IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43063/2014

THE IMMIGRATION ACTS

Heard at Bradford Upper Tribunal	**Decision & Reasons Promulgated**
On 17 June 2015	**On 15 July 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD YUSUF BIN MOHAMAD ASRAFF
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mrs R Pettersen, Senior Home Office Presenting Officer
For the Respondent: Mr T Hussain, instructed by Khan & Company, Solicitors

DECISION AND REASONS

1. The respondent, Muhammad Yusuf Bin Mohamad Asraff, was born on 18 April 1992 and is a male citizen of Singapore. I shall hereafter refer to the appellant as the respondent and to the respondent as the appellant as they appeared respectively before the First-tier Tribunal. The appellant appealed to the First-tier Tribunal against the decision of the Secretary of State dated 15 October 2014 to refuse to grant him further leave to remain. The appellant had made a previous application for leave which had been refused but which had succeeded (to a limited extent) on appeal to the First-tier Tribunal (Judge Reed). Judge Reed, in a decision

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promulgated on 4 March 2013, had found (on the basis of the respondent's so-called evidential flexibility policy in force at that time) that the appellant should have been "offered an opportunity to provide the required documentary evidence relating to financial sponsorship from his father and/or mother rather than his grandparents." [19] The judge noted that the appellant had mistakenly provided evidence of financial sponsorship from his grandparents rather than from his parents as required by the Immigration Rules. The judge stated that, "Grandparents could not act as financial sponsors for a student." Judge Reed considered that it was fair of the respondent "not to seek further clarification and further evidence about financial sponsorship from the appellant." The judge noted that the appellant had been in the United Kingdom as a student since 2005 and had in the past met all financial requirements for leave to remain. In [22], Judge Reed directed that,

> "The respondent should consider this application after allowing a period of 60 days for the appellant to provide evidence relating to financial sponsorship from his parents. I take the view that this should include documentary evidence from the appellant's parents' bank relating to the 28 day period prior to the submission of the application on 2 June 2012. The appellant should however take care to apprise himself of all the relevant requirements of Appendix C (I have <u>not</u> set all these out above). If he has any doubts then he should seek advice."

2. As I have noted above, after the matter was remitted to her, the Secretary of State issued a new decision again refusing the appellant's application. In the decision letter of 15 October 2014, the appellant was awarded zero points for maintenance (funds) because he had provided only a letter "of financial sponsorship ... from [his grandparents] confirming their willingness to provide financial assistance during your time in the United Kingdom." The appellant appealed against that decision to the First-tier Tribunal (Judge Robson) who heard the appeal in Bradford on 2 February 2015. Judge Robson found that the appellant had "been given the benefit of evidential flexibility in the context of the judge's direction but that the appellant did not take advantage of the same. I therefore find that the appellant fails under the Immigration Rules." [56] The judge noted [54] Judge Reed's direction that the appellant should provide further information and evidence within 60 days but found that the appellant had completely failed to provide any information. The judge went on to consider Article 8 ECHR, finding that the appellant could speak English that he had not been a burden on tax payers since he arrived in the United Kingdom in 2005. At [62] the judge concluded that any interference with the appellant's private life in the United Kingdom "will not be proportionate to the legitimate/end sought to be achieved (*sic*)." He therefore allowed the appeal on Article 8 ECHR grounds but dismissed it under the Immigration Rules.

3. The Secretary of State now appeals, with permission, to the Upper Tribunal. I acknowledge that the appellant has sought to comply with the Immigration Rules during his time here as a student since 2005. In his submissions, Mr Hussain sought to characterise the decision of Judge

Robson as entirely coherent and, in particular, not perverse on the basis of the evidence. It may be the case that the decision of Judge Robson is not perverse but I consider that his use of Article 8 ECHR in this instance was wholly improper. I reject Mr Hussain's submission that the judge has followed relevant jurisprudence, such as *CDS* (PBS: "available": Article 8) Brazil [2010] UKUT 00305 (IAC). Whilst the Tribunal in that case did acknowledge that the person who had been admitted to follow a course of study which had not yet ended might "build up a private life that deserves respect" it also firmly held that "Article 8 does not give an Immigration Judge a free-standing liberty to depart from the Immigration Rules." Likewise, *Nasim* (Article 8) Pakistan [2014] UKUT 25 (IAC) following *Patel* [2013] UKSC 72 recognised the limited utility of Article 8 in private life cases. What is clear from all the relevant jurisprudence is that Article 8 is not to be used by judges as a general dispensing power in circumstances where they feel sympathy for an appellant but are unable to allow an appeal under the Immigration Rules. In my view, that is exactly what has occurred in this instance. The judge has taken no account of the fact that Judge Reed had offered the appellant the opportunity to, in effect, perfect his application by giving details from the financial circumstances of his parents (as opposed to his grandparents). His determination could not have been clearer. The appellant took no advantage of the 60 day period given to him by Judge Reed's determination and (as Judge Robson noted) he supplied no new evidence at all. Judge Robson has not considered the relevance of the fact that this appellant has been the author of his own misfortune. Further, Judge Robson, by allowing the appeal on private life Article 8 ECHR grounds, made no proper attempt to examine the extent to which the appellant's private life might be disrupted disproportionately by an immigration decision which the appellant has, in effect, brought upon himself by his own acts and, in particular, omissions. This is, in my view, a clear case of Article 8 being used as a dispensing power to save an appellant for whom the judge felt some sympathy but who was patently unable to satisfy the relevant Immigration Rules. As the Supreme Court has made clear in *Patel* (see above) that is not the manner in which Article 8 should be used by judicial decision-makers. In the circumstances, I find that Judge Robson's determination should be set aside. I remake the decision dismissing the appeal against the immigration decision.

Notice of Decision

The determination of the First-tier Tribunal promulgated on 12 March 2015 is set aside. I remake the decision. The appellant's appeal against the respondent's immigration decision of 15 October 2014 is dismissed under the Immigration Rules and on human rights grounds (Article 8 ECHR).

No anonymity direction is made.

Signed Date 10 July 2015

Upper Tribunal Judge Clive Lane

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 10 July 2015

Upper Tribunal Judge Clive Lane