Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01865/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 August 2019	**On 8 November 2019**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

HANIEH SADAT SEYEDIN NAVADEH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C Hulse instructed by Nido Legal Ltd
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed to the First-tier Tribunal against the decision of the respondent refusing her human rights claim.

2. On a hearing on 17 April 2019, I found errors of law in the judge's decision and as a consequence directed that the matter be reheard in the Upper Tribunal.

3. I attach a copy of my error of law decision which sets out the background to the case and the reasons why an error of law was found.

4. At the renewed hearing on 9th August 2018 the appellant put in a supplementary bundle including a second witness statement. It had been signed by her and she had been told the contents by her solicitor and they were true and, to the best of her knowledge, correct. She relied also on her previous witness statement and both statements were adopted.

5. In oral evidence she said that she had been in the United Kingdom almost all the time since 2006 and had always before or on the date of leave expiring applied for extensions. Twice there had been delays of more than a few days: over 28 days.

6. She was asked her why she was out of the United Kingdom and why she was delayed in 2009-10. She said had gone to Iran to do research and there were limitations on her Iranian passport so she had to go there rather than elsewhere and had no time to get a visa. She did not need a visa to go to Iran. When she decided to return to the United Kingdom she realised she was banned from leaving and it had taken about two months to lift the ban. She had returned with a valid UK visa.

7. The degree she was studying for was a PhD in Chemical Engineering. She was no longer still studying. She had submitted a thesis and it was in the process of major corrections as it had been unsuccessful. She had appealed the decision and she had received the decision that she should do more lab work or get an MPhil and she had rejected both options so it was escalated further.

8. With regard to the second time she was out of the United Kingdom, in 2015, there had been a delay because she had to apply for ATAS to get a CAS. She had given enough time: twenty days, on 3 September. The visa was due to expire on 9 September but her passport had been about to expire and she had got a new one. She had submitted all the relevant documents for a new visa and obtained it on 17 September when she had left the United Kingdom.

9. She only got the CAS letter on the 28th day and had had 28 days before the visa expired. She had chased it. It was issued on the 28th day so she was not able to apply within the 28 days. There had been other delays in booking the appointment and as to whether it should be in Dubai or Turkey which latter she chose in the end. There was no British Embassy in Iran and it had taken time to get an appointment in Turkey and there was delay on the part of the university.

10. There was correspondence in the bundle between pages 82 and 186 concerning this and showing how she had chased matters. The claim was one for family and private life.

11. Mr Lindsay made the point that there was no notice of a family life claim being made and there was no reference to it in the skeleton.

12. With regard to her life in the United Kingdom the appellant said that she worked part-time as an advocate in Balba which helped women seeking asylum. She had been in a relationship with her partner for over a year. He was a British citizen. She lived with her sister. She had friends and family in the United Kingdom. She had a disabled friend named Sarah whom she helped. There was a letter from her in the bundle. She had friends and colleagues and been living in the United Kingdom since she was about 21.

13. When cross-examined the appellant said with reference from the letter from Sarah that she was disabled and had asylum status. She said that no-one could help Sarah as she had no family or friends and government support would take a long time. For between six months and a year no-one would be there for her full-time.

14. It was put to her that she had not mentioned Sarah in her witness statement and would have done so if the relationship was very important. She said she had met Sarah in November 2016/early 2017 and Sarah had not been in her life when she had applied for indefinite leave to remain. She had not had a private life ground and her claim was in respect of her absences.

15. She was also it was fair to say, with regard to the problem in getting the ATAS that if she had been able to get it in good time she would not have had the problem and she agreed that that was the case. She would have been able to get the CAS as it was in time for applying for the visa.

16. It was put to her that she said she needed twenty working days to get the ATAS certificate and she was asked where she got that information from. She said that she was given it by the International Student Advisory Service (ISAS) of the University and she had given it more than a month before. She was asked whether she had ever checked with ATAS, what their standard time was for getting a certificate to someone, and she said she checked it with the ISAS and had taken all her immigration advice from them.

