Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30241/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination issued**
on 28 October 2014	**on 30 October 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

REEMA
(No anonymity order made)

Respondent

For the Appellant: Mrs M O'Brien, Senior Home Office Presenting Officer

For the Respondent: Mr S Winter, Advocate, instructed by Livingstone Brown, Solicitors

DETERMINATION AND REASONS

1. The parties are as described above, but are referred to in the rest of this determination as they were in the First-tier Tribunal.

2. The appellant applied for leave for a purpose not covered by the Immigration Rules, namely to make an academic application for and then to undertake a course of study for a PhD without having to leave the UK to make the associated immigration application to the respondent. The SSHD refused that application under rule 322(1). The appellant appealed to the First-tier Tribunal. In her determination promulgated on 28 May 2014 Judge Kempton found the appellant to be a genuine student who had encountered unfortunate setbacks and should be enabled to make her PhD application to a university in the UK, and purported to allow the appeal "under the Immigration Rules".

3. The SSHD appealed to the Upper Tribunal. The case came before the Hon Mr Justice McCloskey (President of the UT) and Judge Dawson on 2 September 2014. In their decision and reasons dated 15 September 2014 they say that the judge evidently intended to allow the appeal under Article 8 of the ECHR outwith the rules and not under the rules, there being no rule under which it could be allowed. The SSHD's challenge on the basis of lack of reasoning was allowed, there being no indication in the determination of any self-direction as to the relevant legal principles:

> … apart from a misguided reference to the principles of fairness in *Patel* [2011] UKUT 211. It is clear that the judge was sympathetic to the appellant but this is not enough. As observed by Lord Carnwath in *Patel* [2013] UKSC 72 at [57], *"Article 8 is not a general dispensing power"* and *"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."*

4. The determination of the First-tier Tribunal was therefore set aside, and the case came before me for remaking of the decision. The appellant was permitted to produce further evidence, including a statement on which she was cross-examined at some length, and both sides made detailed submissions. It was agreed that the ultimate question was whether the appellant's removal in consequence of the decision would be a disproportionate interference with her right to private life.

5. Mrs O'Brien submitted that the appellant's primary aim was just to complete her application to a university from inside the UK. It might be easier to do so here, with the advantage of directly meeting a potential PhD supervisor, but that showed minor relative inconvenience, not disproportionate interference with a fundamental human right. Many students did obtain PhD places from outside the UK. There was no substance to the complaint that the appellant could not perfect her application form India. As a student, there was nothing to justify going beyond the rules. Although the appellant said she sought only short term leave, much of her evidence suggested longer term motives. On those other matters, it appeared the appellant had obtained non-emergency medical treatment to which she was not entitled and for which ought to have paid. It was for the prosecuting authorities to decide if her presence in the UK was required as a witness in criminal proceedings. There was no need for her to be here to further a personal injuries claim. In the unlikely event that her presence was needed for that purpose, there are provisions in the rules. This was a case of seeking to use Article 8 to dispense with the rules.

6. Mr Winter put the appellant's case as falling within the respondent's guidance on exceptional circumstances for leave to be granted outside the rules. That guidance was conveniently to be found quoted at paragraph 14 of *Ganesabalan* [2014] EWHC 2712 (Admin). As to factor (a) there mentioned, the bulk although not all of the appellant's time in the UK was lawful. As to (b) the appellant's principal reason for seeking leave was to perfect her application to a university and secure her place on a PhD course. It was plausible that it would be easier to do that while having

direct communication with her potential PhD supervisor. She had said that if she obtained her place on a course, she would be willing to return to India to make her application. She had mentioned several other reasons for remaining in the UK in the medium term, although she said that her intention on gaining her PhD was to return permanently to India. Mr Winter said that none of those reasons would on its own justify leave, but they did so as cumulative factors in terms of part (b) of the guidance. The appellant has a network of friends in the UK. She has been cited as a witness and as the complainer in a trial next February of a Hindu priest on a charge of sexual abuse in a temple in Glasgow. This is a sensitive issue in the mixed Hindu and Sikh community here, and she is herself of mixed Hindu and Sikh origin. A complaint has been made of an attempt to have these proceedings dropped in exchange for payment, which may also lead to a trial. The appellant may be a witness in these proceedings also. She has a pending claim for personal injury from a separate incident of a fall, which is in hands of solicitors. She has had an operation on a birth mark on her eye, a problem which might in the long term affect her eyesight if not dealt with. The operation is to be followed by 2 or 3 more. Doctors in India declined to operate, due to concerns over the possible effect on her eyesight, but doctors here reassured her that the procedure could be undertaken without such risk. There is background evidence of the general disadvantages for women in India (respondent's COI report, paragraphs 24.03,07,15,16,30) which would be significantly lessened for the appellant by a higher level of education. All in all, it was disproportionate to refuse the appellant leave for the short period sought to perfect the PhD application to a university, some 4 to 6 weeks.

7. I reserved my determination.

8. Mr Winter has made the best of the appellant's case (i) for the short period she explicitly asks for and (ii) on wider fronts, trying to bring other points in as cumulative factors. However, broadly, I prefer the submissions for the respondent. I do not see how the additional factors add anything to the case for a short period of leave to obtain a place at university, followed by return to India to make the application to the respondent; and I do not think that the additional factors add up to a right to any period of leave.

9. It may well be easier to perfect a PhD application with the benefit of direct access to the potential supervisor, but as Mrs O'Brien pointed out, many such applications come from abroad, without meeting the potential supervisor. In the age of the internet, there is nothing to suggest that the advantage of personal contact is significant. The appellant has had years to work on perfecting her application. The ongoing delay is of her own making. It could have been easily avoided by complying with the rules long ago.

10. A network of friends here is an ordinary part of life. The criminal matters sound serious (sexual abuse by a person in a position of trust, and attempted perversion of the course of justice) but if the appellant is needed as a prosecution witness, that is a matter for the prosecuting

authorities. It does not endow the appellant with a separate right to insist on a grant of leave. There is no need to be here to pursue the personal injuries claim. In the unlikely event that did call for her presence, the rules provide. She has not argued anything close to a case to remain for medical treatment. The rules provide for that also, if appropriate. The evidence on the medical aspect suggests that she may have obtained an irregular advantage, so this tends, if anything, against her not in her favour. The disadvantages for women in India may be mitigated at the higher ends of the social and educational scale, but the appellant in her evidence (although I did not find her generally to be anything but an honest witness) made an exaggerated point about how dramatically her life chances in India would improve by having a PhD and not just an MSc. The concession she seeks in her favour is not a great one, but it essentially for a sympathetic use of Article 8 as a general dispensing power, which is contrary to principle. Her case falls short of disclosing any such interference with fundamental rights as to render compliance with the rules a disproportionate outcome.

11. The determination of the First-tier Tribunal has been set aside, for the reasons fully set out in the Upper Tribunal's decision dated 15 September 2014. The following decision is substituted: the appeal, as originally brought to the First-tier Tribunal, is **dismissed**.

12. No anonymity direction has been requested or made.

29 October 2014
Upper Tribunal Judge Macleman