Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21356/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13th November 2014	**On 29th May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

TINA ROMANIA BROWN
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Iqbal, Counsel
For the Respondent: Mr Bramble, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Ms Tina Romania Brown date of birth 16th April 1980, is a citizen of Jamaica. I have considered whether it is necessary to make an anonymity direction. Having considered all the circumstances I not make such a direction.

2. This is an appeal by the appellant against the determination of First-tier Tribunal Judge C M Phillips promulgated on 3 December 2013, whereby the judge dismissed the appellant's appeal against the decisions of the respondent dated the 16 May 2013 to refuse the appellant further leave to

remain in the United Kingdom and thereupon to remove the appellant from the United Kingdom.

3. Judge Phillips had promulgated his decision on 3 December 2013. The appellant applied for leave to appeal to the Upper Tribunal. That application was refused by First-Tier Tribunal Judge Brunnen by decision made on the 20th December 2013. The appellant renewed her application to the Upper Tribunal but that application was refused by Upper Tribunal Judge Kebede on the 29th January 2014.

4. The appellant sought judicial review of that decision. By order made on 20 May 2014 Master Gidden made the following Order:-

> "Permission having been granted to apply for judicial review and there being no request under CPR Part 54.7A (9) for a substantive hearing, the decision of the Upper Tribunal to refuse permission to appeal is quashed."

5. The appeal was referred back to the Upper Tribunal for further consideration of the application for permission to appeal. In light of the Order of the High Court, Mr C M G Ockelton Vice President of the Upper Tribunal made the following order on 14 August 2014:-

> "Permission is granted in light of the decision of the High Court in this case. The parties are reminded that the Upper Tribunal's task is that set out in section 12 of the 2007 Act: this is a case in which the court has given no reasons for its decision."

6. By reference to section 12 I take that that is a reference to Section 12 of the Tribunals, Courts and Enforcement Act 2007. Section 12 of the Act provides-

> '12. Proceedings on appeal to Upper Tribunal
>
> (1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal-
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
>
> (b) if it does, must either-
>
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
>
> (ii) re-make the decision.
>
> (3) In acting under subsection (2) (b) (i) , the Upper Tribunal may also
>
> (a) direct that the members of the First-Tier who are chosen to reconsider the case are not the same as those who made the decision that has been set aside;

(b) give procedural directions in connection with the reconsideration of the case by the First-Tier Tribunal

(4) In acting under subsection (2)(b)(i) , the Upper Tribunal

(a) may make any decision which the First-Tier Tribunal could make if the First-Tier Tribunal were re-making the decision, and

(b) may make such findings of fact as it considers appropriate.'

7. The High Court has given no reasons for its decision. Thus in the first instance the case appears before me to determine whether or not there is an error of law in the original decision and if there is an error of law to determine how the case should further proceed.

Factual Background

8. The appellant entered the United Kingdom as a visitor on 26 May 2002. The appellant had leave to remain in the United Kingdom as a visitor until 26 November 2002. The appellant during the currency of her leave made an application to remain as a student and that application was granted. The appellant thereafter made further applications as a student resulting in her leave being extended at various times until 30 November 2009. The appellant had spent seven years in the United Kingdom as a student.

9. On 30 November 2009 the appellant submitted a Tier 4 General Student application. This application was rejected on 23 December 2009. It is suggested in the appellant's chronology that the form contained an error and therefore the application was rejected, but was then re-submitted on 5 January 2010. That application was refused on 1 March 2010. The refusal in respect of that application did not give the appellant any right of appeal.

10. According to the Decision and the other evidence herein [see paragraph 15] the first application of December 2009 was incomplete, as mandatory parts of the application had not been filled in by the appellant. When the application was refused, advice was given that the appellant should ensure that all mandatory parts were completed and that all the necessary documentation was included in any future application. Despite that the second application/resubmitted application did not have a valid CAS and did not have the required financial information [see paragraph 17 and the refusal letter of 1st March Annex C1 to respondent's bundle].

11. On 29 April 2010 the appellant submitted a "further application" as a Tier 4 General Student. That application was granted on the 10 June 2010 and the appellant was given leave from 10 June 2010 to 9 September 2010.

