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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33467/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th November 2014	**On 8th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE HARRIES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR AHMED MOHIUDDIN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Nath, Home Office Presenting Officer
For the Respondent: Mr K Manzure Mawla

DECISION AND REASONS

Details of the Parties and Proceedings

1. The appellant in the Upper Tribunal is the Secretary of State for the Home department. The respondent, Mr A Mohiuddin, is referred to hereafter as the claimant. He was born on 5th June 1985 and is a citizen of India. On 18th June 2010 he was granted limited leave to remain in the United Kingdom until 18th June 2012 as a

student. On 6th June 2012 Morgan Hill, Solicitors, applied on his behalf for leave to remain in the United Kingdom outside the Immigration Rules.

2. The Secretary of State refused the application on 17th July 2013 and made a decision to remove the claimant from the United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006. After a hearing at Hatton Cross before First-tier Tribunal Judge S J Clarke (the Judge) on 6th June 2014 the appeal was allowed to the limited extent that the Judge purported to quash the decision of the Secretary of State such that the claimant's application remains outstanding and he was no longer liable to removal. The Judge found that the decision of Secretary of State was not in accordance with the law because it suffered from a defect in procedure.

3. Permission was granted to the Secretary of State to appeal to the Upper Tribunal against the decision of the Judge by First-tier Tribunal Judge Parkes on 14th July 2014. The position of the Secretary of State in challenging the decision was that the Judge erred in law by finding the decision to be unlawful and the proper approach would have been for the Judge to consider the appeal under Article 8. After a hearing before me on 3rd September 2014 I was satisfied that there was a material error in the decision of the First-tier Tribunal and it was set aside to be remade. No findings were made on the facts or merits of the case in the First–tier Tribunal. I was of the view that the claimant is entitled to have his Article 8 case considered and the matter was accordingly adjourned for a resumed hearing before me for that purpose.

The Law

4. Article 8 of the ECHR provides that:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

5. The burden of proof in relation to Article 8 of the ECHR lies with the claimant to prove on the balance of probabilities that private or family life is established and will be interfered with as a result of the respondent's decision. Once he has established that he enjoys this protected right which is threatened with violation the burden shifts to the Secretary of State to show that the interference is lawful and in pursuit of a legitimate aim. It must be shown that the violation is justified and that it does not impair the right any more than is necessary; in other words, whether the interference is proportionate.

6. On 28th July 2014 section 19 of the Immigration Act 2014 made amendments to the Nationality, Immigration and Asylum Act 2002 by introducing a new Part 5A which contains sections 117A, 117B, 117D and 117D. These statutory provisions apply to all appeals heard on or after 28 July 2014, irrespective of when the application or immigration decision was made. Part 5A applies where the Tribunal considers article 8(2) ECHR directly. Section 117A is as follows:

> 117A Application of this Part
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> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
> (a) breaches a person's right to respect for private and family life under Article 8, and
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
> (a) in all cases, to the considerations listed in section 117B, and
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

Section 117B is as follows:

> 117B Article 8: public interest considerations applicable in all cases
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> (1) The maintenance of effective immigration controls is in the public interest.
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
> (a) are less of a burden on taxpayers, and
> (b) are better able to integrate into society.
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
> (a) are not a burden on taxpayers, and
> (b) are better able to integrate into society.
> (4) Little weight should be given to—
> (a) a private life, or
> (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
> (a) the person has a genuine and subsisting parental relationship with a

qualifying child, and
(b) it would not be reasonable to expect the child to leave the United Kingdom.

Consideration of the Evidence and Issues

7. The background to this matter is that the appellant arrived in the United Kingdom on 24th August 2008 with a student visa and was subsequently granted further leave to remain on 18th June 2010 as a Post Study Work Migrant until 18th June 2012. He applied to remain in the United Kingdom thereafter, on 6th June 2012, on the basis of discretionary leave because he had an established presence in the United Kingdom, or in the alternative to be allowed the opportunity to further his education and unfulfilled aspirations; the Secretary of State was urged to grant further leave to enable the claimant to complete his studies.

8. The claimant's application was based on his length of residence in the United Kingdom, since August 2008, and his community connections in the United Kingdom. The application was not made under the Immigration Rules – it was made outside the Rules in the first place on the basis of Article 8 of the ECHR because the claimant could not show more than 4 years presence in the United Kingdom at the date of application.

9. The claimant could not have benefitted from any of the Rules preserved by the Transitional Provisions to HC 194, although the application was determined under the new rules, as set out in Appendix FM and paragraph 276ADE of the Immigration Rules. The Secretary of State refused the application for the reasons set out in a letter dated 17th July 2013. It is accepted that the claimant cannot not show 20 years' continuous presence in the United Kingdom under the new rules and nor could he meet the 14-year requirement under the old rules.

