Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/22274/2012

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 4 July 2013	**On : 5 July 2013**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD MUNEEB AFZAL

Respondent

Representation:

For the Appellant: Ms K Pal, Senior Home Office Presenting Officer
For the Respondent: In Person (with McKenzie Friend, Mr Shahzad Ahmad)

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (SSHD) against the decision of First-tier Tribunal Judge Woodhouse allowing Mr Afzal's appeal, on Article 8 grounds, against the respondent's decision to refuse leave to remain as a Tier 1 (Post-Study Work) Migrant.

2. For the purposes of this decision, I shall refer to the Secretary of State as the respondent and Mr Afzal as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Pakistan, born on 1 January 1988. He first arrived in the United Kingdom on 17 January 2010 with entry clearance conferring leave to enter as a Tier 4 (General) Student Migrant valid until 25 June 2011. On 13 October 2011 he was granted leave to remain as a Tier 4 (General) Student Migrant until 23 February 2012. On 23 January 2012 he applied for further leave to remain as a Tier 1 (Post-Study Work) Migrant under the Points Based System. His application was refused on 26 September 2012 on the basis that his ACCA qualification was a professional qualification and therefore did not meet the requirements for the award of points. He was accordingly awarded zero points under Appendix A and B of the Rules and was unable to meet the requirements of paragraphs 245FD(c) and (d) of HC 395.

4. The appellant appealed against that decision and his appeal was heard on 27 November 2012 by Judge Woodhouse. The judge did not accept that the appellant's ACCA qualification was a UK recognised degree and found that he was accordingly not able to meet the requirements of the immigration rules and she dismissed the appeal on those grounds. However, she went on to allow the appeal on human rights grounds under Article 8 of the ECHR, with reference to the guidance in CDS (PBS: "available": Article 8) Brazil [2010] UKUT 00315 (IAC).

5. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge had failed to have regard to the requirements of the new Article 8 rules. The grounds also referred to the fact that the appellant would have completed his ACCA qualification by the time the determination was promulgated and relied on the guidance in CDS in that respect.

6. Permission to appeal was granted on 17 January 2013 on the grounds argued.

Appeal hearing and submissions

7. The appeal was initially listed for hearing on 4 March 2013. However in view of the indication before the Tribunal that the appellant wished to cross-appeal on the basis that the case of Mirza v SSHD (ACCA Fundamental level qualification – not a recognised degree) [2013] UKUT 00041 had been wrongly decided, the appeal was adjourned in order to await the outcome of a test case in the High Court. The appeal was listed for a 'For Mention' hearing on 20 May 2013, by which time the High Court had, in the case of in Syed, R (on the application of) v Secretary of State for the Home Department [2013] EWHC 984, endorsed the Upper Tribunal's decision in Mirza.

8. The appeal then came before me on 4 July 2013. The appellant was no longer legally represented, but was accompanied by a McKenzie friend, Shahzad Ahmad.

9. Ms Pal relied on the grounds of appeal, submitting that the judge had erred by failing to consider paragraph 276ADE of the immigration rules and had thereby erred in her proportionality assessment. Her reliance upon the fact that the appellant would not be able to work was irrational and perverse and the basis upon which she had allowed the appeal was in effect a "near miss" argument. She had given no consideration to other aspects of the appellant's private life or to the fact that he had no legitimate expectation of being able to remain in the United Kingdom and she had not taken into account the Secretary of State's interests in maintaining a firm immigration control.

10. Mr Ahmad, on behalf of the appellant, relied on a skeleton argument he had produced in submitting that the respondent was wrong to argue that the judge had erred by considering Article 8 without the immigration rules. He submitted further that the judge was right to consider the work experience part of the ACCA course since the qualification was not complete until the work experience had been undertaken. When the appellant had been granted entry to the United Kingdom to do the ACCA course there had been a legitimate expectation that he would be permitted to do the work experience part of the course.

