



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/14086/2014

THE IMMIGRATION ACTS

Heard at: Field House
On: 6th July 2015

Decision and Reasons Promulgated
On 21st August 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Mirza Nauman Baig
(no anonymity direction made)

Respondent

Representation:

For the Appellant: Mr Clarke, Senior Home Office Presenting Officer

For the Respondent: Ms Shaw, Counsel instructed by Hilcrest Solicitors LLP

DETERMINATION AND REASONS

1. The Respondent is a national of Pakistan date of birth 31 January 1984. On the 18 November 2014 the First-tier Tribunal (Judge LK Gibbs) allowed his appeal against a decision to refuse to vary his leave and to remove him from the United Kingdom pursuant to s47 of the Immigration Asylum and

Nationality Act 2006. The Secretary of State now has permission to appeal against that decision¹.

2. The subject of the appeal was the Respondent's application for further leave to remain as a Tier 1 (Entrepreneur) Migrant. That application had been rejected because the documents submitted with the application had not demonstrated that he held the requisite £50,000 in funds. At the appeal hearing before the First-tier Tribunal his Counsel had accepted that this was so; it was however submitted that the Respondent had been the victim of poor legal representation. The Secretary of State had emailed the Respondent's then representatives asking for further documentation and they had failed to respond: it was common ground that had they done so they could have provided the specified documentation to show that the Respondent did indeed have the £50,000 in funds², and that the application would therefore have been successful.
3. It was this unfortunate failure of the representatives which formed the basis of the Respondent's second ground of appeal: that he had established a private life in the UK worthy of protection and that his appeal should be allowed on Article 8 grounds.
4. The First-tier Tribunal found that as a matter of common sense the Respondent must have established a private life since his arrival in 2007, and proceeded straight to consideration of whether the decision is proportionate. The Tribunal directed itself to s117B of the Nationality, Immigration and Asylum Act 2002. At paragraph 15 of the determination it says the following:

"15. In considering the public interest in the appellant's removal I have given weight to the fact that he speaks English, is integrated and is financially independent. I also place weight on the fact that he has invested money in the UK through paying his tuition fees and also intends to invest further with this entrepreneur application. This is, I find, all in the public interest. He remained legally in the UK throughout his time here, and for the reasons I have set out above only finds himself in this position because of shoddy representation. His immigration status has never been '*precarious*'"
5. Having made reference to CDS (Brazil) [2010] UKUT 305 (IAC) it goes on:

"17. Although in this case the appellant has completed his course of study I find that he has a legitimate further avenue available to him, which is an avenue which I find will create economic benefit to the UK. There are no countervailing factors as I have outlined above and although I have of course given weight to the fact that his application was refused by the respondent the reality is that he is able to meet the

¹ Permission to appeal to the Upper Tribunal granted by First-tier Tribunal Judge Nicholson on the 15th January 2015

² See paragraph 7 of the determination

requirements of the Immigration Rules, and through no fault of his own was prevented from providing the necessary documents to prove this.

18. In these particular circumstances I am persuaded that the appellant's removal is disproportionate when weighed against the public interest of maintaining immigration control"

6. The appeal was allowed on human rights grounds for those reasons.

Error of Law

7. The Secretary of State contends that the First-tier Tribunal erred in law in the approach taken to s117B. For the Respondent Ms Shaw concedes that this is so. The Respondent's leave was, at all times since his arrival in 2007 "precarious": see AM (s117B) Malawi [2015] UKUT 0260 (IAC). As such the Tribunal should only have attached little weight to his private life.
8. The Tribunal also fell into error by failing to identify what the interference was. The consequence of this decision *may* have been that the Respondent was required to return to Pakistan, so permanently disrupting his private life in the UK, but that was not the only outcome. He may, for instance, have made a new application for leave to enter or remain, which would, on the facts as found, have every chance of success. This error led to a further omission: a failure to make findings on what the consequences were for the Respondent. In the absence of a finding that there would be any adverse consequences at all (bar the inconvenience and expense) it is difficult to see how the decision, made in accordance with the Rules, was disproportionate.
9. The decision to allow the appeal on human rights grounds must therefore be set aside.

The Re-Making

10. Although there was no cross-appeal against the decision to dismiss the appeal under the Rules, Ms Shaw sought to persuade me that in fact the appeal could have been allowed on that basis, and invited me to remit the matter to the First-tier Tribunal to enable her to run her argument there. Mr Clarke understandably objected to this course of action. The determination clearly records that the Respondent had not pursued his case under the Rules: it would be procedurally unfair if he were allowed to re-open it now. I agree with Mr Clarke. If there was a case under the Rules it should have been pursued before the First-tier Tribunal. The appeal was dismissed on that basis and there being no appeal against that decision this Tribunal has not the *vires* to interfere with it.
11. In respect of the human rights appeal my decision can be gleaned from the reasoning above. The Respondent has not established that there would be a permanent - or even significant - interference with his Article 8 rights as a result of this decision. It is always open to him to make a new application in

order to extend his stay in the UK, returning to Pakistan and making an application for entry clearance if necessary. I know that this decision results in expense, inconvenience and no doubt frustration for the Respondent, who has always intended to do the right thing and comply with the Rules. These are however the unfortunate consequences of s85A NIAA 2002, a statutory provision approved by parliament. There is no evidence before me to suggest that there would be any particularly harsh or compelling consequences arising from the decision and in those circumstances the appeal cannot be allowed under Article 8.

Decisions

12. The determination contains an error of law and the decision to allow the appeal under Article 8 is set aside.
13. I re-make the decision by dismissing the appeal on human rights grounds.

Deputy Upper Tribunal Judge Bruce
7th August 2015