



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/44684/2013

THE IMMIGRATION ACTS

Heard at Field House
On 30th January 2015

Determination Promulgated
On 12th February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NAM HOAI VU
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer

For the Respondent: Ms M Malhotra of Counsel instructed by Norton Folgate Solicitors

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a determination of Judge of the First-tier Tribunal McIntosh promulgated on 8th July 2014.
2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to him as the Claimant.
3. The Claimant is a Vietnamese national born 1st November 1990. He entered the United Kingdom on 10th April 2012 with leave as a Tier 4 (General) Student valid until 30th August 2013. On 29th August 2013 he applied for further leave to remain as

a Tier 4 Student. His application was refused on 11th October 2013, the Respondent refusing to vary leave, and deciding to remove the Appellant from the United Kingdom.

4. The application was refused with reference to paragraph 245ZX(d) of the Immigration Rules with reference to paragraphs 1A and 11 of Appendix C.
5. The Secretary of State did not accept that the Claimant was entitled to be awarded a minimum of 10 points under paragraphs 10 to 14 of Appendix C because in order to satisfy the maintenance (funds) requirement the Claimant needed to show that he had funds of £2,000 for a consecutive 28 day period of time. The Secretary of State calculated that the date of the closing balance on the Claimant's bank statement was 14th August 2013 and therefore he needed to show evidence of £2,000 being available in his account for 28 days between 18th July 2013 and 14th August 2013. Between 6th and 8th August 2013 the Claimant's bank statement showed that he was in possession of no more than £1,572.57. The application was therefore refused under the Immigration Rules.
6. The Claimant appealed to the First-tier Tribunal. It was contended, wrongly, that the Secretary of State was not entitled to make a combined decision to refuse to vary leave and remove at the same time. The decision was made on 11th October 2013, and section 51 of the Crime and Courts Act 2013 made it lawful for two decisions to be made at the same time and to be served in the same document, with effect from 8th May 2013.
7. The Claimant contended that he had sufficient funds to satisfy the financial requirements, and explained that the amount in his account fell below the sum of £2,000 because he loaned £700 to a friend which caused the amount in his account to be less than £2,000 between 6th and 8th August 2013. It was pointed out that the Claimant had the equivalent of in excess of £25,000 in a savings account in Vietnam, and also had financial support from his mother.
8. The appeal was heard by Judge McIntosh (the judge) on 20th June 2014. The judge accepted submissions made by Ms Malhotra that the relevant period for which the sum of £2,000 needed to be held, was between 2nd July 2013 and 1st August 2013. This was because the Claimant's application was dated 29th August 2013 and the appropriate procedure was to count back 28 days from that date, which would give 1st August 2013, and then count back a further 28 days which gave an accounting period between 2nd July 2013 and 1st August 2013. In that period the Claimant had in excess of £2,000 and on that basis the judge found that he satisfied the Immigration Rules and allowed the appeal.
9. Article 8 of the 1950 European Convention on Human Rights was apparently raised at the hearing on the basis that it would be proportionate to allow the Claimant to continue with his education, but the judge made no finding on this, having allowed the appeal under the Immigration Rules.
10. The Secretary of State applied for permission to appeal to the Upper Tribunal, contending in summary that the judge had erred in considering the maintenance

requirements and had failed to consider paragraph 1A(h) of Appendix C. This stipulates that the end date of the 28 day period in which the funds must be available, is the date of the closing balance on the most recent of the specified documents submitted with the application, which must be no earlier than 31 days before the date of application.

11. Permission to appeal was granted by Upper Tribunal Judge Freeman.
12. Following the grant of permission there was no response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008.
13. The Tribunal issued directions that there should be an oral hearing before the Upper Tribunal to ascertain whether the determination of the First-tier Tribunal contained an error of law.

The Upper Tribunal Hearing

Error of Law

14. In contending that the judge materially erred in considering the maintenance requirements of Appendix C Mr Bramble relied upon the grounds contained within the application for permission to appeal.
15. Ms Malhotra contended that the judge's finding that the relevant period for which the Appellant needed to show that he had available the sum of £2,000, was 2nd July 2013 until 1st August 2013, and the judge did not err on this issue.
16. In my view the judge erred in law and I set aside the decision of the First-tier Tribunal, for the following reasons.
17. The judge did not correctly consider Appendix C, paragraph 1A(c) which confirms that the funds must be held for a consecutive 28 day period of time, and 1A(h) which confirms that the end of the 28 day period will be taken as the date of the closing balance on the most recent of the specified documents, (where specified documents from two or more accounts are submitted, this will be the end date for the account that most favours the applicant) and must be no earlier than 31 days before the date of application.
18. In this case the date of application was 29th August 2013. The specified document submitted to prove the availability of funds was a Lloyds TSB Bank statement. It seemed that the date of the closing balance was 9th August 2013, although the statement had been stamped 14th August 2013. It does in fact appear that there are further entries after 9th August 2013 on page 5 of the statement, and the closing balance is in fact 14th August 2013.
19. Therefore the Claimant needed to show that he had £2,000 for a consecutive 28 day period ending on 14th August 2013. It is common ground that between 6th and 8th August 2013 there was less than £2,000 in the bank account, and therefore the requirements of the Immigration Rules were not satisfied. This would have been the same result, if the closing balance was on 9th August 2013. The judge was wrong to

conclude that the Claimant needed to demonstrate a sum of £2,000 between 2nd July 2013 and 1st August 2013.

