



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/11573/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 8<sup>th</sup> April 2014**

**Determination  
Promulgated**

**On 01<sup>st</sup> May 2014**

**Before**

**DESIGNATED JUDGE MURRAY**

**Between**

**MUHAMMAD ALI  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Miss K Currie, Counsel, for Marks and Marks Solicitors,  
Harrow

For the Respondent: Mr N Bramble, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a citizen of Pakistan, born on 9<sup>th</sup> September 1983. He appealed the decision of the Respondent dated 27<sup>th</sup> March 2013 refusing

him leave to remain in the United Kingdom as a student under the provisions of paragraph 245ZX(ha) of the Immigration Rules, because by the time of the completion of his course he would have spent more than six years in the United Kingdom as a Tier 4 (General) Student and the provision of the Rules proscribes this. His appeal was heard by Judge of the First-tier Tribunal Eldridge and allowed on human rights grounds, in a determination promulgated on 17<sup>th</sup> December 2013.

2. An application for permission to appeal was lodged by the Respondent and permission was granted by Judge of the First-tier Tribunal Pooler on 5<sup>th</sup> March 2014. The grounds of application state that the judge erred in law by finding that Article 8 was engaged or alternatively failing to find that the decision was proportionate. The grounds rely on **Patel and Others v SSHD [2013] 3 WLR 1517 UKSC 72** and go on to state that the judge, who relied on **CDS Brazil [2010] UKUT 00305 (IAC)**, made a material misdirection of law in light of the decision in **Patel**.

### **The Hearing**

3. There were no preliminary issues and the Presenting Officer submitted that he is relying on the grounds of application, submitting that the judge did not approach the private life issue in the correct way.
4. He submitted that at paragraph 22 the judge stated that the appellant's application could not meet the terms of the Immigration Rules and this was accepted by his representative.
5. At the time of the hearing the appellant had been in the United Kingdom for nine years. At paragraph 33 the judge states that the appeal cannot succeed in respect of his family life as he has no family life in the United Kingdom.
6. The Presenting Officer submitted that at paragraph 37 the judge heads into "near miss" territory. He found that the refusal of further leave to remain is an interference with the Appellant's private life. He goes on, at paragraph 38, to refer to the gravity of the interference being such as potentially to engage the protection of Article 8. At paragraphs 41 and 42 the judge deals with proportionality and the balancing act. He found that the Appellant's private life outweighs public interest and the necessity for effective immigration control.
7. I was referred to the said case of **Patel** at paragraphs 56 and 57. In these paragraphs it is stated that Article 8 is not a general dispensing power and the opportunity for a promising student to complete his course in this country however desirable in general terms, is not in itself a right protected under Article 8. The Presenting Officer submitted that the judge should have looked at the appellant's moral and physical integrity. He submitted that there is nothing in the evidence about any other aspects of

the appellant's private life apart from his studies, which would be interfered with. He submitted that the Grounds of Appeal relating to the First-tier hearing do not set out any private life; all they do is state that to remove the appellant would be contrary to his human rights.

8. I was referred to the appellant's witness statement in which he states "I also request the Tribunal to consider the appeal under Article 8 if not under the Immigration Rules." What the appellant seems to be doing is relying on the fact that he has no criminal record and is a genuine student. The Presenting Officer submitted that the case law has moved on in this respect and I was referred to the case of **Nasim and Others [2014] UKUT 00025 (IAC)**. **Patel and Others** is referred to in this case and in the headnote it refers to Article 8's limited utility and private life cases that are far removed from the protection of an individual's moral and physical integrity.
9. The Presenting Officer submitted that there is nothing in this claim which raises it to the threshold required for it to succeed under Article 8 of ECHR. In the case of **Nasim** it is stated that a person's human rights are not enhanced by not committing criminal offences or not relying on public funds. He submitted that the core of **Nasim** is addressed at paragraph 20 thereof and that unless there are particular reasons to reduce the public interest of enforcing immigration control, that interest will consequently prevail in striking a proportionality balance.
10. He submitted that the public interest in immigration control in this case, must have greater weight than the circumstances in this appellant's case. The fact that the appellant has accrued time as a student is not enough for this claim to succeed under Article 8. The appellant was always in the United Kingdom for a limited period.
11. The Presenting Officer submitted that this is an error of law on the part of the judge.
12. The appellant's representative made her submissions relying on her grounds of application. She referred to the fact that the Tribunal had found that Article 8 was engaged and she submitted that **CDS Brazil** is relevant.
13. She submitted that there was no material error made by the judge in referring to CDS (Brazil) and referred me to paragraph 41 of the said case of **Nasim and Others** which refers to **CDS Brazil**. This states that it would be going too far to find that the remarks in **CDS** regarding Article 8 were no longer good law and it would be wrong to say that the point has been reached where an adverse immigration decision, in the case of a person who is here for study or other temporary purposes, can never be found to be disproportionate. The headnote in **CDS Brazil** states that a person who is admitted to follow a course that has not ended, may build up a private life that deserves respect and the public interest in removal before the end of the course, may be reduced where there are ample

financial resources available. She submitted that the Presenting Officer saying that **CDS** is no longer good law is taking this point at too high a level. She submitted that there is no longer any “near miss” but in any case, this would not be a “near miss” situation. The judge has not argued that this application nearly meets the Rules.

