Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/04958/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 31 July 2013	**On 15 August 2013**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

MISS SUN YOUNG PARK

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Symes, Counsel
For the Respondent: Ms H Horsley, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal McDade allowing the appellant's appeal under Article 8 of the ECHR.
2. The appellant is a citizen of South Korea, born on 4 August 1973. She arrived in the UK on 7 November 2004 in possession of entry clearance issued in 2004, valid until 3

September 2005, as a student. According to her witness statement she studied English from 8 November 2004 and finished on 5 August 2005. On its completion she believed she had learnt sufficient English to then embark on a one year university foundation course which she did from September 2005 to June 2006. She was awarded Grade A in Economics and Business Studies, Accounting and Mathematics at Stafford House College. This gave her confidence to embark on a Bachelor of Business Administration degree course at the University of Kent. This was to be a three year course from 14 November 2006 until 31 October 2009.

3. She completed the first year of the degree course but did not take exams at the end of the first year because she had encountered difficulties because her level of English was not good enough to adequately follow the teaching. She did not enrol to continue the degree course in a second year but instead worked at home trying to improve her abilities in English.

4. When she felt her English was good enough she obtained a place at Kent University to study for a Bachelor of Arts in Accounting and Finance. She started the course in September 2009 and completed it on 15 October 2012. She was granted leave to remain for the same period to undertake this new course. She successfully completed the course and graduated with an upper second class honours degree. She paid in total £32,430 for the course.

5. The appellant then obtained a place also at Kent University for a one year MSc in Financial Marketing which she started on 15 September 2012 which is due to end on 14 September 2013. She applied for leave to remain to undertake this course and the application was refused on 28 January 2013.

6. The respondent refused the appellant's application under paragraph 245ZX(ha) of the Immigration Rules which states:

> "If the course is at degree level or above, the grant of leave to remain the applicant is seeking must not lead to the applicant having spent more than five years in the UK as a Tier 4 (General) Migrant, or as a student, studying courses at degree level or above unless:
>
> (i) the applicant has successfully completed a course at degree level in the UK of a minimum duration of four academic years, and will follow a course of study at masters degree level sponsored by a sponsor that is a recognised body… and the grant of leave must not lead to the applicant having spent more than six years in the UK as a Tier 4 (General) Student or as a student studying courses at degree level or above; or
>
> (ii) the grant of leave to remain is to follow a course leading to the award of a PhD…".

7. The respondent stated that although the appellant had successfully completed a course at degree level in the UK of a minimum duration of four years and was now applying to study a course at Masters degree level at a sponsor that is a recognised higher education institute, the total duration of study at degree level and above would be more than six years.

8. First-tier Tribunal Judge McDade found as follows:

> "2. I believe it is unarguable that the Appellant does not satisfy the Immigration Rules. Mr Lewis attempted to assert that because she had dropped out of studying for a period of some two years the clock should stop. This makes no sense. The leave is given for the specific purpose of study for a period of five years. If a student for whatever reason is not studying during that time it does not justify the Immigration Rule being stretched to accommodate them. However I consider what is of significance is the fact that this particular Appellant was now at the very end of her Master's degree. She has finished her exams and now only has a dissertation to write up and this will be finished in September 2013. Given the very considerable expenditure of time and money over the years on the Appellant's education I consider it would be unduly harsh in all the circumstances not to conclude that the Appellant has developed a private life under Article 8 that deserves respect. I do not consider that **CDS Brazil** in itself supports the Appellant's situation as that related to an issue of funding when all other immigration requirements were satisfied. However I do consider that given what can only be described as the Appellant's account of her shame for having to drop out of a course some years ago because she was struggling to fully understand its content because of an English language problem (a matter that she subsequently successfully addressed) that this shame related not only to herself but to her parents' potential reaction, I consider any removal at this stage would seriously adversely impact upon her emotional wellbeing. I say this because the Appellant gave evidence as to the severe stress that she suffered as a result of her dropping out some years earlier. The Appellant speaks of being able to pursue a PhD in the United Kingdom. This might well be unachievable in view of the Immigration Rules' five year requirement but in all the circumstances I hold that the Appellant has established a sufficient private life for the reasons I have outlined to render it disproportionate at this stage in her academic career to remove her from the United Kingdom. This in my judgment would have no positive impact on the Secretary of State's legitimate duty to ensure immigration control."

9. The respondent lodged an application for permission to remain that contained four grounds. In my opinion paragraphs 1 and 2 make the same point which is that the appellant failed to meet the requirements of the Immigration Rules as a Tier 4 migrant under paragraph 245ZX(ha) as she has exceeded the five year limit stated

within the Rules. The Immigration Judge failed to make any findings under the amended Rules. He failed to have regard to the Immigration Rules in making its Article 8 assessment. The Immigration Rules are a detailed expression of government policy on controlling immigration and protecting the public. Therefore when a Tribunal considers an individual appeal it should consider proportionality in the light of the clear expression of public policy. The failure to do this means that the decision the Tribunal made on Article 8 is incomplete and is also unsustainable as it failed to consider a key element in the assessment of this case.