17. She was asked whether it was the case that she had contacted ATAS on 4 August 2015 and she said she did not remember the exact date. She agreed that the letter submitted by the representatives she had obtained on 17 September 2015 six weeks later. She was asked whether there was any reason why she could not have applied for it earlier for example in June or July. She said that as she remembered it you could not apply a long time before the visa date expired so you would not apply in June or July. She had been advised by ISAS to apply in early August.

18. She was asked whether at that time she had legal representatives for her immigration status and she said no as they had ISAS at the university and they gave advice on immigration. It was put to her that it was odd advice to tell her it would be better to leave the ATAS application late as there could be administrative delays. She said that it had not occurred to her and they told her she had more than enough time. They would usually get back to you earlier than twenty days. She was asked whether it was right that ISAS had told her this but there was nothing in writing from them. She said there was not. She had booked an appointment with a legal advisor at ISAS and they gave face to face advice. She had all the emails. She had tried to chase the application with ATAS but had no direct contact number or email address and only ISAS had the contact number so the only way to chase was through them. It was the case that before she put in the application to ATAS she could not contact them directly. She was asked whether she had not tried to approach them directly but had gone via ISAS and she said you could only submit online and track online and there was no email or telephone number. She had looked at their website, and there was no way to contact them at that time.

19. She was also asked if there was any reason why if she returned to Iran she could not return to see her sister and she said there would be difficulties in making an application for a visit visa. Her parents had been a few times recently, they had been rejected a few times.

20. In re-examination the appellant was asked whether she had ever worked in civil or electrical engineering in Iran and said yes. She had to have some experience and she had worked as a tutor at the University of Birmingham as well. It was for experience and she had worked in her father's company and other companies he knew.

21. The next witness was [SN]. She is the appellant's sister. She had read the information in the statement she had given to the solicitors, it was true and she had asked for it to be adopted as her evidence-in-chief.

22. In oral evidence she said she had been studying since she came to the United Kingdom, at the University of Birmingham and had a Masters in Civil Engineering and had graduated in 2012. She had a job offer from a French company which was based in the United Kingdom and they had asked her to do the BQS Degree and she had done that, was now qualified as a quantity surveyor, and had worked full-time for more than four years.

23. She could not visit her parents in Iran. She had applied for asylum and she had not been able to go back since 2013. She had applied for indefinite leave to remain some weeks ago and would get the results in six to eight weeks. It was very difficult for her to see her parents. She could not go to Iran and they had applied for a visit visa a few times and had had a few refusals. It was difficult. They had not obtained a visa for her graduation ceremony, so she had not gone.

24. Mr Lindsay had no questions for the witness.

25. The next witness was [EM] who referred to the letter of 25 March 2019 and said the contents were true and that was her evidence-in-chief. She had known the appellant for four years and had been living in the United Kingdom a long time, more than 40 years.

26. Mr Lindsay had no questions for the witness.

27. In his submissions Mr Lindsay said there were two issues, first gaps in the appellant's absence and the exercise of discretion and also Article 8 outside the Rules. With regard to the first point, Mr Lindsay referred to the skeleton argument put in on behalf of the appellant. It was a narrow issue. Paragraph 6(ii)(c) referred to the appellant's attempts to obtain an ATAS certificate in 2015 and the problems she experienced there. The appellant had rightly accepted that if it were not for the time problem the gap in lawful leave would not have arisen. The question for the Tribunal was with regard to that delay. The relevant Rules were set out at paragraph 5 of the appellant's skeleton. There was an exceptional circumstances threshold and examples were given of what might amount to delays resulting from unforeseeable causes. On the evidence the Tribunal was asked to find that the guidance was correct and was applicable to this case and did not fall in the appellant's favour. It was a high threshold.

