IAC-AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21556/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14th January 2015	**On 21st January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MISS UTHTHAMY JEGATHESWARAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Aghayere (Solicitor)
For the Respondent: Ms J Isherwood (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Pacey, promulgated on 14th October 2014, following a hearing at Birmingham on 6th October 2014. In the determination, the judge dismissed the appeal of Uththamy Jegatheswaran. The Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Sri Lanka who was born 6th May 1990. She appealed against the decision of the Respondent dated 26th March 2014 refusing her application for leave to remain in the UK as Tier 4 Student.

The Appellant's Claim

3. The Appellant's claim is that she complies with the requirements of paragraph 245ZX(d) in that she had furnished the relevant letters from her bank confirming that funds were available to her (see paragraphs 6 to 9 of the determination). For example, in the witness statement she explains that she had provided relevant evidence, not only her Nationwide account statement, but also two bank statements from the Bank of Ceylon and Bartleet Finance in Sri Lanka (see paragraph 7). She maintains that an early letter from Bartleet Finance, dated 5th March 2014, confirmed that she had 1,000,000 rupees on deposit from 29th June 2013 until the maturity date of 29th September 2014.

The Judge's Findings

4. The judge concluded that the Appellant had not been able to comply with the Rules. She had not been able to send the necessary documentation confirming the availability of funds at the applicable date. The application was dated 6th March 2014. The Appellant had to show availability of funds of £2,100 with her application. It is true that there was a letter of 5th March, but as the judge observed, "I note from the covering letter dated 22nd March that she sent a Bartleet Finance letter on 22nd March, although it was dated 5th March. This was after the date of her application and hence cannot be taken into account.

5. The date of the application was 6th March, over a fortnight before the Bartleet Finance letter was sent. Section 19(4) makes it clear in the phrase "at the time of making" that documents must be sent with the application when it is made. Paragraph 245AA refers to "documents that have been submitted with the application" and the reference to "with" is conclusive that the documents must accompany the application (see paragraph 12). Second, and in any event, the Nationwide statement dated 6th March shows the current activity between 8th February and 6th March and "it therefore falls short, admittedly by only one day, of the necessary period" but that "in any event it clearly shows that the lowest balance in that period was 01 pence. It cannot therefore serve as evidence of material value of the availability of funds" (paragraph 14). The appeal was dismissed.

Grounds of Application

6. The grounds of application state that the judge failed to apply the relevant Rules, failed to consider the relevant case law, and that the discretion should have been exercised differently. In particular, the judge failed to consider the Appellant's Article 8 rights.

7. On 1st December 2014, permission to appeal was granted on the basis that the judge should have considered the Appellant's Article 8 rights as well because, "while it might be said that the case under Article 8 is not a strong one, the Appellant is entitled to a decision on it..." (paragraph 4).

8. On 4th December 2014, a Rule 24 response was entered. This states that the judge went to considerable length to deal with the inadequacies of the evidence. It states that, "the Respondent has had regards to the Presenting Officer's hearing note and there is nothing to indicate that Article 8 was relied upon at the hearing". The note does however confirm that:

> "It was not in dispute that the financial documents provided by the Appellant at the time of the application were not sufficient to meet the Rules. The reps position was that if the documents were insufficient, then the Secretary of State should have contacted either the Appellant or financial institution concerning to rectify any omission".

Second, and in the alternative, if Article 8 was a live issue the requirements of Article 8 were not met because there was nothing in the grounds of application or the determination to demonstrate what good arguable case could have been relied upon by the Appellant.

Submissions

9. At the hearing before me, Mr Aghayere, appearing on behalf of the Appellant, explained that Article 8 was put as an argument before the judge. It was made clear that the Appellant had been in the UK for five years, she had been here as a student, she had worked for twenty hours a week, she was married to a partner who had discretionary leave until December 2015, and that she was pregnant. My attention was drawn to a letter from the Hillingdon Hospitals dated 23rd September 2014 to the effect that the Appellant had an antenatal clinic appointment on 21st October 2014 for a scan. She is pregnant with her child.

10. Second, even if it was not raised the judge should have considered it because the Notice of Appeal clearly referred to Article 8. Third, permission had been granted now to argue all matters, and not just confined to Article 8, but that if an error of law were to be found with respect to Article 8 not being considered, the matter should be remitted back to the First-tier Tribunal so that all arguments can be put before the judge again.

11. For her part, Ms Isherwood submitted that there was no error of law. She had relied upon the well-known case of **Patel [2014] AC 651** in the Supreme Court, where the Supreme Court made it clear that, "a near miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit". (Paragraph 56). Furthermore, it is made clear that,

> "It is important to remember that Article 8 is not a general dispensing power... 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" (see paragraph 57).

The only proper course for the Appellant, submitted Miss Isherwood, was now to make an Article 8 application directly to the Secretary of State. She was still able to do so. She could rely upon her current circumstances and set out a proper Article 8 application.

12. Second, insofar as it was alleged that paragraph 245 had not been complied with Ms Isherwood relied upon the recent Tribunal case of **Akhter (paragraph 245AA: wrong format) [2014] UKUT 297**. This makes it clear that,

> "A bank letter, which does not specify the postal address, landline telephone number and email address of the account holders is not thereby 'in the wrong format' for the purposes of paragraph 245AA of the Immigration Rules (documents not submitted with applications)".

This was the position argued for by the Appellant. The case of **Akhter** made it clear that it was unsustainable. In any event, paragraph 245AA makes it clear at sub-paragraph B that, "if the applicant has submitted (i) a sequence of documents and some of the documents in the sequence have been omitted.....the UK Border Agency may contact the applicant....". The language here was "may" and not "must".

However, it had to be remembered that the judge at paragraph 11 made it clear that there was "missing information" and this was not a "wrong format" point. The grounds are alleging that there was a absence of "fairness" but this was hard to understand if no necessary documents have been submitted. The grounds referred to the existence of "exceptional circumstances" but nothing exceptional had been identified. But most importantly, the grounds of application, which had been drafted only in October 2014, do not refer to the partner or the child.

13. In his reply, Mr Aghayere submitted that the fact remained that the judge had simply failed to consider Article 8 at all. There was an error in this.

Error of Law

14. I am satisfied that the making of the decision by the judge involved the making of an error. I am not satisfied that the error is a material error such that I should set aside the decision.

15. The judge was correct in stating that the Appellant could not have succeeded under paragraph 245AA because documents had not been "submitted with the application" (see paragraph 16) and a letter of 5th March had not been sent out until 22nd March.

16. The judge should have considered Article 8, although it does appear that it was not properly argued orally before the judge, and this is confirmed in the Respondent Secretary of State's note of the hearing, being confined to the Notice of Appeal. That trend has continued even with the latest application of October 2014.

17. Nevertheless, if the judge were to consider what was at the time before her, she would have dismissed the appeal because the essential argument before the judge was that of the Appellant having made a "near miss". The case of **Patel [2014] AC 651** is clear that, "a near miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit" (paragraph 56). As put before the judge, the human rights claim was otherwise lacking in merit. Accordingly, this is a case where it is appropriate to conclude that the Upper Tribunal may (but need not) set aside the decision of the First-tier Tribunal (see Section 12(2)(a)). No other decision was possible on the evidence.

Notice of Decision

There is no material error of law in the original judge's decision. The determination shall stand.

No anonymity order is made.

Signed Dated

Deputy Upper Tribunal Judge Juss 19th January 2015