Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43643/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 18th July 2014	**On 1 August 2014**

Before

DEPUTY TRIBUNAL JUDGE KELLY

Between

THE SECRETARY OF STATE

Appellant

and

RUSHITAN KIRTIKUMAR RAVAL
(ANONYMITY NOT DIRECTED)

Respondent

Representation:

For the Appellant: Mr G Saunders, Home Office Presenting Officer
For the Respondent:

DETERMINATION AND REASONS

1. The Secretary of State appeals, with permission, against the decision of the First-tier Tribunal (Judge Hodgkinson) to allow Mr Raval's appeal from her decision to refuse his application for leave to remain as a Tier 4 (General) Migrant Student and to remove him from the United Kingdom. For the sake of convenience, I shall refer to the parties according to their status in the First-tier Tribunal. In other words, I shall refer to Mr Raval as "the appellant" and to the Secretary of State as "the respondent".

The background

2. If the respondent were to succeed in this appeal, it would have the consequence of perpetuating an injustice that arose from events that took place as long ago as December 2010. In order to explain how this has come about, it is first necessary to summarise the appellant's immigration history. The following summary is based upon findings that were made by the Tribunal in decisions that were respectively promulgated on the 18th August 2011 and (the decision subject to the instant appeal) the 14th March 2014. Those findings have not been challenged by the respondent in the current proceedings.

3. The appellant is a citizen of India who was born on the 29th October 1989. He was granted leave to enter the United Kingdom on the 24th June 2009 for the purpose of studying 'Hotel Management and Hospitality' at Halifax College. At the end of his course, the appellant was required to re-sit a number of his examinations. As his existing leave to remain expired on the 30th September 2010, the appellant submitted an application for further leave to remain. That application was made in time. It was however invalid for other reasons. The appellant therefore re-submitted his application, on the 13th October 2010, by which time his leave to remain in the United Kingdom had expired.

4. On the 29th November 2010, the respondent wrote to the appellant to say that she required access to his 'Pearson Test Score'. The appellant was allowed three days for this purpose and was informed that no further extension would be granted. The appellant received that letter on the 1st December 2010. He immediately forwarded the respondent's request, by email, to the Test Centre. The Test Centre responded, on the same day, by saying that the information would become available within the next one to two working days. The respondent checked the Test Centre's website on the 7th December 2010, by which time the appellant's test score had still not been made available. This was the sole basis upon which the respondent refused the appellant's application for further leave to remain, in a decision that was made on the 20th June 2011. On the 18th August 2011, the Tribunal allowed the appellant's appeal against that decision on the ground that his removal would be contrary to Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. The respondent responded to the Tribunal's decision by granting the appellant a period of discretionary leave to remain until the 6th November 2012. At the end of that period of leave, the appellant applied for further leave to remain in order to continue his studies.

5. On the 8th May 2013, and whilst his application for further leave to remain was still pending, the respondent wrote to the appellant to inform him that the sponsorship licence of the college which had issued his Confirmation of Acceptance for Studies (CAS) had been revoked. The respondent therefore gave him the opportunity to find an alternative college within a period of 60 days, which the appellant did in fact do.

6. The decision which was the subject of appeal to the First-tier Tribunal, in the current proceedings, was made on the 13th September 2013. The respondent refused the application on two grounds. The first ground was that the appellant had failed to submit specified documents as evidence of the funds that were available to him. The First-tier Tribunal found as a fact that the appellant had in fact submitted those documents with his application, and this finding has not been challenged in these proceedings. The second ground on which the respondent refused the appellant's application was that the appellant fell foul of the requirement that he had last been granted leave to remain as a Tier 4 (General) Student Migrant. The appellant was unable to meet that requirement because his last grant of leave to remain had of course been granted on a discretionary basis.

