



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15956/2016

THE IMMIGRATION ACTS

Heard at Field House
On 3rd April 2018

Decision & Reasons Promulgated
On 16th May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MISS MAHSHID YARAGHI ESFAHANI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss C Charlton (LR)
For the Respondent: Miss A Fijiwala (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Swaniker, promulgated on 14th June 2017, following a hearing at Taylor House on 16th May 2017. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of Iran, and was born on 29th August 1989. She appealed against the decision of the Respondent dated 10th June 2016, refusing her application for indefinite leave to remain in the UK on the basis that she had complied with the long residence provisions of the Immigration Rules in paragraph 276B of HC395, on the basis of having lived continuously in the UK lawfully for ten years.

The Appellant's Claim

3. The Appellant's claim is that she has been a student in the UK undertaking a PhD programme of studies at the University of Brunell. Under paragraph 276A(a)(v) of the Immigration Rules, an applicant's continuous residence shall be considered to have been broken if the applicant has spent a total of more than eighteen months absent from the UK during the period in question. In the Appellant's case, she had spent a period of 726 days outside the UK, when she was permitted an absence of only 540 days, because she had to carry out a part of her PhD research in Iran. The Respondent Secretary of State decided that, although there was discretion in the Immigration Rules allowing the Secretary of State to give consideration to a period of residence out of the UK during the relevant ten year period, this did not amount to "compassionate circumstances" in the Appellant's case, and therefore the application stood to be dismissed.

The Judge's Findings

4. At the hearing before Judge Swaniker, there were submissions made on the basis that the Appellant had been compelled to spend a total period of about 110 days in Iran in order to carry out necessary research for her PhD. There was evidence from two professors supporting her claim. The judge found this to be "credible evidence". Professor Ilias Bantekas of Brunell University stated that, "It was imperative for Miss Esfahani to be physically present in Iran, to access all primary and secondary research sources ... ". Evidence from Professor Dr Amir Masoud Shahramania, from the University of Isfahan, also confirmed the same. The judge held that this evidence does "corroborate and support the Appellant's regard of the reasons for her time spent in Iran during the stated periods and her having to be physically present there during those periods" (paragraph 15). The judge then gave consideration to the guidance on long residence, which in its current form was published on 3rd April 2017, and which contained within it a reference to the fact that, "it may be appropriate to exercise discretion over excess absences in compelling or compassionate circumstances, for example, where the applicant was prevented from returning to the UK through unavoidable circumstances ..." (paragraph 14). The judge held that although the Secretary of State had given consideration to whether there were "compassionate circumstances" and found that this was not the case, there had been a failure to take into account whether there were "compelling circumstances", and plain in this case, if the Appellant were to finish her PhD studies, she had to work in Iran, as confirmed by her two professors, so that under the relevant guidance applicable, the appeal stood to be allowed.

5. The appeal was allowed because the judge held that the Secretary of State's decision was unsustainable (paragraph 16).

Grounds of Application

6. The grounds of application state that it had been established in **AG and Others (policies; executive discretions; Tribunal's powers) Kosovo [2007] UKAIT 00082** that it was not open to the judge to allow the appeal outright. What the judge ought to have done was to have remitted the matter back to the Secretary of State for the Secretary of State to exercise discretion and to make a decision on a matter that had not previously been considered.
7. On 9th January 2018, permission to appeal was granted on the basis that, if the Respondent Secretary of State did not apply her policy correctly, then it fell to the Respondent to so do.

Submissions

8. At the hearing before me on 3rd April 2018, both Miss Fujiwala, appearing on behalf of the Respondent Secretary of State, and Miss Charlton, appealing on behalf of the Appellant, were in agreement that following the decision of the Upper Tribunal in **MHS (HU/07526/2015)**, promulgated on 6th November 2017, it is ultimately a matter for the Secretary of State to decide as to exactly what form of leave to grant the Appellant, and whether it is appropriate to exercise discretion under Rule 276B of HC395, so as to grant indefinite leave to remain. Although Judge Swaniker was entirely correct to say, that with the discretion not having been exercised by the Secretary of State, it fell ultimately upon her to exercise her discretion, she had to do it in the context of paragraph 276ADE and Article 8, and then to decide where the balance of considerations fell. Miss Fujiwala submitted that this Tribunal could now undertake that function after making a finding of an error of law.
9. For her part, Miss Charlton submitted that had the judge in this case simply added another two paragraphs and undertaken the exercise in the context of paragraph 276B of HC395 and Article 8, no criticism could be made of her decision. Ultimately, however, regard had to be given to matters such as the fact that the Appellant's entire family was in the UK, her sister was in the UK, her extended family was in the UK, and she had herself worked in the UK and never had recourse to public funds, such that her life was now in this country, and she could not return to Iran.

Error of Law

10. I am satisfied that the making of the decision by the judge involved the making of an error of law such that I should set aside the decision (see Section 12(1) of TCEA 2007) and remake the decision. My reasons are those given by Judge Canavan in the Upper Tribunal in the unreported decision of **MHS (HU/07526/2015)**, upon which both representatives before me today are agreed. The Secretary of State is correct to say that it is a matter for her to consider whether discretion should be exercised under English Rules and this follows inexorably from the Tribunal decision in **UKUS (discretion:**

when reviewable) [2012] UKUT 00307. In this case, the Appellant had provided reasons for why discretion should be exercised in her favour by referring to the fact that she had to spend time in Iran completing her studies in order to be awarded her PhD, and there is support from two professors, both of whom have been found by the Tribunal to be entirely credible.