11. I advised the parties that in my view the judge had erred in law by failing to consider the Article 8 immigration rules as part of her proportionality assessment and that her findings on Article 8 were materially flawed and had to be set aside.

12. In re-making the decision, I made further enquiries of the appellant in regard to his circumstances in the United Kingdom. He said that the course consisted of fourteen subjects of theoretical studies followed by the practical part of the studies. He should have completed the course in December 2012 but he had failed two subjects and so was studying to re-take them in December 2013. That was the professional part of the course, as he had already passed the fundamentals level. He could start the work experience at any time but needed to have Tier 1 leave in order to do so and therefore had not been able to commence that part of the course. I asked him why he could not do the work experience in Pakistan and he replied that the point of doing the ACCA course here was to do the work experience here. He confirmed that he was single.

13. I then heard from Mr Ahmad in regard to the appellant's circumstances and private life. He said that he was undertaking his studies and had friends in the same field of study. There were parts of the ACCA course, such as taxation, which were particularly relevant to the United Kingdom. ACCA had no chartered status in Pakistan and therefore the appellant could not become a chartered accountant there with that qualification whilst he would be able to do that in the United Kingdom.

14. Ms Pal submitted that there was no evidence from the ACCA board in Pakistan to show how their courses were regulated. There was no evidence that the ACCA course in Pakistan did not follow the same basic modules as the UK course or to show that the appellant would be disadvantaged by having to complete the course in Pakistan.

15. In response, Mr Ahmad said that the ACCA in Pakistan was just a qualification, like a degree, whilst in the United Kingdom you could become a chartered accountant. In Pakistan you could claim exemptions but you could not become a chartered accountant. The ACCA course in Pakistan was cheaper and easier, but people chose to do the course in the United Kingdom because of the effectiveness of the course.

Consideration and findings

Error of Law

16. In my view Judge Woodhouse erred in law in two main respects.

17. Firstly, by omitting to give any consideration to the new immigration rules, and by failing to take account of the fact that the appellant could not meet the requirements of those rules, she omitted from her assessment of proportionality the public policy interests raised by those rules. The Upper Tribunal provided guidance in the case of MF (Article 8 - new rules) Nigeria [2012] UKUT 393 as to the two-stage approach to the consideration of Article 8 and to the role to be played by the new rules in the context of the wider Article 8 assessment, in the following terms:

> "However, as a result of the introduction of the new rules, consideration by judges of Article 8 outside the rules must be informed by the greater specificity which they give to the importance the Secretary of State attaches to the public interest."

18. Indeed, in Green (Article 8 – new rules) [2013] UKUT 00254, the Upper Tribunal, following the decision of the Administrative Court in Nagre v SSHD [2013] EWHC 720, which in turn approved the guidance of the Upper Tribunal in Izuazu (Article 8 – new rules) [2013] UKUT 00045, endorsed the two-stage approach and emphasised the substantial weight to be attached to the rules in the assessment of proportionality. Whilst these latter decisions were subsequent to the appeal before Judge Woodhouse, they serve only to emphasise the need for judges to include in the proportionality assessment the public interest considerations in the immigration rules. Clearly that was a matter that the judge failed to do and as a result her proportionality assessment was flawed.

19. The second respect in which the judge erred in law was in her proportionality assessment at paragraph 65 of her determination, where she took as the overriding consideration the need for the appellant to complete the practical part of his course in a first-world country such as the United Kingdom.

As Ms Pal submitted the judge did not include in the balance other relevant considerations, such as the public interest in immigration control and the appellant's failure to meet the requirements of the rules.

20. In the circumstances, the judge's decision has to be set aside and re-made with respect to Article 8.

Re-making the Decision

21. It is clear that the appellant cannot meet the requirements of the immigration rules relating to private life, namely paragraph 276ADE, and there is no suggestion of any family life established in the United Kingdom relevant to Appendix FM of the rules. His inability to meet those rules has not been disputed.

