
**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal
Number: IA/30564/2015

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **on 5 June 2017** | **on 12 June 2017** |

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**PAVEENA CHIMPALEE**
**(anonymity direction not made)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: no appearance
For the Respondent: Mr Tarlow Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against a decision of First-tier Tribunal Judge M A Khan promulgated on 2 November 2016 in which the Judge dismissed the appellant's appeal against refusal of the application for leave to remain on human rights grounds.

## Background

2. The appellant is a national of Thailand born on 22 September 1971 who entered the United Kingdom on 10 October 2004 with leave as a student extended to 30 January 2015.
3. The application for leave on human rights grounds was refused by reference to paragraph 322(1) of the Immigration Rules as it was asserted that a TOEIC certificates submitted by the applicant with an application dated 30 April 2013 had been obtained fraudulently, by the use of a proxy test taker, and because it was said there were no compassionate factors to warrant a grant of leave outside the Rules. The appellant is subject to a removal direction to Thailand made pursuant to section 10 Immigration and Asylum Act 1999.
4. The Judge noted the appellant's case that she entered the United Kingdom as a student and had completed 10 years lawful residence and that she therefore met all the requirements of paragraph 276B(i) (ii) and (v) of the Immigration Rules.
5. The Judge's findings are set out from [20] of the decision under challenged and can be summarised as follows:

    a. That the appellant's evidence was, in general, straightforward and credible [20].
    b. The appellant did take copies of a passport to the Life in the UK test but those copies were not accepted by the Test Centre [21].
    c. The appellant has lived in the UK for over 10 years and has established some private life here [21].
    d. In relation to the allegation a proxy was used to take an English language test, the respondent's evidence composed of witness statements and an ETS SELT datasheet which led to a finding the respondent had not established dishonesty on the appellant's behalf and had not established that the TOEIC certificate was obtained fraudulently by the appellant [24].
    e. The appellant has no basis for extending her stay in the UK other than her private life [25].
    f. The appellant entered the UK for a limited period with no expectation that she had the right to settle here. The appellant's private life involves having friends and being part of the community. The appellant has family including her parents and siblings in Thailand [25].
    g. The appellant's private life can continue in Thailand [27].
    h. The appellants leave in the UK has been for a limited period of time making her status precarious. Little weight is given to a private life formed when a person's immigration status is precarious [29 – 30].
    i. At [31] "the appellant's case is subject to consideration under Section 117B(5). The whole of the appellant's time spent in the UK is in the knowledge that they have no right to settle here. I see no reason as to why her daughter could not return to Nigeria with her mother and resettle in the country of their origin".

6. The appellant sought to appeal the decision in relation to which permission was granted by another judge of the First-tier Tribunal. The operative parts of that grant in the following terms:

> 2. The appellant says the Judge should have considered her application under paragraph 276A1 but she could appeal only on human rights or protection grounds, had not passed the necessary English language test and it does not appear from the record of proceedings that the appellant's representative pursued paragraph 276A1.
>
> 3. However, there are a number of errors of fact in the decision which are set out at paragraph 10 of the grounds. There is no reference to "both appellants" in paragraph 2 but there is reference to the appellant's son at paragraph 5 and to her daughter returning to Nigeria at paragraph 31. It is arguable that such errors cast doubt upon the decision as a whole.

7. The respondent filed a Rule 24 response which indicated she did not oppose the application.
8. The matter was listed for hearing before the Upper Tribunal and notice of the time date and place of the hearing sent to the parties. I am satisfied that has been valid service of that notice in accordance with the procedure rules. Notwithstanding this fact, both the appellant and her representative failed to attend the hearing to prosecute her challenge to the decision in which she is seeking to have that decision set aside and remade, either before the First-tier Tribunal or by the Upper Tribunal, as this tribunal considers appropriate.
9. No explanation for the appellant's absence was provided and no adjournment request made. No indication was given by the Tribunal that the hearing was not going to proceed or that the attendance of either party was excused.
10. Any indication that has been made of a party's view is not necessarily binding upon the Tribunal and in this case Mr Tarlow withdrew the content of the Rule 24 response on the basis that the challenge has no arguable merit when the decision is properly considered.
11. In light of the failure to attend and absence of proper explanation the Tribunal considered it to be in the interest of justice, and in accordance with the overriding objective, to proceed to consider this matter in the appellant's absence.

