



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/06496/2015

THE IMMIGRATION ACTS

Heard at North Shields
On 21 October 2015
Prepared on 16 November 2015

Decision and Reasons Promulgated
On 24 November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

K. F.

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Mangion, Home Office Presenting Officer
For the Respondent: in person

DECISION AND REASONS

1. The Respondent is a citizen of Pakistan. On 26 August 2013 he was granted entry clearance as a Tier 4 (General) Student expiring on 30 September 2014 in order that he might pursue a course of study at the University of Sunderland.
2. On 27 August 2014 the Respondent applied for a variation of his leave so that he could pursue a further course of study from October 2014 to November 2015, leading to the award of an MBM. He supplied a valid CAS issued to him by the University in support of that application.

3. That application was refused on 21 October 2014, and in consequence a decision was made by reference to s47 of the 2006 Act to remove him from the UK. Two reasons were given by the Appellant for these decisions. The first referred to paragraph 245ZX(d) and concerned the content of the CAS submitted by the Respondent in support of his application. It stated that he had outstanding course fees of £1515, which meant that he needed to demonstrate not only that he had the requisite monies for the "maintenance" of himself and his dependent spouse, but also that sum. The bank statements supplied did not do so, although they did demonstrate sufficient funds for the "maintenance" of himself and his spouse. The second referred to paragraph 245ZX(ha) and asserted that the Respondent had already been granted leave to study in the UK at degree level for ten years, and thus the application he had made would result in his having spent more than five years studying at degree level in the UK.
4. A second refusal of the application and a further decision made by reference to s47 of the 2006 Act to remove him from the UK was made on 22 October 2014. Only one reason were given by the Appellant for these decisions, which repeated the reference to paragraph 245ZX(d).
5. The Respondent's appeal referred to the immigration decisions made on 22 October 2014. It was heard on 5 May 2015, and allowed under the Immigration Rules in a decision promulgated on 13 May 2015 by First Tier Tribunal Judge Conrath.
6. By a decision of First Tier Tribunal Judge Grant-Hutchison dated 29 July 2015 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 evidence that had not been supplied by the Respondent in support of his application. Thus the matter comes before me.

The decision under appeal

7. I drew to the attention of the parties the existence upon the Tribunal file of two refusal decisions dated 21 October 2014 and 22 October 2014, since there is no reference to the former in the Judge's decision. Mr Mangion was unaware of the former, and after checking the Notice of Appeal did refer to the decision of 22 October 2014 suggested that I should treat the decision of 21 October 2014 as withdrawn. He accepted that the Appellant was unable to substantiate the second ground of refusal in the decision of 21 October 2014.
8. In the circumstances I treat the decision of 21 October 2014 as having been withdrawn by the Appellant. The immigration decisions under appeal are those of 22 October 2014.

The CAS

9. It was not in dispute before the Judge that the CAS submitted in support of the application stated that there were outstanding fees of £1515, and that the CAS made no reference to the two scholarships of £1500 and £750 that the Respondent had been awarded by the University.
10. Mr Mangion accepted that there was no issue over the fact that the Respondent had been awarded the scholarships he relied upon before the Judge. He noted that the Respondent had accepted that at the date of his application he had not been issued with any document to confirm the award of those scholarships, although he had been told that they would be awarded to him.
11. Mr Mangion accepted that the Judge had correctly identified that taken in isolation the CAS had not stated the true financial position between the Respondent and the University that existed at the date of decision.
12. Mr Mangion also accepted that if the CAS had referred to the scholarship then the application would have been granted, because the funds reflected in the Respondent's bank statements were sufficient, and held for the requisite period, to cover the other elements of the "maintenance" requirement.
13. Nevertheless Mr Mangion argued that the Judge had not been entitled to allow the appeal, because in order to make the findings of fact that he had made, he had admitted inadmissible evidence into his consideration, and had failed to make any reference to the provisions of s85A of the 2002 Act. For the Respondent to establish his argument, he had been forced to rely upon documents that he had not submitted with his PBS application. There was nothing in the application itself, or in the documents that supported it that could have alerted the Appellant to the existence of the scholarships. The only question in the application form that might possibly have alerted the decision maker to the existence of the scholarships [p6 of 12] had been answered in the negative, although he realistically conceded that this question did not directly raise the issue of whether a scholarship had been awarded by a student's prospective college.

