



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/42583/2013

THE IMMIGRATION ACTS

Heard at Field House
On 26th June 2014
Prepared 3rd July 2014

Determination Promulgated
On 24th July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MISS NAZIA AHMED
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M. Ahammed, Legal Representative
For the Respondent: Mr T. Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

The Appellant

1. The Appellant is a citizen of Bangladesh born on 30th September 1988. She appealed against a decision of the Respondent dated 8th May 2013 to refuse her application for an extension of leave as a Tier 4 (General) Student under the points-based system.

Her appeal was dismissed by Judge of the First-tier Tribunal Oliver sitting at Richmond on 7th March 2014 and she now appeals with leave against that decision. The Appellant wished to study for a level 5 HND qualification in Business Studies at the London School of Technology. According to her Confirmation of Acceptance for Studies (CAS) her course was due to start on 15th November 2012 and finish on 30th September 2014.

2. On 22nd August 2011 the Appellant was granted leave to enter the United Kingdom as a Tier 4 Student, her leave being valid until 29th October 2012. On that date she made an in time application for an extension of leave, refusal of which has given rise to the present proceedings. The Respondent awarded the Appellant 30 points for attributes but awarded 0 points for maintenance funds. As the Appellant was studying outside inner London she needed to show that she had the required funds to cover the fees for the first academic year of the course as the course was twelve months or more and have £800 per month for two months for personal maintenance. The course fees were £2,500 for the first year of the course of which the Appellant had paid £1,500 leaving a balance of £1,000. The Appellant therefore needed to be in possession of £2,600 (£1,600 plus £1,000) for a consecutive 28 day period to meet the Tier 4 (General) Student Migrant maintenance funds requirements.
3. The Respondent refused the application on maintenance grounds stating:

“As the closing day of the bank statement submitted in support of your application was dated 28th January 2013 you need to show evidence of £2,600 maintenance for 28 days from 1st January 2013 to 28th January 2013. However between 1st January 2013 and 7th January 2013 your bank statements state that you were in possession of no more than 182,866.14 Bangladeshi taka [which] equals £1,482.87.”

At the same time the Respondent made a decision under Section 47 of the Immigration, Asylum and Nationality Act 2006 to remove the Appellant from the United Kingdom.

The Proceedings at First Instance

4. The Appellant appealed against these decisions, arguing that she satisfied the financial requirements. On the same day she took her CAS letter from the London School of Technology she requested her parents to send her last three months' bank statements which she submitted to the Home Office. She showed her bank statement to the college who advised her that the Respondent only checked the last balance on the statement. Her mother's current account had enough money, the last balance being 681,866.14 taka. The Respondent's contention that she had not shown sufficient funds was incorrect. The Respondent had not acted fairly.
5. In relation to Article 8 she cited the case of **CDS Brazil [2010] UKUT 00305** that a person who is admitted to follow a course that had not yet ended may build up a private life that deserves respect and the public interest in removal before the end of that course may be reduced where there are ample financial resources available. She

was a genuine student in the middle of her studies. The Respondent's decision was unlawful under the Immigration Rules and Article 8. She should not be removed at this particular moment in time as she was a continuing student.

6. At the hearing at first instance the Appellant told the Judge that twelve or thirteen days after making her application the bank statements sent by her mother arrived which were then submitted to the Respondent. The course she was currently undertaking which would now finish on 30th April 2015 was not available in Pakistan. If she had to return she would lose the time and money she had spent in the United Kingdom.
7. The Appellant argued that the evidential flexibility policy as explained by the Upper Tribunal imposed a duty on the Respondent to give her an opportunity to supply any missing evidence before refusing her application. However, the Judge noted in his determination that that interpretation of the policy was not shown to be correct (following the decision of the Court of Appeal in Rodriguez [2014] EWCA Civ 2). The duty to refer back to applicants was now seen to apply to only a few categories of cases but the facts in the Appellant's case did not represent such an example. At paragraph 6 the Judge continued:

"The facts equally do not give rise to a private life claim under Article 8 and there is no near miss principle applicable to points-based claims either in the interpretation of the Rules or relevant to a human rights claim."

