Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/53035/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 January 2015	**On 17 February 2015**
Oral judgment	

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MR MUHAMMAD SAKID HOSSAIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No Appearance
For the Respondent: Mr Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against a determination of First-tier Tribunal Judge Aujla promulgated on 3 September 2014 following a hearing at Taylor House on 28 July 2014.

2. The Appellant arrived in the United Kingdom on 1 February 2011 with valid clearance as a Tier 4 (General) Student which was extended until 31 May 2014. On 30 May 2013 he applied to vary his leave to permit him a further period of leave as a Tier 4 (General) Student Migrant under the points-based system. That was refused by the Secretary of State on 28

© CROWN COPYRIGHT 2015

November 2013 because it was said the Appellant had not shown he could meet the requirements of the Immigration Rules. The decision was also accompanied by a direction for his removal made pursuant to Section 47 of the Immigration, Asylum and Nationality Act 2006.

3. The reason for the application failing under the Rules, it is said, is that the Appellant had claimed 10 points for maintenance under Appendix C but the documents provided by the sponsor showing funds did not demonstrate that he had been in possession of the required amount of funds for the requisite 28 days. The Secretary of State was therefore not satisfied that he was entitled to 10 points under Appendix C of the Rules and that he could meet the Rules for leave to remain as a Tier 4 (General) Student Migrant.

4. The Judge dealt with this issue in some detail in the determination. The findings of fact are set out from paragraph 17 in which the Judge notes that the issues are very simple, namely whether or not the Appellant had held the required funds for the full consecutive 28 day period before he made his application. The application was submitted on 30 May 2013. A bank statement was submitted dated 5 June 2013. The Judge makes comment that the statement must have been submitted after the application was submitted since it was issued by the bank "five years after the application was submitted". That latter statement appears to bear no relationship to the reality of the facts of the case and one can only assume that it may have been a typographical error, the chronology suggesting it should have been five days after the application was submitted.

5. The Judge notes that as the application was submitted on 30 May 2013 the latest date for the period of 28 days to end was 30 May 2013 and therefore commenced on 2 May. There was, however, no evidence to show that the Appellant had held funds for the full 28 day period since there was no evidence of funds being held from 2 May until 5 May 2013. On that basis it was found that the Rules had not been met and the Judge dismissed the appeal.

6. The grounds of challenge to the decision under the Rules state that the alleged error is that:

> "11. The Secretary of State refused the appellant's application based on the fact that he had provided a bank statement covering only 26 days and not 28. The Secretary of State has power to exercise her discretion where it was so desirable to do so but the Secretary of State chose not to exercise such discretion in the appellant's favour.
>
> 12. The appeal was therefore refused as the appellant has had no plausible argument in relation to the issue as he failed to meet the criteria according to the letter of the law. However, the appellant raised a human rights claim at the Tribunal."

7. There is nothing in the grounds that identifies any arguable material error in the Judge's approach and in fact it appears to be conceded that only 26 days' rather than 28 days' worth of bank statements covering the requisite period were provided. The Rules for the PBS system, as the Court of Appeal recognised in **Alam,** are prescriptive. They set out the mandatory requirements and in relation to this matter it appears to have been conceded as was found by the Judge that those mandatory requirements had not been satisfied. I find no basis for interfering with that decision which shall therefore stand.

8. The comment in paragraph 12 that the Appellant raised a human rights claim before the Tribunal is factually correct. It is also correct that although the grounds assert that the Tribunal dealt with the human rights aspect by finding in paragraph 10 that "on the specific facts of this appeal differences between the burdens and standards of proof have not resulted in any material differences in my findings" the way in which the Tribunal dealt with Article 8, in reality, is that the Tribunal did not deal with Article 8 at all. When one looks at the part of the determination setting out the consideration of findings of fact there is no mention of the Article 8 aspects of the appeal.

