



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

Appeal Number: OA/10247/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 27 August 2014**

**Determination Promulgated
On 28 August 2014**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Shabih Rizvi

[No anonymity direction made]

Claimant

Representation:

For the claimant: Not represented

For the appellant: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Shabih Rizvi, date of birth 29.5.84, is a citizen of India.
2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Miles, who allowed the claimant's appeal against the decision of the respondent to refuse his application for entry clearance to the United Kingdom as a Tier 2 Migrant. The Judge heard the appeal on 15.4.14, allowing it on the basis of private life under article 8 ECHR.

3. First-tier Tribunal Judge Colyer granted permission to appeal on 22.5.14.
4. Thus the matter came before me on 3.7.14 as an appeal in the Upper Tribunal. On that occasion there was no attendance by or on behalf of the claimant. A telephone call to his legal representative revealed that they claimed not to have received notification of the hearing date and only discovered the day before that it was listed on 3.7.14. In the circumstances, it was too late to instruct counsel. The hearing was then adjourned, relisted for 27.8.14.
5. On 8.8.14 the claimant's representative wrote to the Tribunal indicating that their client no longer wished to proceed with the appeal and sought to withdraw it. A reply was sent by the Upper Tribunal explaining that as this was an appeal by the Secretary of State, the claimant could not withdraw the appeal. However, they were advised that if the claimant is not represented at the adjourned hearing the judge may decide to proceed in the absence of representation of the claimant and decide the appeal on such material as is before him, including the request to withdraw the appeal, "as indicating that your client does not have a case to advance against the grounds of application for permission to appeal and the grant of permission."
6. There was no attendance by or on behalf of the appellant. In the circumstances I decided to proceed with the appeal hearing in accordance with the advice given to the appellant's representatives.

Error of Law

7. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Miles should be set aside.
8. In essence, the grounds assert that the judge failed to have regard to the relevant Immigration Rules in making the article 8 assessment, in particular the judge failed to address private life under 276ADE. It is also submitted that only if there may be arguably good grounds for granting leave to remain outside the Immigration Rules would it be necessary to proceed to consider whether there are compelling circumstances insufficiently recognised under the Rules (Nagre [2013] EWHC 720 (Admin)). It is submitted that the judge failed to identify good grounds and compelling circumstances.
9. In granting permission to appeal, Judge Colyer found, "it is arguable that in his assessment of the appellant's private life there is a failure by the judge to consider paragraph 276ADE of the amended immigration rules before coming to his conclusion that the decision of the respondent was disproportionate. The grounds disclose an arguable error of law."
10. For the reasons set out below, I find that there were a number of errors of law in the making of the decision of the First-tier Tribunal such that it should be set aside and remade.

11. The relevant history is as follows:

- (a) December 2009 the appellant arrived in the UK with leave as a Tier 4 student to 17.4.11;
- (b) 3.1.12 Tier 2 leave was granted to expire 12.12.14 for work at the Tier 2 sponsor JML;
- (c) 1.2.12, employment with JML commenced;
- (d) 23.12.12, the Tier 2 sponsor's licence expired and was not renewed;
- (e) 8.4.13, the respondent curtailed leave to expire 7.6.13, under paragraph 323A(b)(i), on the basis that his sponsor ceased to have a sponsor licence;
- (f) 12.4.13, allegedly unaware that the licence had expired and that his leave had been curtailed, the appellant travelled to India, where he was married on 17.4.13;
- (g) 13.5.13, the appellant was refused entry to the UK because his sponsor's licence had expired and he was therefore without entry clearance. When curtailed leave results in there being less than 6 months remaining leave, by the operation of the Immigration (Leave to Enter and Remain) Order 2000, that leave lapses in its entirety when the person leaves the UK. As a visa national the appellant had no suspensive right of appeal against the decision to refuse leave to enter;
- (h) 29.5.13, the appellant was removed to India;
- (i) 21.6.13, appeal against refusal of leave to enter came before Judge Glossop, who found that there was no appealable decision and his notice of appeal was invalid;
- (j) 24.6.13, a new Tier 2 licence was issued to JML;
- (k) October 2013: Upper Tribunal Judge Renton set aside the decision of Judge Glossop on the basis that under section 89(1) of the Nationality Immigration and Asylum Act 2002 the appellant had a right of appeal under section 84(1)(c), on the basis of human rights;
- (l) A new Tier 2 Migrant application made for entry clearance;
- (m) 27.3.14, the application for entry clearance as a Tier 2 migrant was refused with limited rights of appeal;

12. The new Tier 2 application was refused because the appellant previously had leave in that category in the preceding 12 months. That is entirely consistent with the Immigration Rules restricting further applications for Tier 2. The guidance provides: "You will also not be able to reapply to return to the UK under Tier 2 until 12 months

after your last leave under Tier 2 expired or can show you have been outside the UK for 12, whichever is sooner. This will be the case even if you have been in Tier 2 for less than 6 years.”