10. No new evidence was relied upon for the hearing before me but the claimant adopted in oral evidence (given in English) his statement dated 29th May 2014 and was cross-examined on its content. His evidence set out in his statement is that in April 2009 he was awarded a Post-Graduate Diploma in Information Technology from the University of East London and in February 2010 he obtained an MSc in Information Technology. His father died whilst he was studying causing the claimant to make two return trips to India for the funeral in July 2010 and June 2011.

11. The claimant states that in the course of these visits his family tried to force him to marry a lady from a wealthy and politically powerful family in India but he refused to co-operate with these plans. A family feud ensued causing an irretrievable breakdown of the claimant's relationship with his family members. The claimant states that these circumstances have severed all his ties with India.

12. The claimant states that his chosen profession is highly competitive and he wishes to complete his educational and other goals in the United Kingdom to be able to compete with the market in India if he returns there. He therefore pleads for

compassion with his application to give him the freedom of engaging with further studies; he wishes to do a PhD. He states that he has become fully integrated into British society and has built strong connections with the United Kingdom; he has undertaken employed work. He states that he has relatives and a family network in the United Kingdom as well as academic friends, colleagues and connections with lecturers.

13. The appellant claims that as a citizen of India he is in tune with the British values of equality, freedom, justice, fairness and democracy. A return to India will completely disrupt his education and life prospects. He commends himself as a healthy, hardworking, warm, humble, young man with a good immigration history who will make a significant contribution to society and will contribute taxes in the United Kingdom. He is a fluent English-speaker and has never claimed benefits; there is, he states, no public interest in removing him from the United Kingdom. He is of clean character, without criminal convictions, either here or in India.

14. In cross-examination it became evident that the references in the claimant's statement to "family" in the United Kingdom is in the very broadest terms; he has no blood relatives in the United Kingdom. However, he claims to have had no contact at all with his family members in India for 2 years because of the feud over their marriage plans for him. His wish is to further his studies in the United Kingdom, but he has not applied remain in the United Kingdom as a student because, although he has funds, without family support he lacks the necessary funds.

15. In cross examination the claimant was asked for an explanation for failing to bring to the attention of the Secretary of State his fear of return to India for reasons to do with a forced or arranged marriage or feared persecution. There was no clear answer from the claimant about this, but in final submissions Mr Manzure Mawla said that the claimant does not base his application on persecution.

16. I take full account of the letters submitted in support of the claimant's appeal from Mr Shafiq Rehman, the General Secretary of the Mosque attended by the claimant, His friends Mr James Sexton and Ms Monika Bajusz and his employers, namely Tesco and Adil Catering. The claimant is variously commended in these letters as an honest, punctual, responsible, organised, proficient, efficient, hardworking, polite, talkative and jolly, person.

17. I accept that the claimant has inevitably established a private life in the United Kingdom since his arrival here in 2008 through his studies, friendships, work, social and religious networks. He does not rely upon family life and I find that the evidence does not show family life to be established. The 5-step approach set out in Razgar then poses the following questions:

> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
> (2) If so, will such interference have consequences of such gravity as

> potentially to engage the operation of Article 8?
> (3) If so, is such interference in accordance with the law?
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

18. If I accept for the purposes of giving full consideration to the claimant's case under Article 8 of the ECHR that the answer to the first four questions is in the affirmative – the legitimate aim being the public interest in the maintenance of effective immigration controls – the fifth and critical question becomes the issue of proportionality. I necessarily attach significant weight to the public interest, the importance of which is now enshrined in statute. Under section 117B of Part 5A of the Nationality, Immigration and Asylum Act 2002 the maintenance of effective immigration controls is stated to be in the public interest.

19. I accept that that the claimant is of good character, without criminal convictions or an adverse immigration history. I accept that he has completed studies in the United Kingdom and he has been honest enough to say in evidence that he does not apply to remain as a student as he is not sufficiently funded to meet the necessary financial requirements. The public interest in the economic well-being of the United Kingdom must also be weighed in the balance. At the core of his motivation to further his studies is the claimant's intention to be well placed in a competitive employment market in India.

20. The impact of the claimant's removal from the United Kingdom to India is necessarily diminished in the light of his stated intention to return to India to work. His evidence at paragraph 11 of his written statement is:

> "A lot of students, including myself, wish to return to our respective countries at some stage. However, we need to achieve our educational and other goals while in the United Kingdom just merely to avoid being incapable of competing with the colleagues we left behind in India."

