Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: IA/30234/2013**

IA/30243/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 15 October 2014	**On 24 October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

COMFORT OMOLOLA OYOWE

EMMANUEL EYITEMI

(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Nizami Counsel instructed by AA & Co Solicitors

For the Respondent: Mr P Nath Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of these Appellants. Having considered all the circumstances and evidence I do not deem it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Newberry, promulgated on 12 August 2014 which allowed the Appellants appeals and held that it was disproportionate and unlawful under Article 8 of the European Convention on Human Rights to remove them to Nigeria.
3. The second Appellant is a dependent of the first Appellant so in the remainder of the decision I will refer to 'the Appellant.'

Background

4. The Appellant was born on 8 July 1977 and is a citizen of Nigeria.
5. The Appellant had leave to remain as a Tier 4 student valid until 23 April 2012.
6. On 23 April 2012 the Appellant applied for leave to remain in the United Kingdom.
7. On 1 July 2013 the Secretary of State refused the Appellant's application and made directions for her removal under s 47 of the Immigration, Asylum and nationality Act 2006. The decision was made by reference to Appendix FM and paragraph 276ADE which govern Article 8 claims under the Rules and found that she did not meet the Rules. The Appellant's account of her dispute with the London College of Accountancy and their refusal to grant her a CAS was also taken into account but was not considered to be exceptional circumstances to warrant a grant of leave outside the Rules.

The Judge's Decision

8. The Appellant appealed to the First-tier Tribunal and First-tier Tribunal Judge Newberry (hereinafter called "the Judge") allowed the appeal against the Respondent's decision under Article 8. The Judge found that the Appellant had had an emergency caesarean on 27 March 2012 and was therefore unable to take her college examinations which resulted in her not being able to provide a CAS in support of a further Tier 4 application. He found that her private life was intrinsically linked with the purpose of her admission to the United Kingdom namely for education. He allowed the appeal 'to facilitate the completion of the purpose of the original visa.'
9. Grounds of appeal were lodged on the basis that the Judge had erred in law by allowing the appeal on Article 8 ECHR grounds because he failed to have regard

to the Supreme Court's judgement in Patel and others v SSHD [2013] UKSC 72. On 29 August 2014 First tier Tribunal Judge Mc Carthy gave permission to appeal stating ;

"The grounds have merit as it is clear from the determination that the judge has not had regard to the authority indicated, having relied on earlier authorities which are set aside by the authority of the Supreme Court."

10. At the hearing I heard submissions from Mr on behalf of the Respondent that:

(a) He relied on the grounds of appeal.

(b) He relied on the authorities of Patel and others v Secretary of State for the Home Department [2013] UKSC 72 which was upheld in Nasim and others (Article 8) [2014] UKUT 25 (IAC)

11. On behalf of the Appellant Ms Nizami submitted that ;

(a) Patel and Nasim did not overturn CDS (PBS: "available": Article 8) Brazil [2010] UKUT 00305 (IAC) which the Judge had relied on to find that there was a breach of the Appellant's Article 8 private life in the decision.

(b) She submitted that Nasim related to applicants who had completed their studies and wished to remain not those like the Appellant and the applicant in CDS who were, by virtue of the decision, prevented from completing the course.

(c) The Judge found that there were exceptional circumstances to warrant a grant of leave outside the Rules.

(d) The Respondent was appealing all decisions were allowed under Article 8.

12. In reply Mr Nath on behalf of the Respondent submitted :

(a) The Respondent did not appeal all appeals allowed under Article 8.

(b) The Judge relied on old caselaw and failed to take into account Patel that was clearly relevant.

The Law

13. Errors of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on facts or evaluation or giving legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

14. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue under argument. Disagreement with an Immigrations Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence that was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration judge concludes that the story told is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Finding on Material Error

15. Having heard those submissions I reached the conclusion that the Tribunal made material errors of law.

16. The failure of the First-tier Tribunal to address Patel, the most recent and binding authority in relation to the issue of education and students wishing to complete that education as the basis of an Article 8 claim constitutes a clear error of law. This error I consider to be material since had the Tribunal conducted this exercise the outcome could have been different. That in my view is the correct test to apply.

17. I therefore found that errors of law have been established and that the Judge's determination cannot stand and must be set aside in its entirety

18. Ms Nizami submitted that the case should be remitted to the First Tier Tribunal for a re hearing.

19. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First Tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

20. I indicated that I was not satisfied that the Appellant had been deprived of a fair hearing given that her appeal had been allowed. I was satisfied that the factual findings in the case could be preserved the only matter in issue was how the Judge had applied the law to those findings. I confirmed that Ms Nizami adn Mr Nath were in a position to make submissions in respect of that issue before me and they both confirmed that they were.

Submissions in respect of rehearing

21. On behalf of the Respondent Mr Nath made the following submissions

(a) In paragraph 30 of the determination the Judge had found that the sole basis for the Appellant to remain in the United Kingdom was to complete her studies no other evidence was advanced to support an Article 8 claim.

