Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48556/2013

THE IMMIGRATION ACTS

Heard at Field House
On 29 April 2014

Determination Promulgated
On 23 May 2014
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Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MR MOHAMMAD RASEDUL HOQUE
(No Anonymity Direction Made)
Respondent

Representation:

For the Appellant: Mr G Saunders a Senior Home Office Presenting Officer
For the Respondent: Mr M Hashim of counsel instructed by ICS Legal

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department. I will refer to her as the Secretary of State. The respondent is a citizen of Bangladesh who was born on 1 January 1987. I will refer to him as the claimant. The Secretary of State has been given permission to appeal the determination of First-Tier Tribunal Judge Oliver ("the FTTJ") who allowed the claimant's appeal against the Secretary of State's decision of 1 November 2013 to refuse him further leave to remain in the UK on human rights grounds.

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2. The claimant arrived in the UK with entry clearance on 7 November 2005 as a Tier 4 student with a visa valid from 12 December 2005 to 31 December 2008. If these dates are correct it is not clear why the claimant was allowed entry to the UK before the period of his visa commenced but the point does not appear to have been queried and nothing appears to turns on it. He was granted further leave as a Tier 4 student on 8 December 2011 for a period expiring on 30 October 2012. He applied for further leave on 13 October 2012 for reasons set out in a letter from his solicitors dated 30 October 2012. The Secretary of State refuse the application on 1 November 2013 on Article 8 private life grounds under the provisions of paragraph 276ADE of the Immigration Rules.

3. The claimant appealed and the FTTJ heard his appeal on 30 January 2014. Both parties were represented and the claimant gave evidence. It appears that the FTTJ accepted this evidence, finding that the claimant had failed to make good progress with his studies and examinations because of a number of difficulties including the death of his father in March 2009, the serious ill-health of his mother who had had a stroke, family arguments and the claimant's own stress and anxiety and physical ill-health.

4. In paragraph 7 of the determination the FTTJ said; "the refusal letter goes on, however, to pay what I can only regard as lip service to exceptional circumstances, simply citing the May 2013 end to studies without any consideration of why the target date was not met. It is therefore clear that the appellant did not exercise a discretion open to her which, if she had given proper consideration to the facts outlined in the solicitors letter, could only have been exercised in the appellant's favour."

5. In his final conclusion the FTTJ said; "the appeal in respect of the Immigration Rules is not in accordance with the law because the respondent has failed properly to exercise her discretion clearly signalled which could only have been exercised in the appellant's favour. I direct that leave to remain is granted to allow the appellant to complete his studies."

6. The Secretary of State has been granted permission to appeal arguing that the FTTJ erred in law. It is submitted that the Secretary of State had considered exceptional circumstances. The FTTJ had not given adequate reasons for the conclusion that discretion could only have been exercised in the appellant's favour. The question of the exercise of discretion was one for the Secretary of State. It was open to the claimant to return to Bangladesh to pursue his studies there or, if he wished to continue his studies in the UK, to make an application for entry clearance from Bangladesh.

7. The claimant's representatives had submitted a substantial bundle which, I am told, contains all that was in the claimant's bundle before the FTTJ, subsequent Tribunal documentation common to both parties and two new documents, a revised chronology and "Additional legal grounds following permission granted" which equates to a Rule 24 response from the claimant to the Secretary of State's grounds of appeal to the Upper Tribunal.

8. Mr Saunders relied on the grounds of appeal and argued that the FTTJ's decision was not in accordance with the law. Paragraph 5 of the determination referred to a solicitors' letter of 26 October 2012. However, it was clear that the claimant's solicitors' letter in question was that dated 30 October 2012. The claimant's application was made on Article 8 private life human rights grounds only. The Secretary of State properly these and in particular the question of exceptional circumstances in the refusal letter. He could not detect any basis on which it was open to the FTTJ to conclude that the Secretary of State's decision was not in accordance with the law or that the only possible decision could be in the claimant's favour. I was asked to set aside the decision and remake it, dismissing the claimant's appeal.

