Upper Tribunal
(Immigration and Asylum Chamber) **Appeal**
Number: IA/33630/2013

THE IMMIGRATION ACTS

Heard at Field House, London **Decision &**
Reasons Promulgated
On the 16th September 2015 **On the 6th**
October 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL MCGINTY

Between

MR MUHAMMAD WAQAR
(Anonymity Direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I. Khan (Lincolns Solicitors)
For the Respondent: Ms Brocklesby-Weller (Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant Mr Waqar's appeal against the decision of Judge of the First-Tier Tribunal Hussain which was dated the 30th December 2014.

Background

2. The Appellant is a national of Pakistan. He was born on the 19th May 1979 and is

therefore now aged 36 years old. He entered the United Kingdom on the 29th January 2010 as a Tier 4 student migrant. He applied for further Leave to Remain as a student, but this was refused on the 30th April 2011. He appealed that decision as a result of which his Immigration status was reconsidered by the Secretary of State on the 12th March 2012, resulting in him being granted leave until the 13th April 2012. On the 13th April 2012 the Appellant made an application for further leave on the basis that the period of one month leave granted by the Respondent outside of the Immigration Rules was very short and that he would not be able to arrange admission to a new College for study in such a short period of time. That application was refused on the 25th July 2013, which gave rise to the appeal to the First-Tier Tribunal which was heard by Judge of the First-Tier Tribunal Hussain on the 28th November 2014.

3. In that decision Judge of the First-Tier Tribunal Hussein found that the grant of discretionary leave was at the discretion of the Secretary of State and that the Tribunal had no power to substitute the Secretary of State's discretion with its own. The appeal was therefore dismissed.

4. The Appellant sought to appeal that decision to the Upper Tribunal on two grounds. Firstly, that the Judge failed to make findings or his findings were inconclusive on the matters as to whether or not the Secretary of State exercised her discretion; whether the Secretary of State had failed to pay any regard to the discretion vested in her and whether she had failed to exercise discretion, such that the Secretary of State's decision was not in accordance with the law following the case of Ukus (discretion: when reviewable) [2012] UKUT 00307. It is further argued as the second ground of appeal that the Judge failed to make any findings on Article 8 despite referring to the fact that Article 8 had been dealt with in the refusal letter.

5. Permission to appeal was granted by First-Tier Tribunal Judge White on the 5th May 2015. He found that there was no merit in the Ukus point raised in the grounds seeking permission as the Appellant had asked the Respondent to exercise her discretion outside of the Immigration Rules and the Respondent had done so. The exercise of residual discretion which did not appear within the

Rules and was a matter for the Secretary of State and not the Tribunal. However, Judge White did find that the original Grounds of Appeal raised the issue of Article 8 and that the Judge made no findings thereon, either within or outside of the Immigration Rules, which he found was arguably a material error of law.

6. In the Respondent's Section 120 notice, it is argued that whilst the Judge erred in law in not resolving the issue of disproportionate breach of Article 8, such error was not material and that no properly directed Tribunal could have found a disproportionate breach in the Appellant's favour on the facts before it, as there was no adequate evidence to establish a breach.

7. It was on the basis of this background that the case proceeded to the full appeal hearing before me in the Upper Tribunal.

8. In his submissions on behalf of the Appellant Mr Khan argued that there was a material error in the decision of First-Tier Tribunal Judge Hussain in failing to deal with the Article 8 issue, which had been raised in the Grounds of Appeal. However, he conceded that other than the statement from the Appellant there was in fact no further evidence regarding Article 8 before the First-Tier Tribunal, but he sought to argue that the Appellant was in a relationship and did have friends in the UK having entered some time ago on the 29th January 2010. He asked me to find that there was a material error and remit the case back to the First-Tier Tribunal for rehearing.

9. Ms Brocklesby-Weller on behalf of the Respondent argued that the First-Tier Tribunal Judge was in fact entitled to treat the Article 8 point as having been abandoned, the matter not having been dealt with in the Appellant's statement or in submissions before the First-Tier Tribunal Judge. However, she argued that in any event, there was no evidential basis made out for a breach of Article 8, and that therefore any error on the part of the Judge was not material.

My Findings on Error of Law and Materiality

10. In respect of the argument as to whether or not the Respondent had failed to exercise her discretion in respect of the Appellant's application for further Leave to Remain outside of the Immigration Rules, it does not appear from the wording of the grant of permission for leave to appeal by First-Tier Tribunal Judge White that permission to appeal was actually granted on that ground. The Judge specifically referred to the fact that "there would appear to be no merit in the Ukus point raised by the Crown seeking permission". However, even if I am wrong in this regard the Upper Tribunal in the case of Ukus (discretion: when reviewable) [2012] UKUT 00307 (IAC) made it clear that "if a decision maker in the purported exercise of a discretion vested in him noted his function and what was required to be done when fulfilling it and then proceeded to reach a decision on that basis, the decision is a lawful one and the Tribunal cannot intervene in the absence of a statutory power to decide that the discretion should have been exercised differently" and that where the decision-maker failed to exercise discretion vested in him, the Tribunal's jurisdiction is limited to a decision that the failure renders the decision not in accordance with the law. However, this case relates specifically to the statutory power under Section 84 (1) (f) of the Nationality, Immigration and Asylum Act 2002 that "the person taking the decision should have exercised differently a discretion conferred by the Immigration Rules". The case therefore dealt with the situation where the decision maker had a discretion which was vested in him under the Immigration Rules, rather than as in the present case a consideration of the application under a residual discretion outside of the Immigration Rules.

