Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/05410/2014**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons promulgated**
On 11 November 2014 **On 17 June 2015**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Secretary of State for the Home Department
Appellant
and

Pratigyan Kepchhaki
(Anonymity order not made)
Respondent

Representation

For the Appellant: Mr N Bramble, Home Office Presenting Officer.
For the Respondent: Ms R Stickler of Counsel instructed by NC Brothers & Co, Solicitors.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Murray promulgated on 31 July 2014 allowing Ms Kepchhaki's appeal against the decision of the Secretary of State dated 10 January 2014 to refuse to vary lave to remain and to remove her from the UK.

2. Although before me the Secretary of State is the appellant and Ms Kepchhaki is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Ms

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Kepchhaki as the Appellant and the Secretary of State as the Respondent.

Background

3. The Appellant is a national of Nepal born on 29 April 1989. The Appellant immigration history is a matter of record on file: it is summarised in the cover sheet to the Respondent's bundle before the First-tier Tribunal, and referenced in the decision of the First-tier Tribunal herein; something of the history may also be discerned from the decisions of the First-tier Tribunal and the Upper Tribunal in earlier appeal proceedings concerning the Appellant (ref IA/15819/2011). This history is known to the parties, and accordingly I do not reproduce it in its entirety here: I make reference to it as is incidental for the purposes of this document. Most recently, and subsequent to her successful appeal in IA/15819/2011, the Appellant was granted a period of discretionary leave from 13 June 2012 to 28 December 2012. On 20 December 2012 she made an application for variation of leave to remain to complete her studies in the UK. Her application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 10 January 2014; on the same date, a Notice of Immigration Decision was signed on behalf of the Respondent which as well as the decision to refuse to vary leave, communicated a decision to remove the Appellant pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.

4. The Appellant appealed to the IAC.

5. The First-tier Tribunal Judge allowed the Appellant's appeal under Article 8 of the ECHR for reasons set out in his determination.

6. The Respondent sought permission to appeal. The Grounds in support of the application focus on the *soi disant* 'intermediary step' identified in **Gulshan [2013] UKUT 640 (IAC)**, and argue that there were "*no case specific findings as to arguably good grounds and compelling circumstances not sufficiently recognised under the Rules*", and that the Judge "*has given inadequate findings as to arguably good grounds and compelling circumstances not sufficiently recognised under the Rules, to justify a freestanding Article 8 assessment*".

7. Permission to appeal was granted by First-tier Tribunal Judge White on 6 October 2014. In granting permission to appeal Judge White recognised that "*the issue of whether there must be "good arguable grounds" before Article 8 can be considered has now been disposed of in MM [2014] EWCA Civ 985 at paragraph 128/129*". However, seemingly of his own motion, Judge White considered that it was arguable that the

decision of the First-tier Tribunal was inconsistent with the guidance in **Patel [2013] UKSC 72** - although, as recognised in the grant of permission to appeal, Judge Murray had directed himself to **Patel** at paragraph 22 of his decision.

8. In any event, as Mr Bramble identified, the substance of the Grounds necessarily also went to the substantive question of whether the Appellant's removal would be in breach of Article 8.

Consideration

9. The Appellant succeeded in her earlier appeal (IA/15819/2011) before the Upper Tribunal on Article 8 grounds. Just as now, she had applied for leave to remain as a student. In allowing the appeal under Article 8 the Tribunal identified, amongst other things, as a relevant and persuasive factor that the Appellant had experienced "*unhelpful officialdom*" (paragraph 26, see also paragraph 17-18 and paragraph 23). The Tribunal on that occasion identified that the period of leave to be granted in consequence of the successful appeal under Article 8 was "*a matter for the respondent*" but went on to state "*we would envisage a period that would enable the appellant to complete the proposed course*". The decision of the Upper Tribunal was promulgated on 7 October 2011; the Appellant was subsequently granted discretionary leave to remain in the UK from 13 June 2012 to 28 December 2012.

10. It is clear that Judge Murray had this history in mind when determining the instant appeal: see paragraphs 19-21 (although there appears to be a slip at paragraph 19 in stating the date upon which leave was granted as being 28 December 2012, rather than leave being granted until 28 December 2012).

11. It is also clear that Judge Murray had well in mind the effect of the decision in **Patel**. He cites it at paragraph 22, and states the key factor upon which the Respondent – opportunistically in light of Judge White's grant of permission to appeal – now seeks to place reliance: "*The opportunity for a promising student to complete his course in the this country, however desirable in general terms, is not itself protected right under article 8*". Further, Judge Murray goes on to state at the beginning of paragraph 24 "*I have considered the Appellant's arguments in the context of this case law*". I detect no misdirection in this, or indeed in the subsequent paragraphs where the Judge considered the application of principle to the facts of the particular case.

12. In addition to identifying the favourable factors of the Appellant's case historically by reference to the earlier decision of the Upper Tribunal, and finding irrespective of the 'opportunity to pursue studies'

point that the Appellant had established a private life in the UK, the Judge went on, at paragraph 24, to identify features of the case post-dating the earlier appeal proceedings that were relevant to the current assessment of Article 8. In particular:

(i) The Judge identified that notwithstanding the basis upon which the Appellant had succeeded before the Upper Tribunal she was only granted 6 months discretionary leave, and not leave as, all comparable to, the leave that would have been granted to a Tier 4 student after a successful appeal.

(ii) The Judge also identified that it had taken the Respondent over 9 to grant leave.

(iii) The Judge accepted that the reason the Appellant had been unable to obtain a CAS was because she had been granted discretionary leave rather than Tier 4 leave.

(iv) In consequence, and critically, the Judge concluded “she was therefore unable to continue her studies in the manner contemplated by the Upper Tribunal in short, this is a finding that the leave granted by the Respondent did not give effect to the basis upon which the Upper Tribunal allowed the Appellant’s appeal.

(v) The Judge recognised that it was the circumstances that led the Appellant to apply again in December 2012 for further leave.

(vi) The Judge noted that it had taken the Appellant 13 months to determine the application.

13. See similarly paragraph 25.

14. The Judge’s evaluation that in all such circumstances the Respondent’s reliance upon the public interest in the maintaining of effective immigration control in order to justify a removal decision was “*seriously undermined*” (paragraph 25) was entirely open to him on the facts. The Judge’s conclusion that removal would be disproportionate expressly took into account matters not covered by the Immigration Rules that were particular to the circumstances of the Appellant’s case. In my judgement, there was no misdirection in law: the Respondent’s challenge is really one of mere disagreement with the outcome, and I reject it.

15. In all such circumstances I find no error of law in the approach and findings of the First-tier Tribunal.

Notice of Decision

16. The decision of the First-tier Tribunal contained no error of law, and accordingly the decision stands.

17. The challenge of the Secretary of State is dismissed.

18. Ms Kepchhaki's appeal remains allowed.

19. No anonymity order is sought or made.

Deputy Judge of the Upper Tribunal I. A. Lewis 12 June 2015