8. The Judge criticised the statement in the refusal letter that the Appellant might have an option to make a new application. Such an application would have to be made before her current leave expired but since the letter was sent well over six months after the expiry of the Appellant's leave it was misleading to have left it remain in the document. He dismissed the appeal under both the Immigration Rules and Article 8.

The Onward Appeal

9. The Appellant appealed making three points. Firstly the Judge had failed to consider paragraph 245AA(d) of the Immigration Rules which required the Respondent to make enquiries where there were missing documents from the application. Secondly the Section 47 decision was invalid as it was taken on 8th May 2013, the Appellant relying on the Court of Appeal decision in Ahmadi [2013] EWCA Civ 512. Thirdly the Judge had failed to consider the Appellant's Article 8 claim that her right to a private life would be breached by the decision.
10. The application for permission to appeal came on the papers before First-tier Tribunal Judge Andrew on 15th May 2014. He wrote:

"The grounds complain that the Judge did not consider Article 8 in his determination. I can find no reference to it and thus I find there is an arguable error of law. The other matters referred to in the grounds may also be argued, although they will require further amplification."

11. Following the grant of permission the Respondent wrote to the Upper Tribunal on 4th June 2014 stating that the Respondent opposed the Appellant's appeal. The Judge clearly did consider Article 8 and considered that it was not engaged, paragraph 6 refers. He found that there was no near miss principle in human rights claims. In any event no properly directed Tribunal could have found that having failed to meet the requirements of the Rules the decision resulted in a disproportionate interference with the Appellant's Article 8 rights.

The Hearing Before Me

12. In opening submissions on the issue of an error of law the Appellant's representative stated that she was instructed that the Appellant had submitted her mother's bank statement to the Respondent, but this had not been considered by the Respondent. For the Respondent it was noted that there was a letter on file from the Appellant which stated:

"I could not send my bank statement along with the application I have sent to UKBA for extension of my visa due to lateness and some difficulties with the bank statement so now I am sending my bank statement enclosed in the post."

Following the case of **Raju [2013] EWCA Civ 754** the Appellant had to submit her evidence with her application. This was made clear in Appendix C paragraph 1A(a), the applicant must have the funds specified in the relevant part of Appendix C at the date of the application. If it could be shown that the decision maker had looked at the wrong period and looking at the correct period the Appellant had the necessary funds the appeal could be allowed.

13. According to Appendix C paragraph 1B(a)(i)(iii) the Appellant had to submit a personal bank statement which had to cover a consecutive 28 day period of time and must be dated no earlier than 31 days before the date of the application. As the application was made on 29th October the Appellant had to provide evidence of a 28 period in a recent bank statement dated no earlier than 31 days before the date of the application. As the Appellant had applied on 29th October 2012 she would have to show that she had the equivalent £2,600 in a bank account for the relevant period prior to that time. For reasons which were not entirely clear the Respondent's refusal letter had talked about a period between 1st January and 7th January 2013. On the other hand if one went back 28 days from 7th October 2012 to 10th September 2012 according to the mother's bank statement dated 7th January 2013 there was enough money in the mother's account to show that the Appellant could meet the financial requirements.
14. The issue in the case was whether the Appellant had in fact submitted the mother's bank statement to the Respondent shortly after her application was first lodged. The Respondent did not accept that the mother's bank statement had been so submitted to the Respondent. There was a five week period between 16th October 2012 and 12th November 2012 when the Appellant could not satisfy the maintenance requirements. The Presenting Officer could not say from the Respondent's file what documents the decision maker had been looking at.

15. For the Appellant in reply it was submitted that the mother's bank statement had been submitted with the notice of appeal. The burden of proof on what was received was on the Respondent. The Respondent had to prove that the Appellant had not submitted the bank statements. The Respondent had not served any bank statements in the Respondent's bundle.
16. For the Respondent it was also argued that under paragraph 13 of Appendix C where an applicant was relying on their parent's bank statement they had to provide written consent that the parent's funds may be used by the applicant in order to study in the United Kingdom and no such consent had been given to the Respondent nor was it recorded in the Judge's determination. Furthermore, the Appellant had not referred to the bank statement she was submitting to the Respondent as being her mother's statement. The covering letter (see paragraph 12 above) had referred to her own personal bank statement and in her application form itself she had indicated that she would be sending her own statement through not someone else's.

