Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19571/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 July 2013	**On 30 July 2013**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

PANDIDURAI KRISHNAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr F Singarajah, Counsel instructed by Messrs KTS Solicitors
For the Respondent: Ms Z Kiss, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against the decision of the Respondent dated 31 August 2012, to refuse to vary the Appellant's leave to remain in the United Kingdom and to remove him by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006.

2. The brief immigration history of the Appellant is that he was granted conferred leave to enter the United Kingdom on 12 November 2010 as a Tier 4 (General) Student until 30 August 2012, subject to conditions restricting employment and prohibiting recourse to public funds.

3. On appeal before the First-tier Tribunal and in a determination promulgated on 13 February 2013 the First-tier Judge noted that the decision of the Respondent was considered not to breach Article 8 of the ECHR. but that the removal directions at the same time under s.47 had "*to fall by the wayside as they should not now be made at the same time as making a decision on refusal to vary leave*". In that regard reference was made to the guidance of this Tribunal in Ahmadi (s.47: decision: validity; Sapkota) Afghanistan [2012] UKUT 147 (IAC) and Adamally and Jaferi (section 47 removal decisions: Tribunal Procedures) Sri Lanka [2012] UKUT 414 (IAC). To that extent therefore the First-tier Judge allowed the Appellant's appeal against the Section 47 decision and set aside the removal directions.

4. At paragraph 7 of his determination the First-tier Judge recorded as follows:

> "Today however, at the outset of the Appellant's submissions, it was accepted by the Appellant through his Counsel, and quite sensibly, that the Immigration Rules did not assist the Appellant. He did not qualify under them or under any interpretation or application of policy guidance or shortage occupation list or SOC Code 5434 of the Respondent. Only Article 8 was relied upon."

5. In consequence the First-tier Judge proceeded to dismiss the Appellant's appeal under the Immigration Rules.

6. In terms of the Judge's consideration of the Appellant's Article 8 appeal, he had this to say:

> "12. In regard to Article 8, I conducted an assessment of whether the Appellant had a family or private life in the UK and concluded that whilst he may have a private life, he had not established that he enjoyed a family life whilst in the UK. **He actually provided no particulars of either family or private life.** He relied instead on the lack of transitional provisions, being somehow an infringement of his 'rights' under Article 8. I fail to see how that could be so. There was no legitimate expectation argument put forward in regard to the absence of transitional rights. If there are new Rules which assist him in the future then so be it – there has to be a start date and an end date for most things.
>
> 13. In regard to his private life, he always entered and remained in the UK under no illusions that he was here for a limited period. His home is very much elsewhere and the vast majority of his life from 1983 was spent in his home country.

> 14. In the balancing exercise I undertake, and considering all matters put to me, I conclude that the scales began in favour of the Respondent. On the case put forward, I am satisfied that any interference with private life by this decision is a proportionate one given the aims of the Respondent in protecting and upholding the law in this area especially in regard to economic issues." (Emphasis added)

7. The First-tier Judge proceeded to dismiss the Appellant's Article 8 ECHR appeal.

8. The Appellant's initial application for permission to appeal that decision failed and in giving his reasons for refusing the application First-tier Judge Pooler had inter alia this to say:

> "3. The Judge recorded at paragraph 7 Counsel's acknowledgement that the Appellant was unable to meet the requirements of the Immigration Rules, a concession which was repeated in the grounds. In these circumstances, the Judge made no error of law by failing to make findings in respect of matters arising under the Rules since those matters were no longer in dispute between the parties.
>
> 4. The Article 8 appeal relied solely on the Appellant's private life in circumstances where he had entered the UK on a temporary basis under the PBS and could not have expected to be allowed to remain if he did not meet the requirements of the Rules: see for example MM (Tier 1 PSW; Art 8; 'private life') Zimbabwe [2009] UKAIT 00037. The Judge recorded at para 12 that the Appellant had given no particulars of his claimed private life in the UK. Against this background the grounds do not disclose any arguable error of law."

9. However, the Appellant's renewed application to the Upper Tribunal was granted when Upper Tribunal Judge Peter Lane concluded that the Record of Proceedings disclosed that the submissions regarding the operation or the guidance along the lines set out in the grounds, were advanced before the First-tier Tribunal Judge in the context of Article 8 of the ECHR and that the First-tier Tribunal Judge's analysis contained no reference to those submissions which were arguably relevant to the Article 8 case.

10. The Tribunal subsequently received from the Respondent their Rule 24 response that inter alia had this to say:

> "The Respondent has considered the refusal of the FTT Judge. It appears that it was conceded that the Appellant could not meet the Rules and little evidence was advanced as to the Appellant's private life demonstrating that refusal of further leave was a disproportionate interference with the Appellant's rights.
>
> The Respondent cannot conclude that a material error is disclosed and request an oral hearing."

11. Thus the appeal came before me on 9 July 2013 when my first task was to determine whether the determination of the First-tier Judge disclosed an error on a point of law.

