



**Upper Tribunal
(Immigration and Asylum Chamber)**

Nasim and others (Article 8) [2014] UKUT 00025 (IAC)

**Heard at Field House
19th December 2013**

Determination Promulgated

Before

**UPPER TRIBUNAL JUDGE ALLEN
UPPER TRIBUNAL JUDGE PETER LANE**

Between

- (1) MR MUHAMMAD NASIM
- (2) MR TAHIR MAHMOOD
- (4) MR AHSAN KHALID
- (5) MR AHSAN NAEEM
- (6) MR RIZWAN BASHIR
- (7) MR MUHAMMAD ARIF MUGHAL
- (8) MR MUHAMMAD ZULGARNAIN ARIF
- (9) MISS NOOR UL HUDA ARIF MUGHAL
- (10) MISS MAHAM ARIF
- (11) MRS SAFIA ARIF
- (12) MR MUHAMMAD AFIF ARIF
- (13) MR DANISHA EJAZ QURESHI
- (17) MR KAZI MOSHARROF HOSSAIN
- (18) MR ANDROO HAJI RAFAEK
- (19) MR QUMMER AZIZ
- (20) MR ABHILASH MUKUNDHAKSHAN
- (21) MS SANDEEP KAUR
- (22) MR SAJID ABDUL

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

(The numbers allocated above to each appellant are the numbers given to them respectively in the decision in Nasim and Others (Raju: reasons not to follow?) [2013] UKUT 00610 (IAC)).

Representation:

Appellant (1):	No appearance and no representation
Appellants (2), (13), (17), (21) and (22):	Mr A Baddar, Representative, of Farani Javid Taylor Solicitors LLP
Appellant (4):	Mr A Mehta, Representative, of Malik & Malik Solicitors
Appellant (5):	Ms A Mohsin, Counsel, instructed by Primax Solicitors
Appellants (6) to (12):	Mrs J Heybroek, Counsel, instructed by Morgan Mark Solicitors
Appellant (18):	Mr A Sreevalsalan, Solicitor, of Legend Solicitors
Appellant (19):	In person
Appellant (20):	In person
Respondent:	Mr I Jarvis, Senior Home Office Presenting Officer

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.

A person's human rights are not enhanced by not committing criminal offences or not relying on public funds. The only significance of such matters in cases concerning proposed or hypothetical removal from the United Kingdom is to preclude the Secretary of State from pointing to any public interest justifying removal, over and above the basic importance of maintaining a firm and coherent system of immigration control.

DETERMINATION AND REASONS

A. Introduction

1. This determination completes the Upper Tribunal's decision-making in the appeals of the appellants listed above. In Nasim and Others (Raju: reasons not to follow?) [2013] UKUT 00610 (IAC) we made findings in respect of a number of issues advanced by the appellants, in support of their submissions that they should be entitled to succeed in appeals brought against decisions of the respondent to refuse to vary their leave to remain in the United Kingdom, notwithstanding the judgment of the Court of Appeal in Raju and Others v Secretary of State for the Home Department [2013] EWCA Civ 754. At [115] to [118] of Nasim and Others it was explained that, in certain of the appeals, the Upper Tribunal would reconvene to complete proceedings by reference to a single matter, which could not conveniently be dealt with at the hearing on 8th October 2013; namely, whether, in each case, the appellant was entitled to succeed in his or her appeal on the ground that his or her

hypothetical removal, pursuant to the decision to refuse to vary leave, would violate the United Kingdom's obligations under Article 8 of the ECHR.

2. On 19th December 2013 we reconvened in order to consider any evidence and submissions which the relevant appellants and/or their representatives wished to put forward, and to hear Mr Jarvis make submissions on behalf of the respondent.

B. Procedural matters

3. Mr Nasim (appellant (1)) did not appear on 19th December; nor was he represented. On 16th December 2013 his advisors, Immigration Aid, wrote to the Upper Tribunal to say that Mr Nasim wished

“to withdraw his above appeal which is pending with the Upper Tribunal ... our client's circumstances have changed and he intends to submit a fresh application in a different category. We understand that the decision of the Court of Appeal in Raju is not in our client's favour and as such he does not intend to continue with this appeal anymore (sic).”

4. Pursuant to rule 17(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008, we consent to the withdrawal of Mr Nasim's case before the Upper Tribunal. That case comprises his appeal against the decision of the respondent, taken on 28th December 2012, to refuse to vary his leave to remain in the United Kingdom. That appeal is, accordingly, hereby recorded as withdrawn.
5. On behalf of Mr Naeem (appellant (5)), Primax Solicitors had on 12th December 2013 applied for an adjournment of the hearing of his case on 19th December, citing as a reason the fact that “Article 8 issues need to be prepared in full”. It was also requested that the hearing of his case be transferred to Manchester. At the hearing on 19th December, Ms Mohsin of Counsel appeared on behalf of Mr Naeem, who was also present. Ms Mohsin renewed her application for an adjournment, which had been refused in writing by the Upper Tribunal on 17th December.
6. Having heard Ms Mohsin, we refused the adjournment application. Mr Naeem and his legal advisors had been aware since 8th October 2013 that there would be a further hearing concerning any Article 8 ground which he wished to advance. There had, accordingly, been ample time to prepare for this purpose. Since the appellant and his Counsel had been present at the Field House hearing on 8th October, and since Mr Naeem was again present on 19th December, together with Counsel (albeit a different individual), we found no merit in the application that the remaining proceedings should be transferred to a hearing centre in Manchester.
7. We gave Ms Mohsin an opportunity to take instructions from her client on the issue of Article 8. Following refusal of her adjournment request, at 12.30pm we offered Ms Mohsin the opportunity of delaying her submissions to us until 2pm, if she needed

further time. Ms Mohsin indicated that she did not and that she was able to address us on Article 8 (as to which, see below).