The Error of Law Stage

17. The grounds of onward appeal against the Judge's decision were on three bases. The first citing paragraph 245AA Immigration Rules would only be an error if paragraph 245AA was relevant to the case. Paragraph 245AA refers to documents not submitted with the application and was inserted into the Rules from 6th September 2012. It applies if the applicant has submitted a sequence of documents and some of the documents in the sequence have been omitted, for example one bank statement from a series is missing or a document is in the wrong format or is a copy and not an original. None of those conditions applied in the present case. The Appellant appears to have submitted a bank statement but the issue is not whether there was one in a series that was omitted but whether in fact the Appellant had submitted her mother's bank statement showing ample funds. The other two exceptions (wrong format or copied) evidently did not apply. It was not therefore an error of law for the Judge to fail to take account of paragraph 245AA because it did not apply to this case any more than the evidential flexibility policy applied following the Court of Appeal decision in **Rodriguez**.
18. The second challenge to the Judge's decision was that the Section 47 decision was unlawful because it was made on 8th May 2013. This challenge was misconceived. The Crime and Courts Act which amended the relevant passage in Section 47 that had been struck down by the Court of Appeal in **Ahmadi** came into force on 8th May 2013 the day of the decision and thus the decision itself was valid. Again it was no error for the Judge to fail to consider that matter because it was not relevant.
19. The third challenge was to an alleged failure on the part of the Judge to deal with Article 8. The Appellant was entitled to raise Article 8, she had been issued with a Section 120 notice and the Section 47 removal decision. Article 8 was potentially engaged in her claim that her studies would be interrupted by her removal. The Judge's view was that Article 8 was not engaged. I found that there was a failure by the Judge to adequately explain his conclusion that Article 8 was not engaged in this

case. Something more than a mere dismissal of the Article 8 claim was required. There was therefore an error of law in that part of the determination such that the issue of the Appellant's claim under Article 8 fell to be reheard.

20. More difficult was the issue of whether the Judge had come to the right decision in relation to the dismissal of the appeal under the Immigration Rules on the basis that the Appellant had failed to demonstrate she had sufficient funds in her bank statement. The Judge had accepted the information contained in the refusal letter which I have quoted above which if correct would indeed have been decisive in relation to the Immigration Rules part of the appeal. However the refusal letter did not explain why the Appellant failed to meet the maintenance requirements. The refusal letter was talking about a period which was completely irrelevant, namely the 1st to 7th January 2013. If the Appellant had (as she claimed) submitted her mother's bank statements the figures quoted in the refusal letter were wrong as the balance between 1st and 7th January 2013 was considerably higher than the amount stated in the refusal letter. The Respondent's bundle did not enclose a copy of whichever bank statement the Appellant had submitted and there was therefore no evidence to support the Respondent's contention in the refusal letter even if 1st to 7th January had been the correct period.
21. The Presenting Officer took the point at the hearing before me that it was not open for the Appellant now to seek to query the Judge's finding that she could not meet the Immigration Rules on the basis that she had submitted her mother's bank statement. I have some sympathy for that view but I am also concerned that the refusal letter did not accurately explain the basis on which the Appellant's application had been refused by the Respondent. In those circumstances and quite exceptionally I was prepared to indicate that there was an error of law in the Judge's determination not just in relation to the treatment of Article 8 but also the treatment of the claim under the Immigration Rules since the Judge had not engaged with the evident mistake in the refusal letter. I therefore indicated that there was an error of law, I set the Judge's decision aside and reheard the matter both as to the issue of funds and the Article 8 claim.