28. With regard to the earlier period where there was a gap, if one or the other remained a gap then discretion was not exercised in the appellant's favour.

29. It was argued that it was open to the appellant at all times to approach ATAS. They could have been contacted and there was no bar on her applying for a certificate earlier than she had done. She said she had been advised by ISAS to leave the matter till late and that was very surprising advice on the face of it. The appellant was clearly intelligent and such a person would not leave such matters to the last minute as delays could occur. The cause of the delay was not unforeseeable and the high threshold had not been crossed. The respondent could not be expected to exercise discretion in her favour. The third bullet point of the guidance was not met.

30. The appellant said that for ISAS's (non-common-sensical) advice she could have applied earlier. She had expected it some six days before the expiry of her leave to remain and that was cutting things very close. Whatever ISAS had told her, taking the evidence at its highest it was not beyond her control.

31. The appellant in the skeleton argument 6(ii)(c) accepted that there were delays in obtaining the ATAS certificate, and on behalf of the respondent it was said that the key point was that it was reasonably foreseeable that

such a body might be subject to administrative delay and it was not close to the guidance.

32. With regard to the point in the appellant's skeleton at paragraph 6(iii), it was the case that on the appellant's evidence at no time was it outside her control that the delay arose but she had relied on a third party and did not need to take that advice and it was a matter of common sense. The case fell at that point.

33. With regard to the exercise of discretion, even on the fuller evidence the Tribunal now had, it remained the case that it was done appropriately. The Tribunal would also consider that it had to be decided on the materials before the Secretary of State at the time. There was further evidence now but they were the same issues and it pointed to a conclusion that the Secretary of State was entitled to conclude as she did and that was not unreasonable.

34. If the Tribunal were with the appellant then it was unclear what the position was and it might be a matter for written submissions.

35. As regards the second issue, Article 8 private life outside the Rules, reference was made to what the Supreme Court had decided in Rhuppiah. The appellant had only ever had precarious status and all her private life must carry little weight as a consequence and that was dispositive of the appeal. The need for firm and effective immigration control outweighed her side of the balance.

36. With regard to the oral evidence, there were the two letters of support and these were not matters dealt within the appellant's witness statement so they should receive little weight. It was not the thrust of the basis of her claim to remain in the United Kingdom. There were the visa refusals and her sister's asylum status, but there was no good reason why the appellant could not visit her sister through the usual channels once she had indefinite leave to remain. Otherwise communications would be an adequate substitute.

37. In her submissions Ms Hulse referred to page 225 of the bundle concerning applications made before 28 days. All applicants were told to submit information not more than 28 days in advance. Also with the application for example bank statements and if they were earlier there would be some gap in the application and it could be said the bank statements needed to be fresher. The implications of that for this case should be noted.

38. Mr Lindsay had said the appellant began her application on 4 August and leave expired on 9 September. There was evidence of her contacting ATAS and asking for a date when she would get her certificate. She was told on 3 September as could be seen from the documents at pages 82 to 197 of the bundle. Page 84 was particularly important. It should be found that the appellant was very careful in applying in good time. When she

was told about 3 September it was not unreasonable to expect that to happen and it was six days before the deadline. It was sent on 17 September and arrived eight days after. There had been a series of delays. The University of Birmingham had delayed in sending the ATAS, partly as they said she was out of time and only when they were told she was out of time because the certificates had not arrived that they had sent the CAS letter and it arrived on 28 September near the end of the time to make an application from abroad and she had not foreseen she would need to apply from abroad and she only left on 17 September as her leave expired. She foresaw she would need to apply from outside Iran but had not foreseen delay of a week before she had an interview. These were all unforeseen circumstances. She had been in the United Kingdom for over ten years and had made applications mainly from within the United Kingdom. The ACAS had to be submitted before the CAS. On the evidence she had been very conscientious and begun in very good time and there was no reason to foresee that because she renewed her passport she would need the details about the ATAS certificate. There was no evidence to the contrary.