8. On 11th December 2013, Farani Javid Taylor Solicitors applied on behalf of Mr Hossein (appellant (17)), Ms Kaur (appellant (21)) and Mr Abdul (appellant (22)) for an adjournment of their cases, citing “short notice” and the unavailability of Counsel who had attended on 8th October. The Tribunal did not consider that, given the limited nature of the matters to be considered on 19th December, any proper case had been given for the adjournment, which was refused. In the event, Mr Baddar, a legal representative with that firm, attended on 19th December and put forward the Article 8 case for each of the appellants we have mentioned (as well as for appellants (4) and (13)).
9. By agreement, Mr Jarvis addressed us by reference to his written skeleton argument, following which we heard from the representatives and those unrepresented appellants who wished to address us. Mr Jarvis then replied, before the appellants and their representatives were given the opportunity to make closing submissions.

C. *Article 8 in the context of work and studies*

10. Mr Jarvis’s stance, on behalf of the respondent, was uncompromising. In the respondent’s view, none of the appellants could demonstrate that removal in pursuance of the decision to refuse to vary leave would have “consequences of such gravity” as to engage Article 8(1) of the ECHR; that is to say, none could demand a positive answer to the second of the five questions posed by Lord Bingham in Razgar v Secretary of State for the Home Department [2004] UKHL 27, at [17]¹, with the result that it was unnecessary to determine whether such removal constituted a disproportionate interference with Article 8 rights.
11. In this regard, Mr Jarvis placed particular emphasis upon the following part of the judgment of Lord Carnwath in Patel and Others v Secretary of State for the Home Department [2013] UKSC 72:-

“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

¹ The questions are:

- (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant’s right to respect for his private or (as the case may be) family life?
- (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
- (3) If so, will such interference be in accordance with the law?
- (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
- (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

'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."

12. In her submissions, Mrs Heybroek, upon whom the other representatives substantially relied as regards their common Article 8 arguments, contended that, in this passage, Lord Carnwath was doing no more than pointing out that a right to education is not *per se* covered by Article 8. We regard the passage, however, as having a wider import, in seeking to re-focus attention upon the core purposes of Article 8.
13. In order to explain why, the following passage from *Human Rights Law and Practice, 3rd Edition 2009 (Lester, Pannick and Herberg, Eds)*, under the heading "the scope of the right", is instructive:-

"Of all of the Convention rights, art 8 has by far the widest scope. Like other international human rights guarantees, it demands respect for a broad range of loosely allied personal interests: physical or bodily integrity; personal identity and lifestyle (at least in some respects), including sexuality and sexual orientation; reputation; family life; the home and home environment; and correspondence, embracing all forms of communication. It is this breadth that has led to art 8 being described as 'the least defined and most unruly' of the Convention rights. As regards private life, Lord Rodger observed in the *Countryside Alliance* case that 'the European Human Rights Commission long ago rejected any Anglo-Saxon notion that the right to respect for private life was to be equated with the right to privacy'. The closest to a unifying theme for such diverse subjects is the liberal presumption that individuals should have an area of autonomous development, interaction and liberty, a 'private sphere', with or without interaction with others free from state intervention and free from excessive, unsolicited intervention by other uninvited individuals. Thus, the notion of privacy is a continuum, starting from an inviolable core of personal autonomy in a private context and radiating out (yet becoming more subject to qualification or justified interference) into personal and social relationships in the wider world."

14. Whilst the concept of a "family life" is generally speaking readily identifiable, the concept of a "private life" for the purposes of Article 8 is inherently less clear. At one end of the "continuum" stands the concept of moral and physical integrity or "physical and psychological integrity" (as categorised by the ECtHR in eg *Pretty v United Kingdom* (2002) 35 EHRR 1) as to which, in extreme instances, even the state's interest in removing foreign criminals might not constitute a proportionate response. However, as one moves down the continuum, one encounters aspects of private life which, even if engaging Article 8(1) (if not alone, then in combination with other factors) are so far removed from the "core" of Article 8 as to be readily defeasible by state interests, such as the importance of maintaining a credible and coherent system of immigration control.

15. At this point on the continuum the essential elements of the private life relied upon will normally be transposable, in the sense of being capable of replication in their essential respects, following a person's return to their home country. Thus, in headnote 3 of MM (Tier 1 PSW; Art 8; private life) Zimbabwe [2009] UKAIT 0037 we find that:-

"3. When determining the issue of proportionality ... it will always be important to evaluate the extent of the individual's social ties and relationships in the UK. However, a student here on a temporary basis has no expectation of a right to remain in order to further these ties and relationships if the criteria of the points-based system are not met. Also, the character of an individual's "private life" relied upon is ordinarily by its very nature of a type which can be formed elsewhere, albeit through different social ties, after the individual is removed from the UK."

16. As was stated in the earlier case of MG (assessing interference with private life) Serbia and Montenegro [2005] UKAIT 00113:-

"A person's job and precise programme of studies may be different in the country to which he is to be returned and his network of friendships and other acquaintances is likely to be different too, but his private life will continue in respect of all its essential elements."

17. The difference between these types of "private life" case and a case founded on family life is instructive. As was noted in MM, the relationships involved in a family life are more likely to be unique, so as to be incapable of being replicated once an individual leaves the United Kingdom, leaving behind, for example, his or her spouse or minor child.

18. In R (on the application of the Countryside Alliance) v AG and others [2007] UKHL 52, Lord Bingham, having described the concept of private life in Article 8 as "elusive", said that:

"... the purpose of the article is in my view clear. It is to protect the individual against intrusion by agents of the state, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose" [10].

19. It is important to bear in mind that the "good reason", which the state must invoke is not a fixity. British citizens may enjoy friendships, employment and studies that are in all essential respects the same as those enjoyed by persons here who are subject to such controls. The fact that the government cannot arbitrarily interfere with a British citizen's enjoyment of those things, replicable though they may be, and that, in practice, interference is likely to be justified only by strong reasons, such as imprisonment for a criminal offence, cannot be used to restrict the government's ability to rely on the enforcement of immigration controls as a reason for interfering

with friendships, employment and studies enjoyed by a person who is subject to immigration controls.

