



IAC-FH-NL-V1

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

Appeal Number: IA/45219/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 26 October 2015**

**Decision & Reasons Promulgated
On 20 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

**MISS AMARRA AROOJ
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No representation

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

DECISION AND REASONS

The Appellant

1. The appellant is a citizen of Pakistan born on 1 January 1987 and on 14 August 2014 she applied for leave to remain in the United Kingdom outside the Immigration Rules. That application was refused on 27 October 2014 by way of a decision to refuse to vary her leave to remain and a decision to remove her under Section 47 of the Immigration, Asylum and Nationality Act 2006. Her application for leave to remain was refused

on the basis that she had applied for a purpose not covered by the Rules. The Reasons for Refusal Letter included the following:

“The Secretary of State’s policy is to consider granting leave outside the Immigration Rules where particularly compelling circumstances exist. Grants of such leave are rare and are given only for genuinely compassionate reasons. You have claimed that we should exercise discretion in your case because you wish to complete your studies here. This has been carefully considered. However, it is open to you to return to Pakistan and pursue your studies or employment there. Alternatively, if you wish to undertake studies in the United Kingdom, it is open to you to make an application for entry clearance under Tier 4 of the Points Based System. It has been decided that a grant of leave outside the rules is not appropriate in your case.”

2. Accordingly the application was refused.
3. With her application the appellant submitted a letter which stated, “I have a very clear idea of the type and purpose of course that I want to study and am already in touch with educational institutions in the UK: and are able to vouch that their course will start within next 6 months.”
4. In the same letter the appellant stated that she wished to remain in the UK as a prospective student and intended to study in the UK under Tier 4 of the points-based system but had not completed all the arrangements for her course of study. First-tier Tribunal Judge Aziz determined the matter without a hearing and on the papers on 19 February 2015 and a decision was promulgated on 22 February 2015. The judge found that the appellant could not succeed under the Immigration Rules further to paragraph 322(1) which states:

“322. In addition to the grounds for refusal of extension of stay set out in Parts 2-8 of these Rules, the following provisions apply in relation to the refusal of an application for variation of leave to enter or remain or, where appropriate, the curtailment of leave:

Grounds on which leave to remain in the United Kingdom is to be refused

- (1) the fact that variation of leave to enter or remain is being sought for a purpose not covered by these Rules.”

5. The judge also considered the appellant’s case at paragraph 17 of the decision and made a note that Article 8 was not a general dispensing provision.
6. The appellant appealed to the Upper Tribunal and initially her application was refused by First-tier Tribunal Judge McDade. Her grounds were renewed to the Upper Tribunal on the following ground. She submitted she was denied an opportunity to have a fair hearing further to Article 6 of the ECHR as she requested that her matter be listed to the oral hearing so she could make oral submissions and the Tribunal had ignored her fax.

7. Further, she stated the application form on which she applied to the Home Office stated she could have applied for other reasons which were not covered by the application form and the judge did not consider this. The applicant had been led to believe that she had completed the correct application form. The judge had not considered the application under the correct Immigration Rules. The applicant had stated she wished to submit her application under the Immigration Rules cited in her covering letter and the Home Office should not have applied paragraph 322(1) of the Immigration Rules and should have sent the form back as invalid under Rule 34A if necessary. The judge had failed to follow the findings in the case of **Patel (revocation of sponsor licence - fairness) India [2011] UKUT 00211 (IAC)** 6 June 2011 which required the respondent to afford an opportunity to the appellant to have her leave varied.
8. Further the Secretary of State had failed to apply any discretion in the appellant's case knowing that paragraph 322 of the Immigration Rules did not apply. It was conceded and accepted there was a residual of discretion to grant leave outside the Rules and the exercise of discretion should have been considered.
9. Upper Tribunal Judge Perkins granted permission to appeal on the basis that the present grounds raised the contention "apparently for the first time" that the applicant requested the First-tier Tribunal to give an oral hearing and the Tribunal ignored that application. This was arguably a procedural error amounting to an error of law.
10. A Rule 24 response was served by the Secretary of State on the basis that there was no error in the judge's findings at [18] which dealt with the matter and the reference to **Patel** was of no relevance as the application made fell outside the Rules and was not a Tier 4 application. There was no error in the judge's decision to consider the residual discretion. It was open to the judge to allow the appeal on the basis of what was before him and he took into account everything that should have been.
11. Prior to the hearing before the Upper Tribunal on 26 October the appellant submitted a letter dated 21 October 2015 requesting an adjournment. That adjournment was refused by Upper Tribunal Judge Perkins. It stated that "the application for an adjournment is refused because it is not supported by medical evidence. If the appellant really has "bad flu" I am confident that medical evidence showing that she is unfit to attend an appeal hearing would be forthcoming".

The Hearing

12. At the hearing Mr Melvin objected to any grant of an adjournment. I found that there was no evidence that the appellant had produced any medical evidence showing she was unfit to attend an appeal or had responded in any way to the refusal issued on 23 October 2015 to her application for an adjournment previously. She had previously written to the Tribunal on 21 October 2015 and 5 days prior to the hearing stating

that the doctor had told her she could 'self-certify' but I do not accept that a GP would not provide a letter in respect of a court hearing.

