Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18090/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15th November 2018	**On 05th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR MATTHEW ADU LARTEY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Naik (Counsel)
For the Respondent: Ms L Kenny (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Callow, promulgated on 17th August 2018, following a hearing at Taylor House on 28th March 2018 and on 24th May 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

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2. The Appellant is a male, a citizen of Ghana, and was born on 6th August 1977. In what was described as "a long and complex history to this appeal" (paragraph 1) by the judge, the Appellant appealed against the decision of the Respondent Secretary of State, dated 10th June 2016, refusing his application for a variation of his leave to remain in the UK. The basis of the Appellant's appeal is his Article 8 rights, on account of his having been in this country for over thirteen years. He had arrived on 5th January 2005, in order to undergo a diploma in Christian studies at the London College of Business and Theological Studies, and this he completed on 28th February 2006. It is a feature of this appeal that the Appellant has remained in this country lawfully to a very substantial degree during the time that he has been here.

3. However, the Appellant's present difficulty arises when, in February 2016, he made an in-time application for an extension of stay in the UK, without a CAS letter from his college, as they were still awaiting confirmation of their Sponsor's licence from UKBA. In his witness statement of 2nd February 2016, the Appellant explains his predicament as follows:-

> "I approached Christ Church University in Canterbury where I was advised that I would have to wait until the next academic year which commenced in September 2014 and that in order to apply I had to have a minimum of six months' leave to remain as a student."

4. The Appellant further goes on to explain that,

> "On contacting Spurgeon's College, I was advised that the BA that I had obtained was no longer accepted by the Home Office for accreditation reasons and I would therefore have to complete another BA course before embarking on an MA course."

5. The Appellant then goes on to make it clear that,

> "Despite persistent efforts I was unable to find another institution which would accept me onto my desired course with my current immigration status and at a cost comparable to the fees I was paying previously …" (see paragraph 9 of IJ Callow's determination).

The Judge's Determination

6. In a detailed and comprehensive determination, the judge considered the specific issue in the appeal raised before him, observing that the Appellant was *not* alleging that the decision of the Respondent Secretary of State was contrary to the Rules or wrong in law, "but rather that the decision breaches rights protected under Article 8 of the ECHR". In this respect,

> "The Appellant's claim is founded on his well-established private life with family and friends and the overriding claim that he has been prevented from completing his studies for reasons beyond his control. Where the Rules have not been met, then significant facts of private interests must be identified to outweigh the public interest reflected in the Rules" (paragraph 24).

7. The judge went on to consider a distinctive aspect of this appeal, by way of background, namely, that there was an earlier decision by IJ Courtney in August 2013, which fell in favour of the Appellant on Article 8 grounds. An attempt to challenge this decision in the Upper Tribunal by the Respondent Secretary of State failed in October 2013. The judge rightly pointed out that this decision by IJ Courtney "is the starting point in addressing the Grounds of Appeal in the present matter".

8. The judge then properly summarised the essence of the claim before him observing that,

> "His overall length of residence since 2005, the majority of it lawful leave as a student or with clear explanations for the administrative failures leading to his technical overstaying which was recognised by IJ Courtney, was such that his appeal should succeed. None of the public interest considerations in Section 117 of the 2002 Act apply" (paragraph 25).

This, as the judge explained, was the Appellant's case in summary.

9. The judge went on to look at the Appellant's family life observing that it was "uncontentious that the Appellant's parents and siblings, naturalised British citizens, are all resident in the UK. He is accommodated by his family and is financially dependent on them". He also, however, had a son in his home country "with whom he is in contact", but that "beyond the fact of being in the UK for eighteen years" the Appellant, as the judge observed, was unable to show that there were very significant obstacles to his returning back to Ghana (paragraph 28).

10. In undertaking the balancing exercise, which the judge was required to follow, he observed that, if the Appellant's claim was to seek a further extension of time within which to apply for a student visa,

> "It has not been established, nor has any real attempt been made, to show that the Appellant could enrol at a college or university to study for a degree in his chosen field. He has not been able to obtain a CAS, a fundamental requirement to making an application for student leave" (paragraph 29).

