Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/21466/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 January 2019	**On 11 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JORDAN

Between

ADRESHEU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P. Lewis, Counsel instructed by Kidd Rapinet, Solicitors
For the Respondent: Mr T. Lindsay, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Kyrgzstan who was born on 17 November 1984. He appeals against the decision of First-tier Tribunal Judge Wyman promulgated on 23 August 2018 dismissing his appeal against the decision of the respondent made on 25 August 2016 refusing him leave to remain in the United Kingdom on the basis of a family and private life that he has acquired with other members of his family settled lawfully in the United Kingdom.

2. The appellant first entered the United Kingdom on 8 June 2004 with entry clearance granted until 31 March 2006. Entry clearance was granted to him as a student. He was already an adult when he entered the United Kingdom. (He was then aged 19.) He returned to Kyrgzstan at the conclusion of his period of leave by which time he was 21 years old. Whilst this period of lawful leave as a student falls into consideration as part of his immigration history, it does not materially add to his present claim that he should not now be removed.

3. The appellant returned to the United Kingdom some 12 months later on 5 April 2007. He has remained here ever since. The appellant was then aged 22. Once again, he entered the United Kingdom with leave as a student which was, in due course, granted until 30 September 2009. He was then aged 24. His studies had then ended although he applied, unsuccessfully as a Tier 4 General Student in September 2009 which was refused in November 2009. By then he was aged 25; his studies having effectively ended, there was no further basis upon which he might reasonably have argued that he had a right to remain in the United Kingdom, notwithstanding the presence of his mother and younger brother. At the conclusion of his leave, the appellant overstayed. Over a year later, in 2011, he applied for leave to remain on the basis that it would be a violation of his human rights to remove him.

4. Making all due allowance for the limitations of hindsight, the appellant would have experienced almost insuperable difficulties in establishing, at the end of his student leave, having spent 2 ½ years lawfully in the United Kingdom and more than a further year unlawfully, that his removal was then unlawful. The result would have been the same whether or not his mother and brother were settled in the United Kingdom.

5. His application to remain on human rights grounds was refused on 16 February 2011. That decision was not the subject of an appeal. It supports what I set out in paragraph 4 that he had not acquired a protected private or family life.

6. There then followed a period of 5½ years during which the appellant's immigration status remained unresolved. Some time later, (and I was not told the date) the appellant sought reconsideration of the 2011 decision. This was refused on 27 October 2015. The appellant was refused an in-country right of appeal although he was granted a right of appeal that he might only exercise after he had left the United Kingdom.

7. By that time, the appellant had first entered the United Kingdom some 11 years before and some 8 years after his last lawful entry. However, his leave had expired on 30 September 2009, over six years before the October 2015 decision.

8. That decision was unlawful. Judicial review proceedings were settled on 24 May 2016 by consent upon the respondent agreeing to withdraw the October 2015 decision. By a further decision made on 25 August 2016, the Secretary of State again refused the appellant's application. The period between 27 October 2015 and 25 August 2016, some 10 months, represents a delay in the process which can authoritatively be attributed to the Secretary of State by his making an unlawful decision.

9. The decision was made on the basis that the appellant would be afforded a right of appeal. It is this appeal that came before First-tier Tribunal Judge Wyman in August 2018. That was some 7½ years after the appellant's application of 2011. By then, the appellant was 31 years old. By the time the matter came before me he was 34 years old. However, his last leave had expired in September 2009, almost 9 ½ years ago.

10. The respondent's decision was reached after a consideration of the Immigration Rules. When the appellant entered the United Kingdom in April 2007 he had spent almost his entire life in Kyrgzstan and there were no very significant obstacles in his returning there. The appellant speaks Russian, the country's official language. The appellant, however, claimed that, although he was healthy, he had an emotional dependency upon his mother and brother both settled in the United Kingdom. He was exceptionally close to them and this rendered it disproportionate to remove him.