13. I have considered the basis of the application for permission to appeal and consider that there was sufficient information to make a just decision on the papers. I had in mind the overriding objective further to Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the need to balance the need for proper participation of the appellant with the avoidance of further delay so far as it was compatible with a just consideration of the issues. I therefore refuse any further adjournment.
14. I note the appellant made no reference to any request for an oral hearing in her first application for permission to appeal and this was raised in the application to the Upper Tribunal. There was no letter on file from the appellant and no fax dated 6 February 2015. The first notification that such a fax had been sent was in response to the notice of decision of the refusal for her application for permission to appeal to the Upper Tribunal and after the First-tier Tribunal decision. She forwarded a copy of the said fax on 22 May 2015. As Mr Melvin pointed out no fee had been paid in respect of an oral hearing and the appellant indicated at the outset that she wished the matter to be determined on the papers. I am not satisfied that there was a procedural error amounting to an error of law by the judge at the First-tier Tribunal proceeding on the basis that the matter should be determined on the papers.
15. It is clear that the appellant made an application for leave to remain on the basis of being a prospective student and the judge considered the covering letter forwarded with her application dated 14 August 2014. The letter is referred to in paragraph 7 of the First-tier Tribunal decision in which it is outlined that the appellant has a clear idea of the type of course she wishes to study and that she has made contact with a number of educational institutions and that she *hoped* to begin her course within the next six months. The judge clearly set out that the appellant was making an application outside the Immigration Rules and that it was refused further to paragraph 322(1).
16. There is no indication that the judge erred because he failed to consider the application under the correct Immigration Rules as there is no Rule for a prospective student.
17. There is no doubt that the judge also set out that the Secretary of State had addressed her mind to whether there should be a grant of leave outside the Rule but that was rare and only given for genuinely compassionate reasons. That was clearly not made out on the basis of the evidence presented in this case. The judgment **Patel & Others v Secretary of State for the Home Department** confirms that it is important to remember that Article 8 is not a general dispensing power. Indeed, as the judge set out in paragraph 57 of **Patel** "the merits of a decision not to depart from the Rules are not reviewable on appeal", Section 86(6). Although it is now accepted that **Gulshan (Article 8: new**

rules: correct approach) [2013] UKUT 640 (IAC) does not set out a threshold test for the application of Article 8, there was no indication that there were any circumstances in this case which had not been identified by the judge which would lead to a successful appeal under Article 8. As the judge stated at paragraph 17:

“17. I have summarised above a covering letter that was attached to the appellant’s application. She is essentially seeking temporary leave in order to find a place to go study in the United Kingdom. In a further letter dated 25 December 2014 (contained within the appellant’s bundle), she reiterates this request, adding that in Pakistan the conditions to study and lead an independent life are difficult for a girl.”

And at paragraph 21 the judge stated:

“In arriving at her decision I echo the respondent’s observations that if the appellant does wish to study in the United Kingdom then it is open to her to make the appropriate entry clearance application. The appellant is essentially relying on Article 8 as a general dispensing power in order to secure a place of study on a course she has yet to find (let alone secure admission on). The case law in this area is clear that the appellant cannot rely on Article 8 for such purposes.”

18. There is no merit in the contention that the respondent should have returned her application as invalid. She simply does not, on the basis of her claim, fulfil any of the Immigration Rules and further has made out no case for her application to be considered on Article 8 grounds.

19. As stated in **Nasim and others (Article 8)** [2014] UKUT 00025 (IAC)

‘The Tribunal did, however, expressly acknowledge that it was unlikely a person would be able to show an Article 8 right by coming to the United Kingdom for temporary purposes. The chances of such a right carrying the day have, we consider, further diminished, in the light of the judgments in Patel and Others. It would, however, be wrong to say that the point has been reached where an adverse immigration decision in the case of a person who is here for study or other temporary purposes can never be found to be disproportionate. But what is clear is that, on the state of the present law, there is no justification for extending the obiter findings in CDS, so as to equate a person whose course of study has not yet ended with a person who, having finished their course, is precluded by the Immigration Rules from staying on to do something else’.

And further

As **Patel [57]** states

‘It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State’s discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the rules are not reviewable on appeal: section 86(6). One may sympathise with Sedley LJ’s call in Pankina for “common sense” in the application of the rules to graduates who have been studying in the UK for some years (see para 47 above). However, such considerations do not by themselves provide grounds

of appeal under article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8'.

20. The Secretary of States own discretion to refuse to consider the matter outside the Rules is not in this instance reviewable. This appellant has not started a course and as her case stands has established no rights which can secure Article 8 protection. Indeed as stated she can return to Pakistan in order to make an out of country application to study in the United Kingdom. I find no error of law in the determination and the determination shall stand.

Notice of Decision

The First-tier Tribunal made no error and the decision shall stand.

Signed

Date

Deputy Upper Tribunal Judge Rimington