



Upper Tribunal  
(Immigration and Asylum)

Chamber)

Appeal Number: IA/34743/2015

**THE IMMIGRATION ACTS**

Heard at: Field House  
On: 21 February 2018

Decision and Reasons Promulgated  
On: 14 March 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR NAVADEEP KOVAL KRISHAN  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation**

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer  
For the Respondent: Mr J Collins, counsel, instructed by Visa Inn Immigration

**DECISION AND REASONS**

1. I shall refer to the appellant as the secretary of state and to the respondent as the claimant.
2. The secretary of state appeals against the decision of the First-tier Tribunal Judge who, in a decision promulgated on 10 May 2017, allowed the claimant's appeal against the decision of the secretary of state dated 26 November 2015 refusing his application for leave to remain in the UK as a Tier 4 (General) Student.
3. The Judge found that the claimant satisfied the Immigration Rules applicable at the time [26]. If the application had been properly determined at the correct time he would have been able to make an in country application in accordance with paragraph 245ZX(b). It would be unfair in the circumstances to require him to leave the UK to make his application. The secretary of state should accordingly exercise her discretion and allow the application to be made in country [30].
4. The Judge also considered the Article 8 human rights claim. The claimant's circumstances were exceptional and related to "...a result of the lack of failure to

apply the Rules, the unfairness and the changes brought about by the Immigration Act 2014 in relation to in country appeals constitute exceptional circumstances” [33].

5. In the circumstances the decision to remove him was disproportionate [36].
6. On 28 December 2017, First-tier Tribunal Judge Kelly granted the secretary of state permission to appeal. It was arguable that the Tribunal erred in holding that the secretary of state had acted unfairly or that the claimant met the requirements of paragraph 245ZX of the Rules. Further, it was arguable that the Tribunal failed to give any discrete reasons for allowing the appeal under Article 8 of the Human Rights Convention.
7. Mr Jarvis on behalf of the secretary of state has prepared a helpful skeleton argument for the hearing. Mr Collins acknowledged the force of his submissions regarding the findings of the Tribunal in respect of the rules. However, with regard to Article 8, he submitted that there has been an adequate consideration of Article 8 private life.
8. Mr Collins noted that the finding by the Judge that there had been exceptional circumstances was not challenged. Adequate reasons had been given in accordance with the decision of the Upper Tribunal in Budhatoki (reasons for decisions) [2014] UKUT 00341. It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case. This leads to judgments becoming overly long and confused and is not a proportionate approach to deciding cases.
9. The Tribunal in Budhatoki held that it is however necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost. He referred to paragraph [10, 13-14].
10. Mr Collins submitted that the secretary of state can in this case understand why the Judge allowed the Article 8 appeal. The reasons were adequate. The assessment relating to Article 8 begins at [29-30]. This informed the circumstances leading to the conclusion that exceptional circumstances exist. This followed a very unusual background. The claimant had been in the UK since 2010. The conclusion was predicated on the basis of the problems that the claimant had found himself in, flowing from the flawed initial decision.
11. Mr Jarvis contended in essence that the Article 8 findings cannot stand as the Judge had not approached the issue on the basis of the correct legal framework and had applied the wrong framework.
12. In order to apply Article 8 (2), the Judge has to properly understand the nature of both sides of the balance including the legal basis. The secretary of state's case is expressed through the rules.
13. As part of the proportionality assessment the Judge stated at [36] that the claimant should have been granted leave. That however misunderstood the secretary of state's case in respect of the public interest. Nor has the Judge properly given effect

to s.117B(5) which is also predicated on the finding that the claimant should have been granted leave under the rules.