11. The Court of Appeal case of Abdi [1996] Imm AR 148 is authority for the proposition that exercise of any residual discretion which does not appear in the Rules itself is a matter for the Secretary of State and the Tribunal may not impose its own decision. It is clear that the Secretary of State in the refusal on the 22nd July 2013 had considered the Appellant's application, but had refused it. The discretion had therefore been exercised, although exercised against the Appellant. First-tier Tribunal Judge Hussain was therefore perfectly correct in determining that such exercise of discretion was a matter for the Secretary of State and not for him.

12. However, in respect of the main Grounds of Appeal, in respect of which permission to appeal was clearly granted, namely the First-Tier Tribunal Judge's failure to deal with the question of Article 8, it is clear that the Appellant did raise the argument within his Grounds of Appeal that the removal of the Appellant would violate Article 8 of the ECHR 1998. Although this argument does not appear to have been pursued in oral submissions by Mr Khan representing the Appellant at the First-Tier Tribunal, and although there was no direct evidence in respect of Article 8 in the Appellant's witness statement, having been raised in the Grounds of Appeal, I do not consider that the Judge should be simply taken to have considered this argument was being abandoned. He does not appear to have considered the point at all. Clearly, in my judgement, he should have a least considered the issue, even if he were going to go on to state that the ground had not been pursued before him and he took it as being abandoned. However, he has not done so. He has not referred to this Ground of Appeal at all. In my judgement, this does amount to an error of law.

13. However, it is not simply sufficient to find that there has been an error of law in the determination of the First-Tier Tribunal Judge. Such error of law has to be material. In considering that issue, I have to determine whether or not such error was material based upon the evidence before the First-Tier Tribunal. Until that issue has been determined, I am not in a position to set aside the decision or hear further evidence in respect of the Article 8 issue. When considering the evidence that was before the First-Tier Tribunal Judge, although it would have been apparent to him that the Appellant had been in the United Kingdom since the 29th January 2010, as he had specially made this finding at [1] of his decision, there was no evidence before the First-Tier Tribunal Judge of the Appellant having any family within the United Kingdom and no evidence as to the extent of any private life he may have. The Appellant did not specifically have a right to study in the United Kingdom as opposed to elsewhere under Article 8, but any friendships, relationships or other private life that he developed whilst studying, would clearly be relevant. However, there was no evidence thereof before the First-Tier Tribunal Judge.

14. The Appellant within his witness statement had not dealt with any facts relevant for the purposes of Article 8, and had not even mentioned within his witness statement any reasons why his appeal should be allowed on Article 8 grounds. The Respondent had specifically originally considered the application under paragraph 276 ADE, and found that the Appellant did not meet any of the requirements of that paragraph. It was not argued before the First-Tier Tribunal Judge that in fact the Appellant did meet the requirements of paragraph 276 ADE, and there is no evidence before me that on the evidence before the Judge, that any of the requirements of that paragraph were met.

15. Nor was there any evidence before the First-Tier Tribunal Judge that the Appellant met the requirements for a family life under the Immigration Rules. Nor is there any evidence or any argument put before the First-Tier Tribunal Judge that there were any compelling circumstances in the case such as to mean that the Appellant's application should have been considered outside of the Immigration Rules applying the 5 stage Razgar test. The Respondent had extended the Appellant's leave to beyond the end date of his course, so that he could complete the same, and there was in fact then no evidence before the First-Tier Tribunal Judge which would have justified any finding that her failure to extend his leave beyond that point, amounted to a breach of his Human Rights under Article 8, whether inside or outside the Rules.

16. It is not a breach of Human Rights to require an Appellant whose course had finished to return him to make a further application if he wished to continue his studies in the UK, as there is no separate right to study in the UK as opposed to elsewhere, for the purposes of Article 8. The fact that the Appellant having being in the UK since 2010, a period of just 5 years, was on the present case insufficient to justify any finding of a breach of Article 8.

17. The decision reached by First-Tier Tribunal Judge Hussain, therefore, although containing an error of law in terms of his failure to deal with the Article 8 point, was not material, as there was insufficient evidence before the First-Tier Tribunal Judge to justify any finding that the Appellant should have succeed on Article 8 grounds, whether inside or outside of the Immigration Rules. No

material error of law having been found, the decision of First-Tier Tribunal Judge Hussain is maintained and the appeal is dismissed.

Notice of Decision

The decision of First-Tier Tribunal Judge Hussain, not containing any material error of law, is maintained and the appeal is dismissed.

The First-Tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and no application for an anonymity order was made before me. No such order is made.

Signed Dated 16th September 2015

RF McGinty

Deputy Upper Tribunal Judge McGinty