



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/48216/2014**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 29th January 2016**

**Decision & Reasons
Promulgated
On 6th June 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

**MR. SABERULLA BAIG MIRZA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance

For the Respondent: Mr Kotas; Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision and reasons by First-tier Tribunal Judge Malins promulgated on 8th July 2015 in which he dismissed the appellant's appeal against a decision made by the Secretary of State on 19th November 2014 to refuse an application for leave to remain in the UK as a Tier 5 Temporary Worker (Religious Worker) Migrant.

Background

2. The appellant, is an Indian national who entered the UK having been granted leave to enter the UK as a Tier 4 (General) Student on 4th November 2009, valid until 31st December 2011. His leave was subsequently extended, such that he was granted further leave to remain as a Tier 4 student until 26th November 2014. However, on 12th August 2014 his leave to remain as a Tier 4 student was curtailed so as to expire on 14th October 2014.
3. On 8th October 2014, the appellant made a combined application for leave to remain in the UK as a Tier 5 Temporary Worker (Religious Worker) Migrant under the points based system and for a biometric residence permit. The application was refused on 19th November 2014 and it was that decision that gave rise to the appeal before the First-tier Tribunal.
4. In the grounds of appeal, the appellant claimed that he was last granted leave as a student and lawfully obtained a UK master's degree and is undertaking postgraduate training and work experience with his sponsor. He claimed that he therefore satisfied all the requirements to be granted leave as a Tier 5 Religious Worker Migrant. In addition, he claimed that the refusal breached the appellant's right to private life under the Article 8 of the European Convention on Human Rights. Without any useful elaboration, he claimed that during his period of stay in the UK, he has established a private life in the UK.

The decision of First-tier Tribunal Judge Malins

5. The appellant was neither represented, nor attended at the hearing of his appeal before the First-tier Tribunal. At paragraph 6 of his decision, the First-tier Tribunal Judge states:

"6. The appeal hearing was listed for 15th June, before which, the appellant's solicitors Nasim & Co of East Ham, London E6, wrote to the Tribunal stating:

We have been instructed by the appellant that unfortunately he will not be able to attend on the date of hearing therefore kindly decide this appeal on papers in accordance with law'

Accordingly, it was right for a hearing to proceed under Rule 28 of the Asylum and Immigration Tribunal (Procedure) Rules 2006".

6. The Judge sets out the appellant's immigration history at paragraph [2] of his decision and at paragraphs [3] and [4] sets out the reasons for the refusal of the application by the respondent. The Judge heard submissions from the Presenting Officer and set out his findings of fact at paragraph [9] of the decision. At paragraph [9(d)] he found that the appellant's application must fail under the immigration rules because the specific requirement under paragraph 245ZA(b) that "the applicant must have, or have last been granted entry clearance or leave to remain as a Tier 5 (Temporary Worker) Migrant" could not be met.

7. At paragraph [10] of his decision, the Judge concludes:

"10. Accordingly I find on the balance of probabilities that the appellant's application must fail. This is not a case where discretion lies with the decision maker: there is an absolute requirement prescribed, and this must be complied with. It follows from my findings above, that the appellant is actually powerless to comply with the specific requirements in question.

I therefore find that the respondent's decision was correct in law and under the Immigration Rules."

8. Although the appellant had raised Article 8 in his grounds of appeal and the Judge noted at paragraph [5] of his decision that the Notice of Appeal contained grounds of appeal under the Immigration Rules and Article 8, the Judge did not consider the Article 8 grounds.

The Appeal before me

9. The appellant does not challenge the decision of the First-tier Tribunal Judge dismissing the appeal under the immigration rules. The appellant appeals on the ground that the Judge 's failure to properly consider the appellant's appeal under Human Rights grounds (Article 8) was unreasonable and not in accordance with the law.
10. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 4th November 2015. The matter comes before me to consider whether or not the determination by First-tier Tribunal Judge Malins involved the making of a material error of law, and if so, to remake the decision.
11. Directions were issued to the parties in advance of the hearing before me requiring the parties to prepare for the hearing on the basis that, if the Upper Tribunal decides to set aside the determination of the First-tier Tribunal, any further evidence, including supplementary oral evidence, that the Upper Tribunal may need to consider if it decides to re-make the decision, can be so considered at that hearing. No further evidence was relied upon by the appellant and there was no application made pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.
12. The hearing before me was called on at 2:50pm. Neither the appellant nor his representatives were present. The Notice of Hearing had been sent to the appellant and his representatives on 6th January 2016 and there was no explanation for their absence. I note that shortly before the hearing before the First-tier Tribunal, the appellant's representatives had informed the First-tier Tribunal that the appellant would not be attending and had invited the Tribunal to deal with the appeal on the papers.
13. In the absence of any application for an adjournment or an explanation for the failure of the appellant and his representatives to attend the hearing, I consider it appropriate to proceed with the hearing, as I am permitted to do, under Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008. I am satisfied that both the appellant and his

representatives have been notified of the hearing, and that reasonable steps have been taken to notify the appellant of the hearing. I also consider that it is in the interests of justice to proceed with the hearing.

