



Upper Tribunal
(Immigration and Asylum
Chamber)

Appeal Number: HU/04328/2015

THE IMMIGRATION ACTS

Heard at: Field House
On 19 April 2017

Decision and Reasons Promulgated
On 3 May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MISS THI MY NGAN HUYNH
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr M Sowerby, counsel (instructed by The Chancery Partnership)

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Vietnam, born on 13 March 1986. Her appeal against the decision of the respondent dated 4 September 2015, refusing her application for indefinite leave to remain on the basis of long residence was dismissed by First-tier Tribunal Judge Birk, in a decision promulgated on 17 August 2016. The appellant indicated to the First-tier Tribunal that she wanted the appeal to be decided on the papers without a hearing. The appeal was thus decided on the papers.
2. Judge Birk noted that the only ground of appeal available to the appellant was one based on her human rights. He noted at [8] that the appellant in her grounds of appeal and also her witness statement, '...has only addressed the issue of the chronology and failures that she alleged the respondent made in dealing with her applications'.
3. He found at paragraph [9], when trying to "extrapolate" from that information what is relevant for her human rights grounds of appeal which appear to be based on her family and private life that she has family in Vietnam and it appears none in the UK. She therefore had no family life in the UK. As for private life, she had been

in the UK for about ten years and had been studying here. She had not argued that she met any of the Immigration Rules in respect of her family and private life.

4. As it had not been argued that the Immigration Rules had been met Judge Birk stated at paragraph [10], that in order for him to find that an Article 8 assessment is required, then the case of SS (Congo) [2015] EWCA Civ 387 which takes into account R (on the application of MM (Lebanaon) v SSHD [2014] EWCA Civ 985 “...provides guidance.....that compelling circumstances are required to justify such an an assessment and that they need to be identified”.
5. He considered the issues raised in her grounds of appeal and in particular matters which referred to the murder case that she claimed she had become innocently and legitimately involved in and the illness and passing of her father. The grounds of appeal also set out that she was able to return to Vietnam to visit, and also that her family have monies for her study. Those matters did not provide compelling circumstances which required further consideration under Article 8 outside the Rules - [11].
6. The grounds set out in the application for permission to appeal to the Upper Tribunal asserted that: the First-tier Judge erred in finding that there had been no issue that the Immigration Rules had not been met; he failed to properly consider the appellant's evidence in finding that there were no compelling circumstances and failed to engage with any of the submissions put forward by the appellant; he failed to consider whether the appellant's legitimate expectation had been frustrated by the respondent.
7. On 22 February 2017, First-tier Tribunal Judge Scott Baker granted the appellant permission to appeal, stating that

“.....there was little reference to any of the evidence submitted by the appellant or any analysis of the same and few findings of fact. The appellant had requested that the appeal be determined on the papers and it was incumbent on the Judge to display an engagement with the facts which he had arguably failed to do”.

The appeal

8. Mr Sowerby relied on his grounds of appeal. He submitted that the respondent refused the application solely on the basis that there had been a gap of more than 28 days during the appellant's ten years' lawful residence.
9. The Judge was obliged to consider the relevant Rules even though it was a human rights appeal. There had been no findings as to the misfortune that the appellant claimed had affected her. The appellant had not been issued a Basnet notice. When she submitted her Tier 1 application on 28 February 2013 the respondent returned it, stating that the appellant did not complete the payment page. She contended that the form was completed in full. She then submitted a fresh application on 5 March 2013 in which an HSBC cheque was stapled.

10. That application was subsequently returned as invalid. The respondent alleged that there were insufficient funds in the account and the HSBC bank returned the cheque unpaid. The appellant contended that there had been more than sufficient funds to clear the cheque for the application fee. In due course, after collecting a banker draft from her bank, she resubmitted a fresh application dated 5 March 2013. That application was subsequently granted on 3 May 2013.
11. She thus stated that the gap related to a single occasion which occurred beyond her control. She relied on the Home Office policy guidance which required that the respondent consider any evidence of exceptional circumstances which prevented the applicant from applying within the first 28 days of overstaying. That was a high threshold. It included delays from unexpected or unforeseeable causes such as an inability to provide the necessary documents. In this case there were circumstances beyond the applicant's control.
12. Mr Sowerby submitted that in finding that there were no compelling circumstances, the Judge did not consider or place any weight on the fact that the Bank's and Home Office errors led to the appellant's application being rejected. The Judge did not make any finding as to whether the decision maker had exercised a lawful discretion. Had the Judge made findings and considered those matters, it would have been open to him to find that the appellant's case disclosed compelling circumstances warranting consideration outside the Rules under Article 8.
13. He referred to the Supreme Court's decision in R (on the application of Agyarko and Ikuga) v SSHD [2017] UKSC 11 at paragraph [48]. Lord Reed noted the secretary of state's view that the public interest in the removal of persons who are in the UK in breach of immigration laws is, in all but exceptional circumstances, sufficiently compelling to outweigh the individual's interest in family life with a partner in the UK, unless there are insurmountable obstacles to family life with that partner continuing outside the UK was challenged in these proceedings as being too stringent to be compatible with Article 8. The secretary of state has treated 'insurmountable obstacles' as a test applicable to persons in the UK in breach of immigration laws, whereas the the European Court treats "insurmountable obstacles" as a relevant factor in relation to non settled migrants.
14. However, this did not mean that that the secretary of state's test is incompatible with Article 8. The Rules are not a summary of the European court's case law, but a statement of the secretary of state's policy. That policy is qualified by the scope allowed for leave to remain to be granted outside the Rules. If the applicant or his partner would face very significant difficulties in continuing their family life together outside the UK which could not be overcome or would entail very serious hardship, then the "insurmountable" obstacles test will be met, and leave will be granted under the Rules. If that test is not met, but the refusal of the application would result in unjustifiably harsh consequences such that refusal would not be proportionate, then leave will be granted outside the Rules on the basis that there are "exceptional circumstances". The Rules and Instructions are therefore compatible with Article 8. That is a question of fact that must be determined in

dependently by the Tribunal in the light of the particular circumstances of each case.

