



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/14260/2013

THE IMMIGRATION ACTS

Heard at Manchester
On 17th September 2014

Determination Promulgated
On 01st October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

MOHAMMED EMRAN
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Timson of Counsel instructed by Maya Solicitors
For the Respondent: Ms C Johnson, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction and Background

1. The Appellant is a male citizen of Bangladesh born 29th April 1988 who appeals against a determination of Judge of the First-tier Tribunal Lloyd-Smith promulgated on 25th November 2013.

2. The Appellant entered the United Kingdom on 8th October 2009 with leave as a Tier 4 (General) Student valid between 1st September 2009 and 29th February 2012.
3. The Appellant applied for further leave to remain. He had to vary his application because the college to which he applied was suspended from the Respondent's list of approved Sponsors and eventually removed.
4. The Appellant varied his application on 28th March 2013, and his application was refused on 18th April 2013. The decision to refuse to vary leave was made with reference to paragraph 245ZX(d) of the Immigration Rules on maintenance grounds. The Respondent contended that the Appellant needed to show that he had available funds of £1,600 for a consecutive 28 day period ending no earlier than 31 days before the date of application. The Respondent found that the bank statements submitted with the application were not from a bank on the list of acceptable financial institutions listed at Appendix P of the Immigration Rules, and in addition the closing date of the bank statements was 17th September 2012, which was more than 31 days prior to the varied application.
5. The appeal was heard by Judge Lloyd-Smith (the judge) on 19th November 2013. The judge found that the Appellant had not discharged the burden of proof essentially for the reasons given by the Respondent in the decision dated 18th April 2013. The judge did not consider the Appellant's appeal under Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).
6. The Appellant applied for permission to appeal to the Upper Tribunal which was granted by Judge of the First-tier Tribunal P J M Hollingworth in the following terms;

"The judge did not consider Article 8. Plainly the education of the Appellant forms a significant aspect of his private life. The evidential flexibility policy has not been considered fully in the light of the sequence of material adduced by the Appellant in relation to the criteria of the policy. There are arguable errors of law."
7. Following the grant of permission to appeal there was a hearing before me on 19th June 2014. I decided that the judge had not erred in law in relation to paragraph 245ZX, the judge had correctly found that bank statements submitted with the application for leave to remain were not from an acceptable institution, and did not satisfy paragraph 1A(h) of Appendix C because the closing date on the bank statements was more than 31 days before the date of application. The judge had been correct to find that further bank statements submitted after the date of refusal, should not be taken into account by the Tribunal pursuant to section 85A(3) and (4) of the Nationality, Immigration and Asylum Act 2002.
8. I did however find that the judge had erred in not considering Article 8 which had been raised as a ground of appeal and should have been determined. Full reasons for my conclusions are contained in my decision dated 20th June 2014 and promulgated on 26th June 2014.

9. At the hearing on 19th June 2014 I preserved the findings of the judge in relation to paragraph 245ZX but decided that the decision needed to be remade in relation to Article 8. It was my intention to go on and remake the decision, but the Appellant's representative applied for an adjournment on the grounds that he was not ready to proceed, although he acknowledged that directions had been issued, that if the decision of the First-tier Tribunal was set aside the Upper Tribunal may wish to remake the decision at the initial hearing.
10. In the interests of fairness I granted an adjournment. It was indicated that the Appellant wished to call witnesses to support his Article 8 claim. Directions were made that any person who intended to give evidence must prepare and sign a witness statement, and those statements and any other documentary evidence to be relied upon which had not already been served, must be served upon the Respondent and the Tribunal no later than 4pm on 3rd July 2014.

Remaking the Decision - The Upper Tribunal Hearing 17th September 2014

Preliminary Issues

11. Mr Timson who had not previously represented the Appellant, indicated that he wished to argue that the First-tier Tribunal had made an error of law in refusing the application under paragraph 245ZX and stated that it had been conceded by his instructing solicitor at the previous hearing that the judge had not erred in law in relation to the Immigration Rules, but that concession had been made in error.
12. I observed that witness statements and further documentary evidence had been sent by fax by the Appellant's solicitors at 13.53 hours on 16th September 2014, despite directions having been made that those statements and any documentary evidence should have been sent by 3rd July 2014. I observed that of the 28 pages submitted, the first 16 pages were taken up with witness statements and evidence of the persons making those statements together with photographs. Also contained in the bundle, without adequate explanation, was a copy of a letter written by the Appellant's solicitors to a First-tier Judge on another case, some undated and unsourced notes on the points-based system, an article dated 23rd June 2010 referring to the decision in Pankina [2010] EWCA Civ 719, and a First-tier Tribunal determination that related to another appeal, that apparently had been submitted without any consideration of Practice Direction 11 which deals with citation of unreported determinations.
13. Mr Timson could not explain without taking instructions, why the statements and documents had been submitted so late and it was apparent that some of the documents had been submitted to reargue the issue as to whether the judge had erred in law in dismissing the appeal under paragraph 245ZX.
14. Ms Johnson objected to submission of all documents, even the witness statements, on the basis that they had not been served in accordance with directions. She specifically objected to any further consideration of paragraph 245ZX as no notice of this had been given.