10. Ground 3 said further and in the alternative the judge failed to give any or adequate reasons for finding that the appellant's Article 8 rights would be breached, in allowing the appeal on Article 8 grounds leading to a grant of three years' leave when the appellant's current studies are to be completed in September 2003 without adequate reasoning amounts to a material error of law.

11. The fourth ground said that the judge materially erred in law by failing to limit the leave to be granted to the appellant as she is nearly at the end of her course and does not meet the requirements of the Rules at the date of the hearing. The decision by the Court of Appeal, **Miah & Others [2012] EWCA Civ 261** confirmed that there is no near miss principle applicable to the Immigration Rules.

12. The First-tier Tribunal Judge who granted permission said that taking into consideration the guidance of the Upper Tribunal set out in **MF (Article 8 – new Rules) Nigeria [2012] UKUT 393 (IAC)**. It is arguable that the judge should have considered the application of the new Rules and then gone on to consider Article 8 outside the Rules informing himself of the greater specificity which they give to the importance the Secretary of State attaches to the public interest.

13. The First-tier judge then said that it was arguably perverse for the judge to find in favour of the appellant on the basis that the respondent's decision impacted upon her "emotional wellbeing" but to reject the guidance set out in **CDS (PBS "available" Article 8) Brazil [2010] UKUT 305 (IAC)** when the appellant appears to have been a person who was admitted to follow a course that had not yet ended. The latter guidance might have been to the benefit of the appellant in the circumstances of the case.

14. Ms Horsley relied on the Secretary of State's grounds. She submitted that even if the judge had set out a grant of leave to cover the duration of the appellant's current studies, he failed to take into account the public interest in relation to Article 8 which outweighs the appellant's appeal being allowed under Article 8. She said that the judge failed to have regard to the new Immigration Rules. Due to the change in the Immigration Rules in respect of Tier 4, the Secretary of State would not have been able to grant the appellant leave to undertake the Masters degree because that would have meant that she would be here for five years as a student under Tier 4.

15. Ms Horsley submitted that **(CDS) Brazil** is still relevant. Therein the Tribunal held that Article 8 does not give a judge liberty to depart from the Immigration Rules simply because it seems unduly harsh. **CDS** was decided at a time when the maintenance requirement applicable to an applicant was not within the Rules. That had an influence on the panel to allow the applicant's appeal under Article 8. That decision has since been incorporated directly within the Immigration Rule. **CDS** says Article 8 may apply but there must be cumulative factors to engage Article 8. It was also decided at a time when public interest was not as clearly defined as they are now within the Immigration Rules. Ms Horsley argued that the new Rules lay out the test for Article 8 private life. The appellant has failed to meet the Immigration Rules under the point-based system. Article 8 does not apply to her because her case is not exceptional.

16. Mr Symes submitted that there is no material error of law in the judge's decision. He accepted that the judge made no reference to Article 8 in the Immigration Rules but that would not have made an ultimate difference to the judge's decision. It is clear on the authorities that where the Immigration Rules do not reflect pre-existing case law, it is up to the judge to fill in the gaps – paragraph 41 of **MF**.

17. Mr Symes submitted that student cases are not cases where private life finds a reflection in the new Immigration Rules. Paragraph 27ADE is about lengthy connection and family ties abroad. There is a vacuum in the Rules vis-à-vis Article 8 in student cases. In the circumstances the judge's determination is defensible. The judge found that the appellant had built up a private life, which was a mix of education, financial commitment and embarrassment following her withdrawal from the first degree course and the potential failure of not completing the course. All these factors impacted on her emotional wellbeing. She was towards the end of her studies. Therefore removal of the appellant at this stage would be disproportionate. Overall the determination was adequate.

18. Mr Symes went on to consider to what extent the appellant was culpable in her understanding of the Immigration Rules. 245ZX(ha) states if the course is at degree level or above, the grant of leave to remain the applicant is seeking must not lead to the applicant having spent more than five years in the UK as a Tier 4 (General) Migrant or as a student, studying courses at degree level or above. Mr Symes submitted that the appellant's true situation was that she spent nine months when she first came here on studying English and one year on a first degree before pulling out. She was granted fresh leave for a change of her degree course which she completed. The five years refers to the period of study and not a grant of five years' leave to remain. That should not count against her in the Article 8 assessment. The approach taken by the judge is satisfied.

19. As regards **CDS** Mr Symes said the relevant point is made at paragraph 18 where the Tribunal states:

> "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 rights or expectation of extension of stay irrespective of the provisions of the Immigration Rules at the time of the relevant decision on extension."