The decision of the First-tier Tribunal

7. The Tribunal noted that none of the appellant's evidence had been the subject of factual challenge. It also noted that the Home Office Presenting Officer had acknowledged "that the appellant was the victim of several unfortunate circumstances" [paragraph 23]. The Tribunal finally noted, more than once, that the appellant was only in a situation whereby he was unable to meet the requirements of the Immigration Rules - and thus to complete the course for which he had originally been granted leave to enter the United Kingdom – "through no fault of his own" [paragraphs 27 and 28]. The Tribunal then set out its conclusion, at paragraph 29 -

> I find the appellant's circumstances to be sufficiently unusual and exceptional, not only to be such that Article 8 is engaged in relation to his private life, with reference to his attempts to study here and the consequences of him being disabled from doing so, but also the respondent's decision represents a disproportionate interference with that private life. I entirely appreciate that it is difficult indeed for a points-based appellant to establish, both the engagement of Article 8, and a disproportionate breach thereof, but the circumstances found by me are, I find, such that his particular appellant, based upon the facts of his particular case, succeeds.

Error of law

8. The difficulty with this decision, as indeed the Tribunal itself appears to have recognised, is that the circumstances which it identified could not easily be characterised as "private life". The Tribunal would thus have been well-advised to recall the words of the Supreme Court (Lord Carnwath) in Patel and Others v The Secretary of State for the Home Department [2013] UKSC 72 -

> 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. 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.

9. I am therefore satisfied that it was an error of law to allow the appeal on the ground that the appellant's removal would be incompatible with his rights under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

Re-determination of the appeal

10. I will re-determine the appeal on the basis of the facts that are summarised at paragraphs 3 to 6 (above) which, as I have previously observed, have never been in issue.

11. As with the decision that I have just set aside, the Tribunal allowed the appellant's previous appeal (in August 2011) on the ground that the appellant's removal in consequence of the refusal of further leave to remain would be incompatible with his rights under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. It is nevertheless clear from the determination that the underlying basis of the earlier decision was that the respondent had acted unfairly. Thus, at paragraph 16, the Tribunal said this –

> In the present circumstances, I find that the approach taken by the respondent when seeking further information from the appellant to be rather less than fair. To allow three working days to comply with the requirement to allow access is, in my judgement, unreasonable. Given that the letter was dated 29 November 2010, it cannot have been expected to have been delivered prior to 1 December 2010. That was a Wednesday. By the time the respondent checked the website, three working days had only just passed. In this instance the appellant was entirely in the hands of others and it is difficult to see what else he could have done; indeed he believes he had complied. He contacted the examiners who, in turn promised him that the information would be available within the timescale necessary. Clearly it wasn't. Whoever may be at fault, I find it certainly was not the appellant.

12. I think that it is significant that the respondent did not seek to appeal that decision. She instead chose to accept the Tribunal's finding that the appellant had suffered an injustice, and to remedy it by granting discretionary leave to remain. It therefore seems to me that for the respondent now to rely upon the requirement that the appellant had been granted leave to remain under the Immigration Rules is to resurrect and perpetuate a situation that she had previously accepted was unconscionable. The result of her decision, if allowed to stand, will thus be to prevent the appellant from completing the course for which he was originally granted leave to come to the United Kingdom, for reasons that have been consistently found not to be his fault.

13. I accept that the Tribunal does not have jurisdiction to allow an appeal on the ground that the respondent's discretion to depart from immigration rules ought to have been exercised differently [see Sections 84(1)(f) and

86(6) of the Nationality, Immigration and Asylum Act 2002]. Nevertheless, as the discussion of the authorities at paragraph 19.09 of 'Macdonald's Immigration Law and Practice' (eighth edition) clearly demonstrates, the respondent has a public law duty to act fairly, and an Immigration Decision that is made in breach of that duty can and will be held to be "otherwise not in accordance with the law" [see Section 84(1)(e) of the Act]. I am therefore satisfied that the appellant's appeal should be allowed upon this ground.

Decision

14. The appeal of the Secretary of State is allowed.

15. The decision of the First-tier Tribunal to allow Mr Raval's appeal on the ground that the Secretary of State's refusal to grant him further leave to remain would lead to consequences that were incompatible with his rights under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms is set aside. It is substituted by a decision to allow his appeal on the ground that the decision to refuse his application for further leave to remain was otherwise not in accordance with the law

Anonymity not directed.

Signed Date

Deputy Judge of the Upper Tribunal