



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/47825/2013

THE IMMIGRATION ACTS

Heard at Field House
On 25 July 2014
Prepared on 25 July 2014

Determination Promulgated
On 7 August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

G. P.

(ANONYMITY DIRECTION)

Respondent

Representation:

For the Appellant: Mr Deller, Senior Home Office Presenting Officer
For the Respondent: Mr Hossain, London Law Associates

DETERMINATION AND REASONS

1. The Respondent is a citizen of Sri Lanka. On 27 September 2010 he was granted entry clearance as a Tier 4 (General) Student, and then granted a period of LTR expiring on 27 September 2013 as a Tier 1 (PSW) Migrant.
2. On 25 September 2013 the Respondent applied for LTR as a Tier 4 (General) Student Migrant, which application was refused on 28 October 2013, and in consequence a decision was made by reference to s47 of the 2006 Act to remove him from the UK.
3. The sole reason given by the Appellant for these decisions concerned the CAS submitted by the Respondent in support of his application. Upon checking the CAS on 28 October 2013 the

Appellant noted that it had been withdrawn by the sponsor, and thus she took the view the Respondent did not meet the requirements of paragraph 117(b) of Appendix A to the Immigration Rules.

4. The Respondent's appeal against those immigration decisions were heard on 22 May 2014, and they were allowed to the limited extent the decisions were not made in accordance with the law leaving the application outstanding and awaiting a lawful decision, in a Determination promulgated on 22 May 2014 by First Tier Tribunal Judge Hussain.
5. By a decision of First Tier Tribunal Judge Astle dated 12 June 2014 the First Tier Tribunal granted the Appellant permission to appeal on the basis it was arguable the Judge had erred in his approach, which had turned upon a policy that was not specifically identified, and which did not in any event exist.
6. The Respondent filed no Rule 24 Notice, and neither party applied for permission to rely upon further evidence that had not been before the First Tier Tribunal.
7. Thus the matter comes before me.

The CAS

8. It was not in dispute before the Judge that the CAS submitted in support of the application for LTR, and thus relied upon by the Respondent, stated upon its face that it was assigned to him on 5 September 2013, and that the latest acceptance date was 18 September 2013. Nor was there any issue before the Judge over the fact that this CAS had been withdrawn by the sponsor before the 28 October 2013 when the Appellant undertook her checks upon the application. Again there was no issue before the Judge over the fact that the reason for the withdrawal of the CAS was the Respondent's failure to attend his college and commence his course of study by the due date of 9 September 2013. The Judge ought therefore to have found as a fact that the Respondent did not meet the requirements of the Immigration Rules. The failure to do so was plainly an error of law.

The basis for the Judge's decision

9. The Determination records, but makes no finding upon, the Respondent's assertion that he had not realised the date that his course was due to commence, and his assertion (unsupported by any corroborative document from Kingston University) that were his appeal to be allowed, he had been promised that a fresh CAS would be issued to him. However unlikely they might be, and whether or not he genuinely believed those assertions were true; they could not provide a basis upon which the appeal could be allowed under the Immigration Rules.

10. The Judge appears to have formed the view [10] that the Appellant was bound by virtue of the terms of a published policy (which he did not identify by date, or title) to grant to the Respondent a period of time in which to submit a fresh CAS. Quite simply there was no basis for this approach. No such policy exists, or has ever existed. The Judge appears to have fallen into error through a misunderstanding of the proper approach to be taken by the Appellant in circumstances in which a sponsoring college's licence is withdrawn by her without notice to an applicant and after the applicant has made their application. The situation in this case was very different. The Judge's whole approach was therefore vitiated by error of law that requires me to set aside his decision, and remake it.

