



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04078/2016

THE IMMIGRATION ACTS

Heard at Field House
On 23 March 2018

Decision & Reasons Promulgated
On 16 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS KHRYSTYNA MYDZA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer

For the Respondent: Ms F Shaw of Counsel

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal. To avoid confusion, I will refer to the Secretary of State as such throughout and to Ms Mydza as the claimant.
2. The claimant is a citizen of Ukraine, born on 10 January 1993. She arrived in the UK on 31 October 2005 with leave to enter as a student. Her leave was subsequently extended on a number of occasions to October 2015. On 5 October 2015 she made an application for indefinite leave to remain on the basis of long residence.

3. The Secretary of State refused to grant indefinite leave to remain because the claimant had spent a total of 1079 days outside the UK and even after excluding time spent with her family during her father's illness and relocation her absences exceeded the 540 days permitted. The Secretary of State also considered that the claimant did not satisfy the requirements of paragraph 276ADE and that there was no reason to grant leave to remain outside the Immigration Rules.

The appeal to the First-tier Tribunal

4. The claimant appealed against the Secretary of State's decision to the First-tier Tribunal. In a decision promulgated on 17 August 2017 First-tier Tribunal Judge Flynn allowed the claimant's appeal. The First-tier Tribunal found that the Secretary of State should have exercised her discretion in the claimant's favour and exempted her absences. The judge also found that it would be a disproportionate interference in the claimant's Article 8 rights for her to be removed.
5. The Secretary of State applied for permission to appeal against the First-tier Tribunal's decision. On 29 January 2018 First-tier Tribunal Judge Kelly granted permission to appeal.

The hearing before the Upper Tribunal

Submissions

6. The grounds of appeal assert that the First-tier Tribunal made a number of errors including incorrectly citing Rule 276ADE rather than 276B which together with other incorrect references demonstrate a lack of care. The substantive arguments are, in essence, that the judge has failed adequately to analyse the evidence with regard to the claimant's absences and has incorrectly found that the Secretary of State was required to exercise a discretion and that it should have been exercised in the claimant's favour. The claimant did not satisfy the requirements of the Immigration Rules (276B) - the judge was therefore wrong to allow the appeal under the Rules. The judge did not properly apply s117B. Knowledge of English language is a neutral factor, the judge's analysis of financial independence is flawed and there has been no consideration of the precarious nature of the claimant's stay in the proportionality exercise.
7. Ms Isherwood submitted that the claimant acknowledges that the maximum absence period has been exceeded. In this case it is almost 3 years of absence, which is considerably in excess of the permitted period. The judge incorrectly states that the Secretary of State did not exercise discretion. It is clear from the reasons for refusal letter that discretion was considered and that the representations made regarding the excessive absences were considered. The judge effectively found that the Secretary of State didn't exercise her discretion sufficiently. The judge discounted non-compassionate circumstances absences by simply saying that all the absences should be discounted. There was insufficient analysis of the reasons for the absences. It is clear from the dates that many of the absences are not for compassionate reasons. They are simply holidays etc. In **AG Kosovo [2007] UKIAT 00082** it makes clear that the Tribunal has no power to substitute its own decision where a favourable decision

depends on the exercise of discretion. The claimant does not satisfy the Rules. As set out in paragraph 30 of **AG Kosovo** discretion only comes into play if someone has no right under the relevant provision. The judge was clearly wrong to find the claimant met the requirements of the Rules. In paragraph 34 of **AG Kosovo** it makes clear that s86(6) removes from the Tribunal's jurisdiction the review of an exercise of discretion outside the Rules. The claimant chose to study in the UK but went home each holiday and studied abroad for a considerable period. Through the actions of the claimant and her family she does not meet the rules. Judges cannot rewrite the Rules.

8. The judge has failed to consider Article 8 correctly. Article 8 is not a general dispensing power. As found in **Rhuppiah v Secretary of State [2016] EWCA Civ 803** where a person enters as a student it is not unreasonable to expect the student to be prepared to leave at the end of their studies. The judge has given very strong weight to the claimant's private life built up when her stay was precarious. There is no engagement with the requirement in s 117B of the Nationality, Immigration and Asylum Act 2002 that little weight should be given to such a private life. Speaking English is a neutral factor. The judge was incorrect to find that the claimant was financially independent. The claimant cannot work in the UK full time – her visa only allows her to work in vacations. There is nothing compelling in this case to make it disproportionate for the claimant to be expected to leave now her studies are concluded. Reliance was placed on **Agyarko** and it was submitted that the judge has not considered if it would be unduly harsh for the claimant to return to her country of origin.
9. Miss Smith submitted that at paragraph 68 of the decision the judge has considered precariousness. The judge did not simply make passing reference to s117B. In addition to paragraphs 74 and 78 in paragraphs 64, 68 and 80 the judge was considering the s117 factors.
10. The Secretary of State is required to consider exercising her discretion. If a claimant has been out of the UK for less than 540 days they meet the Rules so discretion is not relevant. It is only when the rules are not met that the exercise of discretion becomes relevant. The reasons for refusal letter does not refer to all the circumstances that were asked to be considered. It is not sufficient in the reasons for refusal letter to simply say that all points have been considered. The Secretary of State failed to exercise her discretion properly in this case. The judge looked at all the factors and decided that the absences were for compassionate reasons and on that basis the claimant meets the Rules. The judge considered the factors that should be considered when exercising discretion – age, strength of connections, domestic circumstances etc. The representative's letter set out in great detail why some of the absences were for compassionate reasons. During the hearing before me Ms Smith arranged for her instructing solicitor to go through the schedule of absences that had previously been provided and highlight absences where the claimant was outside the UK for 'other' (i.e. not compassionate reasons) reasons such as holidays etc. There was also a significant period where the claimant was studying abroad (her degree had a year's study abroad included). Ms Smith argued that this should not be included in the absences because it was a UK degree that permitted such study. She submitted that the reference in the headnote of **AG Kosovo** was a reference to the exercise of

discretion outside the Immigration Rules. In this case it is an exercise of discretion within the Rules – see page 11 of the guidance. Ms Smith indicated that the claimant accepts that the requirements of paragraph 276ADE are not met.

11. In reply Ms Isherwood submitted that the claimant has clearly gone well beyond the limit set in a statutory requirement, the Secretary of State decided not to grant leave outside the rules having considered the exercise of discretion. The judge has simply failed to analyse at all the extent of the absences.

Discussion

12. I have considered in some detail the schedule of absences that the claimant submitted. I am grateful to the claimant's representative for assisting me by highlighting the absences that were due to holidays, helping with a move and the study abroad period.
13. I do not need to decide whether the judge erred in the approach to the Secretary of State's exercise of discretion because I consider that the judge erred in law for the reasons set out below.
14. The judge appears to have incorrectly calculated the absences that were due to the claimant assisting with her younger brother's treatment as all falling prior to the date that her father was diagnosed with cancer. The judge found:

“59. The respondent failed to consider the appellant's absences in connection with providing assistance to her family in connection with her younger brother's treatment. I agree with Ms Norman's submission that these were compelling and compassionate circumstances and also that they were unavoidable for very strong family reason.

60. Ms Norman calculated that those absences alone amounted to 115 days. The respondent calculated that the appellant's absences amounted to 625 days before her father was diagnosed with cancer. If both periods are combined, the appellant's absences amount to only 510 days, which fall below the maximum of 540 days.”
15. The judge has simply failed to consider properly the evidence regarding absences. The first mistake was to assume that the remaining time after the claimant's father was diagnosed with cancer (some 454 days i.e. 1079 – 625 (the number of absence days before his diagnosis)) were all absences that could be considered to be due to compassionate circumstances. Clearly they were not all absences that could be considered to be due to compassionate circumstances. The judge appears to have added 115 days to the 454 days to arrive at a total number of days that can be attributed to compassionate circumstances in the amount of 569 days without considering what those absences were for.
16. As set out above at the hearing the claimant's instructing solicitor went through the schedule of absences that had previously been provided and highlighted absences where the claimant was outside the UK for 'other' reasons (e.g. holidays, helping with moving, visa renewals etc i.e. not compassionate reasons) The number of days absence highlighted for 'other' reasons on the schedule amounted to 544 days (which is in

excess of the 540 days). However this excluded the study abroad, which amounted to a further 276 days. I do not accept that the choice of a student to undertake a degree that included a year's study outside the UK falls within compassionate circumstances. It was not argued that there was any basis other than compassionate circumstances that ought to be taken into account when exercising discretion to discount absences over the 540 days total. The requirement is for 10 years of continuous residence. 540 days (18 months) is a generous amount of time. A student in the UK is not 'on a path to settlement' so the fact that a year abroad is included in a UK degree is not time that ought to be discounted. Students are expected to leave the UK at the end of their studies. Ms Smith could not point me to any authority that suggested otherwise. The claimant in this case has been absent for 820 days that I consider do not fall within compassionate circumstances. The First-tier Tribunal Judge failed to engage with the reasons for the absences. I find that this was an error of law.

