Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09130/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 26 November 2013	**On 4 December 2013**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

PALANIVEL MARUTHAMUTHU UDAIYAR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance
For the Respondent: Mr L Tarlow, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of India where he was born on 15 January 1977. He appeals with permission the decision of First-tier Tribunal Judge Deavin who dismissed his appeal against the decision of the Secretary of State made 7 March 2013 refusing the appellant's application for leave to remain as a Tier 2 (General) Migrant. In that decision the Secretary of State refused to vary leave and furthermore made the decision to remove

the appellant. There was no appearance by the appellant nor his representatives at the hearing before me on 26 November nor any explanation for this absence. I proceeded to hear the appeal at 10.15 am and gave my oral determination.

2. The grounds of appeal by the appellant against the Secretary of State's decision were that (i) the decision was not in accordance with the Immigration Rules; (ii) the decision was unlawful under s.6 of the Human Rights Act 1998; (iii) the decision was not otherwise in accordance with the law; (iv) the Secretary of State should have exercised her discretion differently conferred by the Immigration Rules; (v) removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention and/or otherwise would be unlawful under s.6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights.

3. The application made by the appellant had been for further leave to continue in the employment of India Eateries Limited trading as Saravana Bhavani, a specialist South Indian vegetarian restaurant with branches worldwide of which six are in the United Kingdom.

4. The appellant arrived in the United Kingdom on 17 November 2009 with entry clearance as a Tier 2 (Intra-Company Transfer) for employment for three years by this employer. The application leading to the decision under appeal was made on 12 December 2012 for two further years to remain.

5. The respondent awarded the points sought by the appellant in respect of *sponsorship* (30 points), *appropriate salary* (20 points) and *maintenance (funds)* (10). None of the points sought was awarded in respect of *English language*. The reasons given by the Secretary of State was as follows:

> "• You were first granted leave as a Tier 2 (Intra-Company Transfer) Migrant on 17 November 2009. You have applied to extend your leave for a period that combined with the time you have already spent in the United Kingdom as a Tier 2 (Intra-Company Transfer) Migrant will take you beyond three years in the United Kingdom in this category.
>
> • You were therefore required to satisfy the English language requirements as specified under Appendix B of the Immigration Rules
>
> • You have made on your application form that your evidence has previously been submitted. This has been noted and checked with your file but no evidence can be found.
>
> • Evidence of English language was requested on 26 February 2013. No evidence to establish that you meet any of the provisions for the award of points for English language has been provided."

6. I pause there to observe that in an email dated 26 February 2013 addressed to the appellant's advisors, the Secretary of State explained that as the appellant had sought to extend his leave to remain over a three year period he would need to meet the English language requirement. He was invited to provide evidence to satisfy the English language requirement within the next five working days.

7. The appellant's representatives responded in an email on 4 March 2013. They made reference made to paragraphs 27, 28 and 29 of the Tier 2 policy guidance which "clearly states" that where the applicant had obtained Tier 2 ICT under the Rules prior to 6 April 2010 he could apply to extend the leave beyond five years and the job should be at NQF Level 3.

8. The representations go on to state that the applicant had got the Tier 2 ICT leave for three years on the basis of the Rules prior to 6 April 2010 and was therefore allowed to extend his leave beyond three years and not required to satisfy the English language requirement. The representative also referred to three other applicants whose applications had been recently been approved, providing details of their names and their case numbers. The Secretary of State however proceeded to make her decision on 7 March without further correspondence.

9. The appellant was represented by Counsel before the First-tier Tribunal when the judge heard evidence from him and his employer, Mr Dhanesh Frederick. The respondent was also represented by a Presenting Officer, Miss Leyshon. After summarising the evidence he heard and the submissions from the parties, the judge noted that the appellant and his employer had been incorrectly advised by the representatives that an English language certificate was not required. He observed that that representative had chosen to contest what had been said by the Secretary of State in the email dated 13 February 2012. The judge then proceeded to state his conclusions at paragraphs 58 and 59 which I quote:

> "58. I find that there was, at the time of this application, a requirement that an English test certificate should be provided and none was. That means that the respondent's decision was the correct one and was in accordance with the law and the Immigration Rules and I come to similar conclusions myself, for like reasons.
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> 59. The test certificates that have been provided cannot assist as they were not in existence were not provided at the time of the application and, in any event, they are not from an approved provider."

