Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA 32639 2013

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham	**Determination Promulgated**
On 25 March 2014	**On 24 April 2014**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HARJINDER KAUR

Respondent

Representation:

For the Appellant: Mr M Hussain, Senior Home Office Presenting Officer
For the Respondent: Mr S Bellara, Counsel, instructed by S & S Immigration

DETERMINATION AND REASONS

The claimant in this case, the respondent to the appeal, is a citizen of India who was born in 1985. She appealed successfully to the First-tier Tribunal a decision of the Secretary of State, the present appellant, on 17 July 2013, to refuse to vary her leave to enter the United Kingdom as a Tier 4 (General) Student Migrant under paragraph 245ZX(d) of HC 395. In simple terms the claimant did not have sufficient money in her bank account at the right time to satisfy the requirement of the Rules. I see no point in giving precise details because the facts are not in dispute. The claimant had to show a balance in her bank account above a certain sum for a period of 28 days before the application was made but for some of that time the balance was way below the required amount.

It must be emphasised that the Rules are little to do with (in this case) a person's ability to maintain herself but everything to do with presenting evidence in a particular prescribed way. This is a change in approach to the Immigration Rules which can be frustrating and puzzling to practitioners and applicants alike but it is done for the wholly legitimate reason of simplifying the application system and reducing the opportunities for appeal. I assume that a person who can meet the strict requirements of the rules is thought to be likely to be able to maintain herself. It is easy to see if a person meets certain objective criteria and so the underlying purpose of the rule, in this case (I assume) the ability to maintain herself, is demonstrated by her ability to meet different but (probably) correlated criteria.

The Rules required the application to be refused because the requirements of getting permission had not been met.

It is plain from the First-tier Tribunal's notes that there was agreement between the parties that paragraph 245AA of HC 395 (dealing with documents submitted late) had not been considered and indeed agreement that the case should be sent back to the Secretary of State for further consideration to see if the application should be granted exceptionally within paragraph 245AA. The First-tier Tribunal therefore allowed the appeal to the extent that the Secretary of State's decision was not in accordance with the law.

It was also plain from the judge's notes that the Presenting Officer on that occasion (not Mr Hussain) did *not* agree that this was a case where the flexible evidence Rules as set out in the case of **Rodriguez (Flexible evidence policy) [2013] UKUT 0042** apply.

The grounds of appeal by the Secretary of State were not settled by the Presenting Officer who had made the concession but by someone else who, I assume from past experience, was wholly unaware that there had been any kind of agreement. Permission to appeal was sought and granted.

I have to ask myself if the fact that there was agreement about the disposal of the appeal in the First-tier really matters. Clearly at first blush it must seem outrageous to the claimant that the Secretary of State is allowed to appeal a decision to which she consented. Nevertheless I have concluded that the agreement between the parties does prevent my finding an error of law and re-deciding the appeal. The agreement can be no more than an agreement that the decision was contrary to the law. That is not an agreement about the facts, which can be binding, but an agreement about the law which can not.

Paragraph 245AA does not give the Secretary of State a general discretion to allow applications that do not meet the strict requirements of the rules. Rather it identifies certain exceptional circumstances that permit the Secretary of State to allow an application that would not otherwise meet the requirements of the rules. None of the circumstances exist here. Even if the Secretary of State looked at the case again all that she could do would be to refuse the application for the reasons already given. I accept that the claimant's leave would be extended while the Secretary of State remade the decision but is also extended by reason of the application for permission to appeal. The claimant is

not entitled to exceptional leave under the rules and requiring the Secretary of State to say as much would not have impacted significantly on the claimant's circumstances.

I record that, in the absence of evidence to the contrary, I am satisfied that the Secretary of State's application for permission to appeal was not made in bad faith and Mr Bellara (for the claimant) is to be commended for his professional and realistic approach in not opportunistically seeking to make points with no underlying merit. The agreement about disposal in the First-tier Tribunal was the result of a mistake. I did not bind anyone.

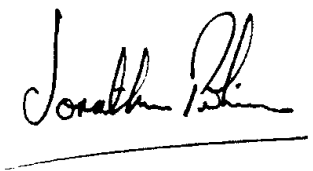
I have the advantage of reading the decision of the Court of Appeal in the case of **Secretary of State for the Home Department v Rodriguez [2014] EWCA Civ 2**. It did not endorse the Upper Tribunal's decision. I am far from satisfied that the First-tier Tribunal applied properly the decision of the Upper Tribunal in Rodriguez but as it was wrongly decided it could not help the claimant. This case is not about "evidential flexibility".

It is plain from the application form that it has never been the claimant's case that, for example, she intended to rely on funds other than her own.

It follows that the claimant did not satisfy the requirements of the Rules and the only proper decision in law was a decision that the appeal be dismissed.

It is always possible that removing someone in consequence of the decision is an unlawful interference with her human rights and I asked Mr Bellara if there was anything he wanted to say on this point. Again he rightly abstained from any temptation to exaggerate or say more than the facts warranted. I am quite satisfied that removal would be an interference with the private and family life of this claimant but only the elements more conveniently described as private life. This case does not have any of the strong features such as might exist where the claimant has a marriage partner or minor child who cannot be expected to remove with her. It is settled law that there is no general right of education that is preserved by Article 8 and although there would be disappointment for the claimant if she is required to leave, there is nothing which would enable me to decide responsibly in accordance with established jurisprudence that removal would be a disproportionate interference.

Cases of this kind give no satisfaction whatsoever to the Tribunal because we see people being very frustrated and disappointed and perhaps incurring significant costs as they try unsuccessfully to remedy what is really no more than a rather silly mistake. It seems likely (I make no findings on the point) that if the claimant had been better organised she could have got the funds in the right place at the right time but the fact is she did not and my duty is to uphold the law.
For the reasons given I set aside the decision of the First-tier Tribunal and substitute with the decision dismissing the claimant's appeal on all grounds.

Signed 

Jonathan Perkins
Judge of the Upper Tribunal

Dated 16 April 2014