11. Finally, in looking at the question of proportionality, the judge observed that, "whilst he was mindful of the fact that the Appellant had lived in the UK for eighteen years since the age of 22,

> "It has not been shown that the Appellant should be granted leave to remain to apply for a student visa and start his academic career all over again. While it is undisputed that the Appellant is capable in English (117B(2)), it has not been established that he is financially independent (117B(3))."

Ultimately, the judge held that "the maintenance of effective immigration control concerning students would be undermined if the Appellant were to be granted leave outside the Rules …" (paragraph 31).

12. The appeal was dismissed.

Grounds of Application

13. The grounds of application make three points. First, that the judge did not engage with Article 8 right to family life fully, confining himself only to the Appellant's claim that he was entitled to pursue his studies here, and this is clear from the statement that, "there is no right to be educated in the UK" (paragraph 31), that the judge makes. Second, that the judge failed to give sufficient weight to the decision of the previous judge, IJ Courtney, that the Appellant had indeed already established private life in the UK since 2005 (quite independently of his right to be educated in this country), and that he had been lawfully established as a genuine student. Third, that the First-tier Tribunal and the Upper Tribunal had accepted, in 2013 and in 2016 respectively, that to remove the Appellant would now breach his Article 8 rights. There had been a failure by the Secretary of State to act upon those decisions. Given the low threshold for interference, and the intervening factors which prevented the Appellant from enrolling on a course which he had amply set out in his witness statement, the judge was wrong to conclude that there was no interference with the Appellant's Article 8 rights.

14. Permission to appeal was granted by the Tribunal on 20th September 2018 on the basis that the judge had arguably erred in the consideration of Article 8 rights, by limiting this to the Appellant's right to education, when the Appellant had already been lawfully established in this country from 2005 onwards until 2010, as accepted by previous Tribunal decisions.

Submissions

15. At the hearing before me on 15th November 2018, Ms Naik made the following submissions.

16. First, that the judge below had erred in concluding that the Appellant's private life was not engaged because "there is no right to be educated in the UK" (at paragraph 31). This conclusion flew in the face of the determination by a previous judge that the Appellant had an established private life in the UK since 2005, and that in 2013 and in 2016 both the First-tier Tribunal and the Upper Tribunal had accepted that to remove the Appellant would breach his Article 8 rights.

17. Second, that in his reasons, the judge erred in concluding that the refusal of the Appellant's claim under Article 8 was necessary and proportionate for the two reasons given by the judge. First, the judge had stated that the Appellant's failure to obtain a CAS in order to make an application for leave to remain as a student was a factor to be counted against him in the Article 8 balancing exercise undertaken outside the Immigration Rules. However, the Appellant had properly explained that he was unable to obtain a CAS without having leave to remain as a student and that he needed longer than 60 days in order to obtain such a CAS to enrol on a

course. The second reason given by the judge was that the Appellant had made no attempt to show that he met the requirements of the Immigration Rules, and this too was wrong, because the judge himself set out at extensive length the Appellant's attempts to enrol at Christ Church University in Canterbury, after which he approached Spurgeon's College, and then also approached the Redeemer Bible College in Camberwell (see paragraph 9 of the determination). Moreover, because of the delay occasioned to the Appellant, which was not of his making, since 2010, his position now was that he would have to do his BA course again, and could not commence his MA course as he had planned to do, and this too went to the balancing exercise that had to be undertaken in relation to the proportionality exercise.

18. Third, Ms Naik submitted that the judge erred in law in failing to accord any weight to the unlawful decisions of the Secretary of State to refuse to grant the Appellant a period of leave, which was required in order to give effect to the 2013 determination, and the ongoing Article 8 breach from 2011 to 2016. The fact was that the refusal of the Secretary of State to extend the Appellant's leave, left the Appellant with no effective mechanism to restore himself to study, and in order to allow him the scope to resolve his immigration status in any meaningful way, such that the decision of the Secretary of State was not in accordance with the law and nor was it consistent with the previous determination which had to be given effect in order to protect the Appellant's Article 8 rights outside the Immigration Rules.