9. It is also debatable whether the Judge erred in paragraph 10 by suggesting there is a difference between the burdens and standards of proof. In a case in which there is no protection element there are no differences between the standard of proof to be applied under the Rules and human rights elements of an appeal. It is the balance of probabilities in both cases. Who has to prove what changes in an Article 8 appeal if proportionality becomes relevant as the burden of proving that the decision is proportionate falls upon the Secretary of State. Bar this, the suggestion that there is some evidential difference to the burden is not supported in any way in the determination although, I find, that does not amount to a material misdirection of law as the Judge failed to undertake an Article 8 assessment.

10. The determination shall be set aside although the findings in relation to the Immigration Rules shall be preserved findings. The Tribunal is minded to go ahead today to remake the decision on the basis of the evidence that was before the First-tier Tribunal Judge.

11. I would state at this point that there is only before the Upper Tribunal a representative for the Secretary of State. The Appellant, Mr Hossain, has not attended and nor have his solicitors SEB Solicitors. The Tribunal received a letter dated 31 December 2014 from them stating: "Our client has instructed us to request the Tribunal take a decision on the papers. Therefore we won't attend the hearing on 5 January 2015." The Tribunal responded by return fax, dated 31 December 2014, to SEB Solicitors in the following terms:

> "I write in regard to your request that the Upper Tribunal hearing of 5 January 2015 be heard on the papers. Please be advised that this hearing will remain in the list so that the Home Office representative

may make oral submissions. The presiding Upper Tribunal Judge will make their decision based upon these submissions and the documents held on file in support of the above-named appellant's appeal. It is at your discretion as to whether the appellant or their representative attends the hearing."

There has been no request for an adjournment and no explanation why the Appellant has failed to attend even if he cannot afford to pay his solicitors or there is some other reason why they cannot attend. The Tribunal considers there has been valid service of the notices in accordance with the necessary Rules as acknowledged in fact by the letter from the solicitors referring to the hearing date. I have considered whether it is fair in all the circumstances for this matter to proceed and for the Upper Tribunal to remake the decision in the absence of the Appellant and consider it is wholly appropriate to do so in the absence of any satisfactory explanation for the failure to attend. The Appellant was also clearly alerted by the Tribunal administration to the fact that if he fails to attend that the Tribunal would be likely to proceed in absence in any event.

12. As stated, Article 8 was before the First-tier Tribunal. It is raised in the original grounds of appeal which assert that the decision is unlawful because it is incompatible with rights under the European Convention on Human Rights. The basis for this appears in paragraph (vi) that "the Appellant has established a private life through his studies, employment and through his residence here in the United Kingdom. He has been integrated in society. The Appellant has been in the UK for a number of years". The grounds fail to specify the period of years but it appears that the date of entry could have been sometime in February 2013 and so at the date the decision was made or the date of the hearing, today's date, he has only been in the United Kingdom for a relatively short period of time.

13. This is not an application for a variation of leave relating to an individual such as the Appellant in the established case of **CDS** who was partway through a course in which it was felt not to be proportionate to expect such an individual to leave when they only had a short period of time left to finalise their studies in the United Kingdom. The CAS provided with the application relates to a course that had not started at the date the application was made. The start date for the course was 10 June 2013, the expected end date was 22 May 2015.

14. In relation to the Article 8 rights being relied upon I have also been handed a copy of the judgment of the Supreme Court in **Patel & Ors [2013] UKSC 72** in which the Supreme Court made it quite clear that a near-miss argument, and I refer to that due to the 26 as opposed to 28 day period when discussing the Immigration Rules, cannot provide substance to a human rights case which is otherwise lacking in merit but was a factor that would be taken into account.

15. More importantly within **Patel** the Supreme Court laid to rest the idea that any individual who had a right to study in the United Kingdom or a person

who came and entered the United Kingdom for the purposes of studies had any legitimate expectation that they will be entitled to remain based upon a private life that they acquired during the time they were undertaking their studies.

16. It is also fair to say that the way in which Article 8 should be assessed has moved on considerably since the decision was made by the decision maker. The date of the decision is 28 November 2013 but as this is an in country appeal the Tribunal is expected to assess the Article 8 matter at the date of the hearing, i.e. at today's date.

