Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/02964/2013
IA/02968/2013
IA/02967/2013

THE IMMIGRATION ACTS

Heard at : Field House

On : 29 July 2013

Determination Promulgated
On : 30 July 2013

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

WAJAHAT REHMAN BABAR
FAHMIDA WAJAHAT
HADIYAH IRAJ WAJAHAT

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S Karim, instructed by Edward Alam & Associates
For the Respondent: Ms E Martin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are citizens of Pakistan and are husband, wife and daughter. They have been given permission to appeal against the determination of First-tier Tribunal Judge Andonian dismissing their appeals against the respondent's decision to refuse the first appellant's application for leave to remain as a Tier 4 (General) Student Migrant under the Points Based System and the second

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and third appellants' applications for leave to remain as dependants of a points-based system migrant.

2. The first appellant arrived in the United Kingdom on 22 June 2004 in possession of a visa that conferred leave to enter as a student until 1 September 2006 and was granted subsequent periods of leave to remain as a student until 31 December 2008, as a Tier 1 post-study worker until 18 December 2010 and then as a Tier 4 student until 27 May 2012. The second appellant, his wife, arrived in the United Kingdom on 20 June 2009 in possession of a visa conferring leave to enter until 18 December 2010 and was granted further leave to remain as a student dependant until 27 May 2012. The third appellant, their child, was born on 30 March 2010 and was first granted leave to remain as a student dependant on 26 January 2011 until 27 May 2012.

3. On 24 May 2012 the first appellant applied for leave to remain as a Tier 4 (General) Student Migrant under the Points Based System and the second and third appellants applied for leave to remain as his dependants. The first appellant's application was refused under the immigration rules, on the basis that he was not able to meet the requirements of paragraph 245ZX(ha), as he had applied to study a Postgraduate Diploma in Strategic Management from 5 June 2012 to 5 December 2013 which would, if granted, mean that he would be studying at degree level or above for beyond the maximum five year limit permitted under the rules. The second and third appellants' applications were refused accordingly.

4. The appellants' appeals were heard on 26 April 2013 before First-tier Tribunal Judge Andonian, who found that they were unable to meet the requirements of the rules and accordingly dismissed the appeals.

5. Permission to appeal to the Upper Tribunal was sought on the grounds that the First-tier Tribunal Judge, in considering the five year period under the immigration rules, had wrongly taken into account periods spent on vacation and thus not studying; and that he had failed to consider Article 8 of the ECHR.

6. Permission to appeal was granted on 7 June 2013 on all grounds, although, in granting permission, Judge Chohan did not see any obvious errors of law in the judge's findings under the immigration rules and granted permission primarily on the ground relating to Article 8.

Appeal hearing and submissions

7. At the hearing before me, Mr Karim noted the basis for the grant of permission and accordingly only pursued the Article 8 grounds. He submitted that the judge's failure to consider Article 8 was a material error, given the appellant's length of time living in the United Kingdom with his family and the opportunities he would have had in Pakistan if he completed his studies in the United Kingdom.

8. Ms Martin submitted that the error was not material as there was little merit in the Article 8 claim. Article 8 could not be used to trump the immigration rules. Ms Martin relied on the cases of Miah v Secretary of State for the Home Department [2012] EWCA Civ 1719 and MM (Tier 1 PSW; Art 8; private life) Zimbabwe [2009] UKAIT 00037 and submitted that the appellant did not need to have his certificate from the United Kingdom in order to set up his own business, as he claimed was his intention on completing his studies.

9. I advised the parties that, in my view, the judge's error in omitting to give any consideration to Article 8 of the ECHR when it had been raised before him, was a material one, particularly in a case such as this when the appellant had lived in the United Kingdom for a number of years. Mr Karim requested that in such circumstances the appeal should be remitted to the First-tier Tribunal to consider Article 8. Ms Martin asked that the decision be re-made in the Upper Tribunal. I decided that it was not appropriate to remit the case to the First-tier given that their findings under the immigration rules remained and the appeal had only to be re-made in part. Mr Karim confirmed that there was to be no further oral evidence and I was directed to the appeal bundle which had been produced. I proceeded to hear submissions from both parties.

10. Ms Martin submitted that the appellant's assertion, that the decision was unfair given the change in the rules since he came to the United Kingdom, was of little merit given that the rules had changed prior to his application in 2011 under the points-based system. The five-year limit under the rules was clear and applied not only to tier 4 students but also to students prior to the Tier 4 points based system. The appellant had no expectation of being able to stay here as he had only limited status. Article 8 could not be used to out-trump the rules.