12. In that regard and at the outset of the hearing, Mr Singarajah most helpfully and in my view realistically informed me as follows:

> "I am not instructed to withdraw but I have spoken to Ms Kiss the Presenting Officer and I am somewhat confused as to the basis upon which the UTJ granted permission in the first place.
>
> It appears from the grounds and the determination that the Immigration Rules were not relied upon – thus leaving a consideration of Article 8.
>
> It is apparent from the determination that certainly there was no reference to a consideration of the balancing exercise under Article 8."

13. Mr Singarajah continued that he was duty bound to submit to me that he did not see how submissions regarding matters relating to the relevant Policy Guidance were "relevant under the framework".

14. Mr Singarajah added that whilst he might advance the argument that the First-tier Judge's Article 8 reasoning was inadequate and more particularly that such reasoning did not include a record of the balancing exercise under Article 8, he nonetheless had nothing further to add.

15. Ms Kiss in response, referred me to the Appellant's original written grounds of appeal that, as she rightly stated, were extremely brief and in terms of the Human Rights Act 1998 simply argued that the removal of the Appellant from the United Kingdom would be "*unlawful under Section 6 of the Human Rights Act 1998… as being incompatible with the Appellant's Convention rights."*

16. Indeed as I observed those brief grounds made no reference at all to Article 8 of the ECHR.

17. Ms Kiss whilst appreciating Mr Singarajah's frank and helpful submissions, further pointed out that the Statement of Changes in the Immigration Rules relevant to this appeal took effect on 14 June 2012 and under the sub-heading "Implementation" the following inter alia was stated:

> "However, if an applicant has made an application for entry clearance or leave before 14 June 2012 and the application has not been decided before that date, it will be decided in accordance with the Rules in force on 13 June 2012."

Further the Explanatory Memorandum to the Statement of Changes stated inter alia at paragraph 3.3 as follows:

> "These changes must come into force on 6 April 2012 as the existing Tier 2 (General) limit expires on 5 April 2012."

18. Further at paragraph 3.5 the following was inter alia stated:

> "The changes to the skills threshold will come into force on 14 June 2012…".

19. It followed from the above that there could be no transitional provision. Ms Kiss further referred me to the decision of the Court of Appeal in Miah that held inter alia that there was no near-miss principle applicable to the Immigration Rules.

20. Miss Kiss otherwise endorsed the Respondent's contention that no material error of law was disclosed in the First-tier Judge's determination for the reasons set out in the Rule 24 response dated 5 June 2013.

21. Mr Singarajah did not choose to respond to Ms Kiss's submissions.

Assessment

22. At the close of the parties' submissions I was able to inform them that I had concluded that the determination of the First-tier Judge in terms of his Article 8 ECHR assessment disclosed no error on a point of law.

23. In reaching that conclusion I have considered the First-tier Judge's determination with care and taken account of Mr Singarajah's most realistic and helpful clarification of the Appellant's position on that issue. I find myself in accord not only with the submissions raised by Ms Kiss before me but also the reasons put forward by the Respondent in her Rule 24 response.

24. The First-tier Judge had recorded at paragraph 7 of his determination the concession of the Appellant through his Counsel that the Immigration Rules did not assist him.

25. At paragraph 12 of his determination the First-tier Judge was clear that the Appellant had "… *actually provided no particulars of either family or private life*".

26. Whilst the First-tier Judge noted that the Appellant relied instead on the lack of transitional provisions being somehow an infringement of his rights under Article 8 the Judge "*failed to see how that could be so*". Such a conclusion, as indeed illuminated by Ms Kiss in her closing submissions for reasons with which I concur, was proper and correct. The Appellant's Counsel's representations before the First-tier Judge based on fairness or legitimate expectation could only impact on proportionality and did not alter the essential feature of this case, namely that the Appellant came to the United Kingdom with leave in a limited capacity and had advanced no evidence to support a conclusion that requiring him to return to his country of origin India, would be a disproportionate interference with his right to private life.

27. It is thus apparent to me that the First-tier Judge's Article 8 findings however brief, were in the circumstances properly open to him and supported by the evidence or indeed lack of it, and thus sustainable in law.

28. Where a claimant fails to establish a substantive right to remain under the Immigration Rules, he will have to put forward evidence of a private/family life of such significance to show that removal would be disproportionate. It is apparent that no such compelling evidence was put before the First-tier Judge in the present appeal.

29. I find that it cannot be said that the Judge's Article 8 findings were irrational and/or Wednesbury unreasonable such as to amount to perversity. It cannot be said that they were in the circumstances inadequate. This is not a case where the Judge's Article 8 reasoning was such that the Tribunal was unable to understand the thought processes that he employed in reaching his decision.

30. I find that the Judge properly identified and recorded the matters that he considered to be critical to his Article 8 decision on the material issues raised before him in this appeal.

Conclusions

31. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

32. I do not set aside the decision.

Signed Date 29 July 2013

Upper Tribunal Judge Goldstein