The decision remade

11. The Respondent did not meet the requirements of paragraph 117 of Appendix A to the Immigration Rules, because the CAS relied upon had been withdrawn by the sponsor. Accordingly the application and the appeal were bound to be refused, and dismissed, under the Immigration Rules.
12. The Respondent relied in the grounds of appeal submitted in support of his IAF1-1 upon his Article 8 rights, asserting that his removal from the UK would prevent him from completing his studies. He did not assert the existence of any "family life" in the UK, and thus the Article 8 appeal could only ever have been considered in the context of his "private life". No evidence was offered to the Judge to suggest, and the grounds of appeal did not suggest, that there was any material element to the "private life" relied upon beyond the Respondent's continuing education. As such the evidence, and the grounds, did not engage with the fact that the Respondent had failed to attend his college for the start of the course relied upon, and had failed to commence that course, and thus his CAS had been withdrawn and his application refused. That was the context in which his Article 8 appeal had to be considered.
13. The Respondent has always had the ability to return to Sri Lanka in safety; he has never sought to suggest otherwise. The Respondent did not meet the requirements of either paragraph 276ADE, or Appendix FM at the date of the hearing. I note the guidance to be found upon the proper approach to a "private life" case in the decisions of Patel [2013] UKSC 72, and Nasim [2014] UKUT 25.
14. I note the Judge did not engage with the Article 8 appeal, and that he failed to identify any unjustifiably harsh consequences that would result for the Respondent from his removal. The closest the Respondent came to doing so himself is recorded [5];

he considered the cost of return to Sri Lanka to make an application for entry clearance as a student was very high, and that the subject he wished to study was not one offered in Sri Lanka. Mr Hossain accepted that he could not identify any other argument that was advanced. On the other hand the Respondent was only ever granted LTR for a limited period, and he plainly has family in Sri Lanka who he could visit whilst making his application. His argument boils down to the assertion that it is unreasonable and disproportionate in these circumstances to require him to be put to the cost of an airfare to Sri Lanka, in order that he might return to visit his family, and then make an application from Sri Lanka for entry clearance in order to pursue the course of study to which he claims to have been so committed that he managed to fail to attend its commencement. Mr Hossain argued in addition that the Respondent might not be granted the entry clearance he would then seek, on grounds that he did not care to identify; but as he eventually accepted, that possibility points firmly in favour of the Appellant's removal.

15. In my consideration of the Article 8 appeal pursued by the Appellant I have to determine the following separate questions:
 - Is there an interference with the right to respect for private life (which includes the right to physical and moral integrity) and family life?
 - If so will such interference have consequences of such gravity as to potentially engage Article 8?
 - Is that interference in accordance with the law?
 - Does that interference have legitimate aims?
 - Is the interference proportionate in a democratic society to the legitimate aim to be achieved?
16. The Appellant has completed a course of degree study in the UK, and a period of post study work experience. He has only ever had a grant of temporary leave for purposes that are now complete. I note the public interest in removal; Patel and Nasim. The following passage in Nasim sets out the relevant principles;
 14. *Whilst the concept of a "family life" is generally speaking readily identifiable, the concept of a "private life" for the purposes of Article 8 is inherently less clear. At one end of the "continuum" stands the concept of moral and physical integrity or "physical and psychological integrity" (as categorised by the ECtHR in eg Pretty v United Kingdom (2002) 35 EHRR 1) as to which, in extreme instances, even the state's interest in removing foreign criminals might not constitute a proportionate response. However, as one moves down the continuum, one encounters aspects of private life which, even if engaging Article 8(1) (if not alone, then in combination with other factors) are so far removed from the "core" of Article 8 as to be readily defeasible by state interests, such as the importance of maintaining a credible and coherent system of immigration control.*
 15. *At this point on the continuum the essential elements of the private life relied upon will normally be transposable, in the sense of being capable of replication in their essential respects, following a person's return to their home country. Thus, in headnote 3 of MM (Tier 1 PSW; Art 8; private life) Zimbabwe [2009] UKAIT 0037 we find that:-*