## Discussion

12. The first point of comment relates to a matter which is not subject to a cross-appeal. That is the finding at [24] of the decision that the two generic witness statements relied upon by the Secretary of State in ETS cases together with the ETS lookup tool are not sufficient. The current case law, which was available to the Judge, finds that the combination of the generic statements together with the ETS lookup tool are sufficient to enable the Secretary of State to discharge the initial burden upon her of proving deception. In this case, it is arguably clear that that was the nature of the evidence before the Judge which should have led the Judge to hear from the appellant to establish an

acceptable explanation, which may have meant the need to revert to the Secretary of State for further comment.

13. As there is no cross-appeal by the Secretary of State and therefore no notice to the appellant that this specific issue was going to be the subject of challenge, this tribunal considers it unfair to make any specific finding in relation to [24] without giving the appellant notice, which would require an adjournment of the hearing which is not arguably necessary for the reasons set out below. This element of the decision shall therefore stand.

14. The judge granting permission refers to [10] of the application for permission to appeal which is drafted in the following terms:

> 10. The FTJ also made an error in dealing with the other grounds/outside the rules on Human rights grounds. In dealing with Article 8 claim, the FTJ did not give sufficient reasons except referring to the legal position on Article 8. Unfortunately that the FTJ made numerous errors of fact in the determination which is quoted below –
>
> i. In paragraph 2 of the determination 'the respondent has set liability to removal directions **against both appellants** under section 10….' In reality, the appellant is the only appellant in these appeal.
>
> ii. In para 5 of determination 'The appellant states that her son has lived in the UK for over 7 years and therefore he qualified under paragraph 276ADE' Neither the grounds of appeal nor the appellant's witness statements made any such claim ever.
>
> iii In paragraph 29 of the determination, 'The appellant in this case out of limited leave to remain as a visitor'. In fact the appellant's immigration history from the reason for decision shows that she has never been a visitor.
>
> iv. The most striking error can be found in concluding paragraph 32 of the determination 'I see no reason as to why her daughter could not return to Nigeria with her mother and resettle in the country of origin'.
>
> It seems from the above serious factual error that the reasoning on dismissal of article 8 claim is based on the facts of unrelated case. As such the determination of the FT J does not disclose clearly the reasons for a tribunal's decision in accordance with the principles in **MK (due to give reasons) Pakistan [2013] UKUT 00641 (IAC)**

15. It is accepted there are a number of factual errors in the decision, as set out in [10] above. In *ML (Nigeria) [2013] EWCA Civ 844* there had been substantial errors in the recollection and record of the facts that were advanced in the case. It was held that, even though there were sound reasons for rejecting the appeal, a series of material factual errors can constitute an error of law. It is trite in not only the field of judicial review but also statutory appeals and appeals by way of case stated that factual errors, if they are significant to the conclusion, can constitute errors of law. The essential question for the UT was whether this appellant had the fair hearing. As part of that fair hearing, the finders of fact must listen to and take into account conscientiously the

arguments that are deployed in favour of a finding that the claimant is telling the truth as well as those arguments against.

16. It has not been made out, nor even pleaded, that the appellant did not receive a fair hearing in this case.

17. The Judge considered those matters that relied upon by both the appellant and the respondent and indeed, albeit arguably erroneously, found in the appellant's favour in relation to the TOEIC certificate and the alleged use of deception.

18. The claim by the appellant that she satisfied the requirements of paragraph 276B has not been shown to have arguable merit for the reasons identified by the judge refusing permission to appeal.

19. In relation to the alleged factual errors, it is arguable the grant of permission to appeal on this basis is itself flawed as a detailed examination of the impugned decision does not reveal that such errors disclose a misunderstanding of the factual matrix of this case or misdirection of law. What they do disclose is a lack of care and/or attention to detail by the Judge in checking the judgment before sending the same for promulgation.

20. The reference in the application for permission to [2] of the decision, where it is alleged the Judge referred to a removal direction been set against both appellants, is in fact a reference to [3]. Although the Judge does refer to there being two appellants this makes no difference to those who are legally subject to a removal direction and is not a finding, but rather an inaccurate reflection of who is the subject of the removal direction.

21. The reference to [5] in the application for permission alleging the Judge stated that the appellant and her son have lived in the UK for over seven years and therefore he qualifies under paragraph 276 ADE is noted. It is also accepted this is a matter not raised by the appellant but has not been shown to be material as this, as in the previous matter, appears in the part of the determination headed "issues under appeal" rather than the findings of fact and credibility in relation to which no decision was made regarding the inaccurate reference.

