Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/25115/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 February 2020	**On 16 March 2020**

Before

UPPER TRIBUNAL JUDGE RIMINGTON
UPPER TRIBUNAL JUDGE BLUNDELL

Between

TANUJA KRISNAJEE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Malik, instructed by Calices Solicitors
For the Respondent: Ms Cunha, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a Mauritian national who was born on 11 February 1981. She appeals against a decision which was issued by First-tier Tribunal Judge Lucas on 15 July 2019, dismissing her appeal against the respondent's refusal of her human rights claim.

Background

2. The appellant arrived in the UK on 9 November 2007. She held entry clearance as a student. The leave to enter which was duly conferred was valid until 31 October 2008. On 28 October 2008, the appellant attempted to make an application for leave to remain but that application was rejected because the declaration was unsigned. A further, completed application was presented to the respondent on 8 December 2009. That application was successful and the appellant was granted leave to remain from 26 February 2009 to 31 October 2009.

3. The appellant made a further application for leave to remain on 30 October 2009. That application was rejected on 2 December 2009 because the photographs provided were non-compliant. On 31 December 2009, the appellant made a further application for leave to remain. That application was refused on 25 February 2010 with no right of appeal. On 30 March 2010, the appellant applied again for leave to remain. That application was granted on 18 May 2010 and the leave to remain was valid until 30 October 2010.

4. The appellant left the United Kingdom on 30 October 2010. She returned on 29 June 2011, holding entry clearance which had been granted on 29 March 2011 and was valid until 29 March 2013. On 26 March 2013, she applied for further leave to remain. That application was refused on 24 May 2013 and the appellant lodged an appeal. The appeal was subsequently withdrawn on 25 November 2013.

5. On 10 October 2013, the appellant applied for further leave to remain. That application was refused on 2 December 2013. The appellant appealed to the First-tier Tribunal, but the appeal was dismissed on 25 September 2014. Permission to appeal was refused by the FtT and the appellant discontinued her subsequent application for permission to appeal to the Upper Tribunal. She became appeal rights exhausted on 19 December 2014.

6. During the course of her ongoing appeal, on 22 November 2014, the appellant applied for further leave to remain. The respondent refused to entertain that application, since the appellant's leave was already extended by virtue of section 3C of the Immigration Act 1971. On 29 December 2014, following the withdrawal of her appeal, the appellant applied again, and was this time successful. She was granted leave to remain from 3 February 2015 to 15 December 2019. On 27 August 2017, the appellant's leave was curtailed so as to expire on 4 May 2018. On 2 May 2018, she applied for Indefinite Leave to Remain on the basis that she had ten years of continuous lawful residence in the

UK and that she satisfied paragraph 276B of the Immigration Rules accordingly.

The Respondent's Decision

7. The respondent reached the decision under appeal on 5 December 2018. She set out the appellant's immigration history, the supporting evidence and the relevant requirements of the Immigration Rules. She then refused the application for the following reasons:

> "As can be seen from your immigration history you have not had any lawful leave in the United Kingdom between these periods: 31.10.08 and until your next leave, which was granted on 29.02.09; and 31.10.09 and until your next leave, which was granted on 18.05.010.
>
> It is noted that you have spent more than six months outside the UK during the period 30.10.10 when you left the UK and until your return on 29.06.11 (241 days outside the UK). You have provided a letter from your psychiatrist dated 26.12.17 stating you suffer from depression. We are unable to exercise discretion in this case as regards to being outside the UK for more than the allowed 180 days, as neither were you hospitalised or considered unreasonable [sic] to expect you to travel back to the UK where there are a wide range of medical help/facilities available for your condition. As a consequence, you have not acquired the 10 years continuous lawful residence in the UK."

8. The remainder of the letter considered whether the appellant could satisfy paragraph 276ADE of the Immigration Rules, the material part of which required her to establish that there would be very significant obstacles to her re-integration to Mauritius, and whether there was otherwise a claim that the appellant's removal would breach Article 8 ECHR. The respondent concluded that the appellant could not succeed on either basis.