Paragraph 245AA

14. Mr Mangion argued that the terms of paragraph 245AA of the Immigration Rules were not engaged by the application, and so the case worker was not required to contact the Respondent and invite him to supplement the "specified documents" that he had submitted in support of his application.
15. Mr Mangion accepted that without the benefit of the scholarship monies the evidence submitted by the Respondent in support of

the application was only deficient in the sense that it did not demonstrate the requisite sums for one day within the requisite 28 day period. The relevant period is 31 July to 27 August 2014, and the calculation has been performed using the credit balances on the bank statements for the three different bank accounts that were supplied in support of the application. Nevertheless he argued, correctly, there was no “near miss” principle that the Respondent could rely upon.

The Respondent’s submissions

16. The Respondent argued out that he was the innocent victim of a failure by the University to set out in the CAS the scholarships that were awarded to him, and that he had now completed the course for which he had sought leave to study, because the University had allowed him to do so whilst the appeal process was ongoing. He had been informed that he had been awarded a distinction in his dissertation, and that if he were in possession of leave to remain he would be able to graduate and attend the graduation ceremony in the UK. He accepted that he could return to Pakistan in safety, and that he could graduate in his absence.
17. The Respondent expressed the concern that if he sought to study further outside Pakistan the refusal would affect him. Whilst he could return to Pakistan and apply for entry clearance to do so he would now always have on his immigration record the refusal of a visa, and a removal decision, which he considered would unfairly blight his future prospects, since he found himself in a position that was not of his own making.

Error of Law?

18. I am satisfied that the Judge did make an error of law in his approach to the evidence that he was entitled to admit when considering whether in the context of a PBS appeal, the claimant had demonstrated that he met the requirements of the Immigration Rules. He was not entitled to admit evidence that had not been supplied with the application, and thus he was not entitled to use documentary evidence of the award of the scholarships which did not exist at the date of the application, and which were not supplied with it. In the circumstances I set aside the decision.

The decision remade

19. The evidence submitted in support of the application did not demonstrate that the Respondent met the requirements of paragraph 245ZX(d) of the Immigration Rules. The period in

relation to the shortfall was extremely short, only one day, but there is no “near miss” principle that could save it.

20. Nor was there anything about the documents submitted in support of the application which engaged paragraph 245AA and thus obliged the case worker to contact the Respondent and request further documents in the anticipation that with their benefit the application would succeed.
21. Nor did the rather more generous 2011 “process instruction” survive the introduction of paragraph 245AA; Mandalia [2015] UKSC 59 @ 28.
22. In the circumstances I am not satisfied that the Respondent has established that the case worker failed to follow any applicable policy when considering his application.
23. The Respondent accepts that his wife’s application for a variation of her own leave was also refused, and that her own appeal to the First Tier Tribunal was dismissed. In the circumstances, even if Article 8 is engaged by the removal decision under appeal I am satisfied that his ability to enjoy his “family life” with his wife is not affected by that decision – neither of them has any immigration status in the UK, and both of them are able to return together to Pakistan to their families in safety. Once in Pakistan the Respondent will be able to graduate in his absence from the University, and receive the qualification for which he has studied and satisfied his examiners. He is not presently engaged in any course of study and accepts that he has not yet decided what to do next with his career. He has identified no new course of study, and has not been accepted onto any further course of study.
24. 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. The Respondent has only ever had a grant of temporary leave for purposes that are now complete. 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.
25. To the extent that the Respondent relies upon his undoubted good character 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.*
26. To sum up then, the Respondent's appeal did not rely upon the core concepts of moral and physical integrity. 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 him leave, and the consequential decision to remove him, led to an unjustifiably harsh outcome. In the light of the provisions of s117A-D, and the guidance to be found in AM (s117A-D) Malawi [2015] UKUT 260 I am satisfied that the removal decision is a proportionate response given the public interest in the maintenance of immigration controls.
27. In the circumstances I remake the decision so as to dismiss the appeal.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 13 May 2015 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: 16 November 2015