Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/19417/2013
IA/19420/2013
IA/19477/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 February 2014	**On 5 February 2014**
Oral judgment	

Before

UPPER TRIBUNAL JUDGE COKER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ADNAN SABRI
BUSHRA ADNAN SABRI
MUHAMMAD AKBAR

Respondent

Representation:

For the Appellants: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr S Bellara, counsel

DETERMINATION AND REASONS

1. The First-tier Tribunal allowed an appeal by the respondents (hereafter the claimants) against a decision dated 17th May 2013 of the appellant (hereafter the SSHD) to refuse to vary their leave to remain as a Tier 1 (Entrepreneur) with dependants. The SSHD had also taken a decision to

remove the claimants in accordance with s47 Immigration Asylum and Nationality Act 2006. The First-tier Tribunal judge found that the claimants did not meet the requirements of the Immigration Rules, in particular paragraph 41-SD(c).

Variation of leave

2. The First-tier Tribunal judge allowed the appeal against the refusal to vary leave on Article 8 grounds of appeal on the basis that the decision was not proportionate. The judge referred in particular to the need for decisions to be made on a fair and consistent basis under Article 8 and although finding that the claimants had failed to meet the requirements of the Rules and although finding that the Secretary of State was not required to seek further information in accordance with the Rules (such findings not being the subject of challenge to the Upper Tribunal) the judge nevertheless found that those failings were in effect so minimal as to render the decision disproportionate.

3. Permission to appeal was granted on the grounds that the First-tier Tribunal had failed to give adequate consideration to the relevant legislation, had paid no regard to the relevant paragraphs of the Immigration Rules, and had in effect found that the criteria in the PBS Rules impose a higher test than the proportionality test of Article 8.

4. There is no reference in the determination to the need to weigh the public interest against the individual circumstances of the claimants. The First-tier Tribunal has, I am satisfied, in effect concluded that the requirements of the Rules imposed too high a burden and could thus be disregarded in the instant case. I set aside the decision of the First-tier Tribunal judge to allow the appeal on Article 8 grounds to be remade.

5. In **Naseem & Others (Article 8) [2014] 00025 (IAC)** the Tribunal draws attention to the judgment of the Supreme Court in **Patel & Others** which, it says, refocuses attention on the nature and purpose of Article 8 and in particular that Article 8 is of limited utility in private life cases, as here, which are far removed from cases involving moral and physical integrity. **Naseem** considers the relationship between Article 8 and work and studies and in paragraph 21 the Tribunal holds that the right asserted or the desire to undertake a period of post-study work lies at the outer reaches of cases requiring an affirmative answer for the second question in the **Razgar** questions. If Article 8 is engaged, then, **Naseem** says, it is to be resolved decisively in favour of the Secretary of State in her role as guardian of the system of immigration control. In paragraph 23 of **Naseem**, the Tribunal addressed the issue of "near miss" and reiterated that the focus of such cases was not on the "near miss" but rather on the significance of the relevant Article 8 element. In this particular case the only issues that have been raised are failures to meet the requirements of the Rules as opposed to any other compelling or compassionate or family issues.

6. On the evidence before me I am satisfied, weighing the legitimate interest of the SSHD in the maintenance of immigration control and the matters raised in favour of the claimants as set out above, that the decision to refuse the claimants' leave to remain is not disproportionate.

7. I therefore allow the appeal of the SSHD; the appeal by the claimants against the decision by the SSHD to refuse to vary their leave is dismissed.

S47 removal decision

8. The decision of the SSHD was taken on 17 May. This postdates the change in the legislation which enables a Section 47 decision to be taken at the same time and on the same piece of paper as a decision to refuse a variation of leave application. The decision to remove the claimants in accordance with Section 47 is thus a lawfully made decision. The claimants appealed that decision but unfortunately the First-tier Tribunal Judge failed to reach a decision on that appeal; this amounts to an error of law; a blatant failure on the part of the First-tier Tribunal to determine any matter raised as a ground of appeal, contrary to s86 (2) Nationality Immigration and Asylum Act 2002.

9. S12(2) of the TCEA 2007 requires a case to be remitted to the First-tier Tribunal with directions or for it to be remade by the Upper Tribunal. Where there has been no hearing on the issue before the First-tier Tribunal as here I conclude that the decision should be remitted to a First-tier Tribunal judge to determine the appeal.

10. Mr Melvin objected strenuously to remitting the appeal against the removal decision. I have considerable sympathy with Mr Melvin's argument but the fact remains that after 8 May the claimants were able to appeal not only the decision to refuse to vary their leave to remain under the Rules but also a lawfully made removal decision. The First-tier Tribunal in this case, probably because the decision was made very shortly after the change in the legislation, has failed to actually reach a decision on the removal decision.

11. I therefore find that there is an error of law in the First-tier Tribunal in failing to reach a decision on a matter that was before it. That matter is to be determined by the First-tier Tribunal as opposed to by me and I therefore remit the appeal against the decision to remove in accordance with Section 47 to the First-tier Tribunal to be heard as soon as possible.

Signed Date 4th February 2014

Upper Tribunal Judge Coker