9. Mr Hashim submitted that there was no error of law and that the FTTJ's decision should stand. There was no lack of reasoning. The FTTJ's reasons for his conclusions could be found in paragraphs 1 to 6. The refusal letter made no mention of the five-year cap on the total duration of the claimant's studies. In reply to my question, Mr Hashim accepted that no point in relation to the five-year cap had been raised in the solicitors' letter of application on behalf of the claimant. However, he submitted that the Secretary of State should have been aware of and considered this. There was a risk that the five-year rule would be used against the claimant if he made a further application. He also accepted that the letter was dated 30 October 2012 not 26 October 2012. I was asked to find that there was no error of law and to uphold the decision.

10. I reserved my determination.

11. The Secretary of State refused the application which was to remain in the UK on private life human rights grounds under the provisions of the Immigration Rules in part because the claimant could not meet the requirements of paragraph 276ADE. It is not now disputed that he does not meet these requirements. The only one which he might have argued that he satisfied was 276ADE(vi) namely that he was aged 18 years or above, had lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but had no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.

12. Having properly concluded that the claimant could not bring himself within the Article 8 human rights provisions under the Immigration Rules the Secretary of State went on to consider whether the appellant could succeed on Article 8 human rights grounds outside the Immigration Rules in relation to his private and family life in the UK. I note that it has never been suggested that the claimant has a family life in this here.

13. What the FTTJ should have done was, firstly, to consider the claimant's application and the Secretary of State's refusal on Article 8 private life human rights grounds under rule 276ADE. Secondly, to consider the claimant's application and the Secretary of State's refusal on Article 8 private life human

rights grounds outside the Immigration Rules and to decide whether the claimant was entitled to succeed on this basis. What he had to consider was nothing to do with any exercise of a discretion by the Secretary of State. It was an error of law to find that the appeal turned on the exercise of such a discretion. That being so it was also an error of law to conclude that any discretion could only have been exercised in favour the claimant.

14. Having found that the FTTJ erred in law I set aside his decision which I now remake. Both sides were informed that it was likely that this would be done. No further evidence has been submitted beyond that contained in the claimant's new bundle to which I have already referred and there has been no request that I should receive or hear any other evidence. There has been no attack on the FTTJ's findings of fact contained in paragraphs 4 and 5 of the determination which I adopt.

15. Although it has not been argued otherwise I find, as a matter of record, that the claimant has not established that he can bring himself within any of the private life requirements under rule 276ADE.

16. Whilst CDS (PBS: "available": Article 8) Brazil [2010] UKUT 00305 (IAC) was decided before the Article 8 provisions of the current Immigration Rules came into force I find that it provides useful guidance in circumstances similar to those in this case. In paragraphs 17 to 24 it is said;

> "17. It is apparent from these principles that Article 8 does not provide a general discretion in the IJ to dispense with requirements of the Immigration Rules merely because the way that they impact in an individual case may appear to be unduly harsh. The present context is not respect for family life that can in certain circumstances require admission to or extension of stay within the United Kingdom of those who do not comply with the general Immigration Rules. It is difficult to imagine how the private life of someone with no prior nexus to the United Kingdom would require admission outside the rules for the purpose of study. There is no human right to come to the United Kingdom for education or other purposes of truly voluntary migration.
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> 18. However, the appellant has been admitted to the UK for the purpose of higher education and has made progress enabling extension of stay in that capacity since her admission in 2007. We acknowledge that that gives no right or expectation of extension of stay irrespective of the provisions of the Immigration Rules at the time of the relevant decision on extension.
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> 19. Nevertheless people who have been admitted on a course of study at a recognised UK institution for higher education, are likely to build up a relevant connection with the course, the institution, an educational sequence for the ultimate professional qualification sought, as well as social ties during the period of study. Cumulatively this may amount to private life that deserves respect because the person has been admitted for

this purpose, the purpose remains unfilled, and discretionary factors such as misrepresentation or criminal conduct have not provided grounds for refusal of extension or curtailment of stay.

