Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/02031/2014
IA/02036/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28 August 2014	**On 29 August 2014**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Gurjeet Kaur
Sujinder Singh
[No anonymity direction made]

Claimants

Representation:

For the claimants: Mr Z Awan, instructed by Mayfair Solicitors
For the appellant: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimants, Gurjeet Kaur, date of birth 4.8.89, and her husband Surjinder Singh, date of birth 20.8.87, are both citizens of India.

2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Sweet, who allowed the claimants' appeals against the decision of the

Secretary of State, dated 20.12.13, to refuse their applications made on 16.4.13 for leave to remain in the UK as Tier 4 (General) Student Migrant and dependant spouse, and to remove them from the UK by way of directions under section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 13.6.14.

3. First-tier Tribunal Judge Landes granted permission to appeal on 10.7.14.

4. Thus the matter came before me on 28.8.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Sweet should be set aside.

6. In granting permission to appeal, Judge Landes found it arguable that Judge Sweet erred in law in the consideration of paragraph 245AA of the Immigration Rules and the application of a flexibility policy. "The basis on which the judge allowed the appeal was that the respondent should have sought further documents from the first appellant before making a decision (see paragraph 23 determination). It is not clear therefore why he allowed the appeal outright rather than remitting the decision to the respondent. I observe that the judge indicated that if he was wrong in his conclusions, he would have allowed the appeal on human rights grounds on the basis of CDS (Brazil). The grounds do not specifically deal with this point but it seems arguable that the judge erred in law in this respect in that he did not direct himself in accordance with Patel [2013] UKSC 72 (in particular paragraph 57)."

7. The application of the first claimant failed because she failed to qualify for the necessary 10 points under Appendix C in respect of maintenance funds. On the calculation of the Secretary of State, the claimant needed to demonstrate a total of £4,400 over a consecutive period of 28 days between 5.2.13 and 4.3.13. However, the submitted bank statement showed a maximum balance during that period of £4,201.04. The claimant therefore did not meet the requirements of paragraph 245ZX of the Immigration Rules. The appeal of the second claimant dependant husband stands or falls with that of his wife.

8. Judge Canavan carefully set out the evidence and submissions and at §17 of the determination noted that the claimant submitted 6 pages of bank statements and "there was therefore no indication to the respondent that there were any missing documents, namely consecutive bank statements, on which they should have sought further information pursuant to paragraph 245AA of the Immigration Rules." The judge concluded within §17 of the determination that the Secretary of State was entitled to take the decision she did.

9. However, from §18 of the determination Judge Canavan went astray in the application of paragraph 245AA and application of an evidential flexibility policy.

10. In SSHD v Rodriguez and Others [2014] EWCA Civ 2, where it was held that the Secretary of State was not under any obligation to afford applicants for leave to remain as Tier 4 (General) Student Migrants any opportunity to remedy defects in their application under an evidential flexibility policy. The Court of Appeal noted that the evidential flexibility policy was not designed to give an applicant a general opportunity first to remedy any defect or inadequacy in an application or supporting documentation so as to save the application from refusal after consideration.

11. The common law principle of fairness does not impose any such obligation and nor do the specific provisions of paragraph 245AA of the Immigration Rules, which came into force in relation to PBS cases in September 2012. In effect, in relation to PBS cases no evidential flexibility policy survived the introduction of paragraph 245AA. The provisions of 245AA are set out below:

> "245AA. Documents not submitted with applications
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> (a) Where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the Entry Clearance Officer, Immigration Officer or the Secretary of State will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with subparagraph (b).
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> (b) If the applicant has submitted specified documents in which:
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> (i) Some of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing);
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> (ii) A document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or
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> (iii) A document is a copy and not an original document; or
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> (iv) A document does not contain all of the specified information;
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> the Entry Clearance Officer, Immigration Officer or the Secretary of State may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received at the address specified in the request within 7 working days of the date of the request.
>
> (c) Documents will not be requested where a specified document has not been submitted (for example an English language certificate is missing), or where the Entry Clearance Officer, Immigration Officer or the Secretary of State does not anticipate that addressing the omission or error referred to in subparagraph (b) will lead to a grant because the application will be refused for other reasons.
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> (d) If the applicant has submitted a specified document: (i) in the wrong format; or
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> (ii) which is a copy and not an original document; or

> (iii) which does not contain all of the specified information, but the missing information is verifiable from:
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> (1) other documents submitted with the application,
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> (2) the website of the organisation which issued the document, or (3) the website of the appropriate regulatory body;
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> the application may be granted exceptionally, providing the Entry Clearance Officer, Immigration Officer or the Secretary of State is satisfied that the specified documents are genuine and the applicant meets all the other requirements. The Entry Clearance Officer, Immigration Officer or the Secretary of State reserves the right to request the specified original documents in the correct format in all cases where (b) applies, and to refuse applications if these documents are not provided as set out in (b)."

12. The judge took the view that the Secretary of State could have seen that the bank statements were not sufficiently up-to-date, "and if it had sought the outstanding documents they would have seen that for the relevant period the appellant did indeed have the necessary £4,400 over a 28 day period (as now shown on pages 16 to 18 of the appellant's bundle)."

