



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: IA/48291/2013

THE IMMIGRATION ACTS

Heard at Field House

On 11 June 2014

Determination Promulgated

On 16 June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

THUY NGA DO

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: not represented

For the Respondent: Mr P Deller Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not deem it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Turquet, promulgated on 28 March 2014 which allowed the Appellant's appeal and held that it was disproportionate and unlawful under Article 8 of the European Convention on Human Rights to remove her to Vietnam.

Background

3. The Appellant was born on 9 February 1990 and is a citizen of Vietnam.
4. On 1 October 2013 the Appellant applied for leave to remain as a Tier 4 (General) student and for a Biometric Residence Permit
5. On 4 November 2013 the Secretary of State refused the Appellant's application. The refusal letter stated that the Appellant could not be awarded the 10 points claimed for Maintenance (funds) as she was unable to show that she had £1600 for a consecutive 28 day period in accordance with paragraph 245ZX(d) as her account fell below that sum in the period 4 September 2013- 1 October 2013.

The Judge's Decision

6. The Appellant appealed the refusal decision stating in her grounds of appeal that she had £1850 in her account from 2 September 2013 but did not realise that she had to have £1600 for a consecutive 28 day period. Therefore she took a small amount of money from her account to buy books and therefore her balance fell to £1349.34 on 19 September 2013. She sought advice from the International Office and was advised that she could use her father's bank statement but when the receipt of this was delayed she panicked and sent the application off without her father's account details. Since her application she has received money from her father and had over £7000 in her account.
7. The Appellant appealed to the First-tier Tribunal and First-tier Tribunal Judge Turquet (hereinafter called "the Judge") dismissed the appeal against the Respondent's decision under the Immigration Rules but allowed the appeal on human rights grounds. The Judge found that the Appellant was half way through her Master's degree and had built up a private life; there were ample financial

resources available and that the interference with her private life in not allowing her to complete her degree was disproportionate. He described her case as '*one of those rare cases*' where refusal was disproportionate.

8. Grounds of appeal were lodged and on 12 May 2014 First-tier Tribunal Judge Saffer gave permission to appeal stating that given what was said in Shazhad (Article 8:legitimate aim) [2014] UKUT 00085 (IAC) the grounds advanced by the Respondent had merit.
9. At the hearing I heard submissions from Mr Deller on behalf of the Respondent that :
 - (a) The Respondent accepted the reasons given by the Appellant for the drop in her funds but given that she did not have £1600 in her account for the 28 day consecutive period her appeal was doomed under the Rules.
 - (b) Having accepted that the Appellant did not meet the requirements of the Rules the Judge should have stopped there: on the facts before the Judge and the relevant caselaw Article 8 was not engaged.
 - (c) Even if it could be established that Article 8 was engaged the Judge erred in relying on the old caselaw CDS (PBS: "available": Article 8) Brazil [2010] UKUT 00305 (IAC). More recent authorities such as Patel and others v Secretary of State for the Home Department [2013] UKSC 72 make clear that Article 8 did not protect the right of a student to complete a course of studies.
 - (d) The Appellant did not establish that this was a strong private life case as she came to the United Kingdom for a temporary purpose, had been here only a short period of time and there was no evidence of her life beyond her studies.
 - (e) In assessing whether the decision was proportionate the Judge also erred in only considering those factors that were in the Appellant's favour: there was no consideration of the states interests and why the interference had taken place.
10. Ms Do explained that she had never intended to use the money in her own account to establish that she could meet the requirements of the Rues for

maintenance. She intended to use the money in her father's account but there was a delay in him sending the necessary documents because he was on a business trip to Russia and she panicked and sent her own bank account details. She said she has now paid her tuition fees in full and she has not spent any of the money her parents sent her. She still has a dissertation to submit by September and then she has already been accepted on a course in Switzerland to do a Post Graduate certificate in Hotel management. She asks to be allowed to stay until September.

The Law

11. Errors of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on facts or evaluation or giving legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
12. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue under argument. Disagreement with an Immigration Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence that was not before him.

