**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/05674/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 7 August 2015** | **On 14 August 2015** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE KAMARA**

**Between**

**MISS YOKO KONDO**
(ANONYMITY DIRECTION NOT MADE)

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr B K Sharma, legal representative, MAAS
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Morrison (hereinafter referred to as the FTTJ), promulgated on 9 March 2015, in which he dismissed an appeal against the respondent's decision, dated 15 January 2014, to refuse to grant the appellant indefinite leave to remain and to remove her from the United Kingdom under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. Permission to appeal was granted by First-tier Tribunal Judge Osborne on 7 May 2015.

Anonymity

3. No direction has been made previously, and I see no reason for one now.

Background

4. The appellant arrived in the United Kingdom on 24 July 2003 with leave to enter as a student. Further leave to remain was granted in the same capacity until 28 February 2011, following timeous applications. On 24 February 2011 the appellant applied for leave to remain as a Tier 4 migrant and this was granted until 5 August 2013. On 13 March 2013, the appellant's leave was curtailed to take effect on 12 May 2013. On 9 April 2013, the appellant sought indefinite leave to remain in the United Kingdom on the basis of her long, lawful, residence. Her application was refused as the respondent considered that she had accrued only 9 years and 10 months leave because her last period of leave was curtailed.

The hearing before the FTTJ

5. The FTTJ found that the appellant had been awarded an MA from the University of London in 2005, an MSc from the University of Oxford in 2007 and had completed two of the three examinations required for her to complete a D.Phil course at the University of Oxford. The appellant was diagnosed with bilateral lateral epicondylitis, which adversely affected her day-to-day activities, including her studies. The FTTJ accepted that as a result of the aforementioned condition, the appellant struggled to complete her thesis by 2012 and ultimately the University had advised the respondent that her studies had lapsed. The FTTJ concluded that the appellant could not meet the requirements of paragraphs 276B or 276ADE of the Rules and there was no reason for a second stage Article 8 assessment to be made in relation to the appellant's private life.

The grounds of appeal

6. In essence, the grounds argued that the FTTJ's decision that the Rules were not met was irrational in that the appellant met the requirements of paragraph 276B of the Rules shortly after her application was made in April 2013. It was said that the FTTJ erred in failing to consider that the respondent had failed to exercise differently a discretion conferred on her and that the FTTJ failed to carry out a full Article 8 assessment.

7. FTTJ Osborne granted permission primarily on the basis that the FTTJ arguably erred in applying an exceptional circumstances threshold in terms of his Article 8 assessment. All the issues raised in the grounds were said to be arguable.

8. In her response of 11 May 2015, the respondent opposed the appeal, stating that the grounds were misconceived in relation to Article 8, the appellant's case was mundane and her circumstances did not require a consideration outside the Rules. No mention was made of the FTTJ's findings on paragraph 276B of the Rules.

The hearing

9. At the hearing before me, I invited the views of the representatives on the indication that the appellant met the requirements of paragraph 276B of the Rules at the time the respondent's decision was taken. Mr Sharma agreed that this was his primary submission.

10. I gave Mr Tarlow (at his request) additional time to consider the appellant's immigration history and to take instructions. Unfortunately, Mr Tarlow's calls to the respondent went unanswered and I therefore heard submissions from both parties, which, essentially, went no further than to repeat the grounds of application and the respondent's Rule 24 reply. Mr Tarlow made no submissions on whether or not the appellant met the requirements of paragraph 276B of the Rules.

Decision on error of law

11. The FTTJ erred in finding, at [18] of the decision and reasons that the appellant "*had been in the United Kingdom for less than 10 years*." At the time of the respondent's decision, the appellant had been continuously, lawfully, present for 10 years and 5 months. By the time of the hearing before the FTTJ, the appellant had been residing in the United Kingdom for 11 years and 7 months. No reasons were provided by the FTTJ for finding that the appellant had acquired less than 10 years residence. In fairness to the FTTJ, it appears that the appellant's case under the Rules was not clearly put, as is apparent from reading the aforementioned paragraph.

12. It is also the case that the FTTJ erred in not carrying out an Article 8 assessment, outside the Rules in view of the fact that she found the Rules were not met. There was copious evidence before the FTTJ of the appellant's lengthy, lawful residence in the United Kingdom; her successful studies, the importance of her D.Phil research, her charitable work and the incapacitating medical problems which she had overcome but which had set back the progress of her research. In addition, at [18] the FTTJ was of the view that the appellant's was a "near miss" case. I consider that in all these circumstances, the appellant showed good reason as to why her case should be given individualised consideration outside the Rules, SSHD v SS (Congo) & Ors [2015] EWCA Civ 387 applies.