(b) The Appellant cannot meet the requirements of the Rules.

(c) There were no exceptional circumstances to warrant a grant of leave outside the Rules.

(d) I am bound by the provisions of s 117B of the Immigration Act 2014 that provides that little weight should be given to a private life.

22. On behalf of the Appellant Ms Nizami made the following submissions:

(a) There were exceptional circumstances in this case and the unusual factual matrix warranted consideration of the Appellant's case under Article 8 outside the Rules.

(b) The Appellant had an impeccable immigration History and therefore s 117B did not apply as it only applied to those who were in the United Kingdom unlawfully.

(c) If the Appellant was prevented from completing her course by the decision the interference was disproportionate.

(d) There was still room for the exercise of discretion and a case to be allowed under Article 8 and education was part of a private life claim.

Law

23. In relation to claims under Article 8 these are now addressed by Appendix FM and paragraph 276ADE of the Rules and the Secretary of State's Guidance. As the refusal letter refers to consideration of 'exceptional circumstances' I have taken into account Section FM 1.0 of the October 2013 Immigration Directorate Instructions ("Partner and ECHR Article 8 guidance") which is about family members applying after 9 July 2012 under Chapter 8 Appendix FM of the Immigration Rules. It sets out the guidance for caseworkers in their approach to decision-making under the new rules. The Guidance states that it:

"reflects a two-stage approach to considering applications under the family and private life rules in Appendix FM and paragraph 276ADE-DH. First, caseworkers must consider whether the applicant meets the requirements of the rules, and if they do, leave under the rules should be granted. If the applicant does not meet the requirements of the rules, the caseworker must move on to a second stage: whether, based on an overall consideration of the facts of the case, there are exceptional circumstances which mean refusal of the application would result in

unjustifiably harsh consequences for the individual or their family such that refusal would not be proportionate under Article 8. If there are such exceptional circumstances, leave outside the rules should be granted. If not, the application should be refused".

24. The Guidance continues that exceptional does not mean unusual or unique. While all cases are to some extent unique, those unique factors do not generally render them exceptional. A case is not exceptional just because the criteria set out in EX.1 of Appendix FM have been missed by a small margin. Rather, the Guidance reads, exceptional "*means circumstances in which refusal would result in unjustifiably harsh consequences for the individual or their family such that refusal of the application would not be proportionate. That is likely to be the case only very rarely*." The paragraph continues that in determining whether there are exceptional circumstances, the decision-maker must consider all relevant factors, such as:

    "*a) The circumstances around the applicant's entry to the UK and the proportion of the time they have been in the UK legally as opposed to illegally. Did they form their relationship with their partner at a time when they had no immigration status or this was precarious? Family life which involves the applicant putting down roots in the UK in the full knowledge that their stay here is unlawful or precarious, should be given less weight, when balanced against the factors weighing in favour of removal, than family life formed by a person lawfully present in the UK.*

    b) Cumulative factors should be considered. For example, where the applicant has family members in the UK but their family life does not provide a basis for stay and they have a significant private life in the UK. Although under the rules family life and private life are considered separately, when considering whether there are exceptional circumstances private and family life can be taken into account."

25. Application of the Rules and guidance ordinarily mean that article 8 considerations have been catered for taking into account the cases of Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) and Haleemudeen 2014 EWCA Civ 558 which make clear that the Immigration Rules are Article 8 compliant and as such if a claimant cannot meet the requirements of

Article 8 under the rules there have to be circumstances in the case to warrant consideration of Article 8 outside the Rules:

"after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);"(Gulshan)

26. Although case law continues to develop in relation to Article 8 and the Rules the current position is expressed in paragraph 135 of R(MM (Lebanon)) v SSHD [2014] EWCA Civ 985:

> "*135. Where the relevant group of IRs [immigration rules], upon their proper construction provide a "complete code" for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although reference to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a "complete code" then the proportionality test will be more at large, albeit guided by the Huang tests and UK and Strasbourg case law."*

27. I am also obliged if making a 'free standing' Article 8 assessment that from 28 July 2014 section 19 of the Immigration Act 2014 is brought into force: article 3 of the Immigration Act 2014 (Commencement No 1, Transitory and Saving Provisions) Order 2014 (SI 2014/1820). This amends the Nationality, Immigration and Asylum Act 2002 by introducing a new Part 5A which contains sections 117A, 117B, 117D and 117D. These statutory provisions apply to *all* appeals heard on or after 28 July 2014 *irrespective* of when the application or immigration decision was made.

28. Section 117A provides that in considering the public interest question I must have regard to the considerations listed in section 117B which, in so far as they are relevant to this application , are:

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) ....

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) ..."

Findings

29. I am required to look at all the evidence in the round before reaching any findings. I have done so. Although, for convenience, I have compartmentalised my findings in some respects below, I must emphasise the findings have only been made having taken account of the evidence as a whole.

