



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/48537/2013

THE IMMIGRATION ACTS

Heard at Birmingham
On 10th June 2014

Determination Promulgated
On 3rd July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DR FATUMA NJERI IBRAHIM

Respondent

Representation:

For the Appellant Secretary of State: Mr N Smart, Senior Home Office Presenting Officer
For the Respondent: In person

DETERMINATION AND REASONS

1. In this determination I will refer to Dr Ibrahim as the Appellant and to the Secretary of State as the Respondent, as they were before the First-tier Tribunal. The Appellant is from Kenya and came to this country, apparently with the assistance of a Kenyan Government scholarship, to study medicine, which she did at the University of Nottingham. She has been successful in her examinations but needed to follow those

through with Foundation years 1 and 2 of the medical course. On 17th September 2013, whilst her leave remained extant, she applied to vary that leave in order to follow a course of study as a Foundation Doctor, terminating on 4th August 2015. Her then leave was due to expire on 19th October 2013.

2. Her application was refused on 1st November 2013. She received the necessary 30 points in respect of her Confirmation of Acceptance for Studies but was awarded no points for maintenance (funds). The narrative of the refusal states that she was required to show living costs of £1,600 plus her outstanding course fees, which in fact were not then due. She was required to show that sum of £1,600 for a consecutive 28 day period in order to meet the maintenance requirements. As the closing balance of the bank statement submitted with her application was dated 17th September 2013 she needed to show evidence of at least that sum for 28 days from 21st August 2013 to 17th September 2013. However it was noted that on 21st August 2013 the bank statement submitted showed a balance of £100 which did not demonstrate that she had the required level of funds. The application was refused with reference to paragraph 245ZX(d) of the Immigration Rules.
3. The Appellant appealed, requesting that the appeal be dealt with on papers. It was allocated for determination to First-tier Tribunal Judge Fox at the Glasgow Hearing Centre. He referred to the refusal notice and found that the Appellant could not meet the requirements of the Immigration Rules. He noted what the Appellant had said in her Notice of Appeal. The Appellant commented that when she made her application in September 2013 she had graduated from Nottingham and had just moved to Birmingham and started working for the NHS as a Foundation Doctor. She had mistakenly not been aware that she was required to show possession of £1,600 for a consecutive 28 day period and after paying her first and last month's rent bills and different subscription fees the balance was below £1,600 for the necessary 28 consecutive days. Her updated bank statements covering the most recent 28 day period showed that there were sufficient funds when she had been studying medicine in the UK. She had paid the tuition fees of £25,000 on time and had passed all of her examinations. She had never defaulted in any way.
4. Judge Fox noted that bank statements submitted for the hearing covering the period 30th October 2013 to 27th November 2013 indicated that the balance did not at any point during that period fall below £1,900. He continued as follows:

“13. Given that the Appellant has had a number of visas in the past and she has adhered to all the Immigration Rules to date I consider it would be unfair in all the circumstances not to exercise flexibility in regard to the production of her account. At the date that she applied for her visa extension she was in the middle of a very traumatic period in her professional life, having just graduated and commenced the Foundation aspect of her professional career. There has been considerable demand on her finances at this time and it is not surprising that she may have lost track of what was coming into and going out of her account.

