IAC-AH-VP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01759/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 12th June 2015	**On 29th June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AUDREY PATRICIA SMITH
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr G Harrison, Senior Home Office Presenting Officer
For the Respondent: Miss I Thomas of Counsel instructed by Sabz Solicitors

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a decision of Judge of the First-tier Tribunal Chambers promulgated on 12th November 2014.

2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to her as the Claimant.

3. The Claimant is a female Jamaican citizen born 16th August 1966 who on 1st November 2013 applied for leave to remain in the United Kingdom based upon her long residence, and her family and private life.

4. The application was refused on 11th December 2013 the Secretary of State refusing to vary leave to remain, and deciding to remove the Claimant from the United Kingdom.

5. The Claimant's appeal was heard by Judge Chambers (the judge) on 4th November 2014. The judge found that the Claimant had at least ten years' continuous lawful residence in the United Kingdom and allowed the appeal under the Immigration Rules with reference to paragraph 276B. The judge went on to consider Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) outside the Immigration Rules, and also allowed the appeal with reference to Article 8.

6. The Secretary of State applied for permission to appeal to the Upper Tribunal. In summary it was contended that the judge had erred in finding that the Claimant had at least ten years' continuous lawful residence. It was contended that the Claimant entered the United Kingdom on 16th October 1999 as a visitor with leave valid until 15th April 2000. The Claimant was subsequently granted further leave to remain as a student valid from 27th April 2000 until 31st July 2001.

7. During that period the Claimant had left the United Kingdom and returned to Jamaica, and on her return to the United Kingdom in July 2000, her leave was suspended and she was granted temporary admission. It was contended that the Claimant's leave as a student was reinstated in August 2000.

8. It was therefore submitted that between July 2001 when the Claimant's student leave expired, and May 2013, when she was granted discretionary leave to remain for a period of six months, the Claimant had no leave to remain and was an overstayer and the judge was wrong to find that she had been lawfully resident in the United Kingdom during that period.

9. It was contended that the judge had erred in finding that she remained on temporary admission for that period, and for the purposes of paragraph 276B, temporary admission does not qualify as lawful leave.

10. In the alternative it was contended that even if it was accepted, as claimed by the Claimant, that she was never informed that her leave as a student was reinstated in August 2000, and she was never told that her temporary admission ended, then she nevertheless would not have had any leave after the expiry of her student leave in July 2001.

11. In relation to Article 8 it was contended that the judge had erred by failing to follow the guidance in Gulshan Pakistan [2013] UKUT 640 (IAC), and the judge's error in finding that the Claimant had remained in the United Kingdom lawfully for ten years infected his Article 8 proportionality assessment.

12. Permission to appeal was granted by Judge of the First-tier Tribunal Denson who found the grounds arguable.

13. Directions were issued making provision for there to be a hearing before the Upper Tribunal to decide whether the First-tier Tribunal decision should be set aside.

The Secretary of State's Submissions

14. Mr Harrison relied upon the grounds contained within the application for permission to appeal and had no further oral submissions to make.

The Claimant's Submissions

15. Miss Thomas submitted that the judge had not erred in law and that the decision should stand. I was asked to find that the judge was entitled to conclude that the Claimant had accrued more than ten years' lawful residence in the United Kingdom and in relation to Article 8, Gulshan was not the appropriate test and the judge had not erred in law in considering and allowing the appeal under Article 8 outside the Immigration Rules.

My Conclusions and Reasons

16. I firstly consider the Secretary of State's submission that temporary admission does not qualify as lawful leave. I asked both representatives whether they had any submissions to make on this, and neither did. I have not been provided with any authority to confirm that temporary admission does not qualify as lawful leave.

17. Lawful residence is defined in paragraph 276A(b) of the Immigration Rules, and it includes temporary admission within section 11 of the Immigration Act 1971 where leave to enter or remain is subsequently granted.

18. In this case it is common ground that leave to remain was subsequently granted to the Claimant, and she was granted leave to remain on 16th May 2013 until 16th November 2013. Therefore in the absence of any authority to the contrary, I find that the judge was entitled to consider temporary admission as lawful residence, and that limited leave to remain was subsequently granted. I therefore find no material error on this point.