11. The evidence before the Tribunal was that his mother's elder sister still lives in Kyrgzstan. (There are four other aunts and one uncle with whom the mother has no contact.) His mother still visits although she no longer owns property there.

12. It thus becomes necessary to consider the circumstances in which his mother and his younger brother acquired settled status which has not been afforded to the appellant.

13. The appellant's mother came to the United Kingdom in 2002 in order to advance her studies. She came on a teacher-exchange programme. At that time the appellant was aged 17 and was left with his maternal grandmother. The grandmother died in 2003. By December 2003, the appellant's mother had married a British citizen, Mr Davis. The couple had met in early 2003. By December 2003, however, the appellant was already an adult. According to paragraph 48 of the Judge's determination, it was the couple's intention to bring both her children to the United Kingdom. The appellant's younger brother was still a minor and he entered the United Kingdom as a dependant of his mother in December 2004. The appellant's aunt had looked after his younger brother (and, perhaps, to some extent the appellant) in the interim.

14. The appellant, unlike his brother, could not seek entry as a minor. Hence the decision to obtain entry as a student with limited leave to enter. He did so in June 2004, returning to Kyrgzstan at the end of his student leave in March 2006.

15. The same thinking prompted a re-entry into the United Kingdom as a student on 5 April 2007.

16. Mr Davis and his mother are settled in the United Kingdom. His younger brother, five years the appellant's junior, was 28 years old at the hearing before the Judge. He works as a bus driver but hopes to qualify as an electrician. He married in 2015. At the time of the hearing, he was still living with his mother and step-father but was hoping to move out to his own home in the course of the year. Both he and his mother are British citizens. His wife works as a sales executive for Harrods.

17. The appellant's mother had given evidence that her first marriage had been unhappy and that she had been subjected to domestic violence. His father left the family in 1989 when he was just five years old. This has resulted in the appellant having lost contact with his father and his paternal relatives. The appellant explained that this traumatic event led to his being ostracised by the family.

18. The appellant relied upon the circumstances of his separation from his father when he was aged 5; his mother's isolation from the father's family since then; the departure of his mother to the UK in 2002 and his remaining in Kyrgzstan with his younger brother and with his grandmother and then his aunt.

19. Medical evidence was produced before the First-tier Tribunal. In a letter from the Whittington Hospital following a bout of gastrointestinal and abdominal pain, it is recorded that the appellant was drinking excessively and that he reported drinking a bottle of vodka a day which had been increasing in the previous two months due to an event which the appellant was reluctant to explain. There were incidents on 22 February 2018 and 12 July 2018 when the appellant was admitted to Accident and Emergency as a result of excessive drinking.

20. Dr Saleh Dhumad, a consultant psychiatrist and cognitive behavioural psychotherapist, provided a report dated 23 January 2018. He has a special interest in PTSD and is a senior lecturer and trainer in cognitive behavioural therapy in Iraq and has trained and supervised doctors in the diagnosis and treatment of PTSD. He is an international speaker on the subject of trauma and conflict.

21. The appellant described to Dr Dhumad that he had been detained in immigration detention for some three weeks in November 2015 and a further two days in March 2016. He stated that this had resulted in a

material deterioration in his mental health as a result of what he considered to be the traumatic circumstances of his detention. Upon his release, he commenced to drink excessive amounts of alcohol and attended a private clinic on two occasions in January 2016 and August 2017 for treatment. He told the doctor that he had not used alcohol since then, save in moderation.

22. Dr Dhumad diagnosed the appellant as suffering the symptoms of post-traumatic stress disorder. At that time, the appellant told Dr Dhumad that he had not informed his GP about his mental health and was not then on medication. Dr Dhumad considered that the appellant's presentation was consistent with the diagnosis of moderate Depressive Episode. There was a moderate risk of suicide which increased in the context of deportation and the main factors in his condition were depression, PTSD and hopelessness. His family in the United Kingdom are his main protective factor. His sense of hopelessness impacts upon the suicide risk, increasing it significantly when he feels that deportation is close.