14. She submitted that the appellant’s case has to be decided outside the Rules and all his circumstances have to be considered.
15. The representative submitted that in exceptional cases a student’s Article 8 claim can succeed and although the judge did not specifically refer to the case of **Patel** he understood the principles therein and that is clear from the determination.
16. I was referred to paragraphs 42 and 43 of the determination. These paragraphs deal with public interest and effective immigration control versus a student who can show that he is genuine in his intentions and can meet the financial requirements. They state that a student with this criteria should have his private life considered and weighed against public interest, when proportionality is assessed. She submitted that the judge was aware of the importance and the difficulty of establishing private life and that he was aware of the cases of **Patel** and **Nasim and Others**. At paragraph 38 the judge states that the gravity of the interference is such as potentially to engage the protection of Article 8. He stresses that the appellant has a wish to follow an academic career and that this Masters Degree will help him to achieve this aim and that he has ten years of study and working behind him and this gives him a strong private life in the United Kingdom, sufficient for Article 8 to be engaged. She submitted that this appellant’s private life circumstances are exceptional compared to many other students’ circumstances.
17. With regard to proportionality the appellant’s representative submitted that the Home Office has not argued that the judge has given insufficient weight to certain matters. The Secretary of State has not argued that the appellant’s private life is insignificant. She submitted that the judge has given sufficient weight to public interest and immigration control and has balanced this against the appellant’s private life interests and found that the weight must fall in favour of the appellant. She submitted that the judge has weighed up all the circumstances properly and proportionally and there is no material error of law in the determination.

### **Determination**

18. The judge and the appellant’s representative have accepted that this appellant’s application does not meet the requirements of the Immigration Rules and that at the conclusion of his course he will have studied at Degree level or above, for seven and a half years. The Rules state that a student cannot spend more than six years as a Tier 4 (General) Student.

The judge has found that the appellant has no family life in the United Kingdom.

19. At paragraph 34 onwards the judge deals with the appellant's private life under Article 8 of ECHR. He refers to the case of **Razgar [2004] UKHL 27**, finding that the gravity of the interference to the Appellant's private life, potentially engages the protection of Article 8, particularly in view of the fact that the appellant wishes to pursue an academic career, rather than a professional career, as an accountant.
20. At paragraph 44 the judge refers to the case of **CDS Brazil**. When the Presenting Officer submitted that this case can no longer represent good law this is taking its findings at too high a level but the judge has not considered the said cases of **Patel** and **Nasim and Others**.
21. Based on what was before him, the only evidence there is of private life is the appellant's studies. It is clear that he is a diligent student, has been here lawfully for ten years and is able to maintain himself but this is the only information we have about his circumstances. When this is weighed against public interest, based on the relevant case law, the Appellant's claim cannot succeed. The case of **CDS** is dated before the cases of **Patel** and **Nasim and Others**. The judge has not considered the most recent case law when making his decision. He does not refer to these cases and his decision does not follow their guidance. This claim is directly against the terms of the Rules. For the appellant to complete his MSc, will mean that he will have been in the United Kingdom studying at Degree level or above, for seven and a half years. There is nothing exceptional in this case. The case of **Patel** refers to the weight to be given to the maintenance of immigration control and refers to there being no "near miss" policy but this has never been a "near miss" claim. As stated in **Patel** "A Rule is a Rule". Rules have to be treated as such. When proportionality is assessed the terms of the Rules cannot be met and this must weigh against the appellant. The case of **Patel** states that Article 8 has to be distinguished from the Secretary of State's discretion to allow leave to remain outside the Rules, which may be unrelated to any protected human right. It refers to graduates who have been studying in the UK for some years and states that this consideration does not, by itself, provide grounds of appeal under Article 8, which is concerned with private life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under Article 8. This is the guidance which should have been followed by the judge and was not.
22. The case of **Nasim and Others** refers to Article 8's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity. The judge has not considered the appellant's moral and physical integrity. The only private life that we are aware of is his leave in the United Kingdom as a student. What the Appellant has in his favour is the fact that he has no criminal record and is able to pay for his course without relying on public funds. This is not

sufficient for the assessment of proportionality to fall on the side of the Appellant when all the circumstances are taken into account. Public interest must outweigh this Appellant's Article 8 claim. The case of **Nasim and Others** refers to the said case of **Patel** and at paragraphs 41 and 42 refers to the said case of **CDS Brazil**. It states that it is unlikely that a person would be able to show an Article 8 right by coming to the United Kingdom for temporary purposes. That is what this Appellant did. Under the law as it stands, there is no justification for extending the obiter findings of **CDS** so as to equate a person, whose course of study has not yet ended, or who, having finished their course, is precluded by the Immigration Rules from staying on to do something else.

23. The judge in this case has made a material error of law by not considering the relevant country guidance cases and making a decision against the guidance in these cases.

### **Decision**

24. There are material errors of law in the judge's determination.
25. The appeal cannot succeed under the Immigration Rules and cannot succeed under Article 8 of ECHR.
26. I uphold First-tier Tribunal Judge Eldridge's decision under the Immigration Rules but set aside her decision on human rights grounds.
27. No anonymity direction has been made.

Signed

Date

Designated Judge Murray  
Judge of the Upper Tribunal