Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/18469/2013
IA/18470/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 29 September 2014	**On 29 September 2014**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Pratima Poyroo
Vishal Ackloo
[No anonymity direction made]

Claimants

Representation:

For the claimants: Mr Naveed, instructed by RW Anderson & Co
For the appellant: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimants, Pratima Poyroo, date of birth 21.5.84, and her dependant husband, Mr Vishal Ackloo, date of birth 4.6.77, are both citizens of Mauritius.

2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Ievins promulgated on 6.6.14, who allowed the claimants' appeals against the decisions of the Secretary of State to refuse their applications made on 28.9.12 for further leave to remain in the United Kingdom as a Tier 4 (General)

Student, and to remove them from the UK by way of directions pursuant to section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 28.5.14.

3. First-tier Tribunal Judge Lambert granted permission to appeal on 30.6.14.

4. Thus the matter came before me on 27.8.14 as an appeal in the Upper Tribunal. However, the claimants' representative fell ill and was unable to attend the hearing, thus it was adjourned to 29.9.14, reserved to myself.

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 Ievins should be set aside.

6. The relevant background is that the first claimant was granted leave to enter the UK as a student in 2005. I understand that the second claimant has been in the UK since 14.10.14. The first claimant's leave was subsequently extended until 14.10.13, with her husband as dependant. However, on 2.8.12, her leave was curtailed so as to expire on 1.10.12. Before the expiry of the curtailed leave, the claimants made applications for further leave to remain. It is the refusal of those applications that is the subject of the present appeal.

7. The application made on 28.9.12 was for the first claimant to study for an extended diploma in strategic management and leadership at St Patrick's International College from 26.9.12 to 20.9.13. As the first claimant had already exceeded the maximum amount of time to study at degree level or above, which was the reason for curtailment of leave, the application was refused.

8. Judge Ievins allowed the claimants' appeals on the basis:

   (a) That time did not run until the first claimant commenced studies under the PBS;

   (b) That not all of her studies were at degree level;

   (c) That an incomplete course did not count towards the period;

   (d) That in the circumstances she had not yet reached the 5 year limit;

9. Unfortunately, the judge was wrong on every count.

10. In granting permission to appeal Judge Lambert found it arguable that the Judge erred in failing to have regard to paragraph 245ZX(ha) and the case of Islam [2013] UKUT 00608.

11. In granting permission to appeal, Judge Lambert also found it arguable that there was an error of law in the judge's reliance on a Policy Guidance issued on its face as

being applicable to Tier 4 applications made on or after April 2014. The application the subject of appeal was made in 2012.

12. The decision of the Secretary of State was made on the basis that paragraph 245ZX(ha) provides that if the course is at degree level or above, the grant of leave to remain the applicant is seeking must not lead to the applicant having spent more than 5 years in the UK as a Tier 4 (General) Migrant, **or as a student**, studying courses **at degree level or above**, unless certain exceptions set out in 245ZX(i) to (iii) apply.

13. As Islam [2013] UKUT 00608 explained, the wording "or as a student" means that in calculating the period of time, the period before the introduction of the Tier 4 system has to be taken into account, nothing in relevant Guidance permits a contrary result. Thus all the time the appellant has spent in the UK studying courses at degree level or above has to be taken into account whether or not it was before the introduction of the Points Based System (PBS), and whether or not the claimant completed any such course.

14. Thus, contrary to the findings of the First-tier Tribunal all degree level study in the UK counts towards the 5 year limit, whether or not she completed any of her courses.

15. Without needing to detail it here, a list of the various courses studies by the first claimant is on the case papers. It is clear from that list produced by the Secretary of State, and Mr Naveed conceded, that she had already studies at degree level for more than 5 years prior to the 2012 application.

16. The Guidance relied on at the First-tier Tribunal was that in force from April 2014, and not the Guidance in force at the date of decision, 8.5.13. Further, the paragraph 107 referred to by the First-tier Tribunal Judge at §9 of the determination related to persons studying below degree level. Paragraphs 109 relates the limit of 5 years for study at or above degree level.

17. In the circumstances, the application of Ms Poyroo was correctly refused and as her dependant, Mr Ackloo's application also failed. Mr Naveed conceded at the hearing before me that they could not meet the requirements of the Immigration Rules.