14. Examination of her earlier account does show that there were considerable periods when she could not have met the Regulations. There was no requirement on her to do so at that time. Also, she was not working at that time. As she has now produced bank statements which bring her within the Rules it is just and equitable that flexibility be exercised admitting this most recent statement.
 15. In these circumstances I am satisfied that leave to remain and a biometric residence card should be issued to the Appellant as confirmation of her right to reside in the United Kingdom.
 16. I have considered the Appellant's claim under the Human Rights Act 1998 Article 8. I find that the UK Government, in its exercise of a fair and firm immigration policy has acted disproportionately by refusing to issue the residence card. There has been private life which has been interfered with in an entirely disproportionate manner."
5. The Secretary of State sought permission to appeal. It was contended that the judge had erred in law. He had found that the Appellant could not meet the requirements of the Immigration Rules. It was made clear in **Shahzad (Art. 8: legitimate aim) [2014] UKUT 85 (IAC)** that as a general Rule ignorance of the law was no excuse. It was contended that the judge had given weight to immaterial matters by stating that the Appellant could have satisfied the Rules at other points in time. Reference was made to the judgment of the Court of Appeal in **Miah and Others v SSHD [2012] EWCA Civ 261** as authority that there was no principle of a near miss and that view had been endorsed by the Supreme Court in **Patel and Others v SSHD [2013] UKSC 72**. It was also said that the judge had considered Article 8 without any real substance. He had given no assessment of the requirements of the Rules and reached his decision without consideration of comments made in **Patel** concerning the ambit of Article 8.
 6. Permission was granted by First-tier Tribunal Judge White on 15th April 2014.
 7. The Appellant attended the hearing in person. She said that she was about to embark on the second Foundation year at the Queen Elizabeth Hospital in Birmingham. Mr Smart relied upon the application and said that Article 8 was not introduced in order to circumvent the Immigration Rules. The Judge appeared to have considered additional bank statements although they had not been submitted prior to the application, or decision, and to do so was contrary to Section 85A of the Nationality, Immigration and Asylum Act 2002. He had failed to consider whether Article 8 was engaged at all and whether having regard to **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 (IAC)** Article 8 fell to be considered.
 8. The Appellant said that she did understand the position. The Foundation year was still part of her training and at the time of the application she had moved from Nottingham and had been under financial pressure. She thought that Judge Fox had taken a pragmatic approach. She also said she thought that she could have avoided

her problems if the refusal had been received earlier because she could have re-applied while she had extant leave but by the time she received the refusal her leave had expired. She said that she had contacted the Home Office upon receipt of the refusal and had been told that she could appeal and she had decided to do so but now realised that she could have made a further application.

9. Having considered what had been said I came to the view that the judge had made a material error of law in his approach. He found, quite rightly, that the Appellant did not meet the requirements of the Immigration Rules. He was understandably sympathetic to the dilemma in which the Appellant found herself and, at paragraph 13 of his determination, considered it unfair not to exercise flexibility but he gave no legal basis for doing so and none is apparent. In his approach to Article 8 he did not follow the approach summarised in recent cases such as **R (Nagre) v SSHD [2013] EWHC 720 (Admin)** and **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC)**. Nor had he considered the ambit of Article 8 in student cases set out in **Patel** or followed the steps outlined by Lord Bingham in **R (Razgar) v SSHD [2004] UKHL 27**. I set his decision aside.
10. I was in a position to re-decide the appeal which I said I would do on the basis of the information before me. It is clear that the Appellant could not meet the requirements of the Rules as the bank statement she had submitted with her application showed that she did not meet the financial requirements. The application was made on 17th September 2013 and the refusal was dated 1st November 2013. There had been no untoward delay on the part of the Home Office in dealing with the application. The Appellant said that she spoke to the Home Office who said she could appeal but it was not for the Home Office to advise her. She could have made a further application, as she can at any time.
11. The Appellant cannot succeed under the Immigration Rules relating to student applications and neither can she succeed under paragraph 276ADE of the Rules. It is clear from the approach taken in **Nagre** and **Gulshan**, as also in **Shahzad** upon which the Respondent relied, that there need to be arguably good grounds for granting leave to remain outside the Rules for Article 8 to be considered. The Appellant faces a fundamental problem in this respect. She does not seek to rely upon any family life aspect of Article 8 but only upon private life. The only significant private life relates to her education and training as a medical doctor. Had the **Razgar** steps been followed it is at this stage that it would have been decided whether Article 8 was potentially involved. The jurisprudence has become clearer of late in this respect. At paragraph 57 of **Patel and Others v SSHD [2013] UKSC 72** Lord Carnwath stated as follows:

“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 rights. 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 to protect it under article 8.”

Unfortunately for the Appellant, as is apparent from the extract from **Patel** above, the continuation of her medical training is not a right protected by Article 8. Her appeal must fail. She is free to re-apply, either in this country (although a refusal would not now generate a right of appeal) or from Kenya.

12. The Appellant has clearly worked hard at her studies and deserves congratulation for her application and success. This may well be a case in which it would be appropriate for the Secretary of State to consider the grant of leave for a limited period, to enable her to conclude the course, outside the Rules. However that is not a matter for judicial decision.
13. Judge Fox made a fee award against the Respondent. That fee award necessarily falls with the setting aside of his decision.

Decision

14. The original determination contained a material error on a point of law and has been set aside.
15. I have re-made the decision and for the reasons set out above this appeal is dismissed.

Signed

Date 02 July 2014

Deputy Upper Tribunal Judge French