17. With regard to Article 8 the claimant accepts that she does not meet the requirements of paragraph 276ADE. The main thrust of the Secretary of State's arguments are that the First-tier Tribunal judge failed to apply the provisions of s117B and that there are no compelling circumstances on the facts of this case.

18. The judge did take into consideration the 'duty under section 117B...which requires me to accord weight to the respondent's public duty of maintaining an effective system of immigration control' (paragraph 67). At paragraph 68 the judge clearly considers the precarious status of the claimant but, as set out in *Rhuppiah*, it may convey a more evaluative concept. The judge considered that there were factors, which militated against an absolute placing of little weight in this case. At paragraph 68 the judge set out:

"68. ... I accept that the appellant has established a significant degree of private life in the UK. Although she has never had a settled status and therefore her status was precarious, I consider it relevant that she was a child for nearly six years, which over half of the required period of continuous residence in the UK; and also that she was dependant on decisions made by her father for that time."

19. I agree that the judge has incorrectly considered the financial position of the claimant – the claimant is not able to work in the UK on a full time basis so any work she was undertaking could only be in vacations. However I do not consider that had the judge understood the position correctly it would have made a material difference to the outcome.

20. The judge again attaches weight to effective immigration control (at paragraph 74) and sets out the balancing of the competing interests:

"75. In balancing the parties competing interests, I bear in mind the background: the appellant's arrival when she was a minor; the fact that she had leave throughout her residence; her extremely strong ties in the UK through her education and employment and her strong friendships, to which all the witnesses attested; and the long period of time spent in the UK overall

76. During that time the appellant has flourished ... It is important to note she has spent her entire adolescence and adult life in the UK.

77. The appellant said she has no family in the Ukraine other than some distant family members with whom she had not had contact since she was a young child. She confirmed that she could speak Ukrainian to some extent but had difficulty in writing it. Although she has visited a number of times since she was 12, these were principally to see her grandmother, who no longer lives there...I find she now has no support network in or ties with the Ukraine...

78. I have considered Ms Hogben's submission that any interference would be proportionate to the respondent's important public duty of maintaining effective immigration control, to which I am required by s117B to give due weight.

On the other hand, I am satisfied for the reasons given above that the appellant has regarded the UK as her home since she was young. I accept that she has no ties to the Ukraine ..."

21. The judge in this case has properly considered the precarious status of the claimant when weighing her Article 8 interests against the public interest in removal. The Secretary of State did not dispute the findings of fact in this case. Given that the claimant has no ties to the Ukraine, has been in the UK since she was 12 and that she has spent her adolescence and adult life in the UK her circumstances are sufficiently compelling for the judge to have reached the conclusion that he did. There was no material error of law in the judge's approach to Article 8.
22. There was an error of law in the judge's approach to the claimant's claim under paragraph 276B. The claimant does not meet the requirements of 276B and even after deducting in full the absences that could potentially fall within 'compassionate circumstances' and thereby discounted the claimant remains considerably over the 540-day limit. I set aside that part of the First-tier Tribunal's decision and re-make it as above. The Secretary of State's decision with regard to paragraph 276B of the Immigration Rules stands.
23. There was no error of law in the First-tier Tribunal's decision on Article 8. The First-tier Tribunal's decision on Article 8 therefore stands.

Decision

The appeal of the Secretary of State against the decision of the First-tier Tribunal is allowed to the limited extent in respect of that part of the decision on paragraph 276B. The appeal of the Secretary of State is dismissed in respect of the First-tier Tribunal's decision on Article 8.

Signed P M Ramshaw

Date 2 May 2018

Deputy Upper Tribunal Judge Ramshaw