18. It follows that Judge Ievins was in error in concluding at §10 of the determination that as the points based system (PBS) came into force in April 2009 policy guidance meant that time spent as a student under the previous Immigration Rules does not count towards the time limit.

19. In the circumstances, I found such error of law in the making of the decision of the First-tier Tribunal that it should be set aside and remade.

20. As the directions issued by the First-tier Tribunal advised the parties to prepare for the hearing before on the basis that if the Upper Tribunal found an error of law it may proceed immediately to remake the decision in the appeal, I indicated to the parties that I would do so.

21. The skeleton argument submitted on behalf of the claimants asserts that the second claimant is entitled to leave to remain under the 10-year long residence provisions of paragraph 276B. However, there was no such application made to the Secretary of State, when the application for leave to remain as Tier 4 (General) Student and dependant was made on 28.9.12. Obviously, there has been no decision in relation to long residence and thus there can be no appeal against a decision not made. Furthermore, the 10 years is not yet reached and will not do so until 14.10.14.

22. I reject the submission of Mr Naveed that as the second claimant can make an application now, within 28 days of reaching the 10 year period, I should allow the appeal on that ground. If he wishes to make any such application that is a matter for him, but there is before me no decision and no appeal in relation to 276B of the Immigration Rules and even if there was, he does not meet the requirements.

23. Mr Naveed then relied on private and family life under article 8 EHCR and submitted that it would be disproportionate to remove the claimants in all the circumstances. Before I can do so, I must first consider private and family life under the Immigration Rules before I consider the recent case law.

24. In MF (Nigeria) v SSHD [2013] EWCA Civ 1192, the Court of Appeal held that in relation to deportation cases the 'new' Immigration Rules are a complete code but involve the application of a proportionality test. Whether that is done within the new rules or outside the new rules as part of the article 8 general law was described as a sterile question, as either way the result should be the same; what matters is that proportionality balancing exercise is required to be carried out. The Court of Appeal observed that it was inclined to the view that insurmountable obstacles (the test under exception EX1) did not literally mean obstacles which it is impossible to surmount, but implied a reasonableness test. In other words, a proportionality test is required whether under the new rules or article 8. MF (Nigeria) was followed in Kabia (MF: para 398 - "exceptional circumstances") 2013 UKUT 00569 (IAC).

25. In Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) the Upper Tribunal set out, inter alia, that on the current state of the authorities:

> (b) after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);
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> (c) the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 00045 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.

26. It is illustrative that in Gulshan the Upper Tribunal considered that it was not unduly harsh for a husband who originated from Pakistan but was now a British national, to return to Pakistan with his wife who was seeking leave to remain as his spouse. The

panel acknowledged that the couple would suffer some hardship, as he had been in the UK since 2002, he had worked here and was receiving a pension, and housing benefit and other state benefits, some of which could not be transferred to Pakistan.

27. In Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC), the Upper Tribunal also held:

(i) Failure on the part of the Secretary of State to identify in her decision any legitimate aim under Article 8(2) of the ECHR does not prevent a court or tribunal from seeking to do so on the basis of the materials before it.

(ii) "Maintenance of effective immigration control" whilst not as such a legitimate aim under Article 8(2) of the ECHR can normally be assumed to be either an aspect of "prevention of disorder or crime" or an aspect of "economic well-being of the country" or both.

(iii) "[P]revention of disorder or crime" is normally a legitimate aim both in expulsion cases where there has been criminal conduct on the part of the claimant and in expulsion cases where there have only been breaches of immigration law.

(iv) MF (Nigeria) [2013] EWCA Civ 1192 held that the new immigration rules regarding deportation of a foreign criminal are a complete code. This was because of the express requirement in them at paragraph 398 to have regard to exceptional circumstances and other factors.

(v) It follows from this that any other rule which has a similar provision will also constitute a complete code;

(vi) Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

28. I am not satisfied that family life is engaged at all in this case. The claimants have family life with each other. They have no children. They will be returning to their home country together and can continue their family life there. It was not argued before me that either of them meets the requirements of Appendix FM for leave to remain. Neither has any entitlement to remain except whilst the second claimant was a student.