15. Mr Sowerby submitted that there were such circumstances operating in this case. The Judge erred in failing to make any findings as to the circumstances. Further, the Judge failed to consider whether the respondent had undertaken a procedurally fair decision making process. The grounds of appeal before the First-tier Tribunal contended that the respondent failed to act fairly and rationally and to observe the requirements of a procedurally fair decision making process. The Judge prevented himself from determining whether the respondent had undertaken such a fair decision making process. The respondent's failure to act fairly and rationally amounted to a compelling circumstance.
16. Nor did the Judge consider whether the appellant's legitimate expectation had been frustrated by the respondent. The appellant had a legitimate expectation that the gap in applying for further leave to remain would be disregarded.
17. On behalf of the respondent, Mr Clarke submitted that this has been a misconceived appeal from the beginning. The appellant's appeal was limited to human rights. The appellant was informed by the respondent in the decision dismissing her application that she had a right of appeal under s.82 of the Nationality, Immigration and Asylum Act 2002 as the respondent has decided "to refuse your human rights claim." She was informed that she may appeal against the refusal of her human rights claim on the grounds that the decision is unlawful under s.6 of the Human Rights Act 1998.
18. Judge Birk noted at [9] that the appellant had made no reference to issues relating to family life or private life under Appendix FM or paragraph 276ADE of the Rules.
19. The fact that she had been here for ten years did not constitute compelling or exceptional circumstances. There had been no substantive contention made nor any facts produced with regard to either family or private life in the UK. She had not lived here for 20 years. Paragraph 276ADE recognises that an inference can be drawn from the fact of such lengthy residence in the UK.
20. The appellant would have to show an interference with respect to her family and private life in the UK. No such attempt had been made other than to contend that the decision was unfair in the circumstances. The Judge did not have jurisdiction under the Rules.
21. In order for there to be compelling circumstances resulting in a disproportionate interference with her human rights under Article 8, the appellant needed to demonstrate interference with regard to such private or family life. Nothing, however, had been set out apart from the secretary of state's policy.
22. There was no evidence as to how the appellant lives, how she engages in the community and what the nature of any private life is. These are matters relevant to

the assessment of the proportionality of the decision under Article 8. Moreover, Agyarko related to a distinct set of facts. It focused on the potential separation of partners.

23. In reply Mr Sowerby submitted that had the Judge found that the Rules were satisfied, he could have found that that that was a matter which affects proportionality of the decision. He referred to the decision in Mostafa (Article 8 in entry clearance) [2015] UKUT 00112. There, the Tribunal held that in the case of appeals brought against refusals of entry clearance under Article 8, ECHR, the claimant's ability to satisfy the Immigration Rules is not the question to be determined by the Tribunal but is capable of being a weighty, although not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control.

Assessment

24. The appellant elected to have her appeal decided on the papers. Judge Birk had before him her grounds of appeal, in which the legal framework regarding paragraph 276B of the Rules as well as the respondent's policy guidance on "long residence" was referred to and set out. The factual background relating to the gap between 24 February 2013 until 3 May 2013, referred to as "the alleged gap," was also set out in some detail.
25. The grounds from paragraph 25 onwards complained that the respondent erred in asserting that the appellant could not meet the requirements under paragraph 276B(i)(a) and (v) of the Rules. It was asserted at paragraph 28 that the respondent's error was 'a cause of action to trigger the alleged gap'. Had the respondent handled the application made on 2 February 2013 with care and accepted it as a valid application, the subsequent events would not have taken place.
26. It was also contended that the respondent erred in asserting that it was not appropriate to exercise discretion. Such discretionary powers were enshrined in the long residence policy guidance which was set out. Accordingly, a procedurally fair decision making process had not taken place.
27. Finally, it was contended that the respondent erred and acted unlawfully so as to frustrate a substantive, legitimate expectation of the appellant.
28. In her witness statement before the Tribunal, the appellant in effect repeated the contentions in the grounds of appeal.
29. Unlike the appellant in Mostafa, supra, she did not rely on or produce any evidence of any family life in the UK which would be adversely affected as a result of the decision. Nor was there any evidence produced of her private life established in the UK. In particular, there was no evidence of any relationships she had with persons by living and engaging in society whilst residing here. There was no evidence relating to any social ties, nor whether she had established any unique

relationship/s which could not be replicated in Vietnam. There was in fact no reference to the development of any close, personal or social ties which developed over time.

30. The respondent informed the appellant of her right of appeal which was limited to human rights grounds. The First-tier Tribunal was thus bound to consider the grounds of appeal which contended that the respondent's decision was incompatible with her human rights under the Convention.
31. The Judge considered the matters she raised with regard to the murder case in which she claimed she became innocently involved, and the illness and the death of her father. She had been able to return to Vietnam to visit. She also stated that her family had monies for study [11]. The finding that these matters did not provide compelling circumstances outside the Rules was available to the Judge on the evidence before him.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of any error on a point of law. The decision shall accordingly stand.

No anonymity direction is made.

Signed

Date: 29 April 2017

Deputy Upper Tribunal Judge C R Mailer