10. The grounds of application for permission to appeal that decision are, in summary, that the judge failed to take into account or give adequate reasons in relation to the appellant having been in employment with an UK company for more than three years and that the refusal of the leave interfered with the rights of the UK based employer to employ the staff needed by the business. It is argued that Mr Frederick's evidence was very relevant to the question whether Article 8 was engaged. It is also argued that the judge failed to determine the *Razgar* question 3, whether the decisions were in accordance with the law. Finally it is argued that the judge failed to take into account that the immigration decision of 7 March

2013 included a decision to remove the appellant by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006.

11. Permission to appeal was granted by First-tier Tribunal Judge Nicholson who in a decision dated 16 September 2013 summarised the grounds of application before him and reached this conclusion in paragraph 4 which I quote:

> *"4. It is arguable that in the circumstances that the judge did err on this issue* [being a reference to the removal decision made concurrently with a decision refusing further leave to remain] *and permission is therefore granted on this ground]. I do not refuse permission on the remaining grounds which relate to Article 8 the ECHR although Article 8 itself appears to be devoid of merit."*

12. Directions were issued by the Upper Tribunal on the grant of permission to appeal inviting the parties to take certain steps in order to prepare for the hearing before the Upper Tribunal. In particular, the parties were directed to serve on the Upper Tribunal not later than 21 days after the date of those directions, an indexed and paginated bundle containing all documentary evidence relied on pursuant to Rule 15(2A) of The Tribunal Procedure (Upper Tribunal) Rules 2008. The parties were warned that a failure to serve evidence as required may lead to the Upper Tribunal refusing to admit that evidence. There has been no compliance.

13. On behalf of the Secretary of State Mr Tarlow accepts that the judge had not reached a conclusion on the Article 8 grounds. He observed the observation of First-tier Tribunal Judge Nicholson that the Article 8 case appeared to be devoid of merit and maintained that as his submission. Whilst accepting that there was an error by the judge in failing to reach a concussion on the Article 8 grounds, he did not consider the error to be material.

14. I raised with Mr Tarlow the other limb on which permission had been specifically granted relating to the concurrent decisions refusing to vary leave and to remove the appellant. In this regard I have noted a letter from the Secretary of State of 4 October 2013. This letter is the Rule 24 response provided for under the Procedure Rules. It is argued that the judge's failure to address Article 8 or make any findings needs to be considered in the context of the appellant having been fully represented at the hearing by Counsel and that the determination recorded no submissions whatsoever regarding Article 8. It is suggested that this was wholly unfair and did not make out a material error capable of having a material impact on the outcome of the appeal and amounted to no more than a disagreement with the findings.

15. With reference to s.47 of the Immigration, Asylum and Nationality Act 2006, it is explained in the response that without the benefit of access to the respondent's file it was not clear whether there had been a s.47 refusal. It is submitted that if there had been such a refusal the respondent respectfully submitted that this was not a material error capable of having a material impact on the outcome of the appeal.

16. I observed to Mr Tarlow that aside from the Article 8 issue, it was clear to me that the decision to remove the appellant was an unlawful one and in the event that I decide to remake the decision the appeal would need to be allowed on that basis. As I understand it Mr Tarlow accepted that to be the position.

17. I reach these conclusions on the submissions from Mr Tarlow and the matters raised in the grounds of application for permission to appeal. I shall deal first with the Article 8 grounds.