22. In the wider context of Article 8, and following the guidance in R (Razgar) v SSHD (2004) UKHL 27, it does not appear to be in dispute that the appellant has established a private life here, based upon his studies, and that his removal as a consequence of the decision to refuse his application would interfere with his private life. Article 8 is engaged. The respondent's decision being in accordance with the law and in pursuit of a legitimate aim, namely the economic well-being of the country in terms of immigration control, the relevant issue in the appeal is thus proportionality.

23. In their decision in CDS, the Upper Tribunal made it clear that Article 8 could not be used as a means of getting around the immigration rules:

> "It is apparent from these principles that Article 8 does not provide a general discretion in the IJ to dispense with requirements of the Immigration Rules merely because the way that they impact in an individual case may appear to be unduly harsh."

24. It seems to me that that is precisely what the appellant is seeking to do. He cannot meet the requirements of the rules under the points based system because his qualification is not a degree. There was no legitimate expectation that the grant of leave to enter would enable him to complete the 36 months of work experience. He was not granted a period of leave of sufficient duration to include such activities but was granted only an initial period of one year, followed by a further period of eight months which enabled him to complete the fundamental levels of the course and to commence the professional ethics module. Had he wished to complete that module, he could have applied for further leave to remain under Tier 4, but he did not do so and chose instead to apply for Tier 1 leave. The letter dated 25 February 2013 from ACCA, upon which the appellant relies, makes it clears that the work experience part of the course could be completed after his studies. No evidence has been produced to show that the appellant could not undertake that work experience in Pakistan after completing the theoretical part of the course in the United Kingdom, with the benefit of the qualifications gained in the United Kingdom, and complete the ACCA course there. The appellant's situation is thus clearly not one contemplated by the Upper Tribunal in CDS when considering the circumstances in which a breach of Article 8 could be demonstrated.

25. The appellant has not provided evidence of other aspects of his private life in the United Kingdom other than his studies. His Article 8 claim appears, therefore, to be based almost exclusively upon those studies and his future employment prospects. It is claimed that he has friends here, but there was no

suggestion that such ties were so strong that they could not be continued from outside the United Kingdom. There are otherwise no other ties to the United Kingdom. In such circumstances, the appellant's case with respect to Article 8 appears to be simply that the immigration rule itself, in preventing him and others from undertaking the practical experience part of the ACCA course in the United Kingdom, is unfair and disproportionate. However such an argument was rejected by the Administrative Court in Syed, in their findings at the end of paragraph 29 of their judgement.

26. Furthermore, and as stated above, the new immigration rules relating to Article 8 provide a strong indication of where the public interest lies in the balancing exercise. The appellant cannot meet the requirements of those rules. He has not been able to show any weighty considerations to balance against the relevant public interest. He has been in the United Kingdom for only a relatively short amount of time, now three and a half years, and has no real ties to the United Kingdom other than his studies and some friendships of which little is known. He has completed the first part of his course and has not applied for the appropriate leave to complete the subsequent module. He has provided no evidence to show that he would not be able to find work in Pakistan using his qualifications gained thus far in the United Kingdom and why he could not complete the ACCA qualification in Pakistan, the country where he spent the majority of his life. Even if it is the case, as Mr Ahmad submitted, that he could not become a chartered accountant in Pakistan, there is no reason why he could not otherwise work as an accountant in that country. He applied to come to the United Kingdom on a temporary basis and never had any legitimate expectation that he would be able to remain here permanently.

27. In all of these circumstances I find that the respondent's decision to refuse his application for Tier 1 leave is not disproportionate and that his removal in accordance with that decision would not breach Article 8 of the ECHR (albeit that a lawful removal decision has yet to be made by the respondent).

DECISION

28. The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. The decision has been set aside and to that extent the appeal made by the SSHD is allowed. I re-make the decision by dismissing the appellant's appeal, in regard to the variation decision, under the immigration rules and on Article 8 human rights grounds.

Signed

Date

Upper Tribunal Judge Kebede