IAC-YW-LM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25050/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 June 2015	**On 5 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

PRAEFA UENNATORNWARANGGOON
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Radford of Counsel instructed by VC Legal (UK)
For the Respondent: Mr C Avery of the Specialist Appeals Team

DECISION AND REASONS

The Appellant

1. The Appellant is a subject of the Kingdom of Thailand born on 11 May 1990. She has been educated in the United Kingdom since the age of 12 and holds a master's degree and now wishes to settle in the United Kingdom and pursue her chosen profession of graphic designer. She also is in a relationship with Thomas Cook, a British national.

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2. On 15 January 2014 she applied for indefinite leave on the basis that she had accumulated ten years' continuous lawful residence in the United Kingdom.

The Respondent's Decision

3. On 27 May 2014 the Respondent refused her application and decided to remove her by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. The Respondent considered the Appellant had not shown she had been continuously resident for at least ten years as defined by paragraph 276A of the Immigration Rules for the purposes of paragraphs 276B-276D. The gaps in her lawful residence had not come about for exceptional reasons. The Respondent went on to consider whether the Appellant had a claim under Article 8 of the European Convention within paragraph 276ADE of the Immigration Rules and concluded that although the Appellant was under the age of 25 years she had not spent at least half her life residing continuously in the United Kingdom and had been absent from the United Kingdom for a substantial aggregate period of time and refused her application because she did not meet the requirements of paragraph 276ADE(iii)-(vi). The decision was taken in the knowledge that the Appellant had two sisters who were naturalised British citizens resident in the United Kingdom.

4. On 12 June 2014 the Appellant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds asserted she had been educated in the United Kingdom, had a network of friends and a boyfriend of over two years standing and referred to her British citizen sisters. They also asserted that by the time of any hearing the Appellant would have been living in the United Kingdom for some twelve years which would be more than half of her life.

The First-tier Tribunal's Decision

5. By a decision promulgated on 25 February 2014, Judge of the First-tier Tribunal James dismissed the Appellant's appeal on all grounds. She had not completed ten years' continuous residence because of the various periods during which she had been absent from the United Kingdom. She noted her education in the United Kingdom and that neither the Appellant nor Mr Cook had identified when their friendship developed into a relationship.

6. The Judge referred to the Appellant's family in Thailand. She rejected her claim that she had no non-Thai friends and that she was unable to speak or write Thai properly.

7. She noted it had been conceded for the Appellant that she could not meet the requirements of paragraph 276ADE of the Immigration Rules. Having dismissed her long residence claim, she went on to dismiss her claim under Article 8 of the European Convention outside the Immigration Rules.

8. The Appellant sought permission to appeal which, on 28 April 2015, Judge of the First-tier Tribunal Colyer granted because it was arguable:-

- The Judge had failed to determine the number of days over the permitted absences for continuous residence during which the Appellant had not been in the United Kingdom.

- The Judge had given little weight to both the private life and the family life she had established in the United Kingdom.

- The Judge had failed to examine the issue of whether and to what extent the Appellant's previous leave could be described as precarious.

- The Judge had failed fully to address the question of the reasonableness of the Appellant's partner leaving the United Kingdom to join her in Thailand.

- The Judge had failed to address the principles relevant to the expulsion of a person who had spent her childhood in the United Kingdom by way of reference to the jurisprudence in *JO (Uganda) and Another v SSHD [2010] EWCA Civ 10*.

- The Judge had erred in estimating the length of the relationship of the Appellant and her partner and in finding that her partner had visited Thailand where he had met the Appellant's family.

9. The grounds upon which permission was granted broadly reflect the grounds given in the application for permission.

The Upper Tribunal Hearing

Submissions for the Appellant

10. The Appellant and her partner attended the hearing although neither of them took any active part.

11. For the Appellant, Ms Radford submitted the actual number of days the Appellant had been out of the United Kingdom was important because if the lower figure for which the Appellant contended was the correct one it might cause the Respondent to consider exercising her discretion in favour of the Appellant and also it would affect the assessment of the proportionality of the decision to refuse leave. The issue was whether the Appellant's absences totalled 69 days (13%) or 161 days (30%) over the total permitted absences under the Immigration Rules and the Respondent's own guidance. The Judge had mentioned this issue at para.26 of her decision but she had not adequately dealt with it.

12. The Judge had referred to Section 117B of the 2002 Act at para.46 of her decision and had given little weight to the Appellant's private life but she had failed to distinguish that while a precarious immigration status might

reduce the weight to be given to any private life, the weight to be given to any family life established in the UK was only to be reduced if it had been developed during a period when the Appellant had been unlawfully resident. She had never been unlawfully resident.