20. Having set aside the decision of the First-tier Tribunal, both representatives indicated that they were in a position to proceed so that the decision could be re-made.

Re-Making the Decision

21. I ascertained that I had all documentation upon which the parties intended to rely. I had the Secretary of State's bundle with Annexes A-D, and the Claimant's bundle comprising 62 pages.
22. Ms Malhotra indicated that she did not intend to call further evidence, and would not make further submissions in relation to the Immigration Rules in view of my finding that the relevant period in which a sum of £2,000 had to be available, was the 28 day period ending 14th August 2013, as it was accepted that the amount in the Claimant's bank account fell below this between 6th and 8th August 2013. In relation to Article 8 I was told that there was no family life claim, and that it was conceded that the Claimant could not succeed with a private life claim under paragraph 276ADE of the Immigration Rules. I was however asked to find that the Claimant had established a private life in the United Kingdom, and that it would be disproportionate to remove him, which would mean that he could not carry on with his education.
23. Mr Bramble relied upon the Secretary of State's decision dated 11th October 2013. I was asked to conclude that the application could not succeed under the Immigration Rules, and should be dismissed with reference to Article 8 and reliance was placed upon Patel and Others [2013] UKSC 72.
24. I reserved my decision.

My Conclusions and Reasons

25. The burden of proof in relation to the Immigration Rules is on the Claimant and the standard is a balance of probability.
26. I find that the Claimant cannot satisfy the requirements of the Immigration Rules because he was unable to demonstrate that he had available the sum of £2,000 for a consecutive 28 day period ending 14th August 2013 as the amount in his bank account fell below that sum between 6th-8th August 2013.
27. In relation to Article 8 my starting point has to be consideration of the rules. As there is no family life claim I need not consider Appendix FM.
28. It is conceded on behalf of the Claimant that he cannot satisfy paragraph 276ADE. I note that the Claimant only entered the United Kingdom on 10th April 2012.
29. I then have to decide whether it is appropriate to consider Article 8 outside the Immigration Rules. Guidance on this was given by the Court of Appeal in MM Lebanon [2014] EWCA Civ 985 and I set out below paragraph 135;

Where the relevant group of IRs, 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 IRs 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.

30. In my view paragraph 276ADE is not a complete code, and there should be a proportionality test carried out. I therefore decided to consider Article 8 outside the rules and I have approached this by adopting the five stage approach advocated in Razgar [2004] UKHL 27. I find that Article 8 is engaged in respect of the Claimant’s private life, and in making this decision I take into account AG (Eritrea) [2007] EWCA Civ 801, paragraph 28, in which it was found that while an interference with private or family life must be real if it is to engage Article 8(1), the threshold of engagement is not a specially high one.
31. I find that the proposed interference with the Claimant’s private life is in accordance with the law, as he cannot satisfy the requirements of the Immigration Rules. I also find that the proposed interference is necessary in the interests of maintaining effective immigration control. I have to decide whether the proposed removal is proportionate to the legitimate public end sought to be achieved.
32. In considering proportionality I take into account section 117B of the Nationality, Immigration and Asylum Act 2002 which confirms the maintenance of effective immigration control is in the public interest.
33. The Claimant’s private life claim is based upon his wish to continue his education in the United Kingdom. In considering this I take into account Miah v SSHD [2013] QB 35, in which it was confirmed that there is no near miss principle when considering Article 8.
34. I attach significant weight to the importance of satisfying the Immigration Rules. I have taken into account all of the evidence submitted on behalf of the Claimant and in particular his witness statement in which he explains why the funds in his account fell below £2,000, and in which he explains that his mother is his financial Sponsor.
35. The issue I have to decide is whether it is proportionate to disregard the financial requirements of the Immigration Rules, and allow the Claimant to continue his education in the United Kingdom by finding that his removal would be a disproportionate breach of his private life, under Article 8. I find that it is not appropriate to disregard the Immigration Rules, and I do not find the Secretary of State’s decision to be disproportionate, and therefore it does not breach Article 8. It is open to the Claimant to make a fresh application and while this may cause him some difficulty, it does not mean that the decision is disproportionate. I set out below paragraph 57 of Patel;

- 57 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 (see paragraph 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.

36. I have sympathy for the Claimant, but I am afraid that the Secretary of State decision is in accordance with the law and Immigration Rules, and does not breach Article 8 of the 1950 European Convention on Human Rights. Therefore the Claimant's appeal must be dismissed.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision.

The Claimant's appeal is dismissed under the Immigration Rules.

The Claimant's appeal is dismissed on human rights grounds.

Anonymity

The First-tier Tribunal made no anonymity direction. There has been no request for anonymity and the Upper Tribunal makes no anonymity order.

Signed

Date 5th February 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

The appeal is dismissed. There is no fee award.

Signed

Date 5th February 2015

Deputy Upper Tribunal Judge M A Hall