14. The respondent has filed a rule 24 response dated 16th November 2014. The respondent opposes the appeal, but submits that even if Article 8 had been considered by the Judge, the appeal would remain dismissed. The respondent submits that the grounds do not challenge the refusal under the substantive Immigration Rules. The grounds fail to acknowledge the wealth of case law which now addresses Article 8, in that there has to be something compelling to remain in the UK outside the rules and nothing has been put forward by the appellant. The rule 24 response was adopted by Mr Kovats on behalf of the respondent.

Discussion

15. It is correct that the First-tier Tribunal Judge did not consider the Article 8 claim either under Appendix FM or paragraph 276ADE(1) of the immigration rules. The appellant does not claim that either Appendix FM or the requirements of paragraph 276ADE(1) of the immigration rules can be met by him. It is therefore useful to set out the general approach that has been taken by the courts upon the assessment of Article 8 claims outside the immigration rules since the introduction of Appendix FM and paragraph 276ADE.
16. In **SS (Congo) [2015] EWCA Civ 387** the Court of Appeal considered the proper approach to applications for leave to enter the UK outside the Immigration Rules on the basis of Article 8 following the Court of Appeal's decision in **MM (Lebanon) & Others -v- SSHD [2014] EWCA Civ 985**. Lord Justice Richards set out the basic legal framework as follows;

"11. Under the 1971 Act, the Secretary of State has a wide residual discretion to grant LTR or LTE outside the Rules, i.e. where an applicant cannot show that they satisfy the conditions in the Rules themselves: see R (Munir) -v- SSHD [2012] UKSC 32; [2012] 1 WLR 2192, at [44]. An applicant

who does not satisfy the conditions stipulated in the Rules may nonetheless have a good claim to be entitled to enter the United Kingdom or to be allowed to remain here by reason of their Convention rights, e.g. Article 3 (protection against torture and inhumane treatment) and Article 8 . Such a claim arises by virtue of the obligation of the Secretary of State under section 6(1) of the HRA to act in a manner compatible with an individual's Convention rights.

...

17. However, the width of the gap between what the Immigration Rules set out by way of entitlement to enter or remain in the United Kingdom and the requirements resulting from application of a relevant Convention right – in these appeals, we are concerned with rights under Article 8 – may be highly relevant in certain contexts. This is because, in the immigration field, the fair balance required to be struck pursuant to Article 8 between individual interests protected by that provision and the general public interest typically involves bringing into account certain public interest considerations in relation to which the Secretary of State has a legitimate role to fulfil by formulating an approach which gives them proper value and weight. The Secretary of State is responsible for the overall operation of the immigration system as a fair system which properly reflects and balances a range of interests, including important aspects of the public interest, and she is accountable to Parliament for what she does.

...

18. If the gap between what Article 8 requires and the content of the Immigration Rules is wide, then the part for the Secretary of State's residual discretion to play in satisfying the requirements of Article 8 and section 6(1) of the HRA will be correspondingly greater. In such circumstances, the practical guidance to be derived from the content of the Rules as to relevant public policy considerations for the purposes of the balance to be struck under Article 8 is also likely to be reduced: to use the expression employed by Aikens LJ in MM (Lebanon) in the Court of Appeal, at [135], the proportionality balancing exercise “will be more at large”. If the Secretary of State has not made a conscientious effort to strike a fair balance for the purposes of Article 8 in making the Rules, a court or tribunal will naturally be disinclined to give significant weight to her view regarding the actual balance to be struck when the court or tribunal has to consider that question for itself. On the other hand, where the Secretary of State has sought to fashion the content of the Rules so as to strike what she regards as the appropriate balance under Article 8 and any gap between the Rules and what Article 8 requires is comparatively narrow, the Secretary of State's

formulation of the Rules may allow the Court to be more confident that she has brought a focused assessment of considerations of the public interest to bear on the matter. That will in turn allow the Court more readily to give weight to that assessment when making its own decision pursuant to Article 8. An issue arises on this appeal as to whether the Secretary of State has made a conscientious effort to use the new Immigration Rules to strike the fair balance which Article 8 requires and whether there is a substantial gap, or not, between the content of the LTE Rules and the requirements of Article 8.