39. Reference was made to the covering letter of the application and her solicitor's letter at page 23 of the bundle. This carefully documented the problems with getting the ATAS certificate. Paragraph 13 referred to the email exchange about the visa. So, all the information was before the Secretary of State. At page 27 there was the point about 625 days out of the United Kingdom as was common ground, including the long period of 2009 to 2010 which was a consequence of the ban on the appellant leaving Iran. The delay in 2015 had been shorter. The university had exacerbated the delay and there were other factors and it was all documented. Page 28 referred to the 2015 absence.

40. With regard to the breaks and continuous absence, reference was made to the guidance at page 221 onwards in the bundle. It was not a six months break case. It would not be reasonable or proportionate to fail to consider the exercise of discretion and to fail to grant discretion. Delays did occur and it was not usually with the issuing of examination or other certificates. A person could not always allow for delay or mistakes. It should be considered whether it was proportionate or reasonable with the evidence the Secretary of State had not to exercise discretion. A hostile environment was not intended and it had been a long time and she had spent a lot of money. She had had difficulties with getting the application in on time and it would be very harsh to say it was outside her control. If discretion had been exercised unreasonably it was for the Tribunal to change that.

41. With regard to the last issue Mr Lindsay referred to the decision in Ukus [2012] UKUT 00307 (IAC) with regard to discretion and when it was reasonable. This was still good law. The Secretary of State had been aware of her functions and what was being asked and it was noted and all the evidence was considered and the decision was open to the

respondent. It was a lawful decision not to exercise discretion. The Secretary of State had a margin of appreciation as the primary decisionmaker.

42. With regard to the relation of this to Article 8, if the Tribunal agreed that it was a lawful decision not to exercise discretion that had no real weight in the Article 8 balance. It questioned the maintenance of a fair and effective immigration control and if the Tribunal disagreed without the exercise of the discretion the public interest would be materially undermined. If it were a lawful decision there was no real Article 8 claim with any weight.

43. By way of reply Ms Hulse contended that it was an arguably unduly harsh decision and therefore disproportionate and unreasonable. It was totally disproportionate with regard to Article 8. There was an interference and it had a very big impact on the appellant who had been in the United Kingdom for nearly thirteen years acquiring qualifications relevant to the United Kingdom. It was open to foreigners to apply as there was a shortage and there was the public interest which was important to enforce the Immigration Rules fairly. But it was unreasonable and it was unlawful. There was a question of the public interest in continuing foreign students coming to the United Kingdom for education.

44. As regards any adverse factors, there was nothing adverse. She was not guilty of any criminal or immigration offences. She had worked only in accordance with the Rules. She had developed her private life. There was a public interest in the United Kingdom being seen as a fair and reasonable country.

45. Ms Hulse relied on what was set out in the skeleton argument. It was the case that the appellant's status in the United Kingdom was precarious if she had less than indefinite leave to remain. The position of a person would always be precarious at any time up to obtaining indefinite leave to remain even after ten years of residence. The Tribunal was bound to consider the proportionality balance. There was enough evidence to consider what weight there was and to find it was in the public interest. Circumstances had been beyond the appellant's control.

46. I directed that both sides put in written submissions on the law as to the exercise of discretion. The respondent was to provide her submissions within seven days and the appellant respond within the seven days thereafter. However unfortunately there was a delay in receiving the submissions in particular from the Secretary of State, but ultimately both sets of submissions were received.

47. In his submissions Mr Lindsay argued that the Secretary of State had considered whether discretion should be exercised in the appellant's favour and decided it should not be. He contended that it was not disputed that the Rules and the policy were and are lawful or that the Secretary of State's decision gave proper effect to those Rules and that

policy. He argued that it was clear, as had been held in Ukus, that if a decisionmaker in the purported exercise of a discretion vested in him noted its function and what was required to be done when fulfilling it and then proceeded to reach a decision on that basis, the decision was a lawful one and the Tribunal could not intervene in the absence of a statutory power in deciding that the discretion should have been exercised differently.

48. He referred also to what had been said by the Supreme Court in Agyarko concerning the margin of appreciation due to the Secretary of State. He argued that it would tend to undermine the important policy objective consistency and predictability in the immigration system if the Tribunal could substitute its own view for that of the Secretary of State when she was due to consider the exercise of her discretion.

49. On behalf of the appellant it was argued that the Presenting Officer before the judge had erred in referring the First-tier Judge to section 39E of the Immigration Rules. The facts of the case were reiterated and it was argued that the appellant was fully integrated into the United Kingdom as a consequence of the amount of time she had lived here lawfully, now in excess of thirteen years. It was argued that had the judge not erroneously failed that the appellant was excluded from discretion under paragraph 39E, he would not erroneously have failed to consider the evidence before him, and would not have upheld the refusal of indefinite leave to remain by the respondent on the basis that the appellant had through no fault of her own and in circumstances beyond her control been out of the United Kingdom in excess of the permitted number of days and contrary to the Secretary of State's policy.

Discussion

50. The issue in respect of which I found there to be an error of law in the judge's decision was his failure to give any consideration to the period in 2015 when the appellant was outside the United Kingdom. It was a matter considered by the decision-maker, who commented that the appellant had decided to remain in the United Kingdom whilst trying to resolve the issue regarding the ATAS certificate and that she had experienced delays in Iran when attempting to obtain entry clearance and wished discretion to be applied to her case. The Secretary of State applied discretion, taking into account the fact that she could have left the United Kingdom with valid leave and applied for entry clearance to re-enter but had chosen to overstay in the United Kingdom with no valid leave.

51. I have set out above the submissions from the representatives in respect of this matter. As Mr Lindsay pointed out in his written submissions, the Secretary of State had considered whether discretion should be exercised in the appellant's favour and decided that it should not be. As he further argued, there is no basis in law for interfering with the decision under appeal where the exercise of discretion has been properly considered and

clear reasons given for the decision. In this regard he relied on the decision of the Upper Tribunal in Ukus [2012] UKUT 00307 (IAC).

52. I have set out above also the arguments made on behalf of the appellant concerning the difficulties that she experienced during the failure by ISAS to provide her with her ATAS certificate for six weeks after it was requested, leading to her overstaying by eight days and the difficulties she experienced thereafter in making her entry clearance application.

53. The difficulty with the submissions made on behalf of the appellant is that they do not show that the respondent unlawfully failed to consider the exercise of her discretion in coming to a decision in respect of that matter. The appellant filed her application under the ten year lawful residence Rule on 20 October 2016, before the amendment in paragraph 39E to applications made on or after 24 November 2016. That relates purely to an arguable error made by the judge and that decision has already been set aside. It does not seem to me that it can be said that the Secretary of State erred as a matter of law in the exercise of her discretion in this case. She gave proper consideration to the 2015 period of absence and the reasons given for it and came to a conclusion which was properly open to her. The further detail that is now provided is not such as can justify any interference with the exercise of the Secretary of State's discretion. The decision was a lawful one.

54. This is clearly a sympathetic case. The appellant has unfortunately experienced difficulties on both of the occasions which led to the significant periods of her time of her being outside the United Kingdom, but that cannot alter the lawfulness of the Secretary of State's exercise of discretion.

55. Nor do I consider that it is such as to place sufficient weight in the Article 8 balance as to render the decision disproportionate. In this regard I take full account of the evidence of the appellant's sister and the relationship between the two, as well as the appellant's private life with friends and her studies. It is clearly a close relationship and one which will be disturbed by the appellant leaving the United Kingdom. But I do not consider it has been shown that the decision is disproportionate and as a consequence I conclude that the Secretary of State's decision in this case was a lawful one and the appeal is dismissed.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date: 30 October 2019

Upper Tribunal Judge Allen