



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

Appeal Number: IA/19668/2013  
IA/19669/2013  
IA/19670/2013  
IA/19671/2013

**THE IMMIGRATION ACTS**

**Heard at Glasgow  
on 1 April 2013**

**Determination  
Promulgated  
On 7 April 2014**

**Before**

**UPPER TRIBUNAL JUDGE MACLEMAN**

**Between**

**NOUSHEEN REHAN + husband and two children**

Appellants

**and**

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

Respondent

For the Appellant: Mr C H Ndubuisi, of Drummond Miller, Solicitors  
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

No anonymity order requested or made

**DETERMINATION AND REASONS**

- 1) The first appellant ("the appellant") entered the UK as a student in 2004. She was later granted leave to remain in the Tier 1 (Post-Study Work) category until 13 January 2012, with her husband and children as her dependants. On 11 January 2012 she sought leave to remain on the basis of her relationship with her husband and two children. By letter dated 10 May 2013 the Respondent refused the applications under Appendix FM of the Immigration Rules (considering the partner route, private life, the family unit, and leave to remain as a child).

2) First-tier Tribunal Judge Agnew dismissed the appellant's appeals by determination promulgated on 20 December 2013.

3) The appellant's first ground of appeal to the Upper Tribunal is as follows:

The judge erred in law in carrying out a proportionality assessment under Article 8 in that she failed to consider a relevant factor, while at the same time considering an irrelevant consideration. At paragraph 31 of the determination it was submitted that the family had now been residing in the UK for 9 years and 9 months and would be able to apply for indefinite leave to remain under the 10 years long residence rule, and that this is ... relevant ... in the Article 8 assessment.

However, the judge at paragraphs 32-36 considered the appellant's continued residence under the Post Study Work visa category and concluded:

*I consider it disingenuous that the appellant applied for a Post Study Work Visa with her family as her dependants, and appealed against the decision to refuse it thereafter, bearing in mind the purpose behind the Post Study Work visa ... when she had no intention of working but was wholly dependant on her husband, who was working full time. He ... has been since 2008 the family's sole financial provider. While technically I accept Mr Ndubuisi's submission that the family have been in the UK legally, I consider that they have been here under false pretences ... the appellant is an educated woman. I did not believe she did not know, as well as her husband, that the family should not be living in the UK on a Post Study Work visa when she had decided to remain at home as full time mother from 2008 and had not intended to seek employment.*

... the judge came to a perverse conclusion ... that the family resided in the UK under false pretences ... the main appellant had given birth to her second child on 25 February 2008 ... the application for Post Study Work was made in 2008. It is very reasonable accept that a nursing mother would usually be on maternity leave even if the appellant was at work ... it is significantly discriminatory ... to conclude that the appellant resided ... under false pretences and that there was no intention to seek employment in the UK when the birth of her new baby, coupled with her first child being only 2 years old, led to the change of heart. It is not only reasonable but lawful for person in the appellant's circumstances to not only enjoy a maternity leave period but also be entitled to a long term period of absence from work to look after their children. There is nothing legally or morally wrong for the main appellant to choose to suspend her career ... to look after her children ...

4) Mr Ndubuisi said that Ground 1 discloses an adverse credibility finding wrongly reached. The judge went wrong because she failed to note that the Post Study Work category does not impose a requirement to take employment. Its purpose is to give international students freedom to remain. It was not really feasible for the appellant to have found work, in her circumstances. He accepted that she has never worked, so there was no question of maternity leave.

5) I queried whether the "false pretences" finding could really be categorised as one on credibility. Mr Ndubuisi acknowledged that, and said the matter amounted to reaching a finding not rationally open to the judge. He relied on the UKBA's guidance on Tier 1, which under the heading "description of category" states:

The Tier 1 Post Study Work category aims to retain the most able international graduates who have studied in the UK. It will also enhance the UK's overall offer to international students.

Successful applicants will be free to seek employment without having a sponsor for the duration of their Tier 1 Post Study Work leave.

6) Mr Ndubuisi submitted that the fact that the appellant had not worked was entirely irrelevant to her case, and it was not open to the judge to consider it an adverse factor in the proportionality assessment.

7) The second ground of appeal is this:

The judge misconstrued the purpose of the Post Study Work visa and whether it affords a route to settlement ... at paragraph 31 ... the judge said:

*It will be seen from paragraph 33 below that this is not my understanding of the position, given the Rules related to Post Study Work visas.*

The extract from the respondent's website cited at paragraph 33 states:

*Applicants under Tier 1 Post Study Work category will not be able to apply to extend their leave in the UK. Time spent in the Tier 1 Post Study Work category does not count towards the period an individual needs to spend in the UK before being eligible to apply for indefinite leave to remain. Leave under the Tier 1 Post Study Work category does not lead to settlement.*

The judge ... was influenced by this extract ... however ... this is incorrect to the extent that it applies to the circumstances of the appellants. Time spent in the Tier 1 Post Study Work category is lawful residence in terms of the 10 years long residence Rule under paragraph 276A-B of the Rules.

... The extract referred to at paragraph 33 indicated:

*Applicants who have permission to stay under Tier 1 Post Study Work can look for work without making her the sponsor.*

... This extract does not use the word must ... it is reasonable for an applicant in the circumstances of the main appellant, who has just given birth to a child, to not be able to look for work immediately or alternatively to look for work to allow her to juggle her family life.

8) Mr Ndubuisi said that this ground speaks for itself.

9) The third ground of appeal is this:

The judge further erred in law in failing to take account of the fact that there are no countervailing circumstances in respect of this family that would make it reasonable to uproot a child who has 7 years' residence in the UK. The family has held legal residence throughout the period of their stay in the UK.

10) Mr Ndubuisi accepted that there had been no evidence that the best interests of the child would be adversely affected by returning to Pakistan with the parents. He said that the fact that the child has resided here lawfully for 7 years was decisive by itself.

- 11) Finally, Mr Ndubuisi submitted that for all the above reasons the decision ought to be reversed.
- 12) Mrs O'Brien pointed out that no separate application was made on behalf of the (older) child. The application was by a parent, with husband and children as dependants. Nor was there any statement of additional grounds, relying on the rights of the child. Although the determination does say at paragraph 14 that Mr Ndubuisi proposed in the FtT that the appellant's eldest child had a freestanding right to remain in the UK because of his age under the Rules, the case had not been clearly put on that basis. In any event, there is no right for every child who has been in the UK lawfully for 7 years to remain indefinitely. This was a case which ought not even to have merited consideration in terms of Article 8 outwith the Rules. There had not been shown any obstacles to family life continuing outside the UK, or any arguably good grounds for granting leave to remain outside the Rules. The question whether there were compelling circumstances not sufficiently recognised under the Rules was not even posed. The judge should not have embarked upon a free ranging exercise under the *Razgar* tests and Article 8, but in any event the outcome reached was correct. The title of the Post Study Work category (which is no longer in the rules) was self-explanatory. It was to encourage graduates to find productive work in the UK, not to become full time mothers and to enable dependants on such an application to become the sole breadwinner. That judge's observations on the appellant were justified. Although the visa category was open-ended in that it specified no requirements actually to obtain work, the judge was entitled to find the use to which it was put by these appellants to be an abuse of the system.
- 13) Mrs O'Brien accepted in relation to Ground 2 that the judge confused the requirements of different routes within the Rules. However, she said that the misdirection was of no importance, because this family had not reached the 10 years lawful residence point and "near miss" arguments are of no relevance to Article 8. The judge reached the right decision, even if not for entirely the right reasons.
- 14) Mr Ndubuisi in reply submitted that the appellant should be treated as having had a freestanding right to remain for the 2 years of her visa in the UK, whether she was interested in working or not. The judge should not have discounted that period in her assessment, so her approach to the proportionality assessment was materially flawed.
- 15) I reserved my determination.
- 16) Mr Ndubuisi did not refer to the next paragraph of the respondent's guidance describing the Tier 1 Post Study Work category:

This category provides a bridge to highly skilled or skilled work. Individuals with Tier 1 (Post Study Work) leave will be expected to switch into another part of the Points Based System as soon as they are able to do so.

- 17) There is of course (as Ground 1 says) nothing morally wrong about a person choosing to be a full time parent rather than a worker. That is beside the point. In my opinion, the FtT judge correctly identified the purpose of the Post Study Work route. The use of the term “false pretences” is quite strong, but I do not think the appellant can fairly quarrel with the description of her conduct as disingenuous.
- 18) Analysis of this case in terms of the Rules by the respondent was all that was required. There were no arguably good grounds to take this case outside the Rules. If it had been necessary to go any further, there were no compelling circumstances not sufficiently recognised under the Rules. (*Nagre*, [2013] EWHC (Admin); *MS* [2013] CSIH 52, paragraphs 26 and 30; *Gulshan* [2013] UKUT 00640.)
- 19) There is no error of law in the judge’s finding that it was not unreasonable for the children to accompany their parents to the country of origin.
- 20) Mr Ndubuisi did not cite any authority for his proposition that the older child of the family has a free standing right to remain in the UK, by which all the appeals should have been allowed. The Presenting Officer submitted that there is no such authority, and I am not aware of any.
- 21) The judge fell into some confusion between leave which may count for different purposes within the Rules, but that is immaterial to the overall outcome.
- 22) The appellant and her family took advantage of her two years leave to remain in the Post Study Work category, although she never worked or intended to work. It is difficult to see why that should be thought incapable of carrying adverse weight in the proportionality balance.
- 23) The appellants have not shown that the determination of the First-tier Tribunal errs in any point of law, such as to require it to be set aside. The determination shall stand.



7 April 2014  
Judge of the Upper Tribunal