### **Assessment**

14. I set out the helpful analysis undertaken by Mr Jarvis. The overarching reason why the Judge found that the decision to refuse in 2015 was unlawful was that the secretary of state failed to apply the rules as at the date of the application. The initial refusal of the application had been overturned by the Tribunal in July 2014, resulting in the claimant having been unfairly prejudiced by the secretary of state, taking into account matters occurring after the date of application.
15. That approach to the applicable issues and law in respect of the November 2015 refusal was contended by Mr Jarvis to be clearly wrong in law. It was inconsistent with binding authorities that unless otherwise stated the secretary of state is to apply the rules as at the time that the decision is made – Adeola [2009] UKHL 25 at [7] [38-39].
16. It is evident that the Judge failed to identify the correct version of the rules as at 10 July 2013 which in any event was not the correct legal stating point.
17. Further, the quotation at [17] by the Judge of what purported to be the 2013 version of paragraph 245ZX is not a full and correct version of the rules. In accordance with the archived rules, produced by Mr Jarvis, paragraph 116 provides that confirmation of acceptance for studies will only be considered to be valid if it was issued no more than six months before the application is made.
18. It is also provided that the institution must still hold such a licence at the time the application for entry clearance or leave to remain is determined. Even assuming that the 2013 rules were correctly applied, the Judge would be required to dismiss the appeal, because, as at the date of the refusal of the application in November 2015, the college had lost its licence which was revoked on 5 June 2015.
19. Nor did the Judge identify any contextual basis for the finding that the time taken to reconsider the claimant's case, 14 months, was in itself unusual and unfair. There had been no legitimate expectation that the secretary of state would be able to process his reconsideration before a specific point in time which the claimant considered favourable to him.
20. In any event, according to the claimant's own evidence, he intended to remain at East Thames College and start a Masters' course. Had he been granted leave earlier, leave would have been later curtailed after his licence was revoked in June 2015. The claimant would have been in the same position. The delay was therefore not relevant in respect of either fairness or Article 8.
21. Mr Jarvis also contended that the legal contentions claimed in the skeleton argument of counsel who represented the claimant at the hearing were also subject to error.
22. The Judge also erred with regard to the application of common law fairness principles. In EK (Ivory Coast) v SSHD [2014] EWCA Civ 1517 the Court of Appeal held that the principle of common law fairness does not apply in factual situations

where the alleged unfairness arises from the action of a third party and not following direct action of the secretary of state.

23. In this case the claimant's submission in the skeleton argument was that the claimant did not get a CAS from any university during a 60 day grace period and the universities takes a dim view of the fact that he came from an institution which had had its licence revoked. This was also the claimant's own evidence.
24. Accordingly, Mr Jarvis submitted that the decision to refuse the issue of a CAS was that of the relevant universities and not the secretary of state. There had been a refusal to issue a CAS when the universities took an adverse view of the educational background of those entrants who came from institutions which had had their licences revoked.
25. Further, the claimant had completed his studies by the time his application was reconsidered, had obtained his degree in February 2015 and therefore the purpose of the original application for leave to remain made in 2013 was complete.
26. As noted, Mr Collins has accepted that this brief analysis as to errors made by the First-tier Tribunal is correct. He did not seek to contend otherwise. He did submit however that there was sufficient evidence available to the Judge for allowing the appeal under Article 8 outside the rules.
27. The difficulty with that submission is, as submitted by Mr Jarvis, the difficulty to divorce from the Article 8 assessment, the fact that the Judge applied the same unlawful logic to the assessment of the public interest and the claimant's private life.
28. Nor was there any basis for the conclusion that his residence in the UK as a student, dependant upon the lawful acquisition of further grants of leave to remain, was not precarious for the purpose of the application of s.117B (5) of the 2002 Act.
29. In the circumstances, I find that there have been material errors. I set aside the decision of the First-tier Tribunal.
30. As noted, the findings with regard to Article 8 were based on misunderstandings of the appropriate legal matrix.
31. In the circumstances I am satisfied that the extent of judicial fact finding which will be necessary in order for the Article 8 decision to be re-made, is extensive. I have had regard to the overriding objective and conclude that it would be just and fair to remit the case to the First-tier Tribunal.

### **Notice of decision**

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside.

The appeal is remitted to the First-tier Tribunal (Taylor House) for a fresh decision to be made.

Anonymity direction not made.

Signed

Date 9 March 2018

Deputy Upper Tribunal Judge C R Mailer