



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/03268/2014

THE IMMIGRATION ACTS

Heard at Field House
On 4th November 2014

Decision & Reasons Promulgated
On 2nd December 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE E B GRANT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

MISS PRASHANTHI PRASHANTHI

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Presenting Officer
For the Respondent: Mr A Jafar of Counsel

DECISION AND REASONS

1. The respondent is a citizen of India who appealed against a decision of the appellant dated 20th December 2013 to refuse her application for leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant pursuant to paragraph 245ZX of the

Immigration Rules HC 395 (as amended). In a determination promulgated on 26th August 2014 FTTJ Sweet allowed her appeal on Article 8 grounds. He concluded that the respondent had not met the Immigration Rules on the balance of probabilities, but under Article 8 she should be allowed to remain in the UK until the outcome of her current course which concluded on 30th October 2014. The appeal was allowed to that limited extent.

2. The appellant sought permission to appeal and the grounds of appeal are in the following terms:

“GROUNDS OF APPEAL

1. *The Immigration Judge erred in law by failing to take the correct approach in considering cases that engage Article 8 as set out in Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)*

‘After applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them’.
2. *Having found that the appeal failed under the rules, the Immigration Judge should have gone on to consider if there were ‘exceptional’ or ‘compelling circumstances’. It is respectfully submitted that a failure to do so, and a failure to refer to Home Office Guidance on ‘exceptional’ or ‘compelling’ circumstances, constitute a material error of law.*
3. *It is submitted that the Immigration Judge erred in law by failing to give adequate reasons as to why the appeal as allowed outside the rules on the basis of Article 8.*
4. *It is also submitted that the Immigration Judge failed to take into account the guidance in Nasim and others (Article 8) [2014] UKUT 00025 (IAC) which makes it clear that less weight should be placed on periods of work or study when considering Article 8.”*

3. On 3rd October 2013 FTTJ Frankish granted permission to appeal in the following terms:

“REASONS FOR DECISION (including any decision on extending time)

1. *In a determination promulgated on 26 August 2014 F-tTJ Sweet allowed an appeal, the appellant having obtained a health and social care diploma, hotel management diploma and awaiting her exam results for a management diploma, against refusal of Tier 4 status on the grounds that a breach of article 8 thereby arose.*
2. *The application for permission to appeal asserts that the F-tTJ failed to take the Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 and Nasim (2014) UKUT 25 approach in failing to apply exceptional circumstances in order to consider article 8 outside of the Rules.*
3. *The appellant lacked the requisite bank evidence at the time of application and therefore did not qualify under the Rules although later inadmissible evidence might have caused her to qualify (no conclusion was reached on this - §15). However (§17), it was considered disproportionate for her to return before her results in October 2014. A long line of cases, including MM and SA (Pankina: near-miss) Pakistan [2010] UKUT 481 rule against allowing a case on the basis of a near miss or substituting the judge’s view of what the Rules should say for what they do say. This is arguably what has occurred here.”*
4. Thus the matter came before me to determine whether there is an error of law in the First-tier Tribunal determination.

5. The background to the respondent's appeal and the chronology is set out in paragraphs 14-17 of the determination which I set out below:

"Findings of Fact

14. *The burden of proof is on the Appellant. The civil standard of a balance of probabilities applies. The Appellant first arrived in the UK in January 2010 with a student visa valid till October 2011. She was granted further leave on 29th June 2012 to 6th March 2013. It appears that she studied at Futures College for an NVQ level 3 in Health and Social care from September 2009 to March 2011, followed by a Diploma in Hotel Management from November 2011 to November 2012. She is currently studying at London College of Business Sciences for a Diploma in Management (level 6), which ran from March 2013 to September 2014. She has paid the fees in full and is currently awaiting the results of her examination on 30th October 2014.*
15. *In support of her most recent application, she relied on the sponsorship from her father and a letter from Andhra Pradesh Grameena Vikas Bank dated 19th February 2013. This bank was not on the Respondent's approved financial institutions as at 24th November 2011 (Appendix P of the Immigration Rules), but the Appellant states that she checked with the Respondent that the bank was indeed acceptable and received such reassurance, possibly because she stated (as set out in the bank's letter) that it was sponsored by State Bank of India – which is indeed on the list of approved financial institutions under table 3 of Appendix P. Whether or not I accept that she received such reassurance, the fact is that her sponsoring bank was not on the list of approved financial institutions at the time of her application in March 2013 and the Presenting Officer submitted that it was never on the approved list.*
16. *The Appellant now relies on post-decision evidence in support, being the revised sponsor's affidavit dated 5th August 2014 (pages 10 to 11) and a bank statement from State Bank of Hyderabad – which is indeed one of the approved financial institutions under table 3 of Appendix P. However, I cannot accept post-decision evidence and therefore I conclude that the Appellant has not met the Immigration Rules on the balance of probabilities.*
17. *However, I am able to consider the Appellant's claimed rights under Article 8 ECHR. She has been a student in the UK since 2010, having obtained appropriate visas, meeting the fees and maintenance requirements and duly paying her rent. Her current course, which she has now concluded but awaits the results, was for a Diploma in Management at London College of Business Studies running from March 2013 to September 2014. She awaits the results in October 2014, and states that she is still attending the college on Monday and Tuesday in order to maintain her attendance record. I do not consider it proportionate for her to have to return to India pending the outcome of her results in October 2014, not just because if she does not pass all the modules, she may have to take a re-sit, but also following CDS (Brazil) she will have built up a sufficient private life in the UK since arriving for her studies that it would not be proportionate for her to return to India at this stage."*

6. On behalf of the appellant Ms Isherwood submitted that the determination contains a material error of law and she relied on the grounds of appeal provided. She observed there was no challenge to a dismissal of the decision under the Immigration Rules and having read the skeleton argument helpfully provided by Mr Jafar it made no reference to the case of **Patel and others v Secretary of State for the Home Department** [2013] UKSC 72 which found at paragraphs 56 and 57:

- "56. *Although the context of the rules may be relevant to the consideration of proportionality, I agree with Burnton LJ that this cannot be equated with a formalised "near-miss" or "sliding scale" principle, as argued for by Mr Malik. That approach is unsupported by Strasbourg authority, or by a proper reading of Lord Bingham's words. Mrs Huang's case for favourable treatment outside the rules did not turn on how close she had come to compliance with rule 317, but on the application of the family values which underlie that rule and are at the heart also of article 8.*

Conversely, a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit.

57. *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."*

7. There is no near miss principle and the opportunity for a promising student to complete her course is not a right protected under Article 8. Ms Isherwood also indicated that part of the challenge to the determination was a lack of adequate reasons challenge in relation to the reasoning applied to the case of **CDS (Brazil) [2010] UKUT 305** relied upon by the judge at paragraph 17 of the determination.
8. Mr Jafar relied upon his skeleton argument. He submitted that the judge had not wrongly applied any near miss principle. The judge had made no reference to allowing the appeal because the respondent nearly met the requirements of the Immigration Rules. Mr Jafar relied upon the case of **MM [2014] EWCA Civ 985** to submit that if a person falls outside the Immigration Rules she must demonstrate she has an arguable case to show she has grounds for consideration outside of the Rules. Mr Jafar submitted those factors were that there has never been any period of time when the respondent was in the United Kingdom illegally. She gained entry in 2010 and renewed her visa under the points-based scheme with the support of her father as her financial sponsor using the same bank account. This is not a case where Article 8 is being considered where the establishment of a private life has been achieved when immigration status was precarious. At all times the respondent has had lawful immigration status in the United Kingdom. If the particular circumstances of an applicant's case are not dealt with by the Home Secretary within the Immigration Rules then the judge must look at Strasbourg case law which is cited in the skeleton argument. Looking at the factors the judge took into account the judge knew the respondent needed only a few months to finish her course in October 2014. The course was running until the end of September. The judge had to decide whether it was proportionate, fair or unduly harsh to require her to stop her studies in which she had invested so much and be required to leave and make an application for entry clearance outside the United Kingdom.
9. In this case there is no public interest in the removal of the respondent. She is not a burden on the state and not a case where she seeks to gain anything other than a short period of time to complete something very important to her.
10. The respondent sought to address the court. She submitted that she had made a simple mistake with regard to the bank account that after becoming aware that the bank was not an approved bank her father had opened a new bank account to meet the requirements of the Immigration Rules. Her father had invested a great deal of