15. I decided that the question of whether the judge had erred in law in dismissing the appeal under paragraph 245ZX had been considered in the hearing before me on 19th November 2013 and a decision had been made that there was no error of law. If the Appellant's representatives believe this is wrong, then they can apply for permission to appeal once this determination has been promulgated. I decided that it was not appropriate to consider paragraph 245ZX, but that the hearing would proceed, as indicated in my written decision, on the basis that Article 8 needed to be considered.
16. I saw no reason to refuse to admit into evidence the witness statements, nor the photographs, and therefore of the bundle of 28 pages that had been submitted on 16th September, I admitted into evidence pages 1-16.

Evidence

17. The Appellant gave evidence adopting his witness statement dated 19th November 2013. I also heard evidence from Cheryl Finney, Mohammed Moshin and Md Imranul Islam who all adopted their witness statements dated 17th September 2014.
18. I have recorded all questions and answers asked of the Appellant and witnesses in my Record of Proceedings and it is not necessary to repeat them in full here. The evidence may be summarised as follows.
19. The Appellant initially paid Mancunia College £3,000 but the college was suspended and eventually removed from the Respondent's Sponsor list. He looked for an alternative college and approached Darwin College and paid £3,500 and completed a course but was not provided with any certificates as the college claimed that the Appellant owed them money which he disputed.
20. The Appellant wishes to complete his education in the United Kingdom. He has been the victim of a crime in this country for which his attacker received a prison sentence of 43 months. The Appellant feels that he cannot return to Bangladesh without a degree.
21. He is not at a college at present but is managing a pizza shop although he only works on a part-time basis. In addition to his wage he receives financial support from his father.

The Respondent's Submissions

22. Reliance was placed upon the refusal decision dated 18th April 2013. Ms Johnson submitted that the Immigration Rules are a complete code and the Appellant accepted that he could not meet those requirements, and there were no compelling circumstances to justify considering Article 8 outside the Rules and the appeal should therefore be dismissed.
23. If Article 8 was considered outside the Rules then section 117 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) must be taken into account. The Appellant does not rely on family life. The removal of the Appellant from the United

Kingdom would be proportionate. He is being supported by his family, and gave evidence that his siblings in Bangladesh are being educated at university and supported by his family and the Appellant could return to his family in Bangladesh and either find employment, or if he wished, make an application to return to the United Kingdom to study, if he could satisfy the Immigration Rules.

24. Ms Johnson stated that she relied upon CDS Brazil [2010] UKUT 00305 (IAC), and Nasim and Others [2014] UKUT 00025 (IAC) although I was not directed to any particular paragraph of those decisions.

The Appellant's Submissions

25. Mr Timson contended that the Appellant's application did in fact satisfy the Immigration Rules, and stated that his instructing solicitor should not have made a concession that the Rules could not have been met.
26. I was asked to extend sympathy to the Appellant who had been the victim of violent crime in this country, and has spent a considerable sum of money on his education without anything to show for it. Mr Timson submitted that the Appellant's evidence was that he would be seen as a failure if he returned to Bangladesh without completing his education.
27. Mr Timson contended that there were compelling circumstances to consider Article 8 outside the Immigration Rules, which he accepted could not be satisfied.
28. I was asked to take into account that the Appellant had been in the United Kingdom for some years, and that three witnesses had taken the trouble to attend the hearing and give evidence in his support. Mr Timson contended that the Appellant had fallen foul of an incredibly complicated immigration system, and I was asked to note that he did not wish to settle in the United Kingdom. His evidence was that he wished to complete his education and return to Bangladesh. I was asked to find it appropriate for limited leave to be granted to the Appellant so that he could complete his studies, and I was asked to allow the appeal with reference to Article 8 outside the Immigration Rules.
29. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

30. The Appellant has been resident in the United Kingdom since 8th October 2009, a period of almost five years. His initial leave was valid until 29th February 2012, and it is not disputed that he applied for leave to remain before his leave expired.
31. I accept that the Appellant has encountered difficulties with colleges to which he had applied, being removed from the Respondent's sponsorship register. The Appellant has completed a course while in the United Kingdom, that being at Darwin's College, Manchester who confirmed in the letter dated 15th February 2012 that the Appellant had completed an Advanced Diploma in Business Studies on 11th February 2012, and

his attendance was described as satisfactory. The Appellant was described as a keen and diligent student who strives to achieve the best he can in his studies.