- “3. When determining the issue of proportionality ... it will always be important to evaluate the extent of the individual’s social ties and relationships in the UK. However, a student here on a temporary basis has no expectation of a right to remain in order to further these ties and relationships if the criteria of the points-based system are not met. Also, the character of an individual’s “private life” relied upon is ordinarily by its very nature of a type which can be formed elsewhere, albeit through different social ties, after the individual is removed from the UK.”*
16. As was stated in the earlier case of MG (assessing interference with private life) Serbia and Montenegro [2005] UKAIT 00113:-
“A person’s job and precise programme of studies may be different in the country to which he is to be returned and his network of friendships and other acquaintances is likely to be different too, but his private life will continue in respect of all its essential elements.”
17. The difference between these types of “private life” case and a case founded on family life is instructive. As was noted in MM, the relationships involved in a family life are more likely to be unique, so as to be incapable of being replicated once an individual leaves the United Kingdom, leaving behind, for example, his or her spouse or minor child.
18. In R (on the application of the Countryside Alliance) v AG and others [2007] UKHL 52, Lord Bingham, having described the concept of private life in Article 8 as “elusive”, said that:
“... the purpose of the article is in my view clear. It is to protect the individual against intrusion by agents of the state, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose” [10].
19. It is important to bear in mind that the “good reason”, which the state must invoke is not a fixity. British citizens may enjoy friendships, employment and studies that are in all essential respects the same as those enjoyed by persons here who are subject to such controls. The fact that the government cannot arbitrarily interfere with a British citizen’s enjoyment of those things, replicable though they may be, and that, in practice, interference is likely to be justified only by strong reasons, such as imprisonment for a criminal offence, cannot be used to restrict the government’s ability to rely on the enforcement of immigration controls as a reason for interfering with friendships, employment and studies enjoyed by a person who is subject to immigration controls.
20. We therefore agree with Mr Jarvis that [57] of Patel and Others is a significant exhortation from the Supreme Court to re-focus attention on the nature and purpose of Article 8 and, in particular, to recognise its limited utility to an individual where one has moved along the continuum, from that Article’s core area of operation towards what might be described as its fuzzy penumbra. The limitation arises, both from what will at that point normally be the tangential effect on the individual of the proposed interference and from the fact that, unless there are particular reasons to reduce the public interest of enforcing immigration controls, that interest will consequently prevail in striking the proportionality balance (even assuming that stage is reached).
21. In conclusion on this first general matter, we find that the nature of the right asserted by each of the appellants, based on their desire, as former students, to undertake a period of post-study work in the United Kingdom, lies at the outer reaches of cases requiring an affirmative answer to the second of the five “Razgar” questions and that, even if such an affirmative answer needs to be given, the issue of proportionality is to be resolved decisively in favour of the respondent, by reference to her functions as the guardian of the system of immigration controls, entrusted to her by Parliament.
17. To the extent that the Appellant relies upon his good character, and his desire to undertake further education the following passage in Nasim is applicable;

25. *A further seam running through the appellant's submissions was that, during their time in the United Kingdom, they had been law-abiding, had not relied on public funds and had contributed to the United Kingdom economy by paying their students' fees. Their aim was now to contribute to that economy by working.*
26. *We do not consider that this set of submissions takes the appellants' cases anywhere. It cannot rationally be contended that their Article 8 rights have been made stronger merely because, during their time in this country, they have not sought public funds, have refrained from committing criminal offences and have paid the fees required in order to undertake their courses. Similarly, a desire to undertake paid employment in the United Kingdom is not, as such, a matter that can enhance a person's right to remain here in reliance on Article 8.*
27. *The only significance of not having criminal convictions and not having relied on public funds is to preclude the respondent from pointing to any public interest in respect of the appellants' removal, over and above the basic importance of maintaining a firm and coherent system of immigration control. However, for reasons we have already enunciated, as a general matter that public interest factor is, in the circumstances of these cases, more than adequate to render removal proportionate.*
18. To sum up then, the Appellant's appeal does not rely upon the core concepts of moral and physical integrity. The only reason offered to the Judge for not returning to Sri Lanka and seeking entry clearance was the cost of the airfare to which he would be put in doing so. The Appellant is not currently studying, and his place on the course of study to which he claims to have been committed was withdrawn following his own failure to attend and enrol upon it. In my judgement the evidence placed before the Judge did not establish that there were any compelling compassionate circumstances that meant the refusal to grant to the Appellant DLR, and the consequential decision to remove him to Sri Lanka, led to an unjustifiably harsh outcome.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 22 May 2014 did involve the making of an error of law that requires that decision to be set aside and remade.

I remake the decision so as to dismiss the appeal under the Immigration Rules, and on Article 8 grounds.

Direction regarding anonymity - Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Deputy Upper Tribunal Judge JM Holmes
Dated 25 July 2014