13. It was appropriate for me to re-make the decision without adjourning the appeal. Neither party sought to suggest otherwise. No new evidence was submitted and the parties elected to rely upon the submissions previously made. At the end of the hearing I allowed the appeal under the Rules and reserved my decision in respect of Article 8 ECHR, outside the Rules.

14. Paragraph 276A of the Rules provides definitions relevant to paragraph 276B of the Rules as follows;

> (a) continuous residence" means residence in the United Kingdom for an unbroken period, and for these purposes a period shall not be considered to have been broken where an applicant is absent from the United Kingdom for a period of 6 months or less at any one time, provided that the applicant in question has existing limited leave to enter or remain upon their departure and return, but shall be considered to have been broken if the applicant: (01.04.2003 HC 538)
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> (i) has been removed under Schedule 2 of the 1971 Act, section 10 of the 1999 Act, has been deported or has left the United Kingdom having been refused leave to enter or remain here; or (01.04.2003 HC 538)
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> (ii) has left the United Kingdom and, on doing so, evidenced a clear intention not to return; or (01.04.2003 HC 538)
>
> (iii) left the United Kingdom in circumstances in which he could have had no reasonable expectation at the time of leaving that he would lawfully be able to return; or (01.04.2003 HC 538)
>
> (iv) has been convicted of an offence and was sentenced to a period of imprisonment or was directed to be detained in an institution other than a prison (including, in particular, a hospital or an institution for young offenders), provided that the sentence in question was not a suspended sentence; or (01.04.2003 HC 538)
>
> (v) has spent a total of more than 18 months absent from the United Kingdom during

the period in question. (01.04.2003 HC 538)
(b) lawful residence" means residence which is continuous residence pursuant to:
(i) existing leave to enter or remain; or (01.04.2003 HC 538)
(ii) temporary admission within section 11 of the 1971 Act where leave to enter or remain is subsequently granted; or (01.04.2003 HC 538)
(iii) an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain. (01.04.2003 HC 538)
(c) 'lived continuously' and 'living continuously' mean 'continuous residence', except that paragraph 276A(a)(iv) shall not apply. (HC 565 06.09.2012)

15. The requirements to be met by the appellant to qualify for a grant of indefinite leave to remain on the grounds are as follows;

276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:
(i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.
(ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:
(a) age; and
(b) strength of connections in the United Kingdom; and
(c) personal history, including character, conduct, associations and employment record; and
(d) domestic circumstances; and
(e) compassionate circumstances; and
(f) any representations received on the person's behalf; and
(iii) the applicant does not fall for refusal under the general grounds for refusal.
(iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.
(v) the applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period.

16. Starting with the appellant's residence in the United Kingdom. At the time of the hearing before me, the appellant had acquired 12 years continuous, lawful residence in the United Kingdom. As accurately set out in the respondent's reasons for refusal letter dated 15 January 2014, the appellant arrived in the United Kingdom on 24 July 2003 with leave to enter as a student until 30 September 2004. On 14 September 2004 she applied for leave to remain as a student and was *"granted continuous leave as a student"* until 28 February 2011. On 24 February 2011 she applied for leave to remain as a Tier 4 migrant and this was granted until 5 August 2013. At the end of that period of leave the appellant would have reached the 10-year point, however on 13 March 2013, her leave to remain was curtailed to 12 May 2013. The appellant made an in-time application for the variation of her leave on 9 April 2013. That application had the effect of extending her existing leave to remain under section 3C(1) of the Immigration Act 1971 (as amended). Therefore while the appellant had not acquired 10 years lawful residence at the time of her application on 9 April 2013, she had done so as of 24 July 2013 when her application was still awaiting the respondent's decision. A decision was not made until 15 January 2014. That decision was served on the appellant on 22 January 2014, against which she appealed on 28 January 2014; thus continuing to extend her leave under section 3C(2) of the Immigration Act.

17. I have carefully considered the detail of the appellant's residence in the United Kingdom, with reference to 276A(a) of the Rules. The appellant provided her valid passports as well as an account of her absences from the United Kingdom on her application form. There was just one occasion when the appellant was absent from the United Kingdom for a lengthy continuous period and this was between 30 December 2007 and 29 June 2008 when she travelled to Bangladesh in order to carry out fieldwork for her D.Phil at the University of Oxford.

