IAC-AH-DP/KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05758/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 10 December 2014	**On 23 December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant
and

MR ZUBAIR MUSTFA
(ANONYMITY DIRECTION NOT MADE)
Respondent/Claimant

Representation:
For the Appellant: Mr T Melvin, Specialist Appeals Team
For the Respondent/Claimant: Mr I Hussain, Legal Representative, Syeds Law Office Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing on human rights (Article 8) grounds an appeal by the claimant against the decision by the Secretary of State to refuse to grant him leave to remain as a student, and against the Secretary of State's concomitant decision to remove him. The First-tier Tribunal did not make an anonymity

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direction, and I do not consider that such a direction is warranted for these proceedings in the Upper Tribunal.

The Claimant’s Material History

2. The claimant is a national of Pakistan, whose date of birth is 10 January 1985. He first landed in the United Kingdom on 1 May 2010 with valid entry clearance as a student until 8 August 2011. He was granted leave to remain as a student from 2 August 2011 until 6 January 2014.

3. On 23 December 2013 he applied to extend his stay in the United Kingdom as a Tier 4 (General) Student Migrant. As was apparent from the CAS, the appellant was seeking to repeat year 2 of his level 5 diploma in management and leadership. The sponsor explained that he had made good progress on this course. However, due to his uncle’s brain haemorrhage illness and subsequent death in May 2013, he had found it difficult to concentrate in the second year of the course and not been able to submit his assignments needed to achieve the qualification. His ability to continue the course was based on his performance to date. As he was repeating the second year of the course in order to achieve a full qualification, the sponsor was satisfied he was making a satisfactory academic progression.

The Reasons for Refusal

4. On 22 January 2014 the Secretary of State gave her reasons for refusing the claimant’s application. Grants of entry clearance or leave to remain for Tier 4 applicants to undertake studies below degree level from the age of 18 were limited to a maximum period of three years. He had previously been granted leave to enter in order to study at Pitman Training Centre. That was for fifteen months eight days in duration. He was then granted further leave to remain to study for a level 5 diploma in management and leadership at the Pitman Training Centre in Peterborough for 24 months and two days. As he was applying for leave to remain and wanted to study a course below degree level, which was eleven months and 27 days in duration, a further grant of leave would exceed a period of three years of combined study below degree level. So the Secretary of State was not satisfied that a further period of leave in this category could be granted. It had therefore been decided to refuse his application for leave to remain under paragraph 245ZX(h) of the Rules.

The Hearing Before, the Decision of, the First-tier Tribunal

5. The claimant’s appeal came before Judge North sitting at Nottingham Magistrates’ Court on 13 June 2014. Both parties were legally represented. It was accepted on behalf of the

claimant that he did not meet the requirements of the Rules, but it was argued that the decision represented a disproportionate interference with his right to respect for his private life in the United Kingdom. The judge allowed the appeal under Article 8 ECHR. The reasoning was contained in paragraph [10] of his decision:

> Having considered all of the evidence, I am satisfied that the [claimant's] account is credible. There is no suggestion that he had not been attending all of his course sessions as required and that his inability to complete his course was as a result of the death of his second paternal figure exacerbated by his financial inability to return for the funeral and then resume his studies after a period of mourning. I am satisfied that otherwise the [claimant] would have completed his course. I am unable to identify any provisions in the Immigration Rules relating to the [claimant's] studies which takes into account the exceptional circumstances faced by him. The [SSHD's] decision was lawful and that it was made within the terms of the Immigration Rules. It does engage the [claimant's] rights under Article 8, because it affects his ability to complete his education. The decision is made in pursuance of the UK's legitimate aim of fair immigration control. It falls to me to consider whether the decision is a disproportionate interference with the [claimant's] right to respect for private life. In all the circumstances, I find that to refuse the [claimant's] application and to require him to leave without completing his course will effectively end his chances of higher education. There is no realistic prospect of him completing that education without continuing to study at Pitman. In all the circumstances, I find the SSHD's decision amounts to a disproportionate interference of the claimant's rights to respect for his private life and to that extent I allow the appeal.