20. 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).
21. In conclusion on this first general matter, we find that the nature of the right asserted by each of the appellants, based on their desire, as former students, to undertake a period of post-study work in the United Kingdom, lies at the outer reaches of cases requiring an affirmative answer to the second of the five "Razgar" questions and that, even if such an affirmative answer needs to be given, the issue of proportionality is to be resolved decisively in favour of the respondent, by reference to her functions as the guardian of the system of immigration controls, entrusted to her by Parliament.

D. Article 8 and the "near-miss" principle

22. A second general matter arising from Patel and Others concerns the relationship between the so-called "near-miss principle" and Article 8. Again, the focus of submissions was on Lord Carnwath's judgment:-

"55. Thus the balance drawn by the rules may be relevant to the consideration of proportionality. I said much the same in *Rudi*. Although I rejected the concept of a 'near-miss principle', I did not see this as inconsistent with the Collins J's words in *Lekstaka*:

'Collins J's statement, on which the court relied [in *SB*], seems unexceptionable. It is saying no more, as I read it, than that the practical or compassionate considerations which underlie the policy are also likely to be relevant to the cases of those who fall just outside it, and to that extent may add weight to their argument for exceptional treatment. He is not saying that there arises any presumption or expectation that the policy will be extended to embrace them.' (para 31(ii))

(My reference to 'exceptional treatment' needs to be read now in the light of *Huang* para 20 in which Lord Bingham made clear that, contrary to previous Court of Appeal case-law, there was no separate 'test of exceptionality'.)

56. Although the context of the rules may be relevant to the consideration of proportionality, I agree with Burnton LJ that this cannot be equated with a formalised 'near-miss' or 'sliding scale' principle, as argued for by Mr Malik. That approach is unsupported by Strasbourg authority, or by a proper reading of Lord Bingham's words. Mrs Huang's case for favourable treatment outside the rules did not turn on how close she had come to compliance with rule 317, but on the application of the family values which underlie that rule and are at the heart also of article 8. Conversely, a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit."

23. We addressed the issue of "near-miss" at [42] to [46] of Nasim and Others. So far as concerns its relevance to Article 8, it is unnecessary to say more than the following. What Lord Carnwath held at [55] and [56] of Patel and others was that certain "near-miss" arguments are, on analysis, appeals to core Article 8 elements, such as "family values", which underpin the criteria of the particular Rule that the appellant has narrowly failed to meet. In other words, the focus in such cases is not on the "near-miss" but, rather, on the significance of the relevant Article 8 element.

24. It can therefore be seen that [55] and [56] of Patel and Others cannot assist the present appellants. The relevant Rules with which they failed to comply were not in any way analogous to paragraph 317 (leave to enter as a parent etc of a person present and settled in the United Kingdom), which was the rule being addressed by Lord Carnwath. The former Tier 1 (Post-Study Work) rules were not framed by the respondent by reference to Article 8.

E. The effect on human rights of paying one's way and not committing criminal offences

25. A further seam running through the appellant's submissions was that, during their time in the United Kingdom, they had been law-abiding, had not relied on public funds and had contributed to the United Kingdom economy by paying their students' fees. Their aim was now to contribute to that economy by working.

26. We do not consider that this set of submissions takes the appellants' cases anywhere. It cannot rationally be contended that their Article 8 rights have been made stronger merely because, during their time in this country, they have not sought public funds, have refrained from committing criminal offences and have paid the fees required in order to undertake their courses. Similarly, a desire to undertake paid employment in the United Kingdom is not, as such, a matter that can enhance a person's right to remain here in reliance on Article 8.

27. The only significance of not having criminal convictions and not having relied on public funds is to preclude the respondent from pointing to any public interest in respect of the appellants' removal, over and above the basic importance of maintaining a firm and coherent system of immigration control. However, for reasons we have already enunciated, as a general matter that public interest factor is,

in the circumstances of these cases, more than adequate to render removal proportionate.

F. Legitimate expectation revisited

28. Several of the appellants contended that they had been encouraged to come to the United Kingdom instead of, say, Canada or the United States of the America, by the prospect, which then existed, of being able to undertake a period of two years' post-study work, following completion of their studies. Certain of the appellants' submissions went so far as to contend that they had, in the circumstances, a legitimate expectation to be able to undertake such work.
29. In Nasim and Others legitimate expectation was amongst the submissions deployed by the appellants and rejected by the Tribunal: [31] to [37]. We heard nothing on 19th December that might even begin to cause us to resile from our findings on this issue. What the present submissions amount to is a contention that Article 8 entitles an immigrant to compel the respondent to continue to apply to that person the Immigration Rules which were in force when the immigrant was granted leave to enter the United Kingdom, or when he or she was subsequently granted leave to remain. This submission is misconceived. It finds no sanction in any case law to which our attention has been drawn. As Mr Jarvis pointed out in his oral submissions, a number of the present appellants arrived in the United Kingdom as students, before the Immigration Rules even contained the provisions concerning Tier 1 (Post-Study Work). Although the present appellants did not, of course, succeed by reference to those provisions, others who applied earlier would have been able to satisfy the requirements, and go on to undertake post-study work, even though the Rules in force on their admission did not permit this. In other words, absent a legitimate expectation, such as occurred in the case of highly skilled migrants, the fact that one must take the Immigration Rules as one finds them cuts both ways. In any event, the essential point is that the ECHR does not have the effect for which the appellants contend.