22. The reference to [29] in the application for permission, where the Judge claimed the appellant had limited leave to enter as a visitor, is noted. What is not challenged are the other findings in that paragraph that the appellant has lived in the United Kingdom since 2004, that the appellant's entry and leave in the United Kingdom was granted for a limited period of time, and that her status has always been precarious. The appellant entered the United Kingdom as a student on 10 October 2004 with leave granted to 30 April 2013. This has never been settled status and the reference by the Judge to section 117B (5) and the decision of the Upper Tribunal in *AM (Malawi) [2015] UKUT 260* are the relevant provisions the Judge was required to consider when assessing the weight to be given to the appellant's private life formed during the time her status has been precarious, which is little. The error is the description in relation to the nature of leave initially granted not the legal consequences and impact of such leave upon the appeal.

23. The reference to [29] in the application for permission where the Judge is stated to have referred to the applicant's country of Nigeria is noted. This is, again, an example of sloppiness/lack of attention to detail rather than legal error. The Judge is aware the appellant is a national of Thailand and that that is the country to which the respondent proposed to return her. This is clearly noted in the removal direction and in the decision under challenge the correct country is noted at [1], [16], [17], [18], and specifically at [27] where the Judge finds "On the balance I find that the appellant's private life can continue in Thailand".
24. No arguable legal error material to the decision is made out in relation to the factual inaccuracies. It would have been preferable that they would not have appeared in the decision in the first place.
25. The appellant's appeal was against the refusal of an application for leave to remain outside the Immigration Rules pursuant to article 8 ECHR. In Section 3 of the application form the appellant confirms the application is for such purpose which she states is because she would like to be in the UK to enable her to complete the "Life in UK" exam which she had not taken at that time. This is noted in the rejection under the heading "Decision on Compassionate Factors" in which the decision-maker notes the exam was organised for 11 February 2015. The decision-maker, however, concluded "It is open to you to return to Thailand to pursue your studies or employment there. Alternatively, if you wish to undertake further studies or employment in the United Kingdom, it is open to you to make an application from Thailand under the appropriate route. It should be noted that you should have taken your Life in the UK test now therefore you can return to Thailand. It is noted that no further application for leave to remain in the UK has been raised".
26. The appellant appeared to be seeking to use article 8 in what may argued to be an inappropriate manner. Article 8 does not give a person the right to choose the country in which they wish to reside and is not designed to facilitate an individual pursuing an application under the Rules, per se, for their convenience. The purpose of article 8 is to prevent unwarranted interference by a Contracting State to the ECHR in a protected right. The right the appellant refers to appears to be her private life as the application sought to enable her to take a test to allow her to continue to live in the UK.
27. The finding by the judge that the appellant's private life can continue in Thailand is not challenged in the application for permission to appeal. Those grounds assert the Judge erred for the reasons set out, including at paragraph 10, which has been dealt with above, and allege the Judge erred in failing to deal with paragraph 276A1 of the Immigration Rules.
28. The appellant has not made out there was a specific application under this provision of the Rules as the application was clearly for leave outside the Rules and under the current appeal regime grounds of appeal are restricted. Although the appellant's grounds assert the respondent acted unlawfully without considering an application it was

not specifically claimed that the appellant sought an extension of stay based on long residence under the Rules. As noted by the judge granting permission to appeal, the difficulty for the appellant in relation to this provision of the Rules is that the appellant did not pass the necessary English language test and it does not appear that before the Judge the appellant's representative pursued this issue. The respondent dealt with the application made and the Judge determined the appeal against the refusal of the application on that basis.

29. Having the considered all matters, it is arguable that the decision by the Judge in dismissing the appeal for the reasons stated is a decision fully open to the Judge on the basis of the facts of this case and one that does not disclose any arguable legal error material to the decision to dismiss the appeal. The Judge adopted a structured approach, applied relevant legal provisions, and gives adequate reasons for the findings made.

30. Accordingly, there is little point in doing other than dismiss the appeal against the Judge's decision. To do otherwise would not be in accordance with the overriding objectives as it has not been made out that anything other than a decision dismissing the appeal on article 8 ECHR grounds is likely to be made on the facts, and considering the current provisions relating to the assessment of human rights claims.

## Decision

**31. There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

32. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 9 June 2017