13. By the operation of section 89 of the 2002 Act, the appellant has only limited rights of appeal against a decision to refuse leave to enter. Essentially, the only relevant ground is human rights. In other words there can be no valid appeal against the decision under the immigration rules on immigration grounds other than in respect of private and family life. The appellant does not assert family life but only private life.
14. The grounds complain that before going on to consider private life under article 8 ECHR, the judge failed to consider the appellant’s private life under paragraph 276ADE. However, at §17 in noting that the appellant asserts that the decision to refuse leave to enter is in breach of his private life under article 8 ECHR, the judge stated, “he does not argue that he can succeed on the private life provisions in the immigration rules in that regard.” In other words, it was common ground that the appellant did not meet the requirements of paragraph 276ADE. That is, however, a factor that should have been brought into account in any proportionality assessment.
15. At §19 the judge considered, under the case law as it then stood, whether there were arguably good grounds for granting leave to remain outside the Immigration Rules and whether there were compelling circumstances insufficiently recognised under the Rules.
16. The Secretary of State submits that there were no good grounds or compelling circumstances to consider article 8 outside the Immigration Rules. In one sense that is a disagreement with the judge’s findings. However, there are serious concerns with the way in which the judge reached the conclusion that there were both good grounds and compelling circumstances for considering article 8 outside the Rules, and in reaching the conclusion that the decision was disproportionate.
17. For the reasons set out herein, I find that there were no sufficiently compelling circumstances to justify granting entry clearance. I find the judge’s article 8 assessment flawed and the decision to allow the appeal one which no reasonable Tribunal could reach on the evidence and facts of this case.
18. I also find in any event on a straightforward article 8 Razgar proportionality balancing exercise that the interference to the appellant’s private life is not sufficiently grave so as to engage article 8 and even if article 8 is so engaged, which I do not accept, I find that the decision is entirely proportionate.
19. The decision to refuse leave to enter was entirely consistent with the Immigration Rules. The sponsor’s licence had lapsed and thus the appellant’s leave was curtailed, leaving him 60 days to find a new sponsor. The appellant and his employer both claim that they were unaware that the licence had lapsed and that his leave had been curtailed before he left the UK. However, whether or not the appellant was aware, it was indisputable that the licence had lapsed and that his leave had been curtailed. It is unfortunate for the appellant but on leaving the UK with less than 6 months leave

remaining had the effect of bringing his entry clearance leave to an end. Thus immigration officers were entirely correct to refuse leave to enter when he returned to the UK in May 2013. It also is correct that he has no right of appeal against the operation of those aspects of the Immigration Rules and other subordinate provisions.

20. The treatment of the appellant at the point of entry was entirely lawful and consistent with the law. He could not be granted leave to enter as he had no entry clearance. As the Secretary of State has pointed out, the Immigration Officer applied the law as it stood when making the decision and the appellant was treated in the same way as any other person in similar circumstances in making the decision to refuse leave to enter.
21. The appellant's appeal is against that decision, the refusal of leave to enter the UK on 13.5.13 at a time when the appellant had no valid entry clearance. Whilst it is unfortunate if the appellant was not aware before he left the UK that his leave had been curtailed, the Secretary of State was not to know that he would do so and in the process miss receipt of the letter advising him of the curtailment. Neither is it for the Secretary of State in making the curtailment decision to consider all eventualities, including that the appellant might choose to absent himself from the UK and thereby trigger the termination of his entry clearance.
22. It is intended that the Immigration Rules are a complete code and reflect the Secretary of State's response to and inclusion in considerations of article 8 private and family life.
23. In Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) has set out, inter alia, that on the then state of the authorities:
 - (b) 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);
 - (c) the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 00045 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.
24. Only if there were arguably good grounds for granting leave to remain outside the rules was it necessary for the judge for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules. It is illustrative that in Gulshan the Upper Tribunal considered that it was not unduly harsh for a husband who originated from Pakistan but was now a British national, to return to Pakistan with his wife who was seeking leave to remain as his spouse. The panel acknowledged that the couple would suffer some hardship, as he had been in the UK since 2002, he had worked here and was receiving a pension, and housing benefit and other state benefits, some of which could not be transferred to Pakistan.