12. However the appellant had been without leave from 23 December 2009, at the earliest when the first application was refused, or from the 1st March at the latest when the second application was refused through to June 2010.

13. On 9 September 2010 the appellant made an application for leave to remain as a Tier 4 General Student. That application was refused. The appellant appealed against the refusal and was successful in the appeal. Following a successful appeal leave to remain was granted from 16 May 2012 until 16 September 2012.

14. The appeal in the First–tier Tribunal was heard on the 17th January 2011, at which time the appellant had 2 terms left to complete of her current course of study, that is through to July 2011. There was an appeal by the respondent to the Upper Tribunal in September 2011 by which time the appellant's course had been completed.

15. The appeal was allowed on the basis that it would be a breach of the appellant's Article 8 rights not to allow her to complete her course. The appellant could not show that she had the required level of funds to meet the immigration rules but the First–tier Judge decided that it would be disproportionate to remove the appellant when she had two terms left to complete level 3 of a BTEC. Of significance in that decision was the appellant's assertion that her intention was to leave the UK and return to Jamaica on completing the two remaining terms. As is evident from the appellant's witness statement [marked JPMc1] paragraph 3 the appellant's course appears to have finished in July 2011.

16. By reason of information received on 25 June 2012 the appellant's leave was curtailed. The effective date of the expiry of the appellant's leave by reason of the curtailment was 24 August 2012.

17. The letter curtailing the appellant's leave dated 25 June 2012 required the appellant to regularise her status/leave to remain in the United Kingdom. The appellant on 23 August 2012 submitted an application for indefinite leave to remain in the United Kingdom on the basis of 10 years long residence.

18. That application was refused by letter dated 16 May 2013. The letter of refusal makes the following points:-

    a) The appellant could not succeed under the long residence provision by reason of the fact that there was a gap in her lawful leave between the 1st March 2010 and 10th June 2010, when the appellant was granted further leave. Whilst the appellant had made an application on the 29th April 2010, no leave had been granted until the 10th June 2010. Therefore there was a break in the lawfulness of the appellant's residence of in excess of 100 days. Accordingly the appellant could not succeed under paragraph 276B(i)(a). [see above - the point appears not taken that the original application by the appellant in November 2009 had been refused in December 2009 and therefore the appellant's leave had ceased at that point. It appears to be accepted that with the re-submission of the application in January the appellant's leave continued for that period].

b) Consideration was then given as to whether or not the appellant could succeed under Appendix FM. As the appellant had not given any evidence to lead the respondent to believe that the appellant had any family life the appellant could not rely upon Appendix FM.

c) Consideration was then given to paragraph 276 ADE of the Immigration Rules. The appellant had not lived in the United Kingdom for at least 20 years. The appellant had resided the majority of the live in Jamaica. It was not accepted that the appellant had severed all ties, including social, cultural and family ties with Jamaica and therefore the appellant did not meet the requirements of paragraph 276ADE.

d) Having found that the appellant could not succeed the respondent made the decisions to refuse the appellant further leave to remain in the United Kingdom and thereupon to remove her from the United Kingdom.

19. As stated the appellant appealed against those decisions and the appeal was heard by First-Tier Tribunal Judge Phillips. In dealing with the appeal at paragraph 6 the judge notes that the appellant has accepted that the continuity of residence had been broken and therefore the appeal could only be pursued outside the Immigration Rules under Article 8 of the ECHR. The judge has specifically identified the fact that the appellant submissions related in substance to the private life which she had developed over a period of 11 years.

The Grounds of Appeal

20. The grounds of appeal appear in two parts. The initial grounds appear to have been settled by the counsel that originally appeared on behalf of the appellant. Thereafter further grounds were submitted relying upon the original grounds and adding further grounds. The original grounds raised the following points;

a) Firstly it is alleged that in considering the case the judge applied an exceptionality test to the appellant's Article 8 claim outside the rules. It is pointed out that at paragraph 13 Judge Phillips had referred to the case of Kabia (MF: para 398 - "exceptional circumstances") [2013] UKUT 00569. It is acknowledged that it had not been stated that the appellant's circumstances were exceptional but this was because the appellant was not required to show exceptional circumstances in order to succeed under Article 8. It is submitted that Judge Phillips had misdirected himself and applied an exceptionality test.