17. Lord Justice Richards considered the different parts of the immigration rules and the tests of exceptional and compelling reasons. He held:

“29. It is clear, therefore, that it cannot be maintained as a general proposition that LTR or LTE outside the Immigration Rules should only be granted in exceptional cases. However, in certain specific contexts, a proper application of Article 8 may itself make it clear that the legal test for grant of LTR or LTE outside the Rules should indeed be a test of exceptionality. This has now been identified to be the case, on the basis of the constant jurisprudence of the ECtHR itself, in relation to applications for LTR outside the Rules on the basis of family life (where no children are involved) established in the United Kingdom at a time when the presence of one or other of the partners was known to be precarious: see Nagre , paras. [38]-[43], approved by this court in MF (Nigeria) at [41]-[42].

...

31. In other contexts, it cannot simply be assumed that a strict legal test of exceptional circumstances will be applicable when examining the application of Article 8 outside the Immigration Rules (or within the Rules themselves, where particular paragraphs are formulated so as fully to cover the applicability of Article 8, as in paragraphs 399 and 399A as interpreted in MF (Nigeria)). The relevant general balance of public interest considerations and individual interests will vary between different parts of the Rules. It is only if the normal balance of interests relevant to the general area in question is such as to require particularly great weight to be given to the public interest as compared with the individual interests at stake (as in the precarious cases considered in Nagre and the foreign criminal deportation cases considered in MF (Nigeria)) that a strict test of exceptionality will apply.

32. However, even away from those contexts, if the Secretary of State has sought to formulate Immigration Rules to reflect a fair balance of interests

under Article 8 in the general run of cases falling within their scope, then, as explained above, the Rules themselves will provide significant evidence about the relevant public interest considerations which should be brought into account when a court or tribunal seeks to strike the proper balance of interests under Article 8 in making its own decision. As Beatson LJ observed in Haleemudeen -v- SSHD [2014] EWCA Civ 558, at [40], the new Rules in Appendix FM:

“... are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interests and rights of people who have come to this country and wish to settle in it. Overall, the Secretary of State's policy as to when an interference with an Article 8 right will be regarded as disproportionate is more particularised in the new Rules than it had previously been.”

Accordingly, a court or tribunal is required to give the new Rules “greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights” (para. [47]).

33. In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of “very compelling reasons” (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ.

18. Thus under section 6(1) of the HRA, a grant of leave outside the Rules is appropriate if, notwithstanding that the case is not within the Rules, a person has a good claim to be entitled to remain by virtue of Article 8 or any other Convention right. The authorities establish that there is always a second stage, but where all relevant considerations have been weighed under the immigration rules and there are no compelling circumstances not sufficiently recognised under the rules it will be enough for the decision maker simply to say that. In this kind of case, the issue for the

First-tier Tribunal is the lawfulness of the refusal to vary the appellant's leave to remain. The duty involves giving proper weight to the public interest as expressed by the respondent in lawfully made rules and guidance (and now applying also sections 117A-D of the 2002 Act). The failure to qualify under the rules will be tend to suggest that the public interest requires refusal of leave to vary, unless some countervailing factors are present which are not already taken into account under the Rules.

19. The appellant has failed either before the First-tier Tribunal Judge or before me to identify what factors exist which are relevant to the proportionality assessment which are not fully reflected in the rules which are designed to cover the generality of cases.
20. Having considered the decision of the First-tier Tribunal Judge I am satisfied that the Judge erred in law in failing to have any regard to the Article 8 claim that was relied upon by the appellant. Whatever the merits of that ground, the appellant was entitled to have a decision from the Judge upon his appeal on Article 8 grounds.
21. However the appellant cannot satisfy the requirements of Appendix FM and paragraph 276ADE(1) of the immigration rules and in my judgement there are no compelling or exceptional circumstances advanced by the appellant, to justify allowing the appeal on Article 8 grounds where the substantive requirements of the immigration rules are not met.
22. In my judgment, in the absence of any other identifiable features of a compelling nature, the appellant has failed to establish that his removal is disproportionate to the legitimate aim of immigration control. The appeal on Article 8 grounds is therefore dismissed.

Notice of Decision

23. The decision of First-tier Tribunal Judge Malins promulgated on 8th July 2015 discloses an error of law in that he failed to make any decision upon the appellant's Article 8 appeal, and the decision is set aside.
24. I remake the decision, dismissing the appeal by the appellant both under the Immigration Rules and on Article 8 grounds.
25. No anonymity direction is made.

Signed

Date 6 June 2016

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT
FEE AWARD

I have allowed the appeal by the appellant but in remaking the decision, I have dismissed the appeal by the appellant and therefore there can be no fee award.

Signed

Date 6 June 2016

Deputy Upper Tribunal Judge Mandalia