



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/16952/2013

THE IMMIGRATION ACTS

Heard at : Field House

On : 7 May 2014

**Determination
Promulgated**

On 14th May 2014

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SUKHPREET SINGH

Respondent

Representation:

For the Appellant: Mr G Saunders, Senior Home Office Presenting Officer

For the Respondent: No Appearance

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (SSHD) against the decision of the First-tier Tribunal allowing Mr Singh's appeal against the respondent's decision to refuse leave to remain as a Tier 1 (Entrepreneur) Migrant and to remove him from the United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

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

3. The appellant is a citizen of India born on 7 November 1988. He first entered the United Kingdom on 15 July 2009 with leave to enter as a student valid until 18 October 2011 and was subsequently granted a further period of leave as a Tier 1 (Post-Study Work) Migrant until 29 September 2012. On 27 September 2012 he applied for further leave to remain as a Tier 1 (Entrepreneur) Migrant, but his application was refused on 23 April 2013.

4. The application was refused under paragraph 244DD of the immigration rules on the grounds that the appellant had failed to meet the requirements of paragraphs 245DD(b). He was awarded zero points under Appendix A (Attributes) as he had failed to demonstrate that he was engaged in business activity in a specified occupation, since the business contract he had supplied did not meet the evidential requirements in paragraph 41-SD(c) of Appendix A. Furthermore, he was unable to demonstrate that he had access to the required funds.

5. The appellant appealed against that decision and his appeal was heard by First-tier Tribunal Judge Herbert on 13 February 2014. The judge noted that he had since produced an updated statement of contract rectifying the mistakes previously made and containing the missing details. However, since the contract was dated well after the decision to refuse leave to remain he found that the appellant could not succeed in his appeal under the immigration rules. He also rejected submissions made with regard to the evidential flexibility policy, relying on the principles in Secretary of State for the Home Department v Rodriguez [2014] EWCA Civ 2. He went on, however, to allow the appeal on Article 8 grounds on the grounds that there were “special circumstances” in the appellant’s case which outweighed the maintenance of immigration control.

6. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge had misdirected himself as to the correct test for the purposes of Article 8 and that his decision to allow the appeal on the basis that he did was contrary to the principles and guidance in Patel & Ors v Secretary of State for the Home Department [2013] UKSC 72 and Nasim and others (Article 8) Pakistan [2014] UKUT 25.

7. Permission to appeal was granted on 9 April 2014.

Appeal Hearing

8. The appeal came before me on 7 May 2014. There was no appearance by or on behalf of the appellant and no explanation for his absence. There appeared to be no reason why the appeal could not proceed in his absence. I therefore went on to hear submissions from Mr Saunders, who relied and expanded upon the grounds of appeal and asked that Judge Herbert’s decision be set aside and that the appellant’s appeal be dismissed on all grounds.

Consideration and Findings

9. Judge Herbert plainly made material errors of law in his decision such that it cannot stand and has to be set aside. Although he properly found that the appeal could not succeed under the immigration rules and that the appellant's circumstances did not fall within the evidential flexibility principles, his decision with respect to Article 8 took no account of the relevant immigration rules relating to private and family life and was inconsistent with the guidance provided in recent case law.

10. At no point did the judge refer to the appellant's inability to meet the requirements of Appendix FM and paragraph 276ADE of the immigration rules, nor to the principles set out in Gulshan [2013] UKUT 640 and Shahzad (Art 8: legitimate aim) Pakistan [2014] UKUT 85, whereby it was necessary to demonstrate arguably good grounds for granting leave to remain outside the rules before even being able to consider whether there were compelling circumstances. His finding, that there were "special circumstances" in the appellant's case, was made without any reference to such principles.

11. As Mr Saunders submitted, in finding that there were "special circumstances" in the appellant's case the judge was simply using Article 8 as a means of circumventing the immigration rules, contrary to the guidance in Patel, as endorsed in Nasim.

12. In Patel, the Supreme Court found, at paragraph 57:

"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."

13. The Upper Tribunal, in Nasim, found that:

"The judgments of the Supreme Court in Patel & Ors v Secretary of State for the Home Department [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."

14. In the appellant's case, the evidence before the judge relating to his private life in the United Kingdom was limited to his business activities, such activities having been found not to meet the requirements of the immigration rules so as to justify a grant of leave as a Tier 1 (Entrepreneur) Migrant. The circumstances found by the judge to be "special" amounted to little more than a desire by the appellant to conduct his business in the United Kingdom rather than in India, together with vague and speculative suggestions of contributions to the United Kingdom economy through the business. Clearly that was a wholly inadequate basis for concluding that a grant of leave to remain was justified outside the immigration rules.

15. In all of these circumstances the judge plainly erred in law in his decision to allow the appeal on Article 8 grounds. His decision is accordingly set aside.

16. In re-making the decision, it is clear that the appellant cannot meet the requirements of Appendix FM and paragraph 276ADE of the immigration rules and indeed it is not suggested that he could. In terms of the principles in Gulshan and Shahzad there are, for the reasons already given above, no arguably good grounds for granting leave to remain outside the rules. It is thus not necessary to go on to consider Article 8 in any wider context. The appellant's removal from the United Kingdom would not be disproportionate to the legitimate aim of maintaining an effective immigration control and would not be in breach of Article 8 of the ECHR.

DECISION

17. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed and the decision of the First-tier Tribunal is set aside. I re-make the decision by dismissing Mr Singh's appeal on all grounds.

Signed
Date
Upper Tribunal Judge Kebede