Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26536/2014

THE IMMIGRATION ACTS

Heard at Field House
On 22 December 2014

Decision & Reasons Promulgated
On 31 December 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

MR MUHAMMAD AAMIR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M M Haque, Legal Representative
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, born on 2 April 1991, is a citizen of Pakistan.

2. He made an application for further leave to remain as a Tier 4 (General) Student together with a biometric residence permit under the provisions of the points-based system. That application was refused on 10 June 2014.

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3. The appellant appealed and in a determination promulgated on 24 September 2014 Judge of the First-tier Stott dismissed the appellant's appeal.

4. Permission to appeal was sought essentially on two grounds, being fairness and a failure by the judge to deal with Article 8.

5. Permission to appeal was granted on 12 November 2014 by Judge of the First-tier Tribunal Saffer. The fourth paragraph of his decision states:-

> "4. The grounds are arguable as the Judge has made a wholly irrelevant suggestion as to how the Respondent may proceed (paragraph 15) instead of determining only 1 of the grounds of appeal in 1 sentence."

6. The First-tier Tribunal Judge's decision records that during the period of the appellant's last grant of leave to remain he had visited Pakistan and on his return to the United Kingdom was detained by the authorities and held for fourteen days on suspicion of committing offences. He was not charged with any offences and his passport was returned to him on 3 February 2014. Upon receipt he sent it along with his application for further leave to remain to the respondent.

7. The appellant claimed that he had taken an English test (a TOEIC test) at West Bridge College. At the end of March the BBC exposed a fraud being conducted at the college in respect of the English language tests resulting in none of the test results released therefrom being capable of use by students such as the appellant who wished to make an application for leave to remain.

8. The appellant appreciated that he had to obtain a Confirmation of Acceptance for Studies (CAS) form but was unable to obtain that documentation without producing evidence of having passed a language test. In order to take such a test he needed to produce his passport which had been sent by him to the respondent along with his application. As a result of this predicament he wrote twice to the respondent explaining the situation and requesting a return of a certified copy of his passport which would then enable him to take the appropriate test and subsequently obtain a CAS form. He received no replies to those letters.

9. In an attempt to speed matters up the appellant booked an IELTS test to be sat on 21 June 2014. Again though he was unable to take the test that day due to the absence of a certified copy of his passport. Without a test certificate the appellant could not support his application for his CAS.

10. The judge's decision can be gleaned from paragraphs 14, 15 and 16 of his decision. He finds at paragraph 14 that:

> "14. … It is apparent that he has submitted an incomplete application and that as at the date of the decision he had not provided a CAS form."

Paragraphs 15 and 16 state:

> "15. In view of these particular circumstances however, where his passport was only returned to him on 3rd February; with his leave expiring on 31st March; with him forwarding his passport to the Respondent on 28th March; with the Respondent failing to provide a certified copy so as to enable the Appellant to take a further English test, the Respondent may wish to consider the decision which has been made and grant the Appellant a short period of leave together with a certified copy of the passport so as to enable the Appellant to pursue an English language test and endeavour to obtain a CAS form.
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> 16. This suggestion is made bearing in mind the period of time that the Appellant has been studying in this country and from the oral evidence given that approximately £20,000 to date has been spent by a family relative on his education."

The judge then dismissed the appellant's appeal under the Immigration Rules.

11. Today Mr Haque handed up at the outset a chronology, a response to the Rule 24 response by the respondent, two Home Office documents relating to changes to English language certification requirements and the authority of **Patel (Revocation of sponsor licence - fairness) India [2011] UKUT 00211 (IAC)**.

12. He, relying on the above-mentioned authority, asserted that Immigration Judges have jurisdiction to determine whether decisions on variation of leave applications are in accordance with the law, where issues of fairness arise. On the facts of this particular appeal the judge should have allowed it on the basis that the decision was not in accordance with the law and that he erred in failing to appreciate that the fairness of the decision was both something that could be adjudicated upon and also that the Tribunal had power to rule upon in all the circumstances. This was an appellant who had taken two English tests and passed. However, as the last test was a TOEIC one and an investigation had found some fraud regarding the test the test was no longer being accepted. Although there was no suggestion that the appellant had himself acted fraudulently the end result was that he had had to take another English to get his CAS. The respondent ignored repeated requests that were made for the return of a certified copy of his passport. Further, beyond the fact that the appellant was not treated fairly it was in any event an infringement of his Article 8 rights by reason of his established private life within the United Kingdom.

