Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU030962016

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
on 24 July 2017	**on 31 July 2017**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

MAN WEI LEUNG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by Gillespie MacAndrew LLP
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is from Hong Kong. His parents live there. He was educated at boarding school in England from age 12 or 13. During shorter holiday periods, he went to stay with his aunt and uncle in Edinburgh. He spent the longer holidays with his parents in Hong Kong. He stayed with his aunt and uncle while he attended Napier University. He applied on 24 September 2015 for indefinite leave to remain in the UK, based on long residency (10 years).

2. The respondent refused his application for reasons explained in her decision dated 17 January 2016.

3. In grounds of appeal to the FtT, the appellant accepted that he had been absent from the UK for 703 days in the 10-year period, exceeding the permitted maximum by 163 days. He said that the respondent failed to consider the duration of and reasons for

absence, and the compelling and compassionate circumstances; it was unreasonable and unlawful not to exercise discretion in his favour; and he had a right to remain under article 8, notwithstanding non-compliance with the rules, based on his private and family life.

4. FtT Judge Doyle dismissed the appellant's appeal, giving his reasons in a decision promulgated on 13 December 2016.

5. These are the grounds of appeal to the UT, lightly edited:

> Ground 1 – errors of law in relation to family life.
>
> The tribunal erred in law in finding that the appellant had not established family life with his uncle and aunt.
>
> (i) Error at ¶15 (c). There is no need for the appellant to be dependent on his aunt and uncle for family life to be established – *Gurung* [2013] 1 WLR 2546, ¶44-46.
>
> (ii) Further error at ¶15 (c). The tribunal failed to place the appellant's relationship in context and thus failed exercise anxious scrutiny. Even if not dependent on them "just now", he had been dependent on them since he was 12 years of age, was still living with them and accordingly family life was established.
>
> (iii) Error at 15 (d), finding nothing beyond normal emotional ties between the appellant and his aunt and uncle. There is no such test. Whether family life exists is simply a matter of fact. The relationship does not need to be beyond normal emotional ties.
>
> (iv) It is unclear whether the tribunal had in mind the correct test. Where the tribunal had in mind the wrong considerations and had those at the forefront of its mind, it cannot be said the decision would have been the same.
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> Ground 2 - errors of law assessing the appeal with reference to article 8.
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> (i) Failure to assess whether the decision was in accordance with the law, in relation to policy and to discretion whether to grant leave under ¶276B of the immigration rules
>
> (ii) Error at ¶16, applying an exceptionality test; a term to be avoided as it creates confusion - *Hesham Ali* [2016] UKSC 60. The tribunal "failed to recognise that the question is simply whether factors in favour of the appellant are sufficient to outweigh immigration control. In particular, the tribunal has not given any weight or not explained what weight it has given to the fact that the appellant has been lawfully in the UK for the time he has been in the UK."
>
> (iii) Error at ¶16 in looking for "compelling circumstances"; there is no need for "compelling circumstances"; the correct test is one of proportionality – *Hesham Ali.*
>
> (iv) Error in finding "no reason" to consider the case outside the rules; it is evident that the tribunal should consider the case outside the rules – *Khan* [2016] CSIH 13.

6. In a skeleton argument, the appellant amplifies the grounds.

> Ground 1 – reliance also on *Ghising* [2012] UKUT 00160. Error material as tribunal failed to assess proportionality on basis that there is family life.
>
> Ground 2 – exceptionality the wrong approach, supported by *Agyarko* [2017] 1 WLR 283 at ¶57 and by *Rhuppiah* [2016] 1 WLR 4203 at ¶53.

> If appellant's stay was lawful and not precarious, exceptional circumstances not the correct test – *Rhuppiah* at ¶44.

7. Mr Winter submitted further on ground 1 that although the Judge said that the existence of family life was a question of fact, he over-relied on *Kugathas*, which is outdated, and that it could not be said that on a different finding, the outcome would have been the same; and on ground 2, that the judge had not considered whether the decision was in accordance with the law, or applied the correct test for cases outside the rules.

8. Mr Matthews replied to the "according to the law" argument by pointing out that the appeal is on human rights grounds only, which rank over policy and discretion. Policy might inform an outcome, but could not have the effect that an appeal succeeded where a human right to leave to remain was not shown. He submitted further as follows. *Agyarko* confirmed that there had to be something significant and compelling to justify a right outside the rules. The appellant had been here lawfully, but only as a student, not on a route to settlement, and his status had always been precarious as interpreted in the case law. The judge had not applied an erroneous test of legal exceptionality. Even if some error of legal approach were found, the outcome of the case, on the evidence, should be the same.

9. I reserved my decision.

10. *Agyarko* deals with "exceptional circumstances" at ¶54 – 60. At ¶57 the Court says that ultimately a tribunal:

> … has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. It must also consider all factors relevant to the specific case in question, including, where relevant, the matters discussed in paras 51-52 above. The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.

11. The test for a case to succeed outside the rules has been variously described, but has not changed, and remains a high one. The grounds erroneously sought to minimise it.

12. The case law may be moving towards the view that there are degrees of precarious status; but it is plain that the appellant's stay has always been as a school and university student, not on a settlement route, and has been precarious.

13. Beyond that, the grounds and submissions for the appellant seek to over-analyse the judge's phrasing of his decision, and to search minutely for error of legal approach

where there is none. The case turned on the assessment of the facts, not on any legal nuance. As to that assessment, the grounds are only disagreement.

14. The appellant has some family life in the UK, in the extended and everyday sense of the phrase, but not within the protected core of article 8. The judge's finding on that issue was plainly open to him, and was not affected by any legal error.

15. If there had been such error, then on the evidence, I would have had no difficulty in coming to the same conclusion.

16. The applicant is no doubt a blameless individual with a genuine preference to make the UK rather than Hong Kong the centre of his life. However, the tribunal was plainly entitled to find nothing in his private and family life which gives him a right to do so, other than by bringing himself within the terms of the immigration rules. The outcome on proportionality was the only one ever likely to have been reached.

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

18. No anonymity direction has been requested or made.

28 July 2017
Upper Tribunal Judge Macleman