25. More recently, in Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC), the Upper Tribunal held:
- (i) Failure on the part of the Secretary of State to identify in her decision any legitimate aim under Article 8(2) of the ECHR does not prevent a court or tribunal from seeking to do so on the basis of the materials before it.
 - (ii) "Maintenance of effective immigration control" whilst not as such a legitimate aim under Article 8(2) of the ECHR can normally be assumed to be either an aspect of "prevention of disorder or crime" or an aspect of "economic well-being of the country" or both.
 - (iii) "[P]revention of disorder or crime" is normally a legitimate aim both in expulsion cases where there has been criminal conduct on the part of the claimant and in expulsion cases where there have only been breaches of immigration law.
 - (iv) MF (Nigeria) [2013] EWCA Civ 1192 held that the new immigration rules regarding deportation of a foreign criminal are a complete code. This was because of the express requirement in them at paragraph 398 to have regard to exceptional circumstances and other factors.
 - (v) It follows from this that any other rule which has a similar provision will also constitute a complete code;
 - (vi) Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. 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.
26. Although the case law continues to develop, the current position is perhaps best 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. Thus before the Tribunal could consider the appellant's private and family law rights outside the Immigration Rules, it would have to find that there is no "complete code" for consideration of his private and/or family life circumstances within the Immigration Rules. Paragraph 276ADE is the Secretary of State's response to article 8 private life. It provides a balanced consideration of the claimant's circumstances where he does not meet the long residence requirements for leave to remain.

However, it has no relevance to an application for entry clearance. In the circumstances, there is no such 'complete code' and thus a Razgar approach is appropriate without the need to find compelling circumstances.

28. However, one has to consider what it is about the decision to refuse leave to enter in May 2013 that infringes the appellant's rights to respect for his private life. The decision did no more than apply the law to the appellant's circumstances. I fail to see how his right to respect for his private life requires the Secretary of State to grant him leave to enter when he had no extant entry clearance and his sponsor's licence had expired. Conversely, I fail to see how the decision to refuse entry clearance amounts to such interference with his private life so as to engage article 8 ECHR at all. The appellant has no right to enter the UK except in accordance with the Immigration Rules, which it is acknowledged he cannot meet. That he has previously worked in the UK carries little weight. Article 8 is not a shortcut to compliance with the Rules and is not strengthened by the degree to which he fails to meet the Rules for entry clearance.
29. Even if article 8 private life is engaged the crucial issue is the proportionality balancing exercise between on the one hand the rights of the claimant to respect for his private life, and on the other the legitimate and necessary aim of the state to protect the economic well-being of the country through the objective application of immigration control. The claimant does not have any private life in the UK at the present time and such relationships as he had he can maintain through modern means of communication. In essence his claim is to return to employment within the UK. However, in that regard he is not entitled to entry simply because of past employment or even the present desire of himself and his employer that he should continue to be employed. It is unfortunate for him that his leave lapsed on leaving the UK, or that had he not left he may still have been able to remain, but there is no such thing as a near-miss principle in the Immigration Rules.
30. I am quite satisfied that the claimant's circumstances could not be described as compelling so as to justify granting leave to remain outside the Immigration Rules. Even on a Razgar article 8 proportionality balancing exercise, taking into account all those factors, I cannot see how any Tribunal could reach a conclusion that the decision was disproportionate. It remains open to the claimant to make a fresh application for entry clearance, provided he can bring himself within the Rules. He had no right to reside or continue to reside in the UK except in accordance with those Rules.
31. In the circumstances, there were errors of law in the making of the decision of the First-tier Tribunal such that it should be set aside and remade. On the basis of the matters set out above, and in the light of the fact that the claimant no longer pursues his application and does not oppose the Secretary of State's refusal decision, the appeal must be dismissed.

Conclusions:

32. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by dismissing it.



Signed:

Date: 5 January 2015

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed.



Signed:

Date: 5 January 2015

Deputy Upper Tribunal Judge Pickup