The Application for Permission to Appeal

6. A member of the Specialist Appeals Team settled the application for permission to appeal on behalf of the Secretary of State. It was made clear in **Gulshan [2013] UKUT 00640 (IAC)** the Article 8 assessment should only be carried out when there were compelling circumstances not recognised by the Rules. The Tribunal did not identify such compelling circumstances and its findings are therefore unsustainable. The Tribunal failed to provide adequate reasons why the claimant's circumstances were either compelling or exceptional. There was nothing exceptional about his private life that could not be continued in Pakistan where he still had family in the form of his mother and he could maintain contact with any friends and connections here via modern methods of communication and visits as he had been able to do with his family in Pakistan from the UK. Should he wish to continue his studies, it was open for him to seek to return to do so. There was no right to remain purely in order to complete his education. If the Tribunal had taken his issues into consideration,

the Tribunal would have found that the decision to remove was proportionate.

The Grant of Permission to Appeal

7. On 6 November 2014 Designated First-tier Tribunal Judge Murray granted the Secretary of State permission to appeal on the ground that the judge had not identified, "the compelling and exceptional circumstances which are required for this human rights claim to succeed".

The Rule 24 Response

8. The claimant's solicitors settled a Rule 24 response in which they submitted that the judge had directed himself appropriately. He found there were exceptional circumstances in that the claimant was unable to complete his studies due to a death in the family. The Secretary of State's argument that the Rules were a complete code was misconceived, having regard to **R (on the application of Ganesabalan) v SSHD [2014] EWHC 2712 (Admin)**.

The Hearing in the Upper Tribunal

9. At the hearing before me, Mr Melvin developed the arguments raised in the grounds of appeal, and Mr Hussain developed the rebuttal of the error of law challenge set out in the Rule 24 response. Having carefully considered the submissions made by the parties, I ruled that an error of law had been made out. I indicated my reasons for so finding in short form, and my extended reasons are set out below.

Reasons for Finding an Error of Law

10. Of the authorities cited to me, **Nasim and Others (Article 8) [2014] UKUT 0025 (IAC)** is the most pertinent. At paragraphs [14] and [15] of **Nasim**, the Tribunal observed that 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 as to which, in extreme circumstances, 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), 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. On this point on the continuum, the essential elements of the private life relied upon will normally be transposable, in the sense of being capable of replication in their essential respects, following a person's return to their home country. A student here on a temporary basis has no expectation

of a right to remain in order to further his social ties and relationships in the UK if the criteria of the points-based system are not met.

11. The Tribunal went on in paragraph [16] to cite with approval **MG (assessing interference of private life) Serbia Montenegro [2005] UKAIT 00113** as follows:

> A person's job and precise programme of studies may be different in the country to which he is to be returned and his network of friendships and other acquaintances is likely to be different too, but his private life will continue in respect of all its essential elements.

12. The Tribunal at paragraph [20] reached the following conclusion:

> We therefore agree with Mr Jarvis that [57] of **Patel and Others** is a significant exhortation from the Supreme Court to refocus attention on the nature and purpose of Article 8 and, in particular, to recognise its limited utility to an individual where one has moved along the continuum, from that Article's core area of operation towards what might be described as its fuzzy penumbra. The limitation arises, both from what will at that point normally be the tangential effect on the individual of the proposed interference and the fact that, 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).

13. At paragraph [21], the Tribunal found the nature of the right asserted by each of the appellants before them, based on their desire as former students to undertake a period of post-study work in the United Kingdom, lay at the outer reaches of cases requiring an affirmative answer to the second of the five **Razgar** questions and that, even if such an affirmative answer needed to be given, the issue of proportionality was to be resolved decisively in favour of the Secretary of State, by reference to her functions as the guardian of the system of immigration controls, entrusted to her by Parliament.

14. The Tribunal went on to address the scope of **CDS (Brazil) [2010] UKUT 305 (IAC)**. At paragraph [41], they declined Mr Jarvis's invitation to find that the obiter remarks in **CDS** regarding Article 8 were no longer good law in the light of **Patel and Others**. But the Tribunal in **CDS** did however expressly knowledge that it was unlikely a person would be able to show an Article 8 right by coming to the United Kingdom for temporary purposes:

> The chances that such a right will prevail have, we consider, further diminished, in the light of the judgments in **Patel and Others**. It would, however, be wrong to say that the point has been reached where an adverse immigration decision in the case of a person was

> here for study or other temporary purposes can never be found to be disproportionate. What is clear is that, on the state of the present law, there is no justification for extending the obiter findings in **CDS**, so as to equate a person whose course of study has not yet ended with a person who, having finished their course, is precluded by the Immigration Rules from staying on to do something else.