32. The Appellant could not satisfy paragraph 245ZX(d) on the grounds of maintenance. He does not rely upon family life, and therefore Appendix FM of the Immigration Rules is not relevant.
33. The Appellant seeks to remain in the United Kingdom on the basis of his private life. He accepts, and I find as a fact that he cannot satisfy the requirements of paragraph 276ADE of the Immigration Rules, which paragraph sets out the requirements to be met by an applicant for leave to remain on the grounds of private life. The Appellant cannot meet this paragraph because he had not lived continuously in the United Kingdom for at least twenty years, and he still has ties to Bangladesh, which he accepts. Having decided that the Appellant cannot succeed under paragraph 276ADE, I have to consider whether it is appropriate to consider Article 8 outside the Immigration Rules.
34. The Court of Appeal in Haleemudeen [2014] EWCA Civ 558 indicated in paragraph 44 that “at least in this court, in the light of the authorities, it is necessary to find compelling circumstances for going outside the Rules.” In my view the case law indicates that where the provisions in the Immigration Rules permit consideration of exceptional circumstances and other factors, then those Rules can be regarded as being a complete code and there will usually be no need to consider Article 8 directly. This is because the same outcome would derive from the application of the Immigration Rules as under Article 8. Where the Immigration Rules contain no such provisions, then they are not a complete code and Article 8 will need to be considered directly.
35. I set out below paragraph 135 of MM (Lebanon) [2014] EWCA Civ 985 which in my view confirms this position;
 135. Where the relevant group of IRs (Immigration Rules), upon their proper construction, provide a complete code for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of foreign criminals, then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to exceptional circumstances in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a complete code then the proportionality test will be more at large, albeit guided by the Huang tests and the UK and Strasbourg case law.

As this is not a case where a proportionality test is carried out under the Immigration Rules, I find that it is appropriate to conduct such a test outside the Rules. This involves following the step by step approach advocated by the House of Lords in Razgar [2004] UKHL 27 which involves answering the following questions;

- (i) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

- (ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
- (iii) If so, is such interference in accordance with the law?
- (iv) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
- (v) If so, is such interference proportionate to the legitimate public end sought to be achieved?

36. I conclude that the Appellant has established a private life since his arrival in the United Kingdom. The threshold for engagement of Article 8 is not especially high, and I therefore conclude that Article 8 is engaged on the basis of the Appellant's private life.
37. The proposed interference with that private life, by the Appellant's removal from the United Kingdom, would be in accordance with the law, because the Appellant cannot satisfy the Immigration Rules in relation to remaining in the United Kingdom.
38. I then have to consider whether interference is necessary and proportionate.
39. I take into account section 117B of the 2002 Act, which in summary, states that the maintenance of effective immigration control is in the public interest. It is also in the public interest that a person who seeks to remain in the United Kingdom is able to speak English and is financially independent. Little weight should be given to a private life established when a person is in the United Kingdom unlawfully or when his immigration status is precarious.
40. In considering the case law referred to by Ms Johnson, CDS Brazil, in summary, indicates that a judge does not have a freestanding liberty to depart from the Immigration Rules, and it is unlikely that a person would be able to show an Article 8 right by coming to the United Kingdom for temporary purposes. However if admitted as a student, and the course is not finished, that individual may have built up a private life deserving of respect, and the public interest in removal before the end of the course may be reduced where ample financial resources are available.
41. In this case it was not demonstrated that ample financial resources were available. That is why the application was refused under the Immigration Rules. The Appellant accepts that he had a dispute with the college over unpaid fees. In CDS Brazil, the Appellant had almost completed a course, whereas in this case the Appellant had not started the course for which he was applying for leave to remain.
42. The decision in Nasim at paragraph 15 refers to MM Zimbabwe [2009] UKAIT 00037. In summary, the head note to MM indicates that while respect for private life under Article 8 does not include a right to work or study per se, social ties and relationships formed during periods of study or work are capable of constituting private life, but a

student in this county on a temporary basis has no expectation of a right to remain in order to further these ties and relationships if the criteria of the points-based system are not met.

43. The Supreme Court in Patel and Others [2013] UKSC 72 gives further guidance on this issue in paragraph 57 which I set out below;

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 paragraph 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.

44. I appreciate that the Appellant wishes to remain in the United Kingdom to further his education. I accept that he has been unfortunate in relation to colleges losing their sponsorship licences. I also accept that he is working part-time and I have taken into account the evidence of the three witnesses who gave evidence before me. However I have to attach great weight to the fact that the Appellant cannot satisfy the Immigration Rules. I attach greater weight to the need to maintain a firm, fair and effective immigration control, than I do to the Appellant's wish to remain in the United Kingdom. This is not a case where the Immigration Rules should be disregarded.

45. Because the Immigration Rules cannot be satisfied, I conclude that the decision of the Respondent to refuse to vary the Appellant's leave to remain is not disproportionate, and does not breach Article 8 of the 1950 Convention.

Decision

The determination of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision.

The appeal is dismissed under the Immigration Rules and on human rights grounds.

Anonymity

No anonymity direction was made in the First-tier Tribunal and there has been no request for anonymity. The Upper Tribunal makes no anonymity order.

Signed

Date 19th September 2014

Judge M A Hall

Judge of the First-tier Tribunal

FEE AWARD

The appeal is dismissed. There is no fee award.

Signed

Date 19th September 2014

Deputy Upper Tribunal Judge M A Hall