21. There is no suggestion that the claimant's removal from the United Kingdom will interrupt any studies; he has completed the courses on which he embarked. Nor does the evidence show that any further course he wishes to pursue would not be available to him in India. The findings in the case of Patel and others [2013] UKSC 72 were endorsed in the case of Nasim "one", decided in 2013, namely that 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. As stated, this claimant is not at risk of failing to complete a course, only of failing to start another in the United Kingdom.

22. In Nasim "two", Nasim and others (Article 8) Pakistan [2014] UKUT 25 (IAC) it was held at paragraph 14 that:

> Whilst the concept of a "family life" is generally speaking readily identifiable, the concept of a "private life" for the purposes of Article 8 is inherently less clear. At one end of the "continuum" stands the concept of moral and physical integrity or "physical and psychological integrity" (as categorised by the ECtHR in eg Pretty v United Kingdom (2002) 35 EHRR 1) as to which, in extreme instances, even the state's interest in removing foreign criminals might not constitute a proportionate response. However, as one moves down the continuum, one encounters aspects of private life which, even if engaging Article 8(1) (if not alone, then in combination with other factors) are so far removed from the "core" of Article 8 as to be readily defeasible by state interests, such as the importance of maintaining a credible and coherent system of immigration control.

23. I find that the claimant in this case cannot rely on aspects of moral and physical integrity; his situation is not distinguishable in my view from that set out in "Nasim two" as follows:

> 15. At this point on the continuum the essential elements of the private life relied upon will normally be transposable, in the sense of being capable of replication in their essential respects, following a person's return to their home country. Thus, in headnote 3 of MM (Tier 1 PSW; Art 8; private life) Zimbabwe [2009] UKAIT 0037 we find that:-
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> > "3. When determining the issue of proportionality … it will always be important to evaluate the extent of the individual's social ties and relationships in the UK. However, a student here on a temporary basis has no expectation of a right to remain in order to further these ties and relationships if the criteria of the points-based system are not met. Also, the character of an individual's "private life" relied upon is ordinarily by its very nature of a type which can be formed elsewhere, albeit through different social ties, after the individual is removed from the UK."
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> 16. As was stated in the earlier case of MG (assessing interference with private life) Serbia and Montenegro [2005] UKAIT 00113:-
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> > "A person's job and precise programme of studies may be different in the country to which he is to be returned and his network of friendships and other acquaintances is likely to be different too, but his private life will continue in respect of all its essential elements."
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> 17. The difference between these types of "private life" case and a case founded on family life is instructive. As was noted in MM, the relationships involved in a family life are more likely to be unique, so as to be incapable of being replicated once an individual leaves the United Kingdom, leaving behind, for example, his or her spouse or minor child.

24. The depth and content of the private life established by the claimant in the United Kingdom is not in my view such that it could not readily be continued and replicated elsewhere. The usual methods of long-distance communication can be used to maintain contact with friends and colleagues and there is nothing to show why visits could not be made as well. The claimant relies on broken family relationships in India, not by way of putting a case for persecution or to show that he cannot return to India, but to show that he has no ties remaining there. In my view the claimant inevitably retains strong ties with his home country having spent only the last 7 of his 29 years in the United Kingdom. He speaks the language of his home country and inevitably retains his culture and heritage there. He spent his formative years there and the evidence is that contact with his blood family ceased only two years ago.

25. In considering the public interest question I must have regard to the matters set out in section 117B of Nationality, Immigration and Asylum Act 2002 as follows. It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English and are financially independent because they are less of a burden on taxpayers and are better able to integrate into society.

26. It was submitted by Mr Manzure Mawla for the claimant that he is English speaking and I accept that he is. I weigh this in the balance in the claimant's favour, however, he is unable to present himself as a financially independent person and this also weighs in the balance. Taking account of all the relevant factors and returning to the issue of public interest I find that those interests are not outweighed by the claimant's Article 8 right to respect for his private life. I find after weighing all matters in the balance that the interference caused to the claimant's private life by the decision of the Secretary of State is proportionate to the legitimate public end. The appeal is accordingly dismissed under Article 8 of the ECHR and the appeal of the Secretary of State succeeds in the Upper Tribunal.

Notice of Decision

27. The claimant's appeal is dismissed under Article 8 of the ECHR.

28. The appeal of the Secretary of State succeeds in the Upper Tribunal.

Anonymity

No direction is made.

Signed

J Harries
Deputy Upper Tribunal Judge
Date: 5th December 2014

Fee Award

In the light of the dismissal of the claimant's appeal in the Upper Tribunal the fee award made in the First-tier Tribunal falls away.

Signed

J Harries

Deputy Upper Tribunal Judge
Date: 5th December 2014