19. I next consider the contention that the judge was wrong to find that temporary admission, which was granted to the Claimant in July 2000, continued thereafter for at least ten years. The judge considered the history of this case, and the evidence that had been supplied. I do not find that the judge failed to consider any material evidence, or took into account any immaterial matters. The judge found that the evidence did not indicate that the Secretary of State in August 2000 reinstated the Claimant's student leave which expired on 31st July 2001. The judge did not find any evidence to indicate that the student leave had been reinstated, and was entitled to find that the evidence indicated the contrary, and to accept the Claimant's

explanation that she had never been served with any notice reinstating her student leave.

20. The judge accepted the Claimant's evidence that she and her representatives had made efforts to contact the Respondent to clarify her immigration status, and that her temporary admission status continued. The judge noted in paragraph 30 of his decision, that in October 2012 an appeal against an earlier decision was adjourned at the Respondent's request in order to investigate the Claimant's immigration status, and that further interviews with the Claimant were conducted, and in April 2013 the Secretary of State withdrew a decision because of uncertainty as to the Claimant's immigration status.

21. The judge found it common ground that the Claimant had been granted temporary admission on 20th July 2000, and was entitled to accept evidence that this status was never revoked and continued for in excess of ten years before the Claimant was granted limited leave to remain in May 2013.

22. This is an extremely unusual situation, but in my view the judge was entitled to reach the conclusions that he did in relation to the Claimant's lawful residence, and did not err in law in so doing. The decision to allow the appeal under the Immigration Rules in relation to lawful residence stands.

23. In relation to Article 8, I note that the judge records at paragraph 26 that the Secretary of State's representative specifically agreed that it was appropriate to consider Article 8 outside the Immigration Rules, and recorded at paragraph 36 that he was invited by both parties to the appeal to consider Article 8.

24. In my view the case law has moved on following Gulshan, and I do not find that Gulshan now sets out the appropriate test. The Court of Appeal in MM and Others [2014] EWCA Civ 985 stated at paragraph 135;

> 135. Where the relevant group of IRs, upon their proper construction, provide a "complete code" for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a "complete code" then the proportionality test will be more at large, albeit guided by the Huang tests and the UK and Strasbourg case law.

25. The Court of Appeal in Singh [2015] EWCA Civ 74 recorded;

> 3. It is now settled that the right course in any case where an applicant relies on his or her private or family life is to proceed by considering first whether leave should be granted under the relevant provisions of the new Rules and only if the answer is no to go on to consider Article 8 in its unvarnished form (the so called "two-stage approach"): see the line of cases which includes Izuazu (Article 8 – new Rules) [2013] UKUT 45 (IAC) and R (Nagre) v Secretary of State for the Home Department [2013] EWHC 7200 (Admin) to which I will have to refer more

fully below. Thus Article 8 claims "outside the Rules" are still possible, though the scope for their operation is reduced.

26. In this appeal, the judge did not consider Article 8 under the Immigration Rules, those being Appendix FM in relation to family life, and paragraph 276ADE in relation to private life, and in my view should have done, even though invited by both representatives to consider Article 8 outside the rules. The judge should only have considered Article 8 outside the rules once he had considered family and private life within the rules. I therefore conclude that the judge erred in his consideration of Article 8, but I do not find this error to be material because the appeal has been allowed under the Immigration Rules in relation to ten years' continuous lawful residence, and was only allowed under Article 8 in the alternative.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision must be set aside.

I do not set aside the decision and the appeal of the Secretary of State is dismissed.

Anonymity

No anonymity order was made by the First-tier Tribunal. There has been no request for anonymity to the Upper Tribunal and no anonymity order is made.

Signed Date 17th June 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The decision of the Fist-tier Tribunal stands and therefore so does the decision to make a fee award in the sum of £140.

Signed Date 17th June 2015

Deputy Upper Tribunal Judge M A Hall