b) The judge has made factual errors misstating the appellant's case in evidence. It is argued that in paragraph 43 of the decision the judge has stated that the appellant has withdrawn her appeal against the removal directions. It is submitted that that is inaccurate. What was conceded was that given the case law and

given the effect of section 51 of the Crime and Courts Act 2013 it could no longer be argued that the respondent could not make two decisions at one and the same time, namely a refusal to vary leave decision at the same time as making a decision to remove under section 47 of the 2006 Act.

c) Further the judge has failed accurately to record the appellant's evidence

   i) The timings of applications and their refusal are not accurate.

   ii) The judge has referred to the appellant indicating that she has accommodation available in Jamaica with her grandmother. As the judge has not compartmentalised the evidence of the appellant it is difficult to ascertain where this evidence came from.

   iii) The impression created is that the judge has failed to give anxious scrutiny to the appellant's case.

d) The judge had failed to properly consider the appellant's case. It had been asserted that the respondent had failed to apply her own policy in the IDIs in respect of long residence. The long residence policy gave the respondent a discretion where there were breaks in the period of residence and where there were exceptional circumstances such as to explain the break in the continuity of residence. The judge was invited to consider the reasons that the appellant's application had been refused; the failure to return the appellant's passport in time; and the delay in renewing the applications, were such as to constitute "*exceptional reasons"* such that the discretion should have been exercised in the appellant's favour. The judge treated the examples in the IDIs as to the circumstances in which the discretion would be exercised as exhaustive, which they were not.

e) The judge erred in concluding that the appellant had been deceptive in a previous appeal in allegedly stating during a student appeal that she intended to return to Jamaica and in finding that Mr Jeffrey Brown had distanced himself from the appellant's evidence, when in fact Mr Brown, a solicitor, stated that he kept a fair distance from advising the appellant. The judge failed to provide reasons for conclusions set out in paragraph 58 of the decision.

f) The Tribunal failed to properly consider the documentary and oral evidence. The general credibility was doubted but no adequate consideration has been given to the evidence and no sufficient basis or reasons for rejecting the evidence. The judge took inadequate account of the evidence that the appellant had a distant relationship with her parents. The appellant's parents are still in Jamaica.

g) The judge erred in assessing the Article 8 claim. It is submitted that the appellant is an integral part of the family of her uncle Mr Keith Brown. There is dependency above and beyond the norm such that family life has been established.

21. The additional grounds concentrate upon

a) A material mistake as to facts - referring again to paragraph 58. It is again reiterated that Mr Jeffrey Brown did not distance himself from the appellant's evidence as to her intention. What he did distanced himself from was providing legal advice to the appellant. It is submitted that the findings by the judge are contrary to the evidence in the circumstances.

b) Procedural unfairness - and states:-

> The IJ has materially erred in law by failing particularise why the appellant was sic - *"unable to explain convincingly or credible in why she had told the previous immigration judge that she intended to return to Jamaica on completion of the course but had chosen to remain in the United Kingdom when she was not a student".*

It is submitted that the appellant had a legitimate expectation that she would be asked to clarify why she had not returned and the judge demonstrably failed to do this. It is asserted that had she been asked the appellant could have given a satisfactory explanation. For subsequent that the appellant's circumstances changed, and she should have been given an opportunity of explaining the changes.

c) The judge has failed to make a finding that the respondent's failure to consider her own IDIs amounted to the respondent making a decision that was not in accordance with the law. It is submitted that the IDIs were a material part of the appeal. The judge's failure to consider them demonstrates an error of law.

22. At the hearing before me the representative made submissions on the issues raised. To an extent having conceded that the appeal was on the basis of Article 8, and the grounds appear to be raising issues relating to other factors including the immigration rules and the IDIs. The grounds raised issues beyond merely Article 8.

23. It is on the basis indicated that the appellant seeks to appeal against the decision on Judge Phillips.

Consideration

24. It is asserted that the judge has applied an exceptionality test. Whilst the judge has within paragraph 13 referred to the case of Kabia, it is necessary to look at how the judge treated the issues with regard to Article 8. Whilst it is correct to say that in paragraph 72 the judge indicates that there is nothing exceptional within the facts as advanced by

the appellant, he does not by reason of that only say that that determines the appeal. He goes on to consider all the steps required by the case of Razgar [2004] UKHL 27 in assessing whether the rights to family and private life would be breached and whether the decisions taken are proportionately justified.