18. The appellant drew attention to this matter in her covering letter of 9 April 2013 which accompanied her application. The Rules states that continuous residence will not be considered to have been broken following an absence of a "*period of 6 months or less at any one time...*" The appellant's absence was exactly 6 months and at the time she left and returned, according to her residence permit, she had existing limited leave to remain in the United Kingdom dating from 3 November 2006 until 28 February 2011. I have calculated the appellant's total periods of absence from the United Kingdom during the 10-year period from 24 July 2003 onwards and it amounts to slightly under 9 months absence whereas the Rules permit up to 18 months absence.

19. Turning now to 276B of the Rules, as indicated above I accept that the appellant has had at least 10 years continuous lawful residence in the United Kingdom.

20. The respondent raised no public interest considerations as to why it would be undesirable for the appellant to be granted indefinite leave to remain on the grounds of long residence. Indeed the respondent's sole objection to the application was on the basis of the erroneous decision that the clock stopped when the appellant's leave was curtailed. I permitted Mr Tarlow additional time to consider this aspect of the appellant's case and he raised no objections of any sort. Therefore I am satisfied that there are no reasons for the appellant's application to fall under the general grounds of refusal. The appellant demonstrated that she had sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom in accordance with Appendix KoLL. At the time of her application, the appellant provided specified evidence that she had taken and passed an ESOL with citizenship qualification including speaking and listening, at ESOL Entry level 3, was regulated by OFQUAL and was listed as an ESOL qualification on the Register of Regulated Qualifications. She also provided a letter from the college, which set out that she had progressed from Entry level 2 to level 3 and taken her qualification at an accredited college. The appellant has never been in the United Kingdom in breach of immigration laws.

21. Given the foregoing paragraphs, I find that the Appellant's appeal succeeds under Paragraph 267B of the Immigration Rules.

22. It is not strictly necessary for me to consider the appellant's Article 8 claim outside the Rules as I have found she meets the requirements of paragraph 276B however I shall do so for completeness. It is not in dispute that the appellant has established a considerable private life in the United Kingdom, demonstrated by her residence here, her master's degree in Lifelong Learning from the University of London in 2005 and MSc in Educational Research Methodology from the University of Oxford in 2007. The appellant's thesis for her D.Phil was frustrated and considerably delayed by difficulties she had in being able to use her arms and hands. It appears those problems have alleviated to some extent with treatment and the passage of time and the completion of her thesis appears to be in prospect. Clearly the decision to remove the appellant amounts to a degree of interference with the private life the appellant has established in this country. I find that the removal decision was in accordance with the law and was made in pursuit of a permissible aim, that is the economic wellbeing of this country. In terms of proportionality, I have had regard to the relevant parts of paragraphs 117A and B of the Nationality, Immigration and Asylum Act 2002 (as amended) and note that the maintenance of a system of immigration control is in the public interest as it is that persons seeking leave to remain speak English and are financially independent. I have had regard to the fact that the appellant's private

life was established at a time when her immigration status was precarious and reduced the weight I attach to her private life accordingly.

23. I have also had regard to the fact that the appellant was resident in Japan until her late thirties and has visited her family on two occasions since arriving here in 2003. I have also considered the appellant's charitable endeavours, which include her funding the education of a child in Pakistan and caring for two elderly people in Oxford. In addition, Dr Shannon Magness who previously taught the appellant and assisted her in relation to her research considers the appellant's research work to be "*extremely important*" for education in poor countries. The appellant also has a spotless immigration history and I am satisfied that her studies were interrupted by genuine, serious, medical problems.

24. I bear in mind what was held in Patel & Ors v SSHD [2013] UKSC 72, in that "*Article 8 is not a general dispensing power*"[57] and further "*the opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8."[*57]. At its essence, the appellant's human rights claim amounts to a desire to complete her research degree which she started in 2005 and which was unfortunately delayed owing to her medical problems. I conclude that the respondent's decision was proportionate in all the circumstances.

**Decision**

**The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.**

**I set aside the decision of the First-tier Tribunal.**

**I re-make the decision by allowing the appeal under the Immigration Rules and dismissing it under the ECHR(Article 8).**

Signed Date: 9 August 2015

T Kamara
Deputy Judge of the Upper Tribunal

**TO THE RESPONDENT**
**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a full award owing to the fact that the appellant met the residence requirements of the Rules at the time of the respondent's decision.

Signed Date: 9 August 2015

T Kamara
Deputy Judge of the Upper Tribunal