G. Inconsistent decision-making?

30. The next generic matter, raised by Mr Baddar in respect of Mr Hossain (appellant (17)) and taken up by Mr Mehta in respect of Mr Khalid (appellant (4)) and Mrs Heybroek in respect of Mr Bashir (appellant (6)) and Mr Mughal (appellant (7)) was the assertion that the respondent had been guilty of inconsistent decision-making. It was asserted that in other cases applicants in the same position as the present appellants had, in fact, been granted variations of leave to remain, either directly by the respondent or in consequence of appeals being allowed by the First-tier Tribunal, which decisions the respondent did not seek to challenge. Mr Sreevalsalan made similar submissions on behalf of Mr Rafeek (appellant (18)).

31. The appellants' representatives acknowledged that the assertion of inconsistent decision-making by the respondent had not featured in the submissions advanced before the Tribunal on 8th October 2013, whether in the context of legitimate expectation, unfairness or otherwise. Ms Heybroek, however, submitted that the issue nevertheless fell to be considered in the context of Article 8, presumably on the basis that, if established, such inconsistency could undermine or, at least, diminish the importance to be given to the system of immigration controls, even if it did not demonstrate that the proposed interference with Article 8 rights was not "in accordance with the law", in terms of the third of the "Razgar" questions: see [10] above.
32. We do not consider that the appellants have begun to make out their case in this regard. The bald assertion made by Mr Hossein, when he gave evidence to the First-tier Tribunal, that "95% of students got their visas on the basis of the same evidence as he had adduced" was rightly rejected by the First-tier judge at [24] of his determination, on the basis that "I know nothing of those cases". Evidence of what might have been an anomalous decision was given in the case of Mr Naeem, as recorded at [21] of the First-tier Tribunal's determination in his appeal. A witness, Mr Khan, told the First-tier Tribunal judge that he had received a degree confirmation letter on 16th April 2012 and a degree certificate in July of that year. He produced a letter from UKBA dated 16th August 2012, granting him leave to remain under Tier 1. But, as the judge noted, "no explanation was given in the letter however as to why the leave had been granted", leading the First-tier judge to find there was "inadequate evidence as to why exactly Mr Khan's application was allowed by the UKBA and why ... it would amount to such an unfairness that I should nonetheless allow it": [34].
33. In her closing submissions, Mrs Heybroek referred to a case within her knowledge, where two brothers studied on the same course at the same institution. One was granted leave to remain under Tier 1, but the other was not. Mrs Heybroek contended that the only person who would know the extent of inconsistent decision-making was the respondent herself. Mrs Heybroek suggested that "freedom of information" requests might have been made in this regard, but she acknowledged that, in any event, the results of any such requests have not been provided.
34. Even accepting the evidence submitted at the hearing of Mr Naeem's appeal and Mrs Heybroek's information regarding the applications of the two brothers, these instances do not begin to demonstrate a systemic inconsistency in relevant decision making by the respondent, such as to require us to find that her decisions in the case of the present appellants, and of the many hundreds of similar cases, must be categorised for "Razgar" purposes as not in accordance with the law; or that, even if lawful, the weight to be afforded to the importance of immigration controls falls to be diminished, to the point where even weak Article 8 private life cases must succeed by reference to that article. In so finding, we have also borne in mind what individual appellants have had to say on this issue (as noted below). Given the scale of the respondent's decision-making in the immigration field, some inconsistencies

or anomalies are almost bound to occur. That is particularly so at or around the point where – as here – Immigration Rules and their attendant policies change.

35. Whilst we accept Mrs Heybroek’s submission that the respondent is best placed to know the extent of any inconsistent decision-making, freedom of information legislation provides a mechanism whereby one or more of the appellants, and others in their position, could have requested any information indicating a systemic failure of decision-making in this area. The appellants have had ample time to take action in this regard. We do not consider that the unsubstantiated allegation about 95% of students receiving leave to remain, coupled with the specific examples to which we have been referred, can rationally be said even to have placed a burden on the respondent to adduce evidence to show that her decision-making has *not* been systematically inconsistent.
36. Finally on this issue, the appellants can derive no material assistance from the fact that the First-tier Tribunal may have allowed appeals, which the respondent did not seek to challenge by onward appeal. We do not doubt that such instances exist; but no argument has been advanced as to why they should affect our conclusions on Article 8 or any other relevant matter.

H. A “closed” class

37. As part of their Article 8 submissions, the appellants relied upon the proposition that, in determining their Article 8 rights, account should be taken of the fact that they were all members of what was, in effect, a “closed” class, comprising persons who had commenced relevant studies before the changes in the Immigration Rules, which took effect on 6th April 2012. As a result, allowing each of them to remain in order to undertake two years of post-study work would not, they said, significantly impair the respondent’s maintenance of immigration controls. Thus, applying the principle of “minimal interference” inherent in the doctrine of proportionality, it could not be said that any of the decisions refusing leave was proportionate.
38. We reject these submissions. As can be seen, they are in substance very similar to the submissions on legitimate expectation: see [28] above. They amount to an unwarranted attempt to invoke Article 8 so as to make tribunals and courts, rather than Parliament, the decider of whether and, if so, how transitional provisions should apply, whenever changes are made to the Immigration Rules. In Nasim and Others we found that the respondent was, according to principles of public law, entitled to end the Tier 1 (Post-Study Work) route. Whenever Immigration Rules change in a restrictive way, there will be persons disappointed and disadvantaged by that change. Subject to established public law principles, it is for the respondent, in the exercise of her statutory functions, to decide whether and, if so, how the effects of that change should be ameliorated by means of transitional provisions.

I. Scope of CDS (Brazil)

39. Both here and elsewhere, the appellants relied upon *obiter* remarks of the Upper Tribunal in CDS (PBS “available” Article 8) Brazil [2010] UKUT 305 (IAC), as authority for the following proposition (taken from their headnote):-

“2. Article 8 does not give an Immigration Judge a free-standing liberty to depart from the Immigration Rules, and it is unlikely that a person will be able to show an Article 8 right by coming to the UK for temporary purposes. But a person who is admitted to follow a course that has not yet ended may build up a private life that deserves respect, and the public interest in removal before the end of the course may be reduced where there are ample financial resources available.”

40. So far as the present point is concerned, what was said in CDS has no material bearing. That case involved the interpretation of Immigration Rules, rather than the effect of changes in such Rules. Furthermore, it is important to emphasise that the appellant in CDS was faced with a hypothetical removal, which would have prevented her from completing the course of study for which she had been given leave. In the present cases, each of the appellants has finished the course (or latest course) to which their leave to remain as a student related. Their complaint is that they were not afforded the opportunity of undertaking two years of post-study work in the United Kingdom, which they could have taken, had the Rules not changed.

41. Mr Jarvis urged us to find that the *obiter* remarks in CDS regarding Article 8 were no longer good law, in the light of Patel and Others. We find that would go too far. It is true that the Tribunal in CDS made reference to the particular passage of the judgment of Sedley LJ in Pankina regarding the need for the Home Office “to exercise some common sense”, which drew comment from Lord Carnwath at [57] of Patel and Others (see above). The Tribunal did, however, expressly acknowledge that it was unlikely a person would be able to show an Article 8 right by coming to the United Kingdom for temporary purposes. The chances of such a right carrying the day have, we consider, further diminished, in the light of the judgments in Patel and Others. It would, however, be wrong to say that the point has been reached where an adverse immigration decision in the case of a person who is here for study or other temporary purposes can never be found to be disproportionate. But what is clear is that, on the state of the present law, there is no justification for extending the *obiter* findings in CDS, so as to equate a person whose course of study has not yet ended with a person who, having finished their course, is precluded by the Immigration Rules from staying on to do something else.

42. We conclude our general Article 8 findings with the following observation. Each of the appellants’ representatives on 19th December confirmed to us that the extent of their clients’ Article 8 ambitions was to be granted two years’ leave to remain, with permission to work (the case for the dependants of Mr Mughal being based on his desire to obtain such leave). Their cases are, accordingly, not put on the basis that the Article 8 rights upon which they rely are necessarily such as to facilitate their indefinite presence in the United Kingdom. Whilst not resiling from what we have

said about the case of CDS, this confirmation serves to underline the general problems facing the appellants in seeking to use human rights law to give effect to their short term socio-economic aspirations.

J. The individual cases

43. In the light of these general findings regarding Article 8, as it bears on the present appellants, we proceed to make the following findings regarding the specific cases.
44. As a general matter, with the exception of Mr Mughal and his family, even bearing in mind the low threshold described in AG (Eritrea) [2007] EWCA Civ 801 as necessary for satisfying the second of the five Razgar questions, we do not find that any of the appellants has demonstrated that the decision to refuse to vary leave to remain has consequences of such gravity as potentially to engage the operation of Article 8. We have, however, also approached the appeals on the alternative basis that it is necessary to address the issue of proportionality.

(2) Tahir Mahmood

45. Mr Baddar said that his client, Mr Mahmood, had entered the United Kingdom on 30th August 2002. His application form, however, records (as does the respondent's immigration record) that he was granted entry clearance on 25th August 2008. In any event, he has been here as a student and asserts no Article 8 rights, otherwise than in relation to his wish to engage in two years of post-study work, as a person who has studied here, paid his fees etc, and not committed any criminal offence.
46. We do not find that removal of Mr Mahmood, pursuant to the decision to refuse to vary leave, would potentially engage the operation of Article 8. In any event, such removal would be proportionate to the legitimate public end; namely, the operation of a coherent and fair system of immigration control. His appeal on human rights grounds is accordingly dismissed.

(4) Ahsan Khalid

47. Mr Mehta told us that Mr Khalid had been in the United Kingdom as a student since 2004. In answer to question D10 of his application form, however, the appellant said that he arrived in the United Kingdom on 21st January 2011. The appellant said that others of whom he knew had been granted leave, who were in a similar position to himself. After his two years' work experience, he felt that he would be able to get a good job. The appellant had no criminal convictions and had not relied on public funds. He wished to remain in this country in order to undertake work experience.

48. In his witness statement of 19th December 2013, Mr Khalid said he wished to rely on the case of CDS; that he had been “attracted to the UK study on the marketing (sic) that I had received stating that I would receive the two years’ post-study work upon the completion of my studies here”; that such work would give him the opportunity to undertake employment/set up a business, which meant that he could then avail himself of the opportunity to apply as an Entrepreneur Migrant; and that he knew of a person, whose appeal had been allowed, notwithstanding his similar circumstances to Mr Khalid. The written statement confirms that the appellant has been in the United Kingdom “since January 2011” which was “indicative that I have made a new life in this country”. He says that he has been “supporting myself and my family financially. I make enough money to support myself and I like working for myself”. What work the appellant has been doing, and how he has been doing it, was unexplained. No submissions were made with regard to the appellant having family members in the United Kingdom, as regards whom he was asserting any Article 8.
49. We do not find that removal of Mr Khalid, pursuant to the decision to refuse to vary leave, would potentially engage the operation of Article 8. In any event, such removal would be proportionate to the legitimate public end; namely, the operation of a coherent and fair system of immigration control. His appeal on human rights grounds is accordingly dismissed.

(5) *Mr Ahsan Naeem*

50. Mr Naeem entered the United Kingdom on 27th July 2010 as a student. Having taken instructions from him, Ms Mohsin told us that when the appellant came to this country he thought he would have an opportunity eventually to work. He considered part of the value of coming to the United Kingdom as being that work opportunity. Being able to work in the United Kingdom would have enhanced his job prospects at home. He had invested a considerable amount of money in order to come here and wanted to have relevant work experience. That desire deserved respect in Article 8 terms.
51. We do not find that removal of Mr Naeem, pursuant to the decision to refuse to vary leave, would potentially engage the operation of Article 8. In any event, such removal would be proportionate to the legitimate public end; namely, the operation of a coherent and fair system of immigration control. His appeal on human rights grounds is accordingly dismissed.

(6) *Mr Rizwan Bashir*

52. Mr Bashir arrived in the United Kingdom on 16th October 2010 with leave as a student. He said he expected after completion of his MBA degree to get two years’ leave to remain to work in order to gain “practical experience”. This would enable

him “to secure a good job in my country of origin”. He considered that he had as an international student “contributed positively toward the British society. I have never been involved in any unlawful activity and always abide by the terms and conditions of leave”.

53. We do not find that removal of Mr Bashir, pursuant to the decision to refuse to vary leave, would potentially engage the operation of Article 8. In any event, such removal would be proportionate to the legitimate public end; namely, the operation of a coherent and fair system of immigration control. His appeal on human rights grounds is accordingly dismissed.

(7) to (12) Mr Mughal and family

54. Mr Mughal entered the United Kingdom on 3rd June 2011 as a student. Shortly after, he was joined by his wife, Mrs Safia Arif, and their three children, born on 23rd January 2004, 13th January 2007 and 20th October 2008. During their time in the United Kingdom, a fourth child has been born to the couple, on 28th December 2011.
55. As with the other appellants, Mr Mughal wished to undertake two years’ post-study work, following completion of his studies in the United Kingdom. At [16] of the determination of the First-tier Tribunal, Mr Mughal “stressed that he was a businessman and had expected to be able to work here and gain experience in export and import and logistics here before returning to Pakistan”. He also said “that he wanted to get work experience in the United Kingdom before he returned to Pakistan”. The First-tier judge found that “the only evidence that he adduced about any private life which he and the other appellants may have established here was to say in oral evidence that his children liked the climate here and were at school. In contrast, in oral evidence, he said that he had a house, office, business and vehicles back in Pakistan. In addition he said that he had an assistant managing his business and the net profit annually was 15 lakhs”.
56. On the basis of the evidence given to her, the First-tier Tribunal judge, writing on 13th November 2012, found that there was no evidence “to show that it would not be in his children’s best interests to return to Pakistan”. It is, however, now a feature of the case for Mr Mughal and his family that the best interests of two of his children, at least, lie in remaining in the United Kingdom. This is on the basis that two of the children of Mr Mughal, a daughter born on 23rd January 2004 and a daughter born on 28th December 2011, suffer from deafness.
57. At the hearing on 19th December, the Tribunal had before it a bundle of documentary material relating to hospital visits made by these children in the United Kingdom, in connection with their deafness, as well as school reports relating to the school-age children. According to an NHS letter dated 19th December 2011, the elder daughter

“is a recent arrival to the UK and had hearing loss diagnosed and hearing aids fitted in Pakistan. We are unable to support the hearing aid she has been wearing as we do not have the appropriate software. The hearing aids were upgraded today ... [M] is a very bright and experienced hearing aid user. She looks after her hearing aids herself and was able to give me some really good feedback on how she found the sound of her new aids.”

58. So far as the younger daughter is concerned, an NHS letter of 2nd October 2013 refers to the locum consultant at East London NHS Foundation Trust wishing to refer “this little girl for aetiological investigations into the cause of her sensorineural hearing loss. Parents missed the original appointment a while ago”. Another letter indicated that it was “more appropriate for [M] to be investigated at Great Ormond Street Hospital where her sister was investigated”. It seems that hearing aids for M have been provided by East London NHS Foundation Trust but that her referral to Great Ormond Street did not make progress as her “parents did not attend the appointment there and were discharged”. At the hearing it was common ground that neither of the daughters could be apparently cured of deafness but that intervention was necessary in order to provide new ear molds for each girl, as their bodies grew.
59. We approach the issue of the best interests of Mr Mughal’s children, as set out in [22] of the judgment of the Court of Appeal in JW (China) and Other v Secretary of State for the Home Department [2013] EWCA Civ 1526.

“22. In my view, the correct approach is very well summarised in the Upper Tribunal decision of MK (Best interests of child) [2011] UKUT 00475 (IAC), where this was said at paragraphs 23 and 24 of the determination:

‘23. There is in our view a fourth point of principle that can be inferred from the Supreme Court’s judgments in ZH (Tanzania). As the use by Baroness Hale and Lord Hope of the adjective ‘overall’ makes clear, the consideration of the best interests of the child involves a weighing up of various factors. Although the conclusion of the best interests of the child consideration must of course provide a yes or no answer to the question, “Is it in the best interests of the child for the child and/or the parents(s) facing expulsion/deportation to remain in the United Kingdom?”, the assessment cannot be reduced to that. Key features of the best interests of the child consideration and its overall balancing of factors, especially those which count for and against an expulsion decision, must be kept in mind when turning to the wider proportionality assessment of whether or not the factors relating to the importance of maintaining immigration control etc. cumulatively reinforce or outweigh the best interests of the child, depending on what they have been found to be.

24. The need to keep in mind the overall factors making up the best interests of the child consideration must not be downplayed. Failure to do so may give rise to an error of law although, as AJ (India) makes clear, what matters is not so much the form of the inquiry but rather whether there has been substantive consideration of the best interests of the child. The consideration must always be fact-sensitive and depending on its

workings-out will affect the Article 8(2) proportionality assessment in different ways. If, for example, all the factors weighing in the best interests of the child consideration point overwhelmingly in favour of the child and/or relevant parent(s) remaining in the UK, that is very likely to mean that only very strong countervailing factors can outweigh it. If, at the other extreme, all the factors of relevance to the best interests of the child consideration (save for the child's and/or parent(s) own claim that they want to remain) point overwhelmingly to the child's interests being best served by him returning with his parent(s) to his country of origin (or to one of his parents being expelled leaving him to remain living here), then very little by way of countervailing considerations to do with immigration control etc. may be necessary in order for the conclusion to be drawn that the decision appealed against was and is proportionate.'

Accepting of course that each case depends on its own facts and circumstances, I would for myself endorse generally not only these passages but the overall approach indicated as appropriate in that decision."

60. We also bear in mind this passage from the judgment of Laws LJ in SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550:-

"43. I will next describe two characteristics, one positive, the other negative, which the learning shows apply in Article 8 cases involving children. The first is that the interests of the child or children are a primary consideration. The second (which applies to all removal cases, whether or not there are children) is that there is no rule of "exceptionality": that is, there is no class of case where the law stipulates that an exceptional Article 8 case must be shown in some situations but need not be in others.

44. These two characteristics are vouchsafed by authority of the House of Lords and the Supreme Court. With great respect they are capable, if not carefully understood, of investing child cases with a uniform prevailing force which yields no or little space to the context in hand. As for the first characteristic, the key phrase is of course 'a primary consideration'. It appears in *ZH* and subsequently, but is taken from Article 3(1) of the UNCRC, so the choice of words may be regarded as having particular significance. What sense is to be given to the adjective 'primary'? We know it does not mean 'paramount' - other considerations may ultimately prevail. And the child's interests are not 'the' but only 'a' primary consideration - indicating there may be other such considerations which, presumably, may count for as much. Thus the term 'primary' seems problematic. In the course of argument Mr Auburn accepted that 'a primary consideration' should be taken to mean a consideration of substantial importance. I think that is right."

61. A useful summary of the learning on the "best interests" of children in the context of immigration is to be found in the determination of Azimi-Moayed and Others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC):-

"13. It is not the case that the best interests principle means that it is automatically in the interests of any child to be permitted to remain in the United Kingdom,

irrespective of age, length of stay, family background or other circumstances. The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the decisions:

- i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.
- ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
- iii) Lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
- iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.
- v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well being of society amply justifies removal in such cases."

62. Even more recently, the Supreme Court has held as follows in Zoumbas v Secretary of State for the Home Department [2013] UKSC 74:-

"24. There is no irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as health care and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. They were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into United Kingdom society would have been predominantly in the context of that family unit. Most significantly, the decision-maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to their well-being ..."

63. Relying on this case law, Mr Jarvis submitted that none of the children of Mr Mughal had anything approaching seven years' residence in the United Kingdom; their ages were such that, particularly so far as the younger ones were concerned, their lives "would logically be centred upon their parents rather than any extra-parental activity"; that three of the children had spent "as much of or more of their lives in Pakistan than in the UK and as with the youngest child, could easily adapt to life in Pakistan"; and that, until recently there had been no suggestion that return to Pakistan would have any adverse effect on the children, as regards their health or education. Mrs Heybroek, however, contended that the children's interests, coupled with all other relevant Article 8 factors, must be such as to render removal a disproportionate interference with the family's Article 8 rights. The best interests of the children were, she contended, to remain in the United Kingdom.
64. We accept Mr Jarvis's submissions and reject those of Mrs Heybroek. The application of authoritative case law to the particular facts of this case admits of only one answer. As in Zoumbas, other things are far from equal. Mr Mughal rests his Article 8 case, not on any indefinite need for him and the children to remain in the United Kingdom, but on his wish to undertake two years post-study work, which he regards as his due. However, even if the family were contending for indefinite residence in the United Kingdom on the basis of Article 8, it is plain that the respondent's immigration decisions are not disproportionate. The family has been in the United Kingdom for only a relatively short period of time. Those children who were already in education in Pakistan suffered a disruption that is inevitably consequent upon a move by parents from one country to another, whether to seek work or to study. There is no evidence to compel the conclusion that a return home would have significantly deleterious effects on the children's continuing education.
65. So far as concerns the two daughters who suffer from deafness, as we can see, the daughter born in Pakistan received medical attention there, leading to the provision of hearing aids. Given the socio-economic position of the family, as noted by the First-tier Tribunal judge (see [55] above), there is no reason whatsoever for assuming that those daughters could not continue to receive necessary medical attention for their deafness in Pakistan. In particular, it has not been shown that new hearing aids cannot be fashioned for them in Pakistan, as the girls grow. Mr Mughal has obtained the educational qualifications for which he came to the United Kingdom. As with the other appellants, no argument has been advanced to the effect that their United Kingdom qualifications will not be of value in their future lives.
66. We do not find that removal of Mr Mughal and his family, in consequence of the decision to refuse to vary leave, would constitute an interference with his Article 8 rights, that is disproportionate to the legitimate public end; namely, the maintenance of a coherent and fair system of immigration control. His appeal on human rights grounds is accordingly dismissed. So too are the appeals of his family.

(13) Mr Danisha Qureshi

67. Mr Qureshi arrived in the United Kingdom on 11th April 2006 with entry clearance as a student, in which capacity he was granted extensions until August 2012. In his “statement of additional grounds” the appellant referred to, but did not elaborate upon, his “established private life” in the United Kingdom. He contended that there was “no pressing social need to deny the appellant [a] right to remain in the United Kingdom”; that human rights were “designed to prevent and control arbitrary discretion and abuse of power”; and that he was “not a threat to the wider community”.
68. We do not find that removal of Mr Qureshi, pursuant to the decision to refuse to vary leave, would potentially engage the operation of Article 8. In any event, such removal would be proportionate to the legitimate public end; namely, the operation of a coherent and fair system of immigration control. His appeal on human rights grounds is accordingly dismissed.

(17) Mr Kazi Hossain

69. Mr Hossain entered the United Kingdom on 23rd July 2007 as a student. He was subsequently granted further periods of leave to remain in that capacity. In his grounds of appeal to the First-tier Tribunal the appellant contended that he had “already established private life here in the UK within the meaning of Article 8 of the ECHR through the course of his studies in the UK”. The studies for which he was granted leave to enter/remain are, however, now completed.
70. We do not find that removal of Mr Hossain, pursuant to the decision to refuse to vary leave, would potentially engage the operation of Article 8. In any event, such removal would be proportionate to the legitimate public end; namely, the operation of a coherent and fair system of immigration control. His appeal on human rights grounds is accordingly dismissed.

(18) Mr Androo Rafeek

71. At [20] of the determination of the First-tier Tribunal, the judge found this:-

“[19] I find that there is no evidence before me that the appellant has established family life in the UK.

[20] On the other hand, I find that he has established private life in the UK, in that he has lived in the UK since 16th February 2011, and has studied here. However, I find that that private life is limited, in that his leave to enter as a student was for the relatively short period of February 2011 to May 2012, he has lived here for less than two years, and he has established his private life here during a period

when he knew that he had leave to stay here only for a limited period and for a limited purpose.”

72. In addition, at [22] the judge found that “he intends, according to his evidence, to return to India in any event, and the fact that he will be returning sooner than he had intended is not, as I find, in all the circumstances of this case a sufficient interference with his private life in the UK to amount to a breach of Article 8”. At the hearing before us, Mr Sreevalsalan submitted that the appellant came to the United Kingdom at a time when the Tier 1 PSW Rules were in existence and that the opportunity to undertake post-study work was an attraction to him in choosing the United Kingdom. Were he to return to India without having undertaken such work the appellant would find it difficult to build up his career as he would have “a gap in his CV”.
73. We do not find those submissions at all persuasive. As Mr Jarvis submitted, the appellant would, in common with the other appellants, be able to explain why time had elapsed between the ending of his last course of studies in the United Kingdom and his return home, by reference to the legal proceedings with which we are concerned. In any event, the contention that disproportionate interference with human rights arises because of speculative effects on a person’s *curriculum vitae* is profoundly unattractive.
74. We do not find that removal of Mr Rafeek, pursuant to the decision to refuse to vary leave, would potentially engage the operation of Article 8. In any event, such removal would be proportionate to the legitimate public end; namely, the operation of a coherent and fair system of immigration control. His appeal on human rights grounds is accordingly dismissed.

(19) Mr Qummer Aziz

75. Mr Aziz arrived in the United Kingdom on 6 May 2004 as a student, subsequently being granted further periods of leave to remain in that capacity until 30th July 2012. In his witness statement of 18th December 2013 he says:-

“... I have been residing in the UK for a significant period of time, during which I have developed strong personal ties in the UK. I have always tried [my] level best to act in accordance to the Immigration Rules and am a hardworking and committed individual which can be demonstrated by the fact that I never relied on public funds during my stay in the UK. I wish to remain in the UK because I have established a private life here. I have now become very much accustomed and fully adopted [to] life in the UK.

4. My private life comprises of family, friends, class fellows, colleagues and career. I would like to mention that my removal from the United Kingdom will cast (sic) sever (sic) negative effects on my career ... I have been contributing toward the British society and economy very positively. I have never been involved in any unlawful activity and always abide by the terms and conditions of leave.”

76. Mr Aziz was not represented on 19th December and, therefore, was not party to the submissions to the effect that what was being sought was two years' post-study work. Mr Aziz's statement appears to contend that respecting his private life requires the respondent to permit the appellant to remain in the United Kingdom, for as long as he wants. The appellant did not elaborate upon his "family" or indeed the other persons mentioned in his statement. Nor did he elaborate upon his career.
77. We do not find that removal of Mr Aziz, pursuant to the decision to refuse to vary leave, would potentially engage the operation of Article 8. In any event, such removal would be proportionate to the legitimate public end; namely, the operation of a coherent and fair system of immigration control. His appeal on human rights grounds is accordingly dismissed.

(20) Mr Abhilash Mukundhakshan

78. Mr Mukundhakshan arrived in the United Kingdom on 6th February 2010 as a student, subsequently being given leave to remain in that capacity until 8th October 2012, subject to a condition restricting employment and prohibiting recourse to public funds. In his submissions to us Mr Mukundhakshan said that he had established a business, Abas Solutions Limited, which, if he were given permission to work, he intended to use in connection with the provision of IT services. He also showed us evidence of a job offer, dependent upon his being given permission to work. In reply, Mr Jarvis said that (as was the case with other appellants), Mr Mukundhakshan could make an application from abroad in order to re-enter pursuant to the Rules. It had, however, been impermissible since December 2012 (when the relevant Rules were changed) for the appellant to "switch" whilst in the United Kingdom to the Tier 2 (Entrepreneur) route.
79. We do not find that removal of Mr Mukundhakshan, pursuant to the decision to refuse to vary leave, would potentially engage the operation of Article 8. In any event, such removal would be proportionate to the legitimate public end; namely, the operation of a coherent and fair system of immigration control. His appeal on human rights grounds is accordingly dismissed.

(21) Ms Sandeep Kaur

80. Ms Kaur entered the United Kingdom on 20th October 2010 as a student, with leave until 28th February 2012. It was clear from Mr Baddar's submissions on her behalf that Ms Kaur's Article 8 claim rests on the propositions we have considered earlier.
81. We do not find that removal of Ms Kaur, pursuant to the decision to refuse to vary leave, would potentially engage the operation of Article 8. In any event, such removal would be proportionate to the legitimate public end; namely, the operation

of a coherent and fair system of immigration control. Her appeal on human rights grounds is accordingly dismissed.

(22) *Mr Sajid Abdul*

82. Mr Abdul arrived in the United Kingdom as a student on 29th December 2009, and was granted further leave in that capacity until 28th January 2012. As with Ms Kaur, it was apparent from Mr Baddar's submissions that Mr Abdul's Article 8 case rested upon the general propositions, which we have considered above.

83. We do not find that removal of Mr Abdul, pursuant to the decision to refuse to vary leave, would potentially engage the operation of Article 8. In any event, such removal would be proportionate to the legitimate public end; namely, the operation of a coherent and fair system of immigration control. His appeal on human rights grounds is accordingly dismissed.

Signed

Date

Upper Tribunal Judge Peter Lane