Upper Tribunal
(Immigration and Asylum Chamber)
IA/53135/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination promulgated**
On August 21, 2014	**On August 26, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR FAHIM MEA

Respondent

Representation:

For the Appellant: Mr McVeety (Home Office Presenting Officer)
For the Respondent: Mr Lane, Counsel, instructed by Khan & Co

DETERMINATION AND REASONS

1. Whereas the respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.

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2. The appellant, born October 21, 1996, is a citizen of South Africa. On October 9, 2013 the appellant applied for leave to remain as a Tier 4 (General) Student.

3. The respondent refused his application on November 18, 2013 on the basis she was not satisfied the appellant satisfied the Immigration Rules and at the same time she also made a decision to remove him by way of directions from the United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

4. On December 11, 2013 the appellant appealed under Section 82(1) of the Nationality, Immigration and Asylum Act 2002. He submitted the decision was not in accordance with the Immigration Rules and breached article 8 ECHR.

5. The matter was listed before Judge of the First-tier Tribunal Levin (hereinafter referred to as "the FtTJ") on April 23, 2014 and in a determination promulgated on May 9, 2014 he dismissed the appeal under the Immigration Rules but allowed the appellant's appeal under article 8 ECHR.

6. The respondent appealed that decision on May 19, 2014. Permission to appeal was granted by Judge of the First-tier Tribunal Osborne on June 25, 2014. She found the FtTJ may have erred by failing to have regard to the cases of <u>FK and OK (Botswana) [2013] EWCA Civ 238</u> and <u>Shahzad [2014] UKUT 85</u> by failing to take into account the issue of the legitimate aim being pursued by the respondent in refusing the application under article 8.

7. The appellant was in attendance but was not required to give any evidence.

<u>SUBMISSIONS ON ERROR OF LAW</u>

8. Mr McVeety relied on the grounds of appeal and submitted the FtTJ erred as follows:-

    a. This was an application to remain as a student and the Rules were a complete code. The FtTJ's approach to article 8 was wrong because he approached the appeal on the basis this was a near miss and the FtTJ was wrong to use article 8 ECHR to allow the appellant to remain in circumstances where the appellant failed to meet the Rules. The

FtTJ erred by finding compelling reasons to consider the appeal outside of the Rules.

b. The decision in MM and others [2014] EWCA Civ 985 did not overrule the decision in Gulshan (Article 8- new rules)-correct approach) [2013] UKUT 640 (IAC). The Court of Appeal made clear that the Tribunal should only go onto consider article 8 ECHR if the Rules did not provide a complete code. The FtTJ erred by falling into the trap of considering this appeal outside of the Rules when the Rules were a complete code.

c. The only reason given by the FtTJ for finding there was private life was because of the appellant's studies but the Tribunal in Nasim and others (Article 8) [2014] UKUT 25 (IAC) and other cases made clear mere studies do not create private life.

9. Mr Lane submitted that this was not a case where the FtTJ allowed the appeal as a "near miss" and the respondent was wrong to try and raise this as a ground at this stage. The FtTJ's finding that article 8 was engaged was a finding that was open to him. He gave cogent reasons for considering the case outside of the Rules and allowed the appeal having carried out a full proportionality assessment. The FtTJ followed the procedure set out in Gulshan and the respondent's submission is a mere disagreement. The Court of Appeal in MM made it clear there was no intermediary test. The FtTJ did not just allow this appeal based on his wish to study but he had regard to immigration history and the fact that he chose to remain here during the school holidays and continue his studies and he had been here for over five years. The FtTJ had regard to the legitimate aim because this was a case where the appellant demonstrated at the date of hearing he met the Rules and the only reason he failed was because he did not have the English language certificate at the date of decision. There was nothing in the public interest that would outweigh his right to remain. The Supreme Court in Patel and others v SSHD [2013] UKSC 72 confirmed it is the private life built up during his period of study that engaged in article 8 ECHR.

10. Mr McVeety responded to these submissions and stated that the FtTJ's reason for allowing the appeal was because a refusal meant he would be unable to complete his course. There was no right to study unless the Rules were met and his proportionality assessment was flawed. Paragraph [57] in Patel makes it clear that

"… The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not itself a right protected under article 8."

ERROR OF LAW ASSESSMENT

11. This was a finely balanced argument especially with regard to Mr McVeety's third ground of appeal. The first two grounds related to whether the FtTJ should have considered article 8. The third ground related to his proportionality assessment.