13. That conclusion amounted to an error of law. It was for the claimant to submit the documents relied on as evidence that she met the requirements of the Immigration Rules. As the judge noted at §17, there was nothing within the submitted bank statements to suggest to the Secretary of State that there was a missing page or other document, on which further information should have been sought. All the bank statements were consecutive and numbered 6 pages. The conclusion reached at §18 and §19 is entirely inconsistent with the finding at §17 and with the provisions of paragraph 245AA. There was nothing within the submitted bank statements, which went up to 4.3.13, to suggest that later bank statements would have shown the £4,400 the claimant needed to evidence. The Secretary of State is not required to speculate as to whether there may be other documents or funds sufficient to meet the application.

14. Further, in taking into account the later bank statements submitted by the claimants for the purpose of the appeal, Judge Canavan fell foul of section 85A(4) of the Nationality Immigration and Asylum Act 2002, which prohibits the Tribunal from considering evidence in a PBS case that was not submitted in support of and at the time of making the application to which the immigration decision relates.

15. If the judge concluded that the Secretary of State had failed to properly seek further information from the claimant, the correct course would have been to allow the appeal to the limited extend that it remained for the Secretary of State to make a decision in accordance with the Rules.

16. In the circumstances the decision of the First-tier Tribunal on immigration grounds cannot stand and must be set aside and remade.

17. Judge Canavan was also in error in the alternative conclusion at §20 of the determination that the appeal would have been allowed under article 8 on the basis of private life, pursuant to CDS (Brazil) [2010] 00305 (IAC). That authority is somewhat dated and the judge failed to consider Patel [2013] UKSC 72, at paragraph 57 where the court held that article 8 is not a general dispensing power. "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."

18. More recently, in Nasim and others (article 8) [2014] UKUT 00025 (IAC), the Upper Tribunal considered whether the hypothetical removal of the 22 PBS claimants, pursuant to the decision to refuse to vary leave, would violate the UK's obligations under article 8 ECHR. Whilst each case must be determined on its merits, the Tribunal noted that the judgements of the Supreme Court in Patel and Others v SSHD [2013] UKSC 72, "serve to re-focus attention on the nature and purpose of article 8 of the ECHR and, in particular, to recognise that article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity."

19. The panel considered at length article 8 in the context of work and studies. The respondent's case was that none of the appellants could demonstrate removal would have such grave consequences as to engage article 8. §57 of Patel stated, "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 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."

20. At §14 of Nasim [2014], the panel stated:

> "Whilst the concept of a "family life" is generally speaking readily identifiable, the concept of a "private life" for the purposes of Article 8 is inherently less clear. At one end of the "continuum" stands the concept of moral and physical integrity or "physical and psychological integrity" (as categorised by the ECtHR in eg Pretty v United Kingdom (2002) 35 EHRR 1) as to which, in extreme instances, even the state's interest in removing foreign criminals might not constitute a proportionate response. However, as one moves down the continuum, one encounters aspects of private life which, even if engaging Article 8(1) (if not alone, then in combination with other factors) are so far removed from the "core" of Article 8 as to be readily defeasible by state interests, such as the importance of maintaining a credible and coherent system of immigration control."

21. In none of the cases under consideration in Nasim did the claimant's private life rights render their removal and interruption to their studies disproportionate. As the court held, "unless there are particular reasons to reduce the public interest of enforcing immigration controls, that interest will consequently prevail in striking the proportionality balance (even assuming that stage is reached)."

22. Mr Awan submitted that at the First-tier Tribunal he argued the issue of fairness and submitted to me that as this was an in-country appeal, the judge was entitled when considering article 8 to look at all the evidence up-to-date and take account of the fact that the claimant had the money and could have demonstrated that to the Secretary of State if the correct documents had been submitted. I see no reference to a fairness issue in the determination. Whilst the outcome may seem harsh to the claimants, I do not accept Mr Awan's argument that the decision was unfair. There is nothing in the decision or actions of the Secretary of State that is unfair and it is not unfair to apply the Rules, which include a degree of latitude under paragraph 245AA but only in certain types of situation, none of which meet the facts of this case.

23. In the circumstances the judge's conclusion at §20 of the determination was in error, if indeed it is part of the decision, as it was expressed in the alternative. There was and is no proper basis to allow the appeal under article 8 on the single stated reason that she had completed over one year of her studies.

24. Both Mr Awan and Mr Avery agreed with me that there was no purpose in hearing further evidence on the matter before remaking the decision, which I did by dismissing the appeal on all grounds.

Conclusions:

25. For the reasons set out herein, the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside and remade. There is no basis either under the Immigration Rules or article 8 private life to allow the appeal. The appeal should have been dismissed at the First-tier Tribunal.

I set aside the decision.

I re-make the decision in the appeal by dismissing it.

Signed: Date: 28 August 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed.

Signed: Date: 28 August 2014

Deputy Upper Tribunal Judge Pickup