17. The statements regarding the nature of private life relied upon are vague and generalistic. They contain no specific details and as stated this is a private life that was accrued during a time that the Appellant has had temporary status to remain in the United Kingdom as a student. The statutory provisions brought in by the Immigration Act 2014 make it mandatory for decision makers, notwithstanding the earlier case law, to consider the statutory provisions set out in part 5A of the 2002 Act under Sections 117A, B and C if applicable. C is not applicable to this case as it is not a deportation case.

18. The statutory provisions make it clear that the view of the Secretary of State regarding the public interest question is to be assessed in accordance with the guidance provided in the clauses and subclauses which includes a requirement for the Tribunal to undertake a balancing exercise. Therefore it is still necessary to consider the proportionality of the decision.

19. It is not disputed before me that private life has been formed in the United Kingdom although whether if one looks at the **Razgar** questions there would be any interference with such private life sufficient to engage Article 8 under the Strasbourg jurisprudence is a question, based on the evidence, that perhaps will not be answered in the Appellant's favour. If it was, in the alternative, and the issue was that of proportionality, and on the basis of the evidence before the Tribunal it would be my finding that the Secretary of State has discharged the burden of proof upon her to the required standard to show that the decision is proportionate.

20. Section 117B reads:

> "Article 8: public interest considerations applicable in all cases
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
>
> (a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to

(a) a private life, or

(b) a relationship formed with a qualifying partner

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

21. Those latter issues in (6) regarding a parental relationship with a qualifying child are not applicable and therefore the issue of 'reasonableness' does not have to be considered as there is no suggestion of any family life or type of life involving an adult relationship or relationship with a child relied upon by the Appellant.

22. The Section 117B criteria require evidence of an ability to speak English which is not in dispute. Subsection (3) regarding the economic wellbeing and the requirement for an individual to be able to show that they are financially independent is not met on the basis of the information before the Tribunal. The Appellant entered the United Kingdom as a student and is seeking leave to study. There is no evidence that he has financial resources available such as to make him financially independent and to show that he will not become a burden on the taxpayer or will be properly able to integrate into the society.

23. Subsection (4) regarding private life or relationship with a partner is not applicable. Subsection (5) specifically gives guidance that little weight should be given to a private life established by a person at a time when the person's immigration status was precarious. In this respect if one considers the meaning of the word 'precarious' it is settled Strasbourg jurisprudence that little weight should be given to the private and family life of an individual developed at a time that they had no lawful leave to remain in the United Kingdom. **Y (Russia)** and other related cases are authority for that proposition.

24. The wording of Section 117, however, does not speak in such terms. It uses the word 'precarious'. Precarious by definition means status with a lack of stability. It does not necessarily mean a person with unlawful or lawful status. The fact the Appellant was in the United Kingdom on a temporary basis as a Tier 4 Student and has no settled status or legitimate expectation he will be granted the same, makes his status precarious. It is the immigration status and the nature of that which is the specific element of the test. If one is to interpret 'precarious' as being a person who does not have settled status or any legitimate expectation that they will have settled status then the Appellant in this case falls foul of that particular. If in fact the interpretation of 'precarious' has to be read as a person with no unlawful leave, then it may be that the statutory provision does not assist the Secretary of State as the leave to date of the Applicant has been lawful but, then one returns to the finding of the Supreme Court in **Patel & Ors,** that private life acquired at a time when an individual is a student does not create a legitimate expectation that they will be given status and allowed to remain in the United Kingdom, the former interpretation is likely to be the correct.

25. Having considered all the provisions relating to the Immigration Rules, statutory provisions and the relevant case law it is my finding that the Secretary of State has discharged the burden of proof upon her to the required standard to show that the decision is proportionate and therefore the appeal must fail.

Notice of Decision

The dismissal of the appeal under the Immigration Rules is a preserved finding. The human right ground of appeal is dismissed.

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Hanson

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

Signed Date

Upper Tribunal Judge Hanson