30. The Appellant and her husband are Nigerian citizens whose application dated 23 April 2012 for further leave to remain in the United was refused in a letter dated 5 July 2013.

31. The Appellant's most recent period of leave had been as a Tier 4 student as she was studying at the London School of Accountancy and that leave on 23 April 2012. It is undisputed that the Appellant was unable to make a renewed application as a student because she did not have a valid CAS. She did not have a valid CAS because the College would not issue one to her because as they stated in their letter of 16 May 2012 that she had not achieved an 'acceptable level of attendance and good academic progress' and they dismissed her from the college on 16 March 2012. This decision following a series of written warnings following absences arising out of the birth of her first child on 2010 and

her failure to sit examinations in April 2012 following an emergency caesarean on 27 March 2012.That decision was one for the college to make and they have not rescaled from it.

32. The decision in the Appellant's case was therefore in essence for further leave to remain in order to try and complete her studies with another educational provider given the decision of the London School of Accountancy. There is no evidence before me to suggest that either they or indeed any other educational establishment are willing to offer her a place even if she had leave.

33. It was not argued that the Appellant could meet either the family or private life requirements of the Rules found in Appendix FM or paragraph 276ADE.

34. The refusal letter stated that the fact that the Appellant was unable to produce a valid CAS arising out of her dispute with the College did not amount to exceptional circumstances. I have considered whether the refusal of leave would result in unjustifiably harsh consequences for the Appellant and her husband such that refusal of the application would not be proportionate reminding myself that given that the Rules have been found to be Article 8 compliant this is likely to be case only very rarely.

35. I am satisfied that the Respondent took into account all of the relevant circumstances underpinning the Appellant's application and the reasons for the absence of a CAS and were entitled to conclude that this did not amount to exceptional circumstances. They had the history of the Appellant's difficulties before them and were aware that this was not the first occasion that the Appellant had fallen behind in her studies as she had previously been given term breaks and exam mitigations. They no doubt also took into account that this was followed by written warnings about her progress after which her attendance continued to be poor and she then failed to attend a progress meeting with the Postgraduate Course Director on 24 November 2011. Against this background the decision by the College was made to refuse her CAS and I am satisfied that taking all of that into account the Respondent was entitled to conclude that this did not amount to exceptional circumstances.

36. However even if I were wrong about this and the Appellant's circumstances warranted consideration of a grant of leave under Article 8 outside the Rules

37. If I am considering Article 8 at large do so on the basis of the questions posed by Lord Bingham in Razgar [2004] UKHL 27

Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private (or as the case may be) family life?

38. I remind myself that the only basis on which the Appellant's case has been argued has been that the decision breaches her private life in the form of her opportunity to complete her studies and there is no other evidence of any other private life enjoyed by the Appellant and her husband in the United Kingdom. While Ms Nizami sought to rely on what was said in CDS about Article 8 I remind myself those remarks were obiter. I remind myself that the removal decision in this case does not prevent the Appellant from completing a course for which she had leave : she was unable to obtain further student leave as she had no CAS. I also remind myself that even so the court expressly acknowledged that it weas unlikely that a person would be able to show an Article 8 right by coming to the United Kingdom for a temporary purpose.

39. I note finally what was said by Carnwath LJ at paragraph 57 of Patel a decision of the Supreme Court which post dates CDS:

"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 para 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".

40. I would therefore come to the conclusion that the desire to complete her education of itself does not engage Article 8.

41. Even I I were wrong about that and had gone on to accept that Article 8 was engaged and that the decision was in accordance with the law I would have to

take into account that the interference does have legitimate aims since it is in pursuit of one of the legitimate aims set out in Article 8 (2) necessary in pursuit of the economic well being of the country through the maintenance of the requirements of a policy of immigration control and the Appellant had been unable to meet those requirements as she did not have the benefit of a valid CAS required for further leave.

42. I am obliged by s 117 B 4(a) of the Immigration Act 2014 to give little weight to that private life. I am satisfied that as 117B (4) (a) is followed by the word 'or' which is disjunctive I must attach little weight to private life **or** a relationship formed when the applicant is in the United Kingdom unlawfully **or** private life established when the applicants status is precarious.

43. Therefore in making the assessment of proportionality against this background I find that the removal of the Appellant and her husband pursuant to the decision to refuse to vary leave would be proportionate to the legitimate public end namely the operation of a coherent and fair system of immigration control.

44. I have considered the issue of anonymity in the present instance. Neither party has sought a direction. The Appellant is an adult and not a vulnerable person. I see no reason to make any direction in this regard.

Decision

45. **There was an error on a point of law in the decision of the First-tier Tribunal with regard to Article 8 such that the decision is set aside**

46. **I remake the appeal.**

47. **I dismiss the appeal on human rights grounds.**

Signed Date 22.10.2014

Deputy Upper Tribunal Judge Birrell