The Rehearing

22. The Appellant attended and gave evidence. She was examined and cross-examined and re-examined. She stated that she had submitted her birth certificate and her mother's identification to prove that it was her mother's account that she was sending to the Respondent. She had been studying for almost a year and was in the middle of her studies which would finish next year in June 2015. The reason why this was later than the date on the CAS (30th September 2014) was because she had joined the course in July 2013 when the college called her. The course was for two years and there were sixteen modules, eight in each year. She had started the course as late as she had because she had not received any reply from the Respondent.
23. When she ticked the box in her application form that she was only relying on her own bank statement she meant that she was relying on her mother's bank statement

treating it as her own. She herself did not have a bank account, all the money that her mother had was hers. It was put to her that in her witness statement she had said that she had shown her own bank statement to the college then talked about monies in her mother's current account, indicating that the Appellant had made a clear distinction between the two accounts. The Appellant replied that she meant her mother's bank account. She repeated that she did not have her own account. The course she was on was not available in Bangladesh. If she went back she would lose her time, she could not do the course there. She could show examples of her studies and further enquiries could be made of the college website. It was really hard for her to survive in Bangladesh. In re-examination she said she had six further modules to take. She would receive her first set of results this August. The course was assignment based and she could provide those assignments if necessary.

Closing Submissions

24. For the Respondent it was argued that the claim did not succeed under the Immigration Rules and it could not succeed outside the Rules under Article 8. It was difficult to see why permission to appeal had been granted. It was not for the Respondent to show what documents were submitted, the Appellant had not shown that she had submitted her bank statement. The Appellant had said in her application form that she was submitting a bank statement in her own name. The bank statement now before the court from the Appellant's mother was not submitted with the application or sent in afterwards. The covering letter sent to the Respondent meant it was not plausible to say, as the Appellant was seeking to do, that when she said she sent in her statements she really meant her mother's. She herself distinguished in her witness statement between the two accounts.
25. There was no suggestion that there was any letter of consent from the mother accompanying the bank statement that the money was available. The Appellant could thus not show for a continuous period of 28 days that she had the necessary funds and the appeal should be dismissed under the Rules. In relation to Article 8 the Appellant said she wanted to continue her studies but that was not a protected right. The Article 8 claim did not get off the ground. It was not disproportionate to remove the Appellant. The Judge at first instance was wrong to say the Appellant could not apply again. She currently had Section 3C leave by virtue of her appeal against the Respondent's decision. She could make a fresh application for Tier 4 within 28 days of her 3C leave expiring. She would not have a right of appeal if there was to be a subsequent refusal but if she was able to show that she had the necessary funds the application might succeed.
26. In closing for the Appellant it was argued that the Respondent had not raised the issue of the mother's consent. The representatives had submitted the mother's bank statement with the notice of appeal. Their instructions from the Appellant were that she had also submitted that bank statement to the Respondent. Even if she had not submitted it, it was incumbent upon the Respondent to prove that the Appellant had submitted a different bank statement which they could not do. The caseworker had not acted fairly towards the Appellant. The decision letter should have said which

bank statement was being referred to, the Appellant's or her mother's. The refusal letter was defective in referring to the period in January 2013 when the period should be earlier than 29th October 2012. That was not a clerical mistake. There was proof that the Appellant had submitted the bank statement.

27. The Article 8 claim should be considered on its merits. The issue was whether there were compelling reasons to enable the Appellant to succeed outside the Rules. The Appellant had no bank statement in her own name. She was able to start the course even though she had not been granted leave at that time by the Respondent because the college had highly trusted status. She came to the United Kingdom to study and wanted to finish. It was unreasonable for her to go back now. The appeal should be allowed to give her a chance to complete her studies.