18. In this regard I referred Mr Tarlow to the recent decision of the Supreme Court in *Patel and Others v SSHD* [2013] UKSC 72. In particular the observations of Lord Carnwath at paragraph 57 which I quote:

> "It is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the Rules which may be unrelated to any protected human right. The merits of the decision not to depart from the Rules are not reviewable on appeal: s.86(6). One may sympathise with Sedley LJ's call in *Pankina* for commonsense in the application of the Rules to graduates who have been studying in the United Kingdom for some years: see paragraph 47 above. However such considerations do not by themselves provide grounds of appeal under Article 8 which is concerned with private or family life, not education as such. 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."

19. There is no dispute that the First-tier Tribunal Judge failed to consider Article 8. There has been no challenge to the findings by the First-tier Tribunal Judge that the appellant did not meet the requirements of the Rules. The question I must ask is whether that failure is an error on a point of law. I am satisfied it is. The First-tier Tribunal was required to consider pursuant to s.86 of the Nationality, Immigration and Asylum Act 2002 any matter raised as a ground of appeal.

20. The next question is whether the decision as a consequence requires to be remade pursuant to s.12 of the Tribunals, Courts and Enforcement Act 2007. The appellant has not taken the opportunity of producing any new evidence. The evidence before the First-tier Tribunal is set out in the determination and I have also had regard to the witness statements of the appellant and Mr Frederick. In his statement, the appellant explains at paragraph (g) that he had established a private life in the United Kingdom and that any removal would constitute disproportionate interference with that private life. He refers to his success in having passed an English test with EMB Qualifications Limited and his disappointment that the respondent had failed to reconsider her decision. The statement by Mr Frederick refers to his frustration and difficulty he would encounter as the appellant is a key member of the Key Operations Restaurant. Without the appellant, the business will suffer very badly and they may have to cut down their operations due to the severe shortage of skilled staff that it is impossible to find in the local employment market.

21. Although the guidance given in *Patel and Others* relates to the quality of private life of somebody who has been granted permission to remain in the United Kingdom in order to pursue a course of study, by analogy, the same principles can be applied to the circumstances of the appellant before me he was granted permission to work in this country for three years with an opportunity for an extension of two years provided he met certain English language requirements. There was nothing in the evidence before the First-tier Tribunal to show that a private or family life has been established by the appellant of the kind that requires protection under Article 8. Furthermore article 8 (disregarding whether a company can acquire protected rights) does not entitle an employer to select whom he wishes for his business activity without regard to the Immigration Rules and law.

22. I am not persuaded that even if the judge had addressed the Article 8 argument he could have come to a decision other than to dismiss the appeal on the basis that Article 8 was not engaged. The observation has been made by the appellant and his advisers that other employees were successful in obtaining an extension of leave to remain. There is no argument that there is a policy in play by the Secretary of State which was not engaged. Mr Tarlow observed that there was no evidence regarding the circumstances of the five employees whose details were provided in Mr Frederick's statement.

23. As observed by Lord Carnwath in *Patel and others,* the decisions not to depart from the Rules are not reviewable on appeal. Whatever the reasons for the Secretary of State for deciding to grant the other applications, I am not satisfied that this created a legitimate expectation for the appellant to benefit likewise.

24. There has been no complaint by the appellant regarding a failure by the Immigration Judge to address the refugee law grounds. This is not surprising. There was no evidence before the judge regarding the basis of ground.

25. My conclusion in respect of the Article 8 and lawfulness grounds (but for what I have to say below) is such that the error by the First-tier Tribunal Judge does not require the decision in that regard to be remade.

26. I turn now to the impact of the combined decisions. I am satisfied that the First-tier Tribunal Judge erred in failing to reach a decision on the decision to remove the appellant. There is no dispute that the Secretary of State was not entitled to make that decision concurrent with the decision refusing to vary leave to remain. There has been a change in legislation to permit this (s. 51 of the Crimes and Courts Act 2013) but this was after the decision under appeal on 8 May 2031.

27. Accordingly I remake the decision solely in respect of the error by the judge in failing to determine the removal decision and allow the appeal against the decision to remove the appellant. The decision by the First-tier Tribunal Judge dismissing the appeal against the variation decision stands.

Signed Date 27 Nov. 13

Upper Tribunal Judge Dawson