13. Further, the Appellant's status in the United Kingdom should not be considered as precarious. If there was a spectrum of precariousness, she was at what might be described as the "stable end". Her sisters had been educated in the United Kingdom and had become naturalised British subjects. The lengthy leave to remain which the Appellant had enjoyed would not suggest to her that her right to reside in the United Kingdom was in any way precarious. The Judge had not considered the issue of precariousness, which in the Appellant's case could be described as "slight", because she had always had lawful leave.

14. In her assessment of the Appellant's claim under Article 8 of the European Convention, the Judge had not considered the insurmountable obstacles there were to her partner joining her in Thailand and indeed had failed to address whether he could move to Thailand and whether it would be proportionate to separate them as a couple. She had noted the relationship had until recently been conducted while the Appellant lived in London and her boyfriend in Leeds. She had not taken account of the fact that her boyfriend's family lived in the United Kingdom and the difficulties of relocation to Thailand. There was nothing in the Judge's decision which found that the public interest was so strong that the Appellant and her boyfriend should be separated.

15. The Judge had failed to consider the jurisprudence in *JO (Uganda)* and *Maslov v Austria [2008] ECHR 546 (App No. 1638/03)*. Strong reasons were required to remove a person who had spent the major part of her life, childhood and youth in the United Kingdom.

16. The Judge had made material errors to which reference had been made in the grounds for appeal. Looked at in the round, these matters pointed to material errors of law in the decision which should be set aside.

Submissions for the Respondent

17. Mr Avery opened by submitting that whatever the period of absence during which the Judge considered the Appellant had been absent from the United Kingdom was a significant period and consequently there was no material error of law in her treatment of the time the Appellant had been absent. In addition, the context in which the Appellant had been absent from the United Kingdom was important, namely, school holidays and family celebrations.

18. It was accepted the Judge may be said to have approached her assessment of the Article 8 claim in a condensed manner. She had referred at para.46 to Section 117B of the 2002 Act. At paras.48 and 49 she had made relevant findings of fact. It was of note the Judge had

concluded she was unable to make a finding that the Appellant was financially independent for the reasons given at para.49.

19. The Appellant's presence in the United Kingdom had been throughout as a student and her private life would have been limited to a presence in the United Kingdom for the purpose of studies. The Judge had made findings of fact about the nature of her private life. There was no reason why the Appellant could not leave the United Kingdom and seek entry clearance to return in the normal way.

20. The circumstances of the applicant in *Maslov* were very different from those of the Appellant who had family and ties to Thailand. Again, the context of the Appellant's relationship with her country of origin needed to be taken into account.

21. The errors of fact which the Judge may have made were not material. The Appellant had mentioned the period of over two years at para.17 of her statement. The relationship currently had been conducted over a long distance between London and Leeds. She had found at para.42 that it was a relatively recent relationship. The Appellant and Mr Cook were neither engaged nor married and had no children: see para.43.

22. Even if Mr Cook had not visited Thailand since meeting the Appellant, the fact was on the evidence of both himself and the Appellant he had travelled to Thailand on holiday before they met and he had met her parents and extended family members, albeit in the United Kingdom. This last point had in fact been noted by the Judge at para.19 of her decision.

23. The Judge was properly entitled to reach her conclusions and the grounds disclosed no material error, simply disagreement with the Judge.

Further Submissions for the Appellant

24. Ms Radford submitted there was no event which had stopped the Appellant's accruing ten years' continuous lawful residence and if that period was completed during the currency of an appeal she was entitled to rely on long residence as a ground.

25. It remained unclear from the decision whether the Judge had properly considered the relevant factors identified in Sections 117A-117D of the 2002 Act. The possibility of the Appellant leaving the United Kingdom and seeking entry clearance did not resolve the problem that the Judge had failed adequately to address her family life claim.

26. The Appellant's circumstances were comparable to those of the applicant in *Maslov* because the essential issue was the amount of time she had spent away from her birth family in the United Kingdom and immersed in British culture.

27. The consideration of her private life needed to have included her social and cultural ties to the community in which she lived, not just her life as a

student. The Judge had failed to consider the circumstances of her partner in the United Kingdom and the decision contained material errors of law and should be set aside.