The Appeal to the First-tier Tribunal

9. The appellant gave notice of her appeal on 14 December 2018. In the grounds of appeal to the First-tier Tribunal, it was submitted that the respondent had erred in refusing to exercise her discretion in respect of the period spent outside the UK and that the decision was in any event contrary to Article 8 ECHR.

10. The appellant's appeal came before First-tier Tribunal Judge Lucas (hereafter "the judge") on 26 June 2019. The appellant was not represented by Mr Malik but by experienced counsel specialising in immigration law. The respondent was

unrepresented. At [2] of his decision, the judge recorded counsel as having made the following concession:

> "At the commencement of this appeal, [counsel] conceded that the appellant could not satisfy the Immigration Rules with regard to Long Residence because of the "accepted" gaps in her residence in the UK. The appeal therefore proceeded on the basis of the Article 8 claim."

11. The judge undertook a review of the evidence in the appeal at [6]-[13]. Amongst other documentary evidence to which he referred, there were statements from the appellant and her sister (with whom she lives in the UK) and medical evidence confirming that the appellant has depression with a possible comorbid presentation of PTSD. At [13], the judge recorded that the appellant and her sister had adopted their statements. (There being no Presenting Officer, there were no further questions.) At [14], the judge recorded the submissions made by counsel in the following way:

> "Submitting to the Tribunal, [counsel] repeated that the appellant could not satisfy the rules with regard to Long Residence. He relied upon the family and private life of the appellant within the UK. He noted that she lived in the UK with her sister, has been educated here and was now in employment with a solicitor's firm. He relied upon her medical condition and the opinion of Dr Sham that her overall condition would deteriorate if she was required to leave the UK. He believed therefore that there were very significant obstacles to return and that the appeal should therefore be allowed under paragraph 276ADE(i)(6) [sic] of the rules."

12. At [16]-[24], the judge set out his reasons for dismissing the appeal. He noted that the appellant's condition was neither severe nor life-threatening and that she had supportive parents in Mauritius, who had assisted her recovery from her last period of depression: [19]. He noted that she was a graduate and that she would be able to access medical treatment in Mauritius, as she had before: [21]. He did not accept that there were very significant obstacles to her re-integration to the country of her nationality and he did not accept that her ties to the UK, including the time she had spent studying here, rendered it disproportionate to return her to Mauritius: [22]. He considered there to be no other exceptional circumstances: [23]

13. The appellant's solicitors sought permission to appeal. That application was refused by a judge of the First-tier Tribunal. A renewed application was made, supported by grounds which had been settled by Mr Malik. There are no fewer than eight grounds of appeal, which may be summarised as follows:

(a) The appeal hearing had been short and procedurally unfair, since the appellant had not had an opportunity to address the issues.

(b) The judge erred in law in his consideration of the appellant's contention that she satisfied paragraph 276B of the Immigration Rules.

(c) The judge had failed to make adequate findings in relation to paragraph 276ADE(1)(vi) of the Immigration Rules.

(d) The judge had left material matters out of account in considering the proportionality of the appellant's removal.

(e) The judge omitted material matters from his consideration of the scope of the appellant's private life in the UK.

(f) The judge's consideration of the appellant's medical claim under Article 8 ECHR was legally inadequate.

(g) The judge had erred in his approach to section 117B of the 2002 Act.

(h) The reasons given by the judge for dismissing the appeal were legally inadequate when considered as a whole.

14. In his oral submissions, Mr Malik condensed his argument into the following three points. Firstly, he submitted that the judge's dismissal of the appellant's Article 8 ECHR claim displayed insufficient consideration of the medical evidence before him. There was a detailed report by Dr Shirin Shams at pages 15-33 of the appellant's trial bundle but the judge had failed to make a finding as to whether or not the appellant suffered from PTSD. There was a lack of engagement with that report, whether as regards the question of whether there were very significant obstacles to the appellant's re-integration or in relation to Article 8 ECHR outside the Immigration Rules.

15. Secondly, Mr Malik submitted that the judge had failed to consider the appellant's claim under paragraph 276B of the Immigration Rules. Even if the appellant's counsel had conceded that the appellant could not meet those Rules, it was incumbent on the judge to consider the reasons for the gaps in the appellant's residence. In the event that the judge had turned his mind to the guidance, he could have found that the gaps were addressed in a manner which was acceptable under the respondent's guidance. In those circumstances, the appeal would have been allowed on Article 8 ECHR grounds. At our request, Mr Malik clarified that the period during which he contended that the appellant had acquired ten years continuous lawful residence was between July 2009 and July 2019. He submitted that insofar as the appellant had not been lawfully resident in the UK during that period, the gaps were permitted by the respondent's Long Residence guidance.

16. Thirdly, Mr Malik submitted that the judge's consideration of the appellant's side of the Article 8 ECHR balance sheet was inadequate. There was, he submitted, evidence of dependency between the appellant and her sister. The threshold in Kugathas [2003] INLR 170 was arguably crossed on the facts of this case and the judge had erred in failing to consider whether there was a family life between them. It was to be recalled, in that connection, that the appellant was a vulnerable individual with a diagnosis of mental health problems including PTSD.

17. Mr Malik did not seek to develop the first ground of appeal, by which it was contended that the hearing had been procedurally unfair. In respect of the fourth ground, he submitted that the judge had erred in law in failing to consider the benefit to the community of the appellant remaining in the UK. She works at a law firm, he submitted, which showed that she was an asset to the United Kingdom.

18. In reply, Ms Cunha submitted that the judge's decision was adequately reasoned and that the conclusions he had reached were open to him as a matter of law. The judge could not be criticised for failing to consider the respondent's policy, given the way in which the case had been argued before him. Whether or not the appellant engaged the terms of the policy was a matter for the respondent but not for the judge. The judge had not been required to state his reasons for finding against the appellant under Article 8 ECHR in any greater detail. He had plainly been aware of the appellant's mental health and it was not clear why he should have set out the conclusions of Dr Shams at greater length; he had plainly understood the thrust of that report. There was obviously no way in which the judge could have concluded that there were very significant obstacles to the appellant's re-integration to Mauritius.

19. Little weight was to be attached to the appellant's private life insofar as it consisted of studying in the UK: Nasim. There was nothing arguably exceptional to give rise to an arguable case outside the Immigration Rules. The evidence was unarguably insufficient to cross the threshold presented by Kugathas and the later authorities which concerned the existence of a family life between adult siblings. The question posed by Jitendra Rai was whether there was real, committed or effective support and there was not. The appellant appeared to be aggrieved by the brevity of the hearing before the FtT but the reality was that the appellant was professionally represented and the respondent was unrepresented. It was quite understandable, in those circumstances, that the hearing had been relatively brief.

20. Mr Malik did not seek to respond to Ms Cunha's submissions.

Discussion

21. Mr Malik was correct not to develop the first ground of appeal, by which it was submitted that the hearing before the First-tier Tribunal had been procedurally unfair. It certainly seems that the hearing was comparatively brief but there is no reason whatsoever to think that it was unfair. The standard directions are for witness statements to stand as evidence in chief. There was no Presenting Officer, so the two witnesses (the appellant and her sister) were not cross-examined. Since they both speak English, and since the judge had no questions of his own for them, the time it took for them to give oral evidence would have amounted to nothing more than the adoption of their statements. There were then succinct submissions from counsel. It is estimated in the grounds that the hearing took no more than fifteen minutes. That is probably correct but that is no basis for concluding that the hearing was procedurally unfair. The appellant was represented by an experienced member of the immigration Bar and there is no evidence from him, whether by witness statement or otherwise, to suggest that there was anything of concern about the judge's conduct of the hearing.

22. Mr Malik did submit that the judge's consideration of the question posed by paragraph 276ADE(1)(vi) of the Immigration Rules was legally inadequate. He submitted that the judge had given inadequate consideration to the report of Dr Shams, and that this report should have been of significance to the assessment under paragraph 276ADE(1)(vi) and to the assessment outside the Rules. In this respect, we agree with Ms Cunha. The judge was plainly aware of the report and took it into account. He summarised the key conclusions and he explained, by a concise and precise process of reasoning, why he did not consider that the appellant's depression and possible PTSD would give rise to very significant obstacles to her re-integration to Mauritius. He concluded that the appellant's condition was not life-threatening; that her parents would support her; and that she would be able to access medical treatment as she had in the past. Given the threshold presented by paragraph 276ADE(1)(vi) (see Parveen [2018] EWCA Civ 932, at [8]-[9]), we consider that the judge engaged adequately with the medical evidence, and with the evidence as a whole, in his consideration of the obstacles which there were to the appellant's return to Mauritius.

23. Mr Malik's second submission founders at the outset. As we have recorded, counsel who represented the appellant before the First-tier Tribunal expressly accepted at the start of the hearing and at the start of his submissions that he was unable to develop an argument in relation to paragraph 276B. The course that the

hearing took is equally clear from the judge's record of counsel's submissions, at [14] of the decision. It was not submitted on the appellant's behalf that she was able to meet the requirements of this paragraph of the Rules or that the respondent had erred in refusing to exercise her discretion under the Long Residence policy. No such arguments having been pursued before the judge, it is wholly inappropriate to suggest that the judge erred in law in not dealing with the points. The ground of appeal must fail on that basis.

24. In any event, the submissions Mr Malik sought to advance in this respect were incapable of establishing that any such error on the part of the judge was a material one. As recorded in the respondent's decision, there were three periods identified as disentitling the appellant to ILR under paragraph 276B. The first of these gaps, from 31 October 2008 to 29 February 2009, was on account of the appellant having failed to sign the declaration on her application for further leave to remain. On receipt of the notification from the respondent that the declaration was unsigned, she corrected the error and returned the form. By the time she did so, her leave to remain had expired. She was therefore without leave between 31 October 2008 and 29 February 2009, when leave was finally granted in response to the out-of-time application. Mr Malik was unable to take us to any provision in the Rules or any part of the respondent's guidance which even arguably suggested that the respondent should have overlooked this period of overstaying.

25. The appellant's second period of overstaying was even longer, between 31 October 2009 and 18 May 2010. This period was also accepted to have occurred for essentially the reason given by the respondent in the decision under challenge. The appellant had presented the wrong size of photograph with her application for further leave to remain. By the time she had been notified of the error and corrected it (with the assistance of a firm of solicitors), her leave had expired. As with the first period, Mr Malik was unable to take us to a part of the Rules or the guidance which even arguably applied to a gap of this nature. He submitted at one point that the part of the guidance which allowed for 'evidence of exceptional circumstances which prevented the applicant from applying' would have availed her. But there was nothing which prevented the applicant from making a compliant application; she simply failed on the first occasion to complete the form properly and failed, on the second occasions, to enclose the correct photographs. She does not suggest that the respondent erred in rejecting either application as invalid. These were her errors and did not come about because of circumstances beyond her control.

26. Then there is the period of 241 days during which the appellant was outside the United Kingdom, between 30 October 2010 and 29 June 2011. The basis upon which the respondent's discretion might ordinarily be exercised in respect of such periods is set out at page 11 of the current guidance. It states 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."

27. That the respondent turned her mind to that policy guidance is clear from the decision itself (as reproduced under [7] above). The respondent refused to exercise her discretion on that basis. The appellant explains in her witness statement the circumstances which occurred when she travelled back to Mauritius in 2010. She had depression and other illnesses and sought assistance, particularly from a spiritual healer and a psychiatrist named Dr Ramkoosalsing. There is nothing in the evidence before us which begins to provide a basis for taking a different view than the respondent's. Whilst we accept that the appellant experienced these problems, there was nothing which actually prevented her from returning to the UK. The threshold in the policy, which is evidently intended to be an elevated one, is not even arguably crossed on the evidence presented in the witness statements and supporting exhibits. Had the judge been invited to consider this point – which he plainly was not – he would have resolved it against the appellant.

28. In summary, the fundamental difficulty with the second point pursued by Mr Malik is that it was abandoned before the FtT. Even if that were not the case, however, we consider that it could not have succeeded, for the reasons above.

29. Mr Malik's third submission represented a consolidation of his original grounds (d)-(h). The overarching submission was that the judge's assessment of Article 8 ECHR outside the Rules was legally deficient in that material matters had been left out of account on both sides of the balance sheet. On the appellant's side of the balance sheet, Mr Malik submitted that the judge had failed to consider whether the appellant's relationship with her sister engaged Article 8 ECHR in its family life aspect.

30. We explored with Mr Malik the evidential foundation upon which it was submitted that there existed more than normal emotional ties[1] or real, effective and committed support[2] between the appellant and her sister. He reminded us that the appellant suffers from a degree of mental ill health and that she lives with her sister. Beyond that, there was nothing. There is evidently no

[1] Kugathas [2003] EWCA Civ 31; [2003] INLR 170
[2] Jitendra Rai [2017] EWCA Civ 320

arguable basis for a submission that there was a protected family life. The appellant works in a firm of solicitors and there is no proper basis for concluding that there is what Sedley LJ described in Kugathas as the "irreducible minimum of what family life implies" between the appellant and her sister. The concept of family life under Article 8 ECHR has been the subject of extensive consideration by the Court of Appeal in recent years and it is clearly not wide enough to encompass a relationship such as this.

31. Mr Malik also submitted, with reference to UE (Nigeria) [2010] EWCA Civ 975; [2012] 1 WLR 127 that the judge had failed to turn his mind to the benefit to the community which would be brought about if the appellant were permitted to remain. As the President explained in Thakrar [2018] UKUT 336 (IAC); [2019] Imm AR 143, however, the public interest in immigration control is only likely to be diluted by a contribution which is very significant. We do not wish to minimise the appellant's achievements in this country with what follows. She passed a law degree in this country and has worked at a firm of solicitors for some years. These are significant achievements but they plainly do not fall into the category of case in which an individual's value to the community might properly reduce the weight which is otherwise accorded to immigration control, as underlined in Part 5A of the Nationality, Immigration and Asylum Act 2002.

32. Mr Malik did not develop orally the remaining points he had made in writing in relation to the judge's assessment of Article 8 ECHR. He was right not to do so. There were general submissions that the judge had failed to consider the nature of the appellant's private life in the UK but that is plainly not correct. The judge was clearly well aware of the fact that the appellant had been in the UK for a number of years, that she worked in a solicitor's firm, that she had invested time and money in her career and that she suffered from a degree of mental ill health.

33. There was also a contention, advanced at ground (h) that the judge had failed to apply s117B NIAA 2002 correctly. In fact, the judge made no reference to the relevant provisions in Part 5A of the Act. He simply said, at [23], that there were no other exceptional circumstances on the facts of the case. In another case, we might have considered that inadequate as a matter of law but is was clearly adequate in this case. As in TZ (Pakistan) [2018] EWCA Civ 1109: the appellant accrued her private life in the UK when her status was precarious; she does not qualify for leave under the Immigration Rules; and there are no exceptional circumstances (as defined) which place her in the small class of case in which leave to remain outside the Rules should be granted so as to avoid contravention of Article 8 ECHR. Had the

judge turned his mind expressly to s117B NIAA 2002, such consideration could only have been to the appellant's disadvantage. Whilst she speaks English and is financially independent, these are neutral matters, which do not militate positively in her favour in the scales of proportionality: Rhuppiah [2018] UKSC 58; [2018] 1 WLR 5536 refers, at [57]. The maintenance of orderly immigration control is in the public interest, however, and her private life accrued when her status was precarious. Those matters militate against her and there is nothing, in our judgment, which begins to approach the particularly strong case required to displace the normative presumption that little weight should be given to her private life in the UK (Rhuppiah refers, at [49]).

34. In the circumstances, we do not consider Judge Lucas to have erred in law in his dismissal of the appellant's appeal on Article 8 ECHR grounds and this appeal is dismissed.

Notice of Decision

The First-tier Tribunal did not err in law and its decision shall stand.

No anonymity direction is made.

MARK BLUNDELL
Judge of the Upper Tribunal (IAC)

13 March 2020