23. The First-tier Tribunal Judge summarised the report of Dr Dhumad in paragraphs 53 to 56 of his determination. It is clear that he had the contents of the report well in mind when he reached his conclusion.

24. The report is further considered in paragraph 64 of the determination and its wider implications in relation to what was then current medication and further steps to seek treatment between paragraphs 71 and 73 as well as in paragraph 83. His depression has since been treated by his GP using antidepressants.

25. The grounds of appeal argue that the First-tier Tribunal erred in law. The first ground is that the First-tier Tribunal Judge failed to have regard to the psychiatric evidence. As I have pointed out above, the Judge made copious references to the evidence of Dr Dhumad. That was the evidence before him. The evidence as a whole was limited in the sense that there was little evidence from the GP who had only recently referred him for an initial assessment with a counsellor in May 2018. He was waiting to start further psychological work. His only medication were antidepressants prescribed as recently as March 2018. There was no evidence of his admission to a private clinic in January 2016 and August 2017. The Judge expressly found that this was 'surprising' in paragraph 64 of his determination. There was no evidence that the appellant had ever seen a counsellor. There was no evidence about his treatment for alcohol abuse. In his evidence, the appellant said that Dr Patel had offered to refer him to alcohol services but he had failed to take any steps in this regard. In my judgement this was ample evidence for the judge to comment on the limitations of the medical evidence. I do not construe that to mean that he was commenting upon any limitations in Dr Dhumad's report.

26. The diagnosis that Dr Dhumad had made about the appellant suffering from depression was implicitly accepted by the judge in his references to his being prescribed medication for depression, albeit as recently as March 2018. The diagnosis that Dr Dhumad had made in relation to PTSD is likely to refer to the effect of his period in immigration detention (some 23 days in all). There is no suggestion that this detention was unlawful, given the appellant's immigration status, but that does not undermine the appellant's claim about its personal effect upon him. Whilst the appellant may have been the victim of a broken marriage, his father left him when he was five years old, 29 years ago. There is no doubt that the uncertainty about the appellant's immigration status will have contributed to his sense of hopelessness and depression. That is wholly understandable. All of these considerations were apparent from Dr Dhumad's report to which the Judge referred but there was no need for the Judge to go further.

27. He has family support in the United Kingdom. He will have the support, at least, of his aunt on return. His mental health must, and will be, monitored during his travel home. There is no history of self-harm, save through alcohol abuse. The evidence does not establish the risk of suicide is such as to prevent removal.

28. I reject the first ground of appeal.

29. The second ground speaks of the First-tier Tribunal Judge's failure to have regard to the delay. I have been at pains to point out the chronology in the foregoing paragraphs in order to set out in detail the reasons why the Tribunal is considering in 2019 an application made in 2011. However, the chronology which I have adopted has been entirely derived from the date set out in the determination. All the material dates are there. The Judge was well aware of the delays implicit in his recital of the immigration history.

30. Delay is a feature regardless of who is responsible for it because it provides the appellant with the opportunity to develop an ever closer private and family life. The personal effect of delay upon an individual may be the same in the case of a person who has entered the United Kingdom illegally and remained incognito for the next 10 years as in the case of a person who entered lawfully and applied for further leave to remain and then had to wait 10 years for a decision. Nevertheless, the delay in those two contrasting examples is likely to be treated differently by the Tribunal. It thus becomes necessary, whilst acknowledging the overall period during which the appellant's immigration status has been unresolved, to consider how that situation has arisen.