13. Mr Avery argued that the appellant had available to him his own passport from 3 February to 28 March with every opportunity to obtain during that period a certified copy. It was for him to ensure that he could meet the requirements of the Immigration Rules. In any event there is an issue as to whether or not the appellant took the TOEIC test and that he may not have told the truth.

14. The appellant's difficulties were of his own making and not of the Secretary of State. There is in all the circumstances no unfairness and no breach of the appellant's Article 8 rights.

15. I deal firstly with the Article 8 point. Albeit that the judge has not made reference to Article 8 this is not a material error as on the facts of this particular appeal the appellant would not have succeeded under Article 8 in any event.

16. The Supreme Court in **Patel & Others v Secretary of State for the Home Department** **[2013] UKSC 72** has now effectively held that there is no near-miss as such, albeit that all facts have to be taken into account and considered in context. In that case three of the appellants who could not rely on points-based evidence on an appeal under the Immigration Rules because of Section 85A Exception 2 of the 2002 Act sought to rely on it under Article 8. The argument was that, if it is shown that the appellant could have met the substantive requirements of the Rules, the failure to do so should be regarded as purely formal, and that accordingly, in the proportionality balance required by Article 8, the objectives of immigration control should carry relatively less weight. A variant of this argument referred to as the "near-miss" principle is that the degree of failure to meet the requirements of the Rules may be relevant in the proportionality balance. In the Supreme Court, Carnwath LJ said:

> "Although the context of the rules may be relevant to the consideration of proportionality, I agree with Burnton LJ [in *Miah v Secretary of State for the Home Department [2012] EWCA Civ 261*; *[2013] QB 35*] that this cannot be equated with a formalised 'near-miss' or 'sliding scale' principle…"

Referring to **Huang** it was said that:

> "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 also of article 8. Conversely, a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit."

Carnwath LJ went on to say:

> "One may sympathise with Sedley LJ's call in *Pankina* for 'common sense' in the application of the rules to graduates who have been studying in the UK for some years. However, such considerations do not by themselves provide grounds of appeal under article 8, which is concerned with private or family life, not education as such. 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."

17. However, following **Patel & Others v Secretary of State for the Home Department** **[2013] UKSC 72**, the prospect of a student now succeeding under Article 8 where he

or she cannot meet the Immigration Rules is remote. Paragraphs 56 and 57 of that judgment state:

> "56. Although the context of the rules may be relevant to the consideration of proportionality, I agree with Burnton LJ that this cannot be equated with a formalised 'near-miss' or 'sliding scale' principle, as argued for by Mr Malik. That approach is unsupported by Strasbourg authority, or by a proper reading of Lord Bingham's words. 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 also 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 State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the rules are not reviewable on appeal: section 86(6). One may sympathise with Sedley LJ's call in *Pankina* for 'common sense' in the application of the rules to graduates who have been studying in the UK for some years (see para 47 above). However, such considerations do not by themselves provide grounds of appeal under article 8, which is concerned with private or family life, not education as such. 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."

18. Mr Haque's submission is that having taken account of paragraph 16 of his decision the period of time the appellant has spent in the United Kingdom and the cost of his education the judge should have found that the respondent's decision would be disproportionate.

19. As I say, whilst the judge may have overlooked the Article 8 claim, it is not a material error as there was no prospect of this appellant succeeding under Article 8 where he was unable to meet the requirements of the Immigration Rules themselves and on the individual facts of his case as found by the judge.

20. As to Mr Haque's other submission again I reject it. The judge has not erred in his approach. It was inevitable that he would find that the appellant could not meet the requirements of the Immigration Rules by reason of having submitted an incomplete application and that as at the date of the decision he had not provided a CAS form. The judge did not err in "not appreciating that the fairness of the decision, was both something that could be adjudicated on and also that the Tribunal had power to rule upon". Prior to sending his passport to the respondent the appellant had ample opportunity to obtain certified copies thereof for use in any future application for an English test. The decision to refuse the application was a lawful one. The nub of the

position is that the appellant was unable to meet the requirements of the Immigration Rules and the judge did not err in so finding and dismissing his appeal.

21. The conclusions of the First-tier Tribunal Judge were open to be made in all the circumstances.

22. The making of the previous decision involved the making of no error on a point of law and I do not set aside the decision but order that it shall stand.

23. No anonymity direction is made.

Signed Date 31 December 2014

Deputy Upper Tribunal Judge Appleyard