Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20071/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28th July 2014	**On 4th August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MRS ISVARIYA KALIRAJAH RAMESH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Jaffar of Counsel
For the Respondent: Miss Isherwood

DETERMINATION AND REASONS

Introduction

1. The Appellant born on 28th April 1989 is a citizen of Sri Lanka. The Appellant who was present was represented by Mr Jaffar of Counsel. The Respondent was represented by Miss Isherwood, a Home Office Presenting Officer.

Substantive Issues under Appeal

2. The Appellant had entered the United Kingdom as a Tier 4 Student in 2010 and had completed a degree course at the University of Sunderland. She had then enrolled in 2012 on an ACCA course at BPP College. In February 2013 she applied for further

leave to remain in order to complete that course. Her application was refused on 11th April 2013 by the Respondent. The Appellant had appealed that decision and the appeal was heard by First-tier Tribunal Judge Widdup sitting at Hatton Cross on 24th April 2014. The judge allowed the Appellant's appeal under Article 8 of the ECHR.

3. The Respondent appealed that decision in an application dated 21st May 2014.

4. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 2nd June 2014 on the basis that it was arguable that the judge should not have allowed the case under Article 8 in light of case law.

5. Directions were issued and the matter comes before me to decide on the question of error of law in accordance with those directions.

The Respondent's Submissions

6. Miss Isherwood relied upon the Respondent's application and submitted that the judge had materially misdirected himself under Article 8 and I was referred to the case law of **Haleemudeen**, **MF (Nigeria)**, and **Patel [2013]**.

7. It was accepted by Miss Isherwood as the documents and the determination disclosed that the single issue under which the Appellant failed is that for a period of one day the required balance of £1,600 fell below that figure by the sum of £56.

Submissions on behalf of the Appellant

8. Mr Jaffar distinguished **Patel** on the basis that **Patel** was concerned with post-study work migrants rather than as in this case an individual who was in the middle of a course of study that ended in December 2014. The Appellant at the time of the First-tier Tribunal hearing had claimed to have exams to sit in June and December. I ascertained from the Appellant that she had indeed sat those exams in June although the results were yet to be issued. Mr Jaffar referred me to the case of **Nasim [2014] UKUT 25** who had made reference at paragraph 41 to the case of **CDS**. It was further submitted that the judge was clearly aware of the case of **Patel** and a reading of the determination also disclosed that he had found exceptional circumstances as to why he allowed the case under Article 8.

9. At the conclusion of the submissions I reserved my decision on the question of error of law which I now provide with my reasons.

Decision and Reasons

10. The judge in this case had the benefit of hearing evidence from the Appellant and her aunt, Mrs Naminthan, as well as considering all the documentary evidence. This was a case where the issue concerned the monies available within the Appellant's bank account for the relevant period. Prior to the hearing there had been a few concerns raised but it is apparent from paragraph 13 and paragraph 17 of the determination that the single issue that remained was the fact that for a one day period on

6th February 2013 the required amount of £1,600, available on each day over the requisite 28 day period, was short by £56. The judge acknowledged that fact at paragraph 23 of his determination. He further accepted that that shortfall meant the Appellant did not meet the Immigration Rules nor that evidential flexibility contained in paragraph 245AA could assist the Appellant. The judge was correct on that matter and he correctly found her application under the Rules failed (paragraph 23).

11. He then properly considered whether her case could succeed outside of the Rules under Article 8 ECHR (paragraph 24). He was clearly aware of the principle referred to in **Patel [2013] UKSC 72** that there is no such concept as a "near miss principle", and that was referred to by him in paragraph 25.

12. The judge had considered the Appellant's case nevertheless under Article 8 of the ECHR by application of the test in **Razgar**. The Respondent, by reference to **Haleemudeen [2014] EWCA Civ 558** and **MF (Nigeria) [2013] EWCA Civ 1192** submitted that the judge had not found "exceptional" or "compelling" circumstances such that he needed to consider Article 8 outside of the Immigration Rules. Indeed the refusal letter itself did not seek to consider whether there were or not exceptional circumstances outside of the Rules rejecting the Appellant's claim solely on the basis of her failure to meet the requirements of the Immigration Rules.

13. The judge made no reference to recent case law or indeed any case law within his determination. However that is not to say the judge did not have in mind the principles referred to within case law quoted by the Respondent or, more importantly, apply them. In like manner as referred to above the judge had not by name referred to the case of **Patel** but clearly was aware of and applied the principle that there was no concept of a "near miss".

14. The judge had at paragraph 32 outlined a series of facts he found relevant to the Article 8 issue. He had additional to those factors presented in paragraph 32 also noted at paragraph 33 the credibility of the Appellant and her aunt both in terms of the anxiety and stress that this matter had placed on the Appellant and the credible evidence, he found that she would return to Sri Lanka at the conclusion of her studies in December 2014. The judge was entitled to make those credibility findings having had the benefit of hearing evidence from the Appellant and her witness. He was entitled to note and take into account the level of anxiety and stress that had been occasioned to the Appellant who had at all times during her stay in the UK been here lawfully and complied with each and every aspect of her visa requirements and had clearly conscientiously applied herself to her studies. As indicated above as an update to the position at the time of the First-tier Tribunal hearing the Appellant has since sat those exams in June 2014. The judge having outlined all those matters that he referred to in paragraphs 32 and 33 had as apparent in paragraph 35 also been clearly mindful of the public interest and the due regard to be had for the Respondent's position. However as he indicated in paragraph 35 he found this to be an exceptional case.

15. The determination indicates that the judge was aware of the current case law and approach to be adopted in such cases even though he made no specific reference to individual cases. He was not bound to do so. He correctly identified the Appellant failed under the Immigration Rules and correctly identified that evidential flexibility did not assist the Appellant. He also correctly identified the lack of a doctrine of near miss. Thereafter for reasons provided within the determination he found the Appellant's case to be an exceptional case and having found that then applied the test of **Razgar** and concluded that in the exceptional circumstances of this case a removal would be disproportionate.

16. In those circumstances the approach adopted by the judge is consistent with the approach now suggested by case law. Lord Carnwath in his judgment in **Patel**, in reference to One-Stop Procedures refer to Jackson LJ's comments that the law in this field is "an impenetrable jungle of intertwined statutory provisions and judicial decisions". Such position may indeed go beyond simply the One-Stop Procedures and infect this particular area of the law. There is nothing to suggest the judge in this case has departed from what may be considered the central principles that new case law seeks to define when looking at Article 8 of the ECHR outside of the post-9th July 2012 Immigration Rules.

17. There was no material error of law made in this case. Whilst it is ultimately a matter for the Respondent in granting a period of discretionary leave the evidence indicates that such leave would only need to be granted exceptionally until December 2014 to allow the Appellant time to complete her final exams.

Decision

18. There was no material error of law made in this case and I uphold the decision of the First-tier Tribunal.

Signed Date

Deputy Upper Tribunal Judge Lever