Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/32987/2013
IA/32994/2013

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court
On 9th May 2014

Determination Promulgated
On 10th June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MRS BALJIT KAUR
(2) MR MANUJ KUMAR
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: No appearance
For the Respondent: Mr M Smart (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Freer promulgated on 12th February 2014, following a hearing at Birmingham Sheldon Court on 7th February 2014. In the determination, the judge allowed the appeal of Mrs Baljit Kaur, and her dependent husband, Mr Manuj Kumar. The Respondent Secretary of State, applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

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The Appellants

2. The Appellants are wife and husband. Both are citizens of India. The first Appellant (who is the principal Appellant, and who will be referred to as "the Appellant" hereafter) was born on 6th January 1986. Her husband was born on 23rd September 1984. The Appellant was granted leave to enter as a student on 19th July 2012 until 23rd June 2013, with conditions. On 7th June 2013, she applied for a variation of leave to remain in the UK as a Tier 4 (General) Student Migrant under the points-based system. Her application, and that of her dependent husband, were both refused on 19th July 2013 by the Respondent Secretary of State. The basis was that there were insufficient levels of funds as required over the specified consecutive 28 day period for a Tier 4 Migrant. The Appellant had to show available funds of at least £2,500, excluding the course fees, which were fully paid. The Respondent Secretary of State took the view that at the closing date of the bank statements, which were 10th May 2013, she needed to show evidence of having the specified sum of £2,500 for 28 days from 13th April to 10th May. However, her balance between 13th to 17th April was no more than £2,115 and her balance between 18th and 19th April was no more than £2,301. Accordingly she could not succeed.

3. It was the Appellant's case, however, that she could succeed because she had provided evidence of two separate bank accounts up to 29th May 2013 and she maintains that she did have the requisite £2,500 in them.

The Judge's Findings

4. The judge applied Section 85A of the Nationality, Immigration and Asylum Act 2002 which states at subparagraph 3 that evidence under the Immigration Rules is restricted to the evidence that was submitted in support of the application (see determination at paragraph 11). The judge made a finding of fact that,

> "what is omitted from those papers [which were submitted at the time of the application] is the crucial statement, now supplied, with the appeal bundle, for the joint bank statement, which I find shows no changes in the balance of £1,895 from 10th May 2013 until 19th August, as there were no further transactions between those two dates. This proves that she had £1,895 in her account for the rest of May 2013 …" (paragraph 24).

5. The judge also held that there was no scope for the "evidential flexibility rule" to be applied in her case (paragraph 34).

6. However, the judge then went on to hold that, given that the Respondent had been supplied at the outset with two accounts of two different but overlapping periods,

> "there is no fair or rational reason shown, … why the Respondent should simply assume that this good balance figure on the earlier statement had fallen or indeed changed at all. Arguably, the Respondent under the relevant version of the evidential flexibility policy, should have contacted the Appellant for a

statement taking the financial evidence up to the end of May so as to match the other statements presented at the time" (paragraph 36).

The appeal was therefore allowed on the basis that the post-decision bank statements could now be admitted (paragraph 38). In the alternative, the judge also held that on the basis of "common law fairness" the appeal could succeed (paragraph 40).

Grounds of Application

7. The grounds of application state that the judge had misdirected himself because it was well-established that there is no general dispensing power in Article 8 where a person could not benefit from the Rules, so that such a person could not benefit then on Article 8 grounds. This is clear from the case of **Patel** in the Supreme Court (see **Patel [2013] UKSC 72**) where the court had held that,

> "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".

8. The **Patel** judgements had been followed by the Tribunal in **Nasim [2014] UKUT 00025** where the Tribunal had held that "a person's human rights are not enhanced by … not relying on public funds.

9. 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 …".

10. On 3rd March 2014 permission to appeal was granted by the Tribunal on the basis that Article 8 had been used as a "general dispensing power, contrary to the Supreme Court judgments in **Patel**, by the judge".

Submissions

11. At the hearing before me, there was no appearance by anyone on behalf of the Appellant. Previously, I also note, there was no appearance, as at appeal before the judge below was also determined as a "paper hearing" with no-one in attendance. Mr Smart, appearing on behalf of the Respondent Secretary of State, placed reliance upon the case of **Alam [2011] UKUT 00421** (although this had not been pleaded in the Grounds of Appeal) to demonstrate that Section 85A has a very limited application when it comes to the admission of evidence that had not been adduced at the time of the making of the application.

12. Mr Smart submitted that there was no "near miss" principle to be applied. **Patel** was decisive in terms of the way in which Article 8 was to be used. The judge had not been able to demonstrate in any way why it was said that the Appellant could not

exercise her Article 8 rights, if she could not succeed under the Immigration Rules, as indeed the judge had found she could not.

13. Furthermore, the judge had not been able to demonstrate why there was a good reason, the Rules not having been satisfied, for the judge to consider the position outside the Immigration Rules in circumstances where those Rules were compliant with Article 8, so as to look at freestanding Article 8 jurisprudence.

14. But most of all, the judge had not been able to demonstrate why the proportionality consideration was compelling under freestanding Article 8 jurisprudence, when that was not the case under the Immigration Rules.

Error of Law

15. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside that decision and remake the decision (see Section 12(2) of TCEA 2007). My reasons are as follows.

16. First, Section 85A of the 2002 Act governs. The case of **Alam [2011] UKUT 00421**, which Mr Smart handed up is clearly applicable.

17. Second, the judge had made a clear finding that the Appellant could not succeed under the Immigration Rules. She could not succeed because the evidence which she had submitted at the time of the making of her application did not include the evidence that she was now relying upon before the judge. This is clear from the judge's findings that, "what is omitted from those papers is the crucial statement, now supplied with the appeal bundle, for the joint bank account, which I find shows no changes in the balance of £1,895 …" (paragraph 24).

18. Third, in these circumstances there was no requirement under the "evidential flexibility" policy for the Secretary of State to make enquiries of the Appellant's situation. The appeal could not succeed. Finally, the appeal could not succeed under Article 8 either because of the judgment in **Patel** by the Supreme Court (at paragraph 57) that "Article 8 is not a general dispensing power", a decision that has subsequently been applied by the Tribunal in **Nasim**. For all these reasons, this appeal could not have succeeded.

Remaking the Decision

19. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. For the reasons I have given above, I remake the decision by dismissing the appeal of the Appellant and her husband.

Decision

20. The decision of the First-tier Tribunal involved the making of an error on a point of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is dismissed.

21. No anonymity order is made.

Signed
Deputy Upper Tribunal Judge Juss

Date
9th June 2014