his money in her studies in the United Kingdom and it would be terrible if she had to go back and would not be able to return to the United Kingdom again to complete her studies. If she has successfully passed all her examinations she would like to apply to study for a Masters Degree in the United Kingdom.

Decision

11. Whilst I have a great deal of sympathy for the respondent and the predicament she found herself in as a result of the submission of a bank statement from a bank not on the approved list, I have no difficulty in finding, in the light of Supreme Court authority of **Patel**, that the judge erred in law in allowing the appeal of the respondent on Article 8 grounds. It can be seen from the facts as set out by the judge in his determination that there were no exceptional compelling or indeed particular circumstances requiring consideration of the appeal outside of the Immigration Rules. Indeed a recent decision of the Court of Appeal in **Meera Muhiadeen Heleemudeen v Secretary of State for the Home Department [2014] EWCA Civ 558** summarised the legal position with regard to Article 8 in the Immigration Rules and found at paragraph 40:

"I, however, consider that the FTT Judge did err in his approach to Article 8. This is because he did not consider Mr. Haleemudeen's case for remaining in the United Kingdom on the basis of his private and family life against the Secretary of State's policy as contained in Appendix FM and Rule 276ADE of the Immigration Rules. These new provisions in the Immigration Rules are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interests and rights of people who have come to this country and wish to settle in it. Overall the Secretary of State's policy as to when an interference with an Article 8 right will be regarded as disproportionate is more particularised in the new Rules than it had previously been. The new Rules require stronger bonds with the United Kingdom before leave will be given under them. The features of the policy contained in the Rule include the requirements of twenty year residence, that the applicant's partner be a British citizen in the United Kingdom, settled here, or here with leave as a refugee or humanitarian protection, and that where the basis of the application rests on the applicant's children that they have been residents for seven years.

The FTT's decision on Mr Haleemudeen's Article 8 appeal is contained in [34]-[41], which I summarised and set out in part at [21] – [23] above. Those paragraphs do not refer, either expressly or implicitly, to paragraph 276ADE of the rules or to Appendix FM. None of the new more particularised features of the policy are identified or even referred to in general terms. The only reference to the provisions is in the FTT's summary (at [30]) of Mr. Richardson's submission that the reference to the new Rules in the refusal letter was of little relevance because at the time of Mr. Haleemudeen's application those Rules had not been promulgated and thus did not apply to his case. That submission could not succeed in view of the decision of the House of Lords in Odelola's case, to which I refer at [25] above".

12. In the determination which is the subject of the application before me I find that the FTTJ did not set the respondent's right to respect for private life against the Secretary of State's policy as contained in the Immigration Rules.
13. For all of these reasons I find that FTTJ erred in law in carrying out the Article 8 assessment and his determination must be set aside.
14. On the facts as found by the FTTJ and in the light of binding higher authority case law having found the respondent did not meet the requirements of the Immigration Rules the appeal should have been dismissed on that basis.

15. I therefore remake the decision in the appeal by substituting a decision dismissing the appeal.

Conclusions

16. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
17. I set aside the decision
18. I remake the decision in the appeal by dismissing it.

Anonymity

The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Signed

13 November 2014

Judge E B Grant
Deputy Upper Tribunal Judge

Signed

13 November 2014

Judge E B Grant
Deputy Upper Tribunal Judge