29. I have considered paragraph 276ADE, but the claimants have not shown that they have lost all ties, including family, cultural and social with Mauritius. Mr Naveed made no such submissions and I heard no evidence to that effect. They have lived most of their lives in their home country and retain the language and have family there.

30. In the circumstances, I am satisfied that even in relation to private and family life the claimants do not meet the requirements of the Immigration Rules.

31. There was an express mechanism in the Immigration Rules for considering exceptional circumstances under paragraph 276ADE 'no ties' test, which is in effect an exceptional circumstances or proportionality assessment, making provision for leave to remain where a person does not meet the long residence requirements but has no remaining ties with his home country, including social, cultural and family. In the circumstances this may be regarded as a complete code.

32. The claimants have not demonstrated any compelling or exceptional circumstances insufficiently recognised in the Immigration Rules so as to justify granting leave to remain outside the Rules under article 8 ECHR private and family life on the basis that the decision of the Secretary of State is unduly harsh. In the circumstances I am not satisfied that there is any justification for considering article 8 private or family life outside the Rules.

33. However, even if I am wrong on that I have considered the Razgar steps, of which the crucial issue is the proportionality balancing exercise. In that assessment balancing on the one hand the rights of the claimants and on the other the legitimate and necessary aim of the state to protect the economic well-being of the UK through immigration control, I find that the decision to remove is entirely proportionate.

34. Mr Naveed urged on me that as the second claimant was close to reaching the 10 year threshold I should take that into account in the proportionality assessment. In essence this is a near-miss argument. There is no such thing as near miss in the Immigration Rules, as is clear from established case law. However, I do take into account the length of residence in the UK. Miah [2012] EWCA Civ 261: Burnton LJ, at §26 stated, "In my judgement, there is no Near-Miss principle applicable in the Immigration Rules. The Secretary of State, and on appeal the Tribunal, must assess the strength of an article 8 claim, but the requirements of immigration control is not weakened by the degree of non-compliance with the Immigration Rules."

35. It is not open to the Tribunal to allow the appeal on the basis of a near miss, as held in MM and SA (Pankina: near-miss). In Patel [2013] UKSC 72 Lord Carnwath said:

> "55. Thus the balance drawn by the rules may be relevant to the consideration of proportionality……
> 56. Although the context of the rules may be relevant to the consideration of proportionality….this cannot be equated with a formalised "near-miss" or "sliding scale" principle…..Mrs Huang's case for favourable treatment outside the rules did not turn on how close she had come to compliance with rule 317, but on the application of the family values which underlie that rule and are at the heart of article 8. conversely, a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit.
> 57. It is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the Secretary of States' discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right…."

36. I also am required to have regard to section 117B(5) that "Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious." The claimants have no legitimate expectation to be able to remain in the UK other than under Immigration Rules. I have to take into account that they have been unable to meet the Immigration Rules and that as students they must be taken to have expected to leave the UK on completion of the studies. The second claimant last studied in September 2013 and since then has stayed at home whilst the first claimant has worked.

37. I also have to bear in mind that 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."

38. 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."

39. 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."

40. The panel pointed out that at this point on the continuum, "the essential elements of the private life relied on 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, (§15)" and (§20) recognised "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 from 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)." In the circumstances, the claimants' rights to private life developed whilst as students carries little weight against the public interest in the proportionality balancing exercise.

41. I take into account all that I have been able to glean from the papers before me and from the evidence and witness statements of the claimants. Mr Naveed did not want to call any oral evidence, but agreed for me to ask the first claimant for some detail of her private life in the UK. She spoke of going to the leisure centre and jogging with friends, but other than attendance at church on Sundays she was unable to point me to any community links or associations. I accept that they will both have a circle of friends and associates, but those relationships can be continued from outside the UK through modern means of communication and do not demand their presence in the UK. There was nothing particularly remarkable or significant about their private lives, which were no more than one would expect in the circumstances.

42. In all the circumstances, I find that there is nothing disproportionate in the decision of the Secretary of State so as to justify granting leave to remain in the UK.

Conclusion & Decision:

43. 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.

I set aside the decision.

I re-make the decision in the appeal by dismissing the appeal of each appellant.

Signed: Date: 29 September 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 appeals have been dismissed.

Signed: Date: 29 September 2014

Deputy Upper Tribunal Judge Pickup