19. For her part, Ms Kenny helpfully began by stating that the chronology that had been extensively set out in the skeleton argument of Ms Naik was not in dispute. However, she stated that the Appellant had submitted his application, when he had been given a period of grace, but it was important to look at his present situation, which was that he was unable to complete his study, as he did not have a CAS. The Appellant could only succeed on the basis of his private life, but this he could not do, because as the judge explains, the Appellant had no college to go to, no recognition of his BA degree, and quite simply had to start all over again. That was the reality of his situation. The judge is clear that, "it has not been shown that the Appellant should be granted leave to remain to apply for a student visa and start his academic career all over again" (paragraph 31).

20. Second, the judge had been fully cognizant of the previous decision in 2013 in the Appellant's favour by IJ Courtney (see paragraph 25), but what militated against the Appellant was Section 117B, with regard to which the judge first concluded that the Appellant was not financially independent (see Section 117B(3)), and then went on to say that,

> "In the absence of showing that he could meet the requirements of the Rules for the issue of a student visa, the public interest in the maintenance of effective immigration control is engaged (117B(1)). The maintenance of effective immigration control concerning students would be undermined …" (paragraph 31).

21. In reply, Ms Naik submitted that the plain fact was that the Appellant could not get a CAS unless he was granted leave by the Secretary of State. Moreover, 60 days was not enough, in terms of the length of period needed, where it is noted that the Appellant had not been given leave since 2010, on account of the failure of the Secretary of State to give effect to the decisions previously of the First-tier Tribunal and the Upper Tribunal. The judge was factually wrong to say that there was no evidence that "any real attempt has been made, to show that the Appellant could enrol at a college or university …" (paragraph 29). This is because as the evidence set out by the judge itself demonstrates (at paragraph 9) the Appellant had made enquiries, and was a genuine student, such that there were in this case "exceptional circumstances", borne out of a situation of constant to-ing and fro-ing, with the Secretary of State procrastinating and refusing to give effect to previous judicial decisions, and thus putting the Appellant in a situation where no leave had been given to him since 2010. There was evidence before the Tribunal that the Appellant's parents had always supported him both for his accommodation and for his financial needs and the judge accepts that this is the case (at paragraph 28), and therefore the judge was wrong to say that the Appellant was unable to demonstrate grounds for why this appeal should be allowed.

Error of Law

22. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake it. My reasons are as follows.

23. First, the judge begins his analysis with the observation that in the present appeal the Appellant is seeking a further extension of time within which to apply for a student visa, but that "it has not been established, nor has any real attempt been made, to show that the Appellant could enrol at a college …" (paragraph 29). This is not correct, because the Appellant has made a real attempt to enrol at a college, and the judge provides evidence for this at paragraph 9 of the determination.

24. Second, in looking at the situation to remain outside the Immigration Rules (at paragraph 30), the judge goes through the established case law, but then concludes that the denial of leave to remain does not amount to an interference, "where there is no right to be educated in the UK" (paragraph 31). The judge erred in confining his consideration, with respect to Article 8 outside the Immigration Rules, to simply the right to education in the UK. This is because it had already been found in 2013 and 2015 that the Appellant had established Article 8 rights to remain in the UK, since his arrival in this country in 2005, over a period of what was now eighteen years, so that to suggest that Article 8 was not even engaged is not correct. Insofar as the judge does consider the Appellant's claim to continue with his desire to be educated in the UK, the judge fails, in looking at the situation outside the Immigration Rules, to take into account the fact that the Appellant has to start all over again. This is

because his difficulties to enrol for an MA in 2016 arose because the BA awarded to him by Trinity College and by Theological Seminary, was now no longer recognised, and this was the direct result of the passage of time for which he was not responsible. The judge had himself in fact noted that, "if he were to attempt to embark upon an MA, he would first have to undertake another BA course of study: in order words, start again" (paragraph 27).

25. Third, even with respect to the judge's focus, on the Appellant's claim that he should be granted a further extension of time within which he could apply for a student visa, the judge's approach to Section 117B is misconceived when he states that,

> "Contrary to the submissions made by Ms Naik, it has not been shown that the Appellant should be granted leave to remain to apply for a student visa and start his academic career all over again. While it is undisputed that the Appellant is capable in English, it has not been established that he is financially independent. In the absence of showing that he could meet the requirements of the Rules for the issue of a student visa, the public interest in the maintenance of effective immigration control is engaged (117B(1)). The maintenance of effective immigration control concerning students would be undermined …" (paragraph 31).