11. Mr Karim submitted that there was no correlation between the immigration rules and Article 8. The appellant had established a private life in the United Kingdom and the case of CDS (PBS: "available": Article 8) Brazil [2010] UKUT 00315 (IAC) provided for circumstances such as his, where he had nearly completed his studies. He had already achieved 60 credits and only needed 60 more. He had invested time and effort in his studies here. He needed his MBA qualification in order to be able to set up a business in Pakistan and in any event his plans had now changed and he had been offered a job in Pakistan provided he completed his qualification in the United Kingdom.

12. Ms Martin raised a further point, namely that the letter now produced offering the appellant employment in a company in Pakistan pre-dated the hearing before the First-tier Tribunal but had not been produced then. At that time the appellant's evidence was that he wanted to start his own business in Pakistan.

13. Mr Karim did not have any response.

Consideration and findings

14. Mr Karim did not pursue the grounds of appeal relating to the judge's decision under the immigration rules and clearly he was right not to do so, since that decision was properly made and was one that the judge was entitled to make. The error of law lies only in the judge's failure to consider Article 8, when that had clearly been raised before him. As such, I re-make the decision in that respect only.

15. The first appellant's Article 8 claim is pursued on grounds of private life, since his only family life here remains with his wife and daughter whose applications have been refused in line with his. He has established a private life here as he has lived here for some nine years and has been studying for most of that period of time and working. His wife has lived here with him for the past four years and his daughter since her birth in 2010. There would be interference with the private lives of all three if they had to return to Pakistan. However, I consider that such interference is clearly justified in the interests of maintaining an effective immigration control, as part of the economic well-being of the United Kingdom. The only evidence produced by the appellants about their private lives in the United Kingdom, aside from a handwritten letter from a friend, is in relation to the first appellant's studies and his desire to complete those studies to assist his future employment prospects. However he cannot meet the requirements of the immigration rules with respect to his studies. The issue of unfairness raised in the grounds is, as Ms Martin submitted, of no merit, given that the rules had changed at the time the appellant made his application and he would therefore have been aware at that time of the limit on the number of years for which he could undertake such studies.

16. The appellant relies on CDS (PBS: "available": Article 8) Brazil [2010] UKUT 00315 (IAC) in asserting that he should be granted leave to remain in order to complete his studies. However, in CDS the Upper Tribunal made it clear that Article 8 was not to be used as a substitute to the immigration rules:

> "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."

17. Although the Upper Tribunal contemplated circumstances where ties to the United Kingdom, including a period of study as well as social and other ties, cumulatively amounted to private life deserving respect, I do not consider that to be the case with the appellant, whose evidence of ties to the United Kingdom is limited. He claims to require only 60 points to complete his course of studies but there is no evidence from the college to confirm that that is the case or to confirm how that is to be achieved. Furthermore, his evidence as to his future intentions is not consistent. His evidence before the First-tier Tribunal was that he needed his current qualification in order to establish himself in

business in Pakistan, which is what he intended to do on completion of his studies. According to his evidence in his recent statement produced for this appeal, he had reconsidered his options and was considering taking up employment on return to Pakistan and had been offered employment in a well-established company in Pakistan on condition that he completed his course of studies in the United Kingdom. However, as Ms Martin pointed out, the letter of offer of employment is dated 21 November 2012, and thus plainly pre-dated the appellant's statement and his evidence before the First-tier Tribunal and, as such, casts doubts on his claim to have simply changed his mind about the options available to him. It seems to me that this raises significant doubts as to the appellant's true intentions and accordingly the relevance to him of his current course of studies.

18. There is no reason why the appellant cannot return to Pakistan and obtain employment with the qualifications and experience he has already gained. Likewise, there is no reason why his wife and child cannot return to Pakistan and resume or establish their private lives there. His daughter is only three years of age and no evidence has been submitted to suggest that her best interests lie anywhere other than with her parents, whether that be in the United Kingdom or in Pakistan.

19. In all of the circumstances I do not consider that the appellants' removal from the United Kingdom as a consequence of the respondent's decision to refuse to vary their leave amounts to a breach of Article 8. I would accordingly dismiss the appeals on those grounds.

DECISION

20. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision has been set aside. I re-make the decision in the appeals by dismissing them on all grounds.

Signed Date 30th July 2013

Upper Tribunal Judge Kebede