Mr Symes submitted that the appellant has spent significant funds on her studies in the UK. The public interest in refusing the appellant's application is limited.

Findings

20. I accept, as did Mr. Symes, that the judge failed to have regard to the new Rules under Article 8. The Upper Tribunal in **Izuazu** said that in cases to which the new Immigration Rules introduced as of 9 July 2012 by HC 194 apply, judges should proceed by first considering whether a claimant is able to benefit under the applicable provisions of the Immigration Rules designed to address Article 8 claims. Where the claimant does not meet the requirement of the Rules it would be necessary to go on to make an assessment of Article 8 applying the criteria established by law. The Upper Tribunal's observation in **MF (Article 8 – new Rules) Nigeria [2012] 00393 (IAC)** to the same effect is endorsed. In light of the decision in **Izuazu** I find that the judge erred in law in failing to first consider whether the appellant is able to benefit under the new Rules in respect of Article 8.

21. The question is whether the error materially flaws the judge's decision. Ms Horsley says it does because the judge failed to consider the public interest involved in an assessment of this nature and furthermore the appellant's case was not exceptional. Mr Symes said it would have made no difference to the judge's decision because the public interest to be considered under paragraph 276ADE talks about lengthy connections the appellant has to the UK and family ties abroad.

22. I do not find that the appellant's understanding of the Immigration Rules should be a consideration. Paragraph 245ZX(ha) was in force when she made her application. Under the Tier 4 Guidance (v11.OEXT valid from 6 April 2013), interruptions to study are not taken into account. This is because the Immigration Rules paragraphs 245ZX(h)-(hb) are based on the 'grant of leave'. This means that the two years the appellant worked at home trying to improve her abilities in English would not have been taken into account in calculating five years in the UK as a Tier 4 (General) Migrant. The judge's finding that the appellant did not qualify for leave to remain under the Immigration Rules was in her particular circumstances sustainable.

23. I agree with Mr Symes that the Article 8 Immigration Rules do not cover the case of a student such, as this appellant, who does not qualify to remain under the Immigration Rules because the grant of a further year would mean she would exceed five years studying in the UK on a course at degree level and above. The Article 8 private life referred to in the new Rules (paragraph 276ADE) deals with cases where an applicant has a lengthy period of leave in the UK and has no social, cultural or

family ties with the country to which they would have to go if required to leave the UK. That is not the case here. The appellant was applying for a further year to study for a Masters degree in the UK. The judge accepted that the appellant does not qualify for leave to remain under the Immigration Rules. I also accept that there is no near miss principle in the Immigration Rules. The judge found that **CDS** did not apply to this case. I agree with him for the reasons given by him and for the reasons alluded to by Miss Horsley.

24. There is therefore a vacuum in the Immigration Rules vis-à-vis Article 8 and students. In the circumstances the judge was left with considering the appellant's appeal under Article 8 of the ECHR. The judge's failure therefore to consider the Article 8 sections of the Immigration Rules discloses no material error of law.

25. Counsel handed me a letter from Wilson Solicitors dated 30 July 2013 addressed to the Tribunal Service. The letter relied on paragraph 5.2 of the Immigration Directorate Instructions concerning what period of leave should be granted when an appeal against refusal of an application under the points-based system has been allowed on Article 8 grounds. It states as follows:

> "Where an appeal against refusal of an application under the points-based system has been allowed on Article 8 grounds which relate to the initial application, e.g. a refusal of a student application is held to be a breach of Article 8 because the student would be unable to complete their course, the appellant should be granted leave of the same type and duration and on the same conditions as if the relevant points-based system application had been granted."

26. Wilson & Co made the point that the appellant would not therefore have been granted three years' leave to remain as stated in paragraphs 3 and 4 of the Secretary of State's grounds of appeal. I agree with this entirely.

27. Wilson & Co also made the point that the extract from the Tier 4 guidance shows that the appellant would only have been granted leave to remain until the end of her MSc course and an additional four months after the course ends, that is, until 31 January 2014. I do not agree. As the appellant's appeal could not succeed under the Tier 4 Rules and I find that this guidance does not apply to her.

28. I find that had the judge relied solely on the impact of removal on the appellant's emotional wellbeing, his decision would have been perverse. He did however place significant weight on the fact that the appellant was now at the very end of her Master's Degree. She had finished her exams and now only had a dissertation to write up. In those circumstances, and in light of the IDI, the judge should have directed that the appellant be granted limited leave to remain to complete her Master's Degree. His failure to do so was an error of law.

29. I set aside the judge's decision and remake it. I allow the appellant's appeal under Article 8 of the ECHR only to the limited extent that the appellant is granted leave to remain to enable her to complete her Master's Degree.

Signed Date

Upper Tribunal Judge Eshun