15. It follows that it was not necessarily perverse, as submitted by Mr Melvin, for the judge to find that the interference with the claimant's studies consequential upon the refusal decision was disproportionate. But this appellant's case was weaker than the paradigm case of **CDS (Brazil)** in that he had been able to complete the course for which he had been granted entry clearance to the UK. Furthermore, on the current state of the law, the exceptional or compelling circumstances have to be very cogent to justify allowing an Article 8 claim on private life grounds by a student. The judge sought to justify his conclusion of disproportionality by finding that the refusal would effectively end the appellant's chances of higher education. This finding is not adequately reasoned, and so an error of law is made out.

The Remaking of the Decision

16. For the purposes of remaking the decision, I invited Mr Hussain to tender the claimant as a witness. In answer to questions from Mr Hussain, the claimant confirmed that he had completed the level 3 course for which he had sought entry clearance as a student. He could follow the level 5 course in Pakistan, but he would have to go back to the beginning of the course. He would not be able to rely on the transcripts of results showing that he had successfully completed year 1 of the course in the UK. But once he had completed a level 5 course in Pakistan, he would be eligible to apply for leave to enter the United Kingdom in order to follow a degree course.

17. His sponsoring college had lost its licence in June 2014, shortly after the hearing in the First-tier Tribunal. The college had stopped operating, and so he needed a letter from the Secretary of State to enable him to find an alternative sponsor within 60 days.

18. In his closing submissions on behalf of the Secretary of State, Mr Melvin submitted that the claimant's Article 8 claim was now even weaker than it was before the First-tier Tribunal, as it was now necessary to apply Section 117B of the 2002 Act. In reply, Mr Hussain submitted that the claimant had only been refused leave to remain on a technicality, and the public interest in his removal was reduced, applying **CDS (Brazil)**.

Discussion and Findings

19. The effect of the refusal decision is not to rob the claimant of the chances of pursuing his higher education either in the UK or in Pakistan. As the Rules do not enable a student to repeat a course below degree level (if the effect is to exceed the three year maximum), a student has to return to his country of origin or go to another country to repeat the course. While in the claimant's case this is inconvenient and will involve some additional and/or wasted expenditure, it does not have the consequence of frustrating his ultimate ambition of going on to study at degree level. There were undoubtedly compassionate reasons for the claimant not being able to satisfy the requirements of the Rules. But on analysis the interference consequential upon the refusal decision is not so grave as to engage Article 8(1) of the ECHR. In short, I answer questions 1 and 2 of the **Razgar** test in favour of the Secretary of State, not in favour of the claimant. But even if I am wrong about that, on the current state of the law, there can only be one answer to the remaining three questions of the **Razgar** test. The decision appealed against is in accordance with the law; it is necessary in a democratic society; and it is proportionate to the legitimate public end sought to be achieved. I am reinforced in my finding on proportionality by taking into account the factors set out in Section 117B of the 2002 Act as amended by the Immigration Act 2014. Of particular relevance is sub-Section 4, which provides that little weight should be attached to a private life which is established while a person's status is precarious. As a student who entered for a temporary purpose, the claimant clearly falls into the category of a person whose status is and always has been precarious.

20. Mr Hussain invited me to find in the alternative that the decision of the Secretary of State was not in accordance with the law, because she had not made a decision on exceptional circumstances. She had only considered the application under the Rules. While it is true that the Secretary of State only considered the application under the Rules, the application did not specifically invite her to exercise discretion on exceptional circumstances outside the Rules. So the duty on the Secretary of State to consider exercising her discretion outside the Rules did not arise on the facts of this particular case, in contrast to the facts of **Ganesabalan**.

Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant's appeal against the refusal of further leave to remain as a student, and against the concomitant decision to remove him, is dismissed under the Rules and under Article 8 ECHR.

Signed Date **23 December 2014**

Deputy Upper Tribunal Judge Monson