11. The scope of Article 8 assessment would however be germane and would need to be undertaken by the Tribunal, and in so undertaking this assessment, the judge had before her evidence produced that satisfies the requirement of the Respondent's policy guidance. The question then is whether a correct balance is struck between the competing interests, giving due weight to the Respondent's policy guidance, which states that she may find it appropriate to exercise discretion if an applicant can explain why there were compelling or compassionate circumstances that prevented her from returning to the UK in time.
12. In this case, the fact that the Appellant had provided an adequate explanation for the extended absence was a matter that was relevant and was properly before the judge. The balancing of exercise under Article 8 should have taken that into account. The evidence here is incontestable that the Appellant's centre of gravity over the last ten years has been in the UK, that her family is in this country, that her extended family is in this country, and that she has worked to support herself in this country, without recourse to public funds. The evidence before the judge was clear that the excess number of days that the Appellant spent in Iran was entirely on account of the Appellant wanting to finish her studies in the UK because it required the necessary field work that was essential for her PhD dissertation. The judge referred to the "trips the Appellant had made out of the UK" (paragraph 9).
13. But, the issue here was not whether there were "compassionate circumstances" but whether there were "compelling circumstances because she had to complete a compulsory part of her PhD in Iran" (paragraph 9). The evidence before the judge was that "this specific information was very necessary to be able to demonstrate that the Appellant's research in Iran was a compelling circumstance". It is in these circumstances, that the judge was driven to the conclusion that,

"The evidence before me leads me to conclude that the purpose of the Appellant's grant of leave to complete a PhD course would likely have been frustrated if she had not been able to spend the time in Iran to conduct her research on a clearly specialist (and arguably topical) subject" (paragraph 16).
14. The Appellant had also had to spend time in Iran "on account of medical treatment following an accident there" (paragraph 13) and the Respondent Secretary of State properly made allowance for this. Ultimately the application was based upon the Appellant's family and private life rights under Appendix FM and paragraph 276ADE (see paragraph 2). These are matters that should have been put in the balance of consideration.

Remaking the Decision

15. I have remade the decision on the basis of the findings of the original judge, the evidence before her, and the submissions that I have heard today. I have allowed this appeal for the reasons that I have given above. This is a case where the Appellant has studied and worked in the UK, and has established social and economic ties here. Her entire family is in the UK and her extended family is in the UK. Her sister, to whom she is close, was in attendance in this Tribunal, as she is also in the UK. In the circumstances, therefore, I am satisfied that the Appellant's removal in consequence of the decision made by the Secretary of State is likely to interfere with the right to private life in a sufficiently grave way so as to engage the operation of Article 8, and in particular points 1 and 2 of Lord Bingham's five-pronged approach in **Razgar [2004] INLR 349**.
16. Ultimately the issue is whether the decision strikes a fair balance between the weight to be given to the public interest in maintaining effective immigration control and the impact of the decision of the Appellant's private and family life. This Tribunal has to give appropriate weight to these matters as set out in **Hasham Ali [2016] UKSC 60**. The Appellant met the requirements of the Immigration Rules save for the period of absence of 600 days, which was in excess of the total period permitted of 540 days. Although in this case this Tribunal cannot exercise discretion under the Immigration Rules, it is nevertheless appropriate to exercise a discretion given the overall proportionality assessment, varied by the circumstances in which the Respondent would consider exercising discretion in accordance with the policy guidance, become relevant. Given that this is the case, the First-tier Tribunal under Judge Swaniker, was satisfied that the Appellant had produced sufficient evidence to show the reasons for her extended period of absence from 11th June 2013 to 4th January 2014, of 27 days and of 80 days respectively.
17. I am satisfied that the Appellant provided good reason for the extended periods of absence that there are compelling circumstances because, as the judge pointed out, a failure by the Appellant to be in Iran would have frustrated her PhD studies. Taking into account Section 117B of the NIAA 2002, which sets out the public interest considerations that this Tribunal must take into account, and bearing in mind that the maintenance of an effective system of immigration control is in the public interest, I am satisfied that weight should be given to the fact that the Appellant has met the combined requirements of the Immigration Rules and the relevant policy guidance because the Rules and guidance reflect where a fair balance is struck under Article 8. It is also clear that Section 117B(5) makes it clear that little weight should be given to a private life established by a person at a time when a person's immigration status is precarious. This is a case where the Appellant was granted periods of limited leave to remain in the UK, and it is not in dispute that her status was nevertheless still "precarious" for the purposes of Section 117B(5).
18. However, the fact that the Appellant developed a private life in the UK when her status was "precarious" is only one part of the overall assessment of the facts of this case. In this case the periods of limited leave to remain counted towards potential settlement

under paragraph 276B of the Immigration Rules and it must not be forgotten that she also had a substantial family life interest with both her own nuclear family as well as her extended family, which could not be replicated elsewhere, except in the United Kingdom. In these circumstances, the decision of the Secretary of State under Section 6 of the Human Rights Act 1998 was unlawful. It remains ultimately, however, for the Secretary of State to consider what form of leave should be granted to the Appellant, and whether it is appropriate to exercise discretion under Rule 276B to grant indefinite leave to remain.

Decision

19. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.
20. No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

14th May 2018

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I made a fee award of any fee which has been paid or may be payable.

Signed

Date

Deputy Upper Tribunal Judge Juss

14th May 2018