Findings

28. There are two issues I have to decide in this matter. The first is whether the Appellant can show that she did satisfy the requirements of Appendix C because she did submit her mother's bank statement to the Respondent before the decision to refuse was taken. If she can show that she did submit her bank statement then her appeal succeeds because for the relevant period there was enough money in the bank statement subject to the issue of consent. If she cannot show that she submitted her mother's bank statement but rather it appears that she submitted her own bank statement then her appeal fails under the Immigration Rules as there would be insufficient funds.
29. The Appellant's case now is that she has not had a bank account of her own and that when she referred to a bank statement she was referring to her mother's bank statement. I do not accept that explanation. It is quite clear from her application form that when faced with a choice of whether she was submitting her own or her parent's bank statement she clearly ticked the box to indicate that she was submitting her own bank statement (at question M15). Further in her witness statement as the Respondent pointed out she drew a distinction between her own account and her mother's account. When she wrote to the Respondent shortly after lodging her application submitting a bank statement with an explanation why it was late, she did not say it was her mother's account, she referred to it as hers.
30. The burden of proof of showing that she submitted a bank statement to the Respondent rests upon the Appellant. It is not for the Respondent to prove a negative. The burden is the usual civil standard of balance of probabilities but I find the Appellant cannot show that she did submit her mother's bank statement. Had her covering letter clearly indicated that she was submitting her mother's bank statement or indicated that she regarded her mother's account as the same as her own matters might have been different but she did not do that. The Appellant's denial of having a bank account of her own means that she does not disclose what bank statement she actually did send to the Respondent. As I do not accept her explanation that she sent her mother's account I have no evidence before me that demonstrates that she was able to meet the financial criteria for the relevant period.

She does not contend that there was written permission from her mother to say that the funds could be used. This point was raised for the first time before me by the Respondent. In my view that is too late but in view of my findings I do not need to consider the issue. The claim under the Rules therefore fails.

31. I therefore turn to the claim under Article 8. The Appellant does not claim to have a family life in this country. Her claim is that she has a private life by reason of her studies which would be disproportionately interfered with by her removal. In considering the Appellant's claim under Article 8 I bear in mind the step by step approach required by the case of Razgar [2004] UKHL 27.
32. I find that the Appellant has established a private life in this country by reason of her studies here. Given that she is in the middle of a course at present those studies would be interfered with by requiring her to return to Bangladesh. The interference is pursuant to the legitimate aim of immigration control because the Appellant cannot meet the Immigration Rules and cannot demonstrate that she has sufficient funds. The issue therefore is whether the interference with her private life is proportionate. The Upper Tribunal have recently considered the situation where someone claims to remain outside the Immigration Rules under Article 8 in the case of Gulshan [2013] UKUT 00640. There must be some compelling circumstances for a person to be able to succeed in that situation.
33. In the Upper Tribunal decision of MM it was held that a desire to study was unlikely to be sufficient to engage Article 8. In this case the Appellant is part way through her studies but largely because she began the course substantially later than the date on the CAS. That appears, she says, to be due to the delay by the college in offering her a place. Be that as it may, had she begun her studies at the date indicated on the CAS she would now be less than four months away from completion. Instead she has at least a year more to go. I do not consider that that is a factor that weighs on the Appellant's favour, rather the reverse. It was for the Appellant to sort out with her college when she could start and given the muddle over her finances I do not accept that I have been given a full account of why the Appellant started as late as she did.
34. In any event, weight has to be attached to the public interest as expressed in the Immigration Rules. The Appellant could not show that she had sufficient funds of her own and she did not submit evidence of her mother's funds to the Respondent. I do not find in the circumstances that there is anything which is so compelling about this case that exceptionally she should be granted leave to remain outside the Immigration Rules. The Appellant can resume her private life in Bangladesh upon her return where she has spent the majority of her life. She does not have right to come to the United Kingdom to study whatever the position may be in Bangladesh as to the availability of courses there. Alternatively she can if she wishes make a fresh application for leave to remain within 28 days of becoming appeal rights exhausted and can then produce further evidence, if that is available, to the Respondent. She would not have a right of appeal against any subsequent refusal but that of itself is not something which would engage Article 8. I do not consider that there was any

procedural unfairness in the way that the Respondent dealt with the application save that the dates for monies of January 2013 were clearly wrong, however, that defect was cured by enabling the Appellant to appeal that aspect of the Judge's decision. As the Appellant cannot show any reason which engages the Human Rights Convention I dismiss the appeal on immigration grounds and human rights grounds.

Decision

The decision of the First-tier Tribunal involved the making of an error of law. I have therefore set it aside and remade the decision by dismissing the Appellant's appeal on both immigration grounds and human rights grounds.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

As I have dismissed the appeal there can be no fee award.

Dated this 23rd day of July 2014

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Deputy Upper Tribunal Judge Woodcraft