Finding on Material Error

13. Having heard those submissions I reached the conclusion that the Tribunal made material errors of law.
14. The challenge in this case is limited to the Judges findings in relation to Article 8. The Judge dismissed the Appellant's appeal under the Rules and the Appellant in

essence accepts that she does not meet the requirements of the Rules in relation to funding although she sought to put that failure into context.

15. The failure of the First-tier Tribunal to adequately address and determine why Article 8 was engaged outside the Rules given that the Appellant failed to meet the requirements of the Rules as a student and could not have met the requirements of the Rules in relation to private life constitutes a clear error of law. This error I consider to be material since had the Tribunal conducted this exercise the outcome could have been different. That in my view is the correct test to apply.
16. I find that while the Judge referred and quoted Patel and other more recent decisions than CDS he failed to engage with the ratio of the decisions and explain what there was about the Appellant's case that put it in the category of a 'rare' case.
17. Even if the Judge was correct to consider Article 8 outside the Rules his assessment of proportionality was flawed by the failure to have any regard for the factors that weighed in the other side of the balance.
18. I therefore set the decision of the Judge aside in relation to Article 8 only and indicated that subject to anything that the Appellant had to say I proposed to re hear the case.
19. Ms Do indicated that she did not seek to have the case adjourned to obtain legal representation or gather other evidence in relation to her life in the United Kingdom. She was eager to proceed as she wanted to have sufficient time to make an application for a visa to Switzerland in the event that the Respondent's appeal succeeded.

Findings

20. The Appellant is a citizen of Vietnam who first came to the United Kingdom as a student with a visa valid from 5 March 2008 until 11 November 2009. The Appellant renewed her visa and in the course of studying in the United Kingdom did a Bachelors Degree at Portsmouth University in Accountancy and Financial

Management. The Appellant made an application for further leave to complete an MSc in Financial Decision Analysis at the University of Portsmouth.

21. She appealed against the decision of the Respondent made on the 4 November 2013 to refuse the application made on 10 October 2013 for leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant under the Points Based System and for a Biometric Immigration Document ("Tier 4 student scheme") and to make directions to remove her under s47 of the Immigration, Nationality and Asylum Act 2006.
22. The refusal was on the basis that the requirements of paragraph 245ZX (d) of HC 395 were not met. The Appellant was unable to show that she had £1600 in her account for the 28 day period 4 September 2013 to 1 October 2013. While the determination of the Judge and indeed the Appellant in her grounds suggested that the Appellant fell below the required level on one day only, 19 September 2013, in fact the Appellant fell below the required level for the period 18 September 2013 to 24 September 2013. Therefore the Appellant could not have succeeded under the Rules and her appeal was properly dismissed on that basis.
23. Having found that the Appellant does not meet the requirements of the Rules as a student the issue is whether Article 8 is engaged by the refusal of further leave and the issuing of removal directions.
24. I find that the only evidence before me as to private life in the United Kingdom is that the Appellant has been in the United Kingdom to study since 2008: there is no other evidence of relationships, friends or other engagement with the community.
25. I am satisfied that the court in Nasim and others (Article 8) [2014] UKUT 25 (IAC) it held that the judgments of the Supreme Court in Patel and Others v Secretary of State for the Home Department [2013] UKSC 72 serve to re-focus attention on the nature and purpose of Article 8 of the ECHR and, in particular, to recognise that Article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity. In Nasim and others (Article 8) [2014] UKUT 25 (IAC) whilst not finding that CDS was no longer good law, it was clear that the tribunal considered that in the light of Patel and Others v

Secretary of State for the Home Department [2013] UKSC 72 its application was probably very limited.

26. I remind myself that in Patel Carnwath LJ said "*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.*"

27. I therefore find that this case was in fact a run of the mill case where the Appellant failed to meet the funding requirements of the Rules while in the United Kingdom to study for a limited period. There was no evidence of any other elements of a private life in the United Kingdom beyond that of study.

Conclusion

28. There was an error on a point of law in the decision of the First-tier Tribunal with regard to Article 8 such that the decision is set aside

29. I remake the appeal.

Decision

30. I dismiss the appeal on human rights grounds; the decision to dismiss the appeal under the Rules stands.

Signed

Date 15 June 2014

Deputy Upper Tribunal Judge Birrell