Findings and Consideration

28. I shall first address the errors of fact in the Judge's decision referred to by the Appellant. As already noted, the Judge was aware at para.19 that the Appellant's boyfriend had met the Appellant's family in the United Kingdom. Whether he had travelled to Thailand before or after meeting her, I do not find an important issue. The material facts are that he had travelled to Thailand, albeit as a tourist, and he had met the Appellant's parents and extended family, albeit in the United Kingdom.

29. The Appellant had described her relationship with her boyfriend as being "of over two years" in para.17 of her statement of 28 July 2014. The evidence before the Judge as recorded at para.42 of her decision is that they had met in early 2012 and the hearing took place on 18 February 2015. The Appellant did not and her boyfriend could not inform the Judge when their friendship developed into a relationship. Crucially, the Appellant at the hearing had told the Judge that she had moved to Leeds to live with her boyfriend as recently as 23 January 2015. In the circumstances, I do not find the reference to the friendship or relationship having been in existence for two years rather three to be material, even if the error is something more than typographical.

30. There was no argument that the Appellant had been absent from the United Kingdom during her claimed ten years' continuous residence for more than the permitted period under the Immigration Rules and the Respondent's own guidance. There was no analysis of any different periods of ten years' claimed continuous residence or suggestion that any of the gaps in lawful residence had been for exceptional reasons. The aggregate period of absence might be relevant in the assessment of the proportionality of any claim under Article 8 outside the Immigration Rules, but its relevance or materiality will depend in each case on the individual circumstances of an applicant. I refer later to the Judge's assessment of the Article 8 claim.

31. There was little, if any, evidence before the Judge of the Appellant's private life beyond that of a student and an intern and the evidence of her relationship with her boyfriend was limited. The Judge acknowledged the low threshold for the establishment of family life at para.45 but again, in view of her findings at paras.42- 45, it cannot reasonably be said that in relation to the Appellant's family life anything turned on the point that her immigration status was not unlawful. Having noted the evidence, the Judge was entitled to draw the conclusions she reached. Her findings set out the limited private life the Appellant had developed and the limited family life with her boyfriend.

32. Given the Judge found that the Appellant's private and family life were so limited, whether or not she failed to distinguish between the two in respect of the weight to be given to each aspect whether by reason of precarious immigration status or unlawful residence, was in all the circumstances not a material error.

33. The Judge did refer to the comments in the Respondent's decision about precariousness at para.13 of her decision. She expressly took account of the public interest at paras.8, 9 and 54 and dealt with the relevant factors referred to in section 117B of the 2002 Act at paras.36-38, 42 and 49.

34. Given the Judge's findings about the Appellant's relationship with her boyfriend and the family life it constituted, it was not a material error that the Judge failed specifically and in depth to address the circumstances of her boyfriend and whether he could migrate to Thailand. The Judge did address the continuance of the relationship if the Appellant were removed to Thailand at para.51. There was no evidence before the Judge that Mr Cook would be unable to join the Appellant in Thailand. Indeed, at para.7 of his statement of 21 July 2014 he says:-

> "The way in which we have maintained our technically long-distance relationship gives me confidence that we would somehow manage to overcome the eventuality that Praefa had to leave the UK as far as our relationship goes ...."

35. The applicant in *Maslov* had come to Austria aged 6 and when he was aged about 16 had been granted an unlimited settlement permit. He subsequently acquired a substantial criminal record. What distinguishes *Maslov* from the Appellant's circumstances is that *Maslov* had an unlimited settlement permit. The Appellant has only had temporary leave to enter or remain as a student. In the circumstances it would appear that there was little, if any, point in considering the jurisprudence in *Maslov*. *JO (Uganda)* concerned two appellants who had come to the United Kingdom aged about 4 or 5. The first of them had been granted indefinite leave to remain when aged about 13 or 14. The other appellant was suspected of having illegally entered the United Kingdom shortly after his 18th birthday. Each of them had subsequently acquired criminal records. Again, there would appear to be little of relevance in this judgment for the Judge to consider.

36. The Judge's treatment at paras.52-54 of the claim under Article 8 outside the Immigration Rules may have been brief but given the factual findings she had already made, I find her treatment of the claim by reference to *R (Razgar) v SSHD [2004] UKHL 27* to have been adequate.

37. My conclusion is that the First-tier Tribunal's decision did not contain any material error of law such that it should be set aside in whole or in part and it shall stand. The effect is that the Appellant's appeal is dismissed.

NOTICE OF DECISION

The decision of the First-tier Tribunal did not contain any material error of law and shall stand with the consequence that the Appellant's appeal is dismissed.

No anonymity order is made.

Signed/Official Crest Date 31. vii. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal