



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/21507/2013

THE IMMIGRATION ACTS

Heard at Field House  
On 7 May 2014

Determination Promulgated  
On 29 May 2014  
.....

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR FAHID IKRAM  
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Miss S Vidhyadharan  
For the Respondent: Mr A S Qureshi

DETERMINATION AND REASONS

1. The parties are referred to hereafter as they were in the First-tier Tribunal so that Mr Ikram is the appellant and the Secretary of State is the respondent.
2. The appellant is a citizen of Pakistan who was born on 16 June 1990. On 5 September 2012 he applied for leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant under the points-based system ("PBS"). That application was refused by a decision dated 11 January 2013. A decision was made concurrently to

remove the appellant from the UK under Section 47 of the Immigration, Asylum and Nationality Act 2006.

3. The reason for refusal was that the appellant claimed 10 points for Maintenance (Funds) under Appendix C of the Immigration Rules but the Secretary of State was not satisfied that the documents he provided demonstrated that he had been in possession of the required level of funds for 28 days. He needed to show that he had the required funds to cover the fees for the first academic year of his course and, in addition, the sum of £1,000 per month to cover the cost of his own maintenance.
4. The appellant paid £5,000 towards the course fees of £13,925 for the first year of the course. He therefore needed to show that he was in possession of £10,925 for a consecutive 28 day period. The closing date of the bank statement submitted in support of the application is dated 1 September 2012 and the appellant therefore needed to show evidence of £10,925 in his possession for 28 days from 4 August 2012 to 1 September 2012. However, between 4 August 2012 and 12 August 2012 the bank statements show that he was in possession of no more than £6,448.92 and between 25 August and 27 August 2012 no more than £10,886.67.
5. The appellant appealed the decision and the matter came before the Tribunal sitting at Hatton Cross on 6 December 2013. In a determination promulgated on 6 January 2014 the First-tier Judge dismissed the appeal under the Immigration Rules but allowed it under Article 8 ECHR. He noted that the Section 47 decision was withdrawn.
6. The respondent sought permission to appeal that decision submitting that in allowing the appeal on Article 8 grounds, having dismissed it under the PBS provisions in the Immigration Rules, the Tribunal misdirected itself in law as to what amounts to a proportionate interference with private life. In effect it is argued that the Tribunal found that the criteria in the PBS Rules imposes a higher test than the proportionality test of Article 8. The submission is that the Immigration Rules operate within the margin of appreciation available to states in interpreting Article 8 obligations and that has been endorsed by parliament. **Miah [2012] EWCA Civ 261** shows that there is no near miss principle applicable to the Immigration Rules.
7. Permission to appeal was granted. The judge doing so noted that the appellant did not appeal on human rights grounds but the appeal was allowed under Article 8, the judge concluding that the decision was a disproportionate interference with the appellant's private life.

### **The Hearing before Me**

8. In the determination the judge noted at paragraphs 18 and 19 that the PBS Rules are very specific in their requirements. The judge did not doubt that the appellant knew the sum of money required to be demonstrated as he had filled in the application form and had correctly inserted the amount that he needed to show for fees and maintenance. The judge also recognised that there are strict rules of evidence in relation to the PBS but that the evidence that the fees were subsequently paid and the

appellant maintained is not evidence that could be considered by the Tribunal in relation to the award of points under the PBS.

9. The grounds of appeal raised in the documentation submitted to the Tribunal included reference to the appellant's private life and his rights under Article 8. In her submissions before me Miss Vidhyadharan drew attention to the fact that the judge dealt with the Article 8 private life issue at paragraphs 22 and 23. The judge stated that he was of the opinion that a student can acquire a private life so that the particular goal that he was seeking to achieve could be completed. The judge went on to consider whether the interference with the appellant's private life by removing him would be disproportionate and found that it would be. This was on the basis that on the evidence before him including the money spent by the appellant both in fees and maintenance the interference with his private life would not be proportionate in all the circumstances of the case. He went on to find that it would be disproportionate not to let the appellant complete his course of study "at this reputable university in June 2013".
10. Miss Vidhyadharan submitted, however, that apart from the statement from the appellant there was no evidence before the judge that he would not be able to obtain a similar degree in Pakistan and nothing to say what the judge made of the statement that there may be a course available in Pakistan but the appellant would have to begin again and his time in the UK and his studies would be of no value. The judge did not explain what the exceptional circumstances are and why it would be unjustifiably harsh not to allow this appeal under Article 8.
11. Miss Vidhyadharan drew attention to **Miah** at paragraph 26 which states:-
 

"26. For these reasons, I would dismiss the appeal in relation to the near miss argument. In my judgment, there is no near miss principle applicable to the Immigration Rules. The Secretary of State, and on appeal the Tribunal, must assess the strength of an Article 8 claim, but the requirements of immigration control is not weakened by the degree of non-compliance with the Immigration Rules."
12. Miss Vidhyadharan submitted also that it is necessary to have regard to paragraphs 56 and 57 of **Patel and Others [2013] UKSC 72** which state as follows:-
 

"56. Although the context of the Rules may be relevant to the consideration of proportionality, I agree with Burnton LJ that this cannot be equated with a formalised 'near miss' or 'sliding scale' principle, as argued for by Mr Malik. That approach is unsupported by Strasbourg authority, or by a proper reading of Lord Bingham's words. Mrs Huang's case for favourable treatment outside the Rules did not turn on how close she had come to compliance with Rule 317, but on the application of the family values which underlie that Rule and are at the heart also of Article 8. Conversely, a near miss under the Rules cannot provide substance to a human rights case which is otherwise lacking in merit."

57. It is important to remember that Article 8 is not a general dispensing power. It is 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. The merits of a decision not to depart from the Rules are not reviewable on appeal: Section 86(6). One may sympathise with Sedley LJ's call in **Pankina** for 'common sense' in the application of the Rules to graduates who have been studying in the UK for some years (see paragraph 47 above). However, such considerations do not by themselves provide grounds of appeal under Article 8, which is concerned with private or family 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."
13. In his submissions Mr Qureshi stated that Article 8 was not raised in the grounds of appeal but in a letter written by one Martin Donkin dated 28 June 2013 where it was explained that the appellant submitted his notice of appeal himself without receiving advice and it was there that the private life Article 8 claim was made. Mr Qureshi submitted that the judge had given sound reasons for coming to his decision and directed himself properly. It was for the Home Office to show that it was proportionate to interfere with the appellant's private life. There was only one year left before the appellant would complete his course and the importance of the maintenance of immigration control would not be weakened by the short period of him being allowed to stay here. The appellant came here legally and he is not a dishonest person. He has been supporting himself helped by his brother and has not been a burden on the state at all. It would be a punishment to expel him at this stage and he referred to the case of **OA (Nigeria) [2008] EWCA Civ 82** and that the consequences for the appellant are of sufficient gravity to engage Article 8.
14. In reply Miss Vidhyadharan stated that the appellant has still not demonstrated why this was a truly exceptional case or why it would be unduly harsh for him not to continue with his studies in the United Kingdom.

### **The error of law decision**

15. I announced my decision at the time that I found that the judge had not sufficiently reasoned his decision as to why the appellant could succeed under Article 8 when he could not succeed under the Immigration Rules. Unsurprisingly he made no reference to **Patel** as at the date of hearing on 6 December 2013 **Patel** had only just been published. It may well be that his decision would have been different had he had the benefit of reading that decision.
16. Having announced my decision after a brief adjournment the resumed hearing took place and I heard evidence from the appellant.
17. The appellant gave his evidence in English. He undertook a foundation course in electrical engineering and at date of hearing was about to take his second year exams. His course is due to finish in June 2015. The course is not available in Pakistan as it

consists of two elements, electrical and electronics. In Pakistan he could study one or the other but not both. He has no financial difficulties because his brother is fortunate enough to be in a position to provide for him. The appellant explained that he has another £12,000 still to pay in September to cover the remainder of his course. After he has completed his education he plans to go back to obtain a job in Pakistan. He is engaged to be married to a girl there. His parents, two sisters and uncles etc. live in Pakistan.

18. Cross-examined by Miss Vidhyadharan the appellant said that he has no evidence with him to say that the degree he is studying here is not taught in Pakistan. If it was it would not be of the same value as a degree obtained here. He came to receive an education and confirmed that he intended to return to Pakistan and the date for doing so has been fixed. This date is 20 August 2015 but he was not one hundred percent that this would be the date because it would depend on the situation at the time.
19. I asked the appellant what his private life consisted of and he replied that he had come for education.

### **Submissions**

20. Miss Vidhyadharan submitted that there was nothing unjustifiably harsh about the decision. The appellant came here for an education and there was nothing to indicate what his private life here is. He had insufficient funds to meet the Rules at the time and although this may only have been a near miss, as stated in **Miah**, the requirements of immigration control are not weakened by the degree of non-compliance with the Rules.
21. Mr Qureshi submitted that even though the **Miah** case may be relevant consideration of Article 8 is not excluded and he relied on the submissions made by him at the error of law point in the hearing.

### **My Deliberations**

22. It is not in doubt that the appellant did not meet the requirements of the Immigration Rules at the date of his application. As the First-tier Judge rightly pointed out the appellant knew the sum of money that was required for him to meet the requirements of the Rules because he himself inserted the correct amount in the appropriate box in the application form. For whatever reason the required sum did not remain in the account for the relevant period of 28 days and this has proved fatal to the application under the Rules.
23. I have already set out above paragraphs 56 and 57 of **Patel** and the point is made there that the opportunity for a promising student to complete his course of education in this country, however desirable that may be, is not in itself a right protected under Article 8. The appellant has said that he only came here to receive an education. Details of his private life are scant. His brother lives here and no doubt his brother's family also. It is likely that the appellant has a family relationship

with them and has made friends with fellow students and others. He intends to return to Pakistan, he says, after he has completed his engineering course in 2015. He has given verbal evidence that there is no similar course available in Pakistan that deals with both electrical and electronic engineering but he had no supporting evidence for that assertion.

24. Such private life as the appellant has may be enjoyed in Pakistan with his family and friends there and I find that there is no good evidence before me that what he has studied here will not stand him in good stead in the future in Pakistan. Having taken the foundation course and then applied for further leave the appellant was refused such leave in January 2013. He has been prepared to take the risk it seems of continuing with his studies and paying out fees between that date of refusal and up to date of hearing.
25. My conclusions are that in light of these facts and in particular in light of **Miah** and also **Patel** the appellant has not shown that this is one of those few cases where there are any compelling or exceptional circumstances, or words to that effect, that would amount to a breach of the appellant's Article 8 private life rights by dismissing the appeal.
26. I only comment further that the Section 47 decision was withdrawn. If it is the intention of the respondent to remove the appellant a fresh decision will be made and the appellant may make further submissions as to why he should be allowed to remain. It will of course then be for the respondent to decide in her discretion whether to allow the appellant to remain outside the Rules for a limited or other period. That is entirely a matter for her. However, and as things stand, for the reasons set out above this appeal fails.

### **Decision**

27. The decision of the First-tier Tribunal Judge is set aside for the reasons given earlier in this determination.
28. The appeal is dismissed under the Immigration Rules and under Article 8 ECHR. This is also for the reasons set out above.
29. Although I was not addressed on the matter of anonymity I see no need to make such a direction in the particular circumstances of this appeal.
30. As a last point I note that the judge (at paragraph 26) made a fee award. It is entirely unclear on what basis he decided to make such an award and it seems all the more surprising that he has done so without giving reasons when the appeal was dismissed under the Rules entirely through the actions of the appellant. However, I was not addressed on the point.

Signed

Date

Upper Tribunal Judge Pinkerton