26. In **Rhuppiah [2018] UKSC 58**, the Supreme Court has recently affirmed that, whilst it is the case that Section 117B makes it clear that "little weight should be given to a private life established by a person at a time when the person's immigration status is precarious", nevertheless,

> "The provisions of Section 117B cannot put decision-makers in a straight-jacket which constrains them to determine claims under Article 8 inconsistently with the Article itself. Inbuilt into the concept of 'little weight' itself is a small degree of flexibility."

27. In fact, "Section 117A(2)(a) necessarily enables their applications occasionally to succeed" (paragraph 49). The judge in the instant case erred in effectively putting himself in a straight-jacket which constrained his ability to determine Article 8 inconsistently with the Article itself. The judge went on to say that in 2013 it was just for the Appellant to be given time by IJ Courtney and in November 2015 by UTJ Storey within which to apply for an extended visa, "but which is now very different in that the Appellant regrettably, must start all over again" (paragraph 31). This fails to take account of the full amplitude of Article 8 itself.

Remaking the Decision

28. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the following reasons.

29. First, this is a case where the Appellant had come to the UK lawfully, and then lived here continuously for over ten years when, whilst engaged in his Masters course and supported and accommodated by his family who are

settled in the UK, his initial application for leave to remain as a student was refused on technical grounds.

30. Second, in his previous successful 2013 appeal before IJ Courtney, it was established that the Appellant had a significant private life with family and friends in the UK, and that he had been prevented from completing his studies in circumstances which outweighed the public interest of immigration control that required his removal, so that he should be granted further leave to remain. This means that the Appellant has established private life in this country.

31. Third, the Respondent Secretary of State's policy normally is to grant up to 30 months' leave to remain after a successful appeal against a removal decision on Article 8 human rights grounds. However, in this case, the Appellant was not granted 30 months, and it is not clear why the Respondent Secretary of State departed from this policy. The Appellant's appeal was not one involving a student appeal, but a human rights appeal. Had the Appellant been granted a full 60 days' leave to remain, some four years ago when he succeeded in his immigration appeal, the present problem may well not have arisen.

32. Fourth, this means that a proper implementation of the Appellant's previously successful appeal on human rights grounds, which would be consistent with his acknowledged right to respect for his private life, means that a period of discretionary leave should be granted to him, permitting him to live, and work, and study for a suitable time to enable him to find a course that will enable him to complete his masters degree.

33. Fifth, the balance of considerations in any proportionality exercise falls in favour of the Appellant because he has lived in the UK for eighteen years since the age of 22. He migrated to the UK lawfully. He has an established private and home life in the UK with friends and family.

34. There has been a "historic injustice" to the Appellant if full regard is had to his history and the administrative errors that have impacted upon him. When the Article 8(2) balancing exercise is performed, it is clear from established jurisprudence that the "historic injustice" falls to be taken into account. It is not irrelevant.

35. As was made clear by the Court of Appeal in **Gurung** (at paragraphs 36 to 37), the "requirement to take the injustice into account in striking a fair balance between Article 8.1 right and the public interest in maintaining a firm immigration policy is inherent in Article 8(2) itself …"

36. The Appellant's case is not one where he is seeking to rely upon Article 8 as a general dispensing power because he cannot meet the requirements of the Rules.

37. His case is that he is able to demonstrate that the Secretary of State's refusal to exercise discretion outside Article 8 is not a necessary and

proportionate exercise of power because of his established private life right. This, together with the reasons set out above as to why he was not able to continue with his studies after his leave was originally not extended, as well as the success of his human rights appeal, which was not appropriately followed through by the Secretary of State, means this appeal must be allowed.

Notice of Decision

38. The decision of the First-tier Tribunal involved the making of an error on a point of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

39. No anonymity direction is made.

40. This appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 18th January 2019

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have made a fee award of the amount that has been paid or is payable.

Signed Date

Deputy Upper Tribunal Judge Juss 18th January 2019