31. Following the appellant's arrival in the United Kingdom on 5 April 2007, his period of leave expired on 30 September 2009. He then overstayed. The application before me is an application made in 2011 which was

refused on 16 February 2011. The decision was later reconsidered by the Secretary of State and refused again on 27 October 2015. There is little evidence about whether the delay in making the decision on 27 October 2015 was entirely attributable to the respondent but, inferentially, at least some of it is likely to have been. I have already pointed out that the 10-month delay between 27 October 2015 and August 2016 was attributable to the fact that the appellant was not afforded an in-country right of appeal. Thereafter, time has elapsed in the course of the appeal process. The First-tier Tribunal did not finally hear the appeal until 1 August 2018, the determination followed swiftly on 23 August 2018; leave to appeal was refused in the First-tier Tribunal. It was granted by the Upper Tribunal on 27 December 2018. Directions were given on 3 January 2019 in the hearing before me took place on 29 January 2019.

32. In the course of this process, the appellant has never received an indication that his application or his subsequent appeal was likely to succeed. Since he first overstayed in 2009, his subsequent applications have never carried a right to be treated as a person with continuing leave. His immigration status has always been precarious. As I pointed out, the human rights claim did not have a realistic chance of success when it was made in 2011. It has inevitably improved with the sheer passage of time but the delay cannot all be attributed to the fault of the Secretary of State. Apart from the passage of time, the family situation has remained remarkably stable. The mother and brother's claim have always been secure and neither is dependent on the appellant for any specific support. Whilst the strength of the emotional bond that is said to exist has been consistently highlighted by the appellant, there is little firm evidence that its character is different from the normal relationship between a parent and a child or between siblings save for the fact that they are in a position of relative strength created by their own secure position in the UK whilst the appellant is in a position of relative need created by his own insecurity. That, however, is the same is almost all cases where a settled relative provides a home to a non-national with a precarious immigration status.

33. For these reasons, I am not satisfied that delay arising through the default of the respondent accounts for a significant period, save for those periods which I have identified above. The fact that the appellant has been in the UK for a considerable period of time *must* go into the balance (indeed it is his presence in the United Kingdom which is the *principal* factor in his favour given the fact that he had no arguable claim to remain when his leave expired and he remained as an overstayer). But I am not prepared to equate *presence* with *delay* save as I have earlier indicated. Further, there is no doubt that the Secretary of State has always made it clear what his intention has consistently been since the first adverse decision was made in 2011 and has never given the appellant any indication that he has a right to stay. That does not mean that the appellant will not have *hoped*

he might remain, however groundless that aspiration might have been. That is, doubtless, what this drawn-out process of decision-making and litigation brings in its wake. That, however has to be set against the fact that there is also public a interest gravitating against permitting to remain a person who, many years ago, entered the United Kingdom as a student and who overstayed, notwithstanding the presence of other family members, unless the situation is exceptional.

34. I note that Mr Lewis in his undated skeleton argument before the First-tier Tribunal does not refer to delay as a separate element of the claim, although mentioning the length of time that the appellant has spent in the United Kingdom. This may explain why the Judge did not deal with the issue under a separate heading.

35. Although it was not raised before me, I am conscious of the striking disparity between the appellant and his brother, five years his junior. The brother is a British citizen, married, in work with good prospects and about to start a home of his own. The stark difference arises, of course, because the appellant's brother entered the United Kingdom as a minor and was able to enjoy the vicarious benefits derived from his mother's status as the spouse of a British citizen. The appellant, as we have seen, has at all relevant times been an adult, albeit a young adult, and the Immigration Rules do not provide for similar treatment to those who are in a position to lead an independent life. The fact that the mother has chosen to remain in the United Kingdom is a matter of choice, made reasonably, but it was always a decision that would have consequences. Neither she nor her husband could determine where the appellant would settle; indeed, this was known to the couple and was reflected in the decision to have the appellant enter the United Kingdom as a student. He could not have entered as a family member and even a creative application of Article 8 would not have led to such a result.

36. I am satisfied that the First-tier Tribunal Judge did not make a material error of law.

DECISION

The First-tier Tribunal Judge made no error on a point of law and the determination of the First-tier Tribunal shall stand.

ANDREW JORDAN
DEPUTY UPPER TRIBUNAL JUDGE
8 February 2019