20. In the present case a change in the sponsorship rules during the course of a period of study has had a serious effect on the ability of the appellant to conclude her course of study. Some requirements of the Immigration Rules or applicable public policy scheme may be of such importance that a miss is as good as a mile, but this is not always the case.

21. The points-based system aims to provide objective criteria for what funds are needed to be demonstrated before an extension of stay is granted. If we are wrong on our first conclusion, we shall here assume that it may also set strict criteria as to how such the availability of such funds is to be demonstrated and in whose accounts the funds may be. But where the appellant establishes by evidence that she has funds available to support her if needed, the strength of the public interest in refusing her an extension based on somewhat arbitrary provisions of guidance attached to an appendix to the rules, is in our judgment somewhat less than the failure to meet a central requirement of the Rules.

22. But even central requirements are not determinative if the countervailing claim is of sufficient weight. Mrs Huang could not meet the dependant relative rules because she had not reached the minimum age required, but nevertheless the particular circumstances of her history required the strength of her family life to be taken into account. Sedley LJ in Pankina contemplated that some points-based claimants may not meet the minimum funding requirements for a short period due to unforeseen circumstances.

23. Here the same sponsors who ensured that the appellant had sufficient funds at the beginning of her course were available with ample financial support to ensure that she met the substantive requirements of Appendix C in order to continue with her studies. If minds had been applied to the problem the necessary funds could have been transferred to her account so both the letter and the purpose of the Policy Guidance was met.

24. In our judgment, the application to this appellant of the Policy Guidance that prevented her from obtaining the extension at the time and in the circumstances set out above, was a disproportionate interference with private life that deserved respect as long as she continued to meet the other requirements of the Rules and make appropriate progress in her course of studies here."

17. Whilst there are differences there are also similarities in the facts of this case. The claimant has paid the fees to enable him to finish his course. During the course of his studies the Immigration Rules have changed so that he is now

caught by a five-year maximum period for degree level studies. He has suffered considerable misfortune in the shape of personal ill-health, the death of his father, the illness of his mother and family disputes. The death of his father and the need for family funds to be used to support his mother means that the funds are not available to pay for him to start an entirely new course rather than finishing the existing one. He has completed 300 credits out of the required 364 for his existing degree level course. The University has indicated a willingness to permit him to finish his studies were it not for the new five-year maximum period requirements in the Immigration Rules.

18. Applying the tests set out in Razgar, R (on the Application of) v. Secretary of State [2004] UKHL 27 I find that the removal of the claimant from the UK would be an interference by a public authority with the exercise of his right to respect for his private life. The interference would have consequences of such gravity as potentially to engage the operation of Article 8. The interference would be in accordance with the law and 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. The appeal turns on the final question; whether such interference is proportionate to the legitimate public end sought to be achieved.

19. It has not been suggested that the appellant has been here in breach of immigration control, that he has any criminal convictions or that he has behaved badly. On the other hand at no stage could he have had any reasonable expectation of a prolonged or indefinite stay in the UK. However under the Rules in force at the time he started his studies he could have had a reasonable expectation of being able to finish them if he made reasonable progress. I also take into account the factors which I have set out in paragraph 17. Weighing this with all the evidence in the round, including the findings of fact made by the FTTJ, I conclude that it would be a disproportionate interference with the claimant's right to respect for his Article 8 private life to remove him from the UK and not to permit him to attempt to complete his studies. Such a decision would be unreasonable and his circumstances are exceptional.

20. Having set aside the decision of the FTTJ I remake it by allowing the claimant's appeal on Article 8 human rights grounds.

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Signed Date 30 April 2014

Upper Tribunal Judge Moulden