25. The judge has started his consideration of Article 8 at paragraph 64. The judge does within paragraph 66 commence consideration by following the guidance given in the case of Razgar [2004] UKHL27.

26. The judge considers whether family and private life exist. Having considered all of the circumstances he does not find that there is sufficient elements of dependency to show that family life exists. The approach of the judge is consistent with the case law, specifically the case of Kugathas [2003] INLR 170. The judge has considered the evidence and given valid reasons for the conclusions reached. In that respect the judge has made material findings sufficient to find that there was no family life.

27. The judge has however gone on in paragraph 67 to find that by reason of the period of time that the appellant has been in the United Kingdom she has developed a private life. The judge thereafter goes on to consider in accordance with Razgar the remaining elements of the guidance given in the case law, whether the decision to remove the appellant and to refuse further leave would be sufficiently serious to engage Article 8 private life. As is evident from the conclusions of paragraph 68 the judge was satisfied that the decisions sufficiently seriously interfered with the appellant's private life so as to engage Article 8. It was clear and evident that the decision on the basis of an analysis of the judge was in accordance with the law and was for the purposes of maintaining immigration control.

28. Thereafter the judge has gone on to assess whether the decision is proportionately justified and in so doing makes it clear that he is undertaking the balancing exercise as required by Razgar. The judge was looking at all the factors in relation to the proportionality of the decisions.

29. In that context whether there are exceptional factors is a material consideration to put into the proportionality balance. The judge found that there was nothing exceptional within the facts as presented by the appellant. The judge has however gone on to consider other factors. As is evident from the conclusions within paragraphs 76 to 78 the judge was assessing all of the evidence before him in determining whether or not the decisions were proportionately justified and was satisfied in all the circumstances that they were.

30. In the light of such an approach he cannot be said that the judge has applied an exceptionality test. He was merely considering whether or not there were exceptional factors which needed to be placed into the balancing exercise in favour of the appellant. The judge has not applied an exceptionality test therefore and there is no error of law in the approach the judge.

31. With regard to the second ground whilst it is correct to say that the judge appears to be indicating that the appellant has withdrawn her appeal against the removal directions, it is clear from what follows thereafter that the judge was merely indicating that the grounds previously advanced in other cases that removal decision could not be made at the same time as a decision to refuse to vary leave could no longer be maintained. The judge has again not stopped the assessment of the case at that point but has gone on to consider with care the Immigration Rules and Article 8.

32. As is evident again from paragraph 78 the judge has assessed whether the decisions to refuse further leave and to remove constituted a breach of Article 8 rights, clearly concentrating on whether or not it was unreasonable to remove the appellant or whether or not it was proportionately justified. Whilst the complaint is against paragraph 43 it is clear that the judge was dealing with the issue of whether a removal decision could be made at the same time as a decision to refuse further leave. Whilst the phrasing may be unfortunate the judge has considered ultimately whether removal was proportionately justified. The circumstances the judge has not treated the appeal against the removal as withdrawn but merely that an argument that the removal decision was illegal was no longer pursued.

33. Thereafter it is suggested that the judge has not accurately record the appellant's and her witnesses' evidence. That there were inaccuracies within the timings of applications and their refusal. It does not appear to be challenged that there was a gap in the lawfulness of the residence of the appellant from March 2010 until June 2010. During that period of time the appellant did not have lawful leave to be in the United Kingdom.

34. It is now asserted that the judge has failed to consider the IDIs properly. As is evident from paragraph 36 the judge was considering the submission that there was a historic wrong and whether a discretion should be exercised in favour of the appellant. The judge has specifically dealt with that matter in paragraph 56 of the decision. The judge has pointed out that the reasons for the rejection of the applications in the period of November 2009 to March 2010 were failures on the part of the appellant to submit properly completed applications with a valid CAS letter and with the required financial details.

