant that the procedural unfairness did not deprive the Appellant of a fair hearing in respect of an important and contentious matter. There was never any suggestion that she was not being financially supported *at all* and was therefore reliant on public funds.

If one were to proceed on the basis that the appellant's explanation as to how she received money from her father was entirely credible, this could only have provided somewhat better evidence as to her financial independence in the United Kingdom a matter which was not in fact in dispute. Taking this across to the mandatory considerations set out in section 117B(3) of the 2002 Act, such financial independence is of neutral value.

Second, the judge made it clear enough that the financial support issue did not go to a core issue in the appeal. I acknowledge that he deemed the appellant's explanation as somewhat damaging to her overall credibility. However, he did not make a finding that she had practised deception in any way. On a fair reading of the judge's decision as a whole, there are no other express findings that the appellant had perpetrated significant misconduct or had lied about particular matters. The considerations weighing against the appellant set out at [17] are essentially simple statements of fact: she was in fact an overstayer and had been since early 2017; her status, when lawful, was in fact only ever precarious; she had in fact made numerous unsuccessful applications (most, if

not all, based on repeated Article 8 assertions) since becoming an overstayer; her claim had in fact only ever really been predicated on a desire to undertake a further course of studies in this country (I will deal with the position of Mr Kumar, below) and the judge was perfectly entitled to conclude that there was no right to study protected by Article 8 (see, for example, Patel [2013] UKSC 72; [2014] 1 AC 651, at paragraph 57).

In respect of the final sentence at [17], one can readily discount any enhancement of the public interest in play (i.e. the importance of maintaining effective immigration control) by virtue of any perceived concerns with the appellant's credibility. On any view, the 'normal' public interest, as enshrined in section 117B(1) of the 2002 Act was a significant factor on the Respondent's side of the balance sheet.

In view of the above, and having regard to the case-law and mandatory considerations under section 117B of the 2002 Act, even if an entirely benevolent view had been taken of her overall credibility and motivation, it is in my judgment so difficult to conceive a judge, directing himself or herself properly in law, allowing the Appellant's appeal on private life Article 8 grounds, that I am driven to conclude that the error I have identified was immaterial.

Third, there is no conceivable way in which the error relating to the financial support issue could have materially the judge's consideration of Mr Kumar, an Indian citizen with no status in the United Kingdom.

Fourth, I do not regard the fact that the judge made an adverse observation as to the Appellant's credibility, which I have concluded was based on an error, to be a sufficient basis, in and of itself, to set the decision aside. If there had been an express finding of dishonesty by the judge, my view might have been different. However, as mentioned above, no such finding was made. If the Appellant has an adverse immigration history, it is in truth only because she has remained in the United Kingdom as an overstayer since 2017 and made repeated unsuccessful applications for further leave, rather than perhaps adopting a different course of action such as returning to India earlier and seeking entry clearance as a student.

### **Notice of Decision**

**Although making of the decision of the First-tier Tribunal did involve the making of an error on a point of law, I do not set that decision aside.**

**The decision of the First-tier Tribunal shall stand.**

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

Signed H Norton-Taylor

Date: 8 July 2021

Upper Tribunal Judge Norton-Taylor