12. The FtTJ considered the evidence in some detail in paragraphs [13] to [21] of his determination and then having rejected his appeal under the Immigration Rules he found, for the reasons set out in paragraph [25], that this was a case, which could properly be considered outside of the Rules. The FtTJ did consider the test that is set out in Gulshan and whilst I may not necessarily have reached the same conclusion as to whether the claim should be considered outside of the Rules that is of course not the test that I am applying at this point. I agree with the judge who gave permission that the first two grounds are not made out as the FtTJ considered the evidence and then gave his reason for reaching his decision.

13. The third ground argued by Mr McVeety is the strongest ground because this centres on the FtTJ's proportionality assessment. Whilst the FtTJ has properly set the law out in paragraphs [31] and [32] I am persuaded by Mr McVeety that his proportionality assessment is unbalanced because the FtTJ's reason for allowing this appeal under article 8 is based on two factors namely the fact it was not his fault he had no English language certificate and the fact he had studied throughout his time here. At paragraph [36] the FtTJ gave his reason for allowing the appeal. This was-

> "I find the respondent's *(appellant is meant)* removal to South Africa will clearly have serious implications for him in that not only will it disrupt his degree studies in the UK but also it may cause serious problems for any future application that the appellant makes for leave to enter the UK from abroad in circumstances where he has previously been removed from the UK…."

14. I am satisfied that this is an error in law because wishing to continue studies is not a reason to allow an appeal under article 8 and there is no evidence to

support the finding that the appellant would face difficulties in being admitted if he left the UK as he would not be an overstayer.

15. I indicated to both representatives that I was satisfied that the issue could be dealt by way of submissions and Mr Lane confirmed he did not intend to call any additional evidence. There was no challenge to the FtTJ's finding that it was necessarily not the appellant's fault that he did not have the correct English language certificate.

SUBMISSIONS

16. Mr McVeety reminded me that the Immigration Act 2014 now applied to this appeal and in particular section 19 that introduced Section 117B into the 2002 Act. The only evidence of private life was his studies and this on its own was insufficient to engage private life under article 8 ECHR. Whilst he had been here for sometime he was only here as a student and as such his leave was temporary and conditional on him meeting the Rules. There were no significant obstacles or safety issues facing him in South Africa and he could not meet paragraph 276ADE HC 395. He submitted there was nothing to engage article 8 ECHR. In any event, the appellant could re-apply before his leave expired.

17. Mr Lane relied on his skeleton argument from paragraph [9] onwards. He argued that the appellant had established a private life as he had been here since he was a minor at boarding school. He came as a child to live and study at a boarding school. He remained at the school during the holiday and he had created for himself an intense education and private life. He was in the middle of a six-year course and following the guidance in CDS (PBS: "available": article 8) (Brazil) [2010] UKUT 00305 (IAC) he should be allowed leave to remain under article 8 to complete his studies. In balancing proportionality there was no public interest in maintaining immigration control because he has demonstrated that he has the necessary English language skills and maintenance is not an issue. There was therefore no economic interest in removing him. Finally, he submitted that the fact he may now met the Rules was not a reason to refuse his article 8 submission.

18. I reserved my decision.

CONSIDERATION OF SUBSTANTIVE APPEAL

19. The only issue for me to consider was whether the appellant had established private life and if he had was removal disproportionate.

20. The appellant had been unable to meet the Immigration Rules because he did not have an English language certificate as at the date of his application but the FtTJ concluded this was a case that could be considered outside of the Rules. I have already addressed this issue earlier in my determination and I accepted there was no error in law in the way the FtTJ dealt with this issue because of the facts of the case.

21. The Court in MM (Lebanon) & Ors, R (on the application of) v Secretary of State for the Home Department & Anor [2014] EWCA Civ 985 considered the approaches in Gulshan [2013] UKUT 00640 (IAC) and Nagre [2013] EWHC 720 Admin and confirmed the approach to be taken.

22. The Court of Appeal in MM examined numerous authorities and stated:

> "128. … In Nagre the new rules were themselves attempting to cover, generally, circumstances where an individual should be allowed to remain in the UK on Article 8 grounds… Nagre does not add anything to the debate, save for the statement that if a particular person is outside the rule then he has to demonstrate, as a preliminary to a consideration outside the rule, that he has an arguable case that there may be good grounds for granting leave to remain outside the rules. I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy the rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision-maker.
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> 134. Where the relevant group of 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 Immigration Rules is not such a "complete code" then the proportionality test will be more at large, albeit guided by the Huang tests and UK and Strasbourg case law.
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> 159. … It seems clear from the statement of Lord Dyson MR in MF (Nigeria) and Sales J in Nagre that a court would have to consider first whether the new MIR and the "Exceptional circumstances" created a "complete code" and, if they did, precisely how the "proportionality test" would be applied by reference to that "code".
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> 162. … Firstly, paragraph GEN.1.1 of Appendix FM states that the provision of the family route "takes into account the need to safeguard and promote the welfare of children in the UK", which indicates that the Secretary of State has had regard to the statutory duty. Secondly, there is no legal requirement that the Immigration Rules should provide that the best interests of the child should be determinative. Section 55 is not a "trump card" to be played whenever the interests of a child arise…"

23. I have to consider whether a refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate.

24. The respondent accepted the appellant had been here lawfully throughout his stay here and that he had come here as a minor in May 2009 pursuant to a Tier 4 student visa. This visa enabled him to remain here until October 31, 2013. Having completed his initial studies the appellant applied to remain so that he could start an NQF7 on November 1, 2013. This course runs until July 10, 2017.

25. The refusal letter set out reasons for the refusal and at section C explained what help and advice on returning to South Africa there was for him. Section D reminded him that he also had the option to submit a fresh application and if he did this he should include full supporting evidence and the appropriate fee. The letter concluded that an application should be made before his current leave expired.

26. I have considered his witness statement dated February 13, 2014 and the only part that addresses his private life is paragraph [10]. He stated that he was halfway through his theology course and had worked extremely hard and spent substantial sums of money in respect of his studies. He indicated he had integrated into the community of Blackburn and established social ties through his studies and the school. He stressed his intention is to return to South Africa and to provide his services to his local community in South Africa. There was also a letter from the college confirming his progress.

27. There was no other evidence of his private life save Mr Ahmed's evidence, the college UKBA liaison officer, that the error in submitting documentation was theirs and not his.

28. Mr McVeety referred me to paragraph [57] of Patel in which the Supreme Court held-

> "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."

29. The Tribunal in Nasim considered a variety of possible article 8 scenarios including article 8 in the context of work and studies. At paragraph [12] of Nasim the Court considered the above paragraph and stated-

> "…We regard the passage, however, as having a wider import, in seeking to re-focus attention upon the core purposes of Article 8."

30. The Court continued at paragraph [20] in Nasim-

> "We therefore agree with Mr Jarvis that [57] of Patel and Others is a significant exhortation from the Supreme Court to re-focus attention on the nature and purpose of Article 8 and, in particular, to recognise its limited utility to an individual where one has moved along the continuum, from that Article's core area of operation towards what might be described as its fuzzy penumbra. The limitation arises, both from what will at that point normally be the tangential effect on the individual of the proposed interference and from the fact that, unless there are particular reasons to reduce the public interest of enforcing immigration controls, that interest will consequently prevail in striking the proportionality balance (even assuming that stage is reached)."

31. Turning to the facts of this appeal whilst I accept the appellant wishes to complete his studies he had nevertheless reached a point in his studies where he was about to start on a new course. He had finished the course he originally came to study so this is not a case where removal would mean he would be halfway or even three quarters through the course he began in 2009.

32. It appears this appellant lives for his studies because no other evidence of any private life has been adduced. The court made clear in Patel that merely being good student is not sufficient.

33. Mr Lane argues there is no purpose in removal as he now has he correct English language certificate and he is financially supported. However, immigration control includes a requirement that a person must meet the Rules for either entry clearance or leave to remain. Although the fault was not necessarily his, the FtTJ rejected his appeal under the Rules and he was also unable to satisfy paragraph 276ADE HC 395.

34. Following the decision in Shahzad I am satisfied there are no compelling reasons that would justify allowing this appeal outside of the Rules. In FK and OK the Court found in paragraph [11]–

> "That the individuals concerned in the present case are law-abiding (other than in respect of immigration controls) does not detract from the fact that the maintenance of a generally applicable immigration policy is,

albeit indirectly, a legitimate aim for the purposes of article 8.2."

35. I am satisfied that removal would not mean this appellant was unable to continue his studies as long as he satisfied the Rules and whether he applies here (as provided for in his refusal letter) or from South Africa Mr McVeety's submission is correct. Refusing this appeal is not disproportionate because private life is encompassed in the Rules and the fact the appellant has not submitted any evidence other than an interest in study has drawn me to the conclusion that private life has not been established outside of the Rules and refusing his application would not be unjustifiably harsh.

DECISION

36. There is a material error of law and I set aside the original decision in respect of article 8 ECHR.

37. I have remade the article 8 decision and I dismiss the appeal under Article 8 ECHR.

38. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I do not make a fee award, as the appeal did not succeed.

Signed: Dated:

Deputy Upper Tribunal Judge Alis