35. It is suggested in the grounds of appeal that the judge has failed to consider the IDIs. Alternatively it is suggested that in considering the IDIs has failed to find that there were circumstances justifying the exercise of a discretion. As is evident from paragraph 53 the judge considered the matter and noted that the previous determination was granted not on the basis of an application under the immigration rules but on the basis of Article 8 under in part on the basis that the appellant was going to return to Jamaica at the end for a course. The judge was satisfied that no legitimate expectation arose or no argument on administrative error was appropriate.

36. The reasons that the applications failed was because the appellant failed to submit proper and completed applications. The appellant had been warned after the failure of the first application in 2009 to ensure that she submitted completed applications with all the necessary documents.

37. The appellant seeks to rely upon the IDIs. The IDIs are in the appellant's bundle at page 45. There is reference therein to breaks or gaps in lawful residence. The IDIs indicate that gaps of the lawfulness of the residents may be permitted where the gap is no more than 28 days. However the IDIs go on to say that there is a discretion exceptionally where in respect of a single application a gap of more than 28 days occurs. In one sense it depends very much on how one views the period from November through to March whether that is a single application or three separate applications made by the appellant. Further the examples given of where a discretion may be exercised point clearly to circumstances where responsibility lies with others, not failures by the appellant and certainly not failures by the appellant who has been told to submit all the appropriate documentation. Whilst there may be a discretion none of the examples where a discretion was exercised involved the failure on the part of the appellant to submit a proper complete application or the required documentation with the application. The judge had considered the issue of discretion and decided that it should not be exercised in favour of the appellant in the circumstances. Again the judge has fully justified his approach to the issues raised.

38. In respect of the remaining grounds a number of issues relate to the evidence been raised, for example relating to whether accommodation was available with the appellant's grandmother. It is suggested that, as the evidence was not been compartmentalised, the representative could not identify where the suggestion has come from that accommodation was available. No one has requested the noted of evidence of the judge. However at the conclusion of cross-examination the notes of the judge clearly indicate that the appellant was asked whether or not accommodation was available with her grandmother and she indicated that it was. Cross-examination was finished at that point. The notes continue by indicating that the appellant was re-examined by her representative on the point immediately.

39. The issue was whether or not the appellant was asked questions about the availability of accommodation in Jamaica. The appellant was and she gave an answer that accommodation would be available with her grandmother. Whilst subsequently she sought to resile from that and suggest that the grandmother could not support her and that the grandmother lives on a pension, it is clearly an issue that was raised in evidence and the judge was entitled to take the evidence into account. The appellant also has her parents in Jamaica. Whilst the appellant now seeks to submit evidence that she has a "distant" relationship with her parents, the fact is that she has immediate family members in Jamaica.

40. The appellant's representative was also raised the issue of the judge making a finding that the appellant had been deceptive in giving evidence previously stating that she intended to leave the United Kingdom at the end of her course. That was clearly an issue that was there to be considered. The appellant had every opportunity to explain why she remained in the United Kingdom after the end of her course having stated previously that when her course finished she would leave and return to Jamaica. The judge was entitled to consider the evidence and consider the fact that the appellant had not offered an explanation when she could have done so. That was a finding of fact that the judge was entitled to make on the evidence. If the appellant wanted to give an explanation then she had every opportunity of doing so.

41. The judge in the decision refers to the evidence given by other members of the family in the previous appeal with regard to the appellant’s stated intention to return to Jamaica. Whilst it is suggested that the judge has misunderstood the evidence by Mr Jeffrey Brown, there is no challenge to the evidence given by Claudette Brown, as recorded by the judge, that she was not aware that the appellant's intention to return to Jamaica in July 2011. The judge has considered the evidence that was before him and given valid reasons for the findings that he made. The appellant had every opportunity to deal with an issue was clearly there on the papers. There is no error in the approach the judge to the issue

42. In the circumstances the judge has properly considered all the evidence and made valid findings of fact with regard to the issues in the case. The judge was aware that the appellant had family members in Jamaica including her parents and her grandmother.

43. The judge has properly assessed all the issues under Article 8 and was entitled to make the decision that he did on the evidence presented.

44. There is no material error of law in the determination. I uphold the decision to dismiss this appeal on all grounds

Signed Date

Deputy Upper Tribunal Judge McClure