Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/38210/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 12 June 2014	**On 12 August 2014**
Judgment given orally on day of hearing	

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RENA RINKY

Respondent

Representation:

For the Appellant: Mr G. Saunders, Home Office Presenting Officer
For the Respondent: No appearance and not represented

DETERMINATION AND REASONS

1. The appellant in these proceedings is the Secretary of State. However, for convenience I refer to the parties as they were before the First-tier Tribunal.

2. This appeal comes before me following an earlier hearing on 13 March 2014. That hearing was in respect of an appeal by the Secretary of State against the decision of the First-tier Tribunal which allowed this appellant's appeal against a refusal to vary

her leave to remain. She sought further leave to remain as a Tier 4 Student Migrant. At that hearing I set aside the decision of the First-tier Tribunal on the basis of error of law for the reasons that appear in the error of law decision which is attached as an annex to this judgment.

3. The application to vary leave to remain was refused by the Secretary of State solely in respect of maintenance. The appellant needed to provide evidence of funds amounting to £7,200 which she did not do by reference to evidence that complied with the relevant Immigration Rules. Simply put, the error of law by the First-tier Tribunal was to take into account post-decision evidence which the judge was prohibited from doing by virtue of Section 85A(4) of the Nationality, Immigration and Asylum Act 2002. The appeal under the Immigration Rules was not formally dismissed at that hearing but I indicated in the decision that that was going to be the outcome.

4. I should say that having reviewed the judgment that I gave in respect of the error of law issue, I neglected to deal with a submission that was made in terms of evidential flexibility. It was suggested that evidential flexibility applied to the appellant's application under the Immigration Rules whereby the Secretary of State should have sought further information from the appellant and allow her to provide evidence of funds held in some bank. I was not referred to any evidential flexibility policy, if there was one, that is said to have been in existence, and I was not referred to paragraph 245AA of the Immigration Rules which now governs evidential flexibility contained in the Immigration Rules. It may be that there is a policy that runs alongside this aspect of the Rules but I was not referred to it. In any event I cannot see that any application of evidential flexibility could have saved the application under the Immigration Rules. This was not a case where there was a missing document or a document in a series that was missing. Evidential flexibility plainly had no part to play in the decision by the Secretary of State.

5. I indicated at the last hearing that the outcome of the challenge to the First-tier Tribunal's decision was that the appeal under the Immigration Rules under the Immigration Rules was to be dismissed. Having set aside that aspect of the decision, I re-make the decision by dismissing the appeal under the Immigration Rules.

6. This hearing is to consider Article 8 of the European Convention on Human Rights.

7. Again, as indicated in the error of law decision, Article 8 was not expressly referred to in the grounds of appeal before the First-tier Tribunal but it seemed to me that it would be appropriate for me to allow the grounds to be amended to include Article 8, bearing in mind that the appellant herself completed the initial grounds before the First-tier Tribunal.

8. On 13 March 2004 I gave a direction to the parties, subsequently confirmed in writing, that no later than 14 days from the date of the written judgment, 27 March 2014, the appellant through her representatives must file and serve all evidence relied on in support of the new, Article 8, ground of appeal.

9. What has been provided is a witness statement from the appellant dated 11 June 2014. It states, in summary, that the decision is unlawful because it is incompatible with her European Convention rights. It is said that she is a genuine student who came to the UK with the intention to get a higher education. She has invested considerable time and money in her studies, is hard-working and is a dedicated student. She states she has regularly attended classes since her arrival and has always complied with the conditions attached to the visa. She goes on to state that if she is unable to continue to fulfil her ambition at this stage it will be unjust and will deprive her of "my basic right of education". The statement continues that she has already established private life by engaging myself into studies and has enough funds to finance those studies. She also states that she will be able to accommodate herself and complete her studies without recourse to public funds.

10. Along with that statement was a letter from her representatives dated 11 June 2014 asking that the appeal "be heard on papers rather than a normal hearing". That request was repeated in a letter dated 16 June 2014. I do not think that the Secretary of State was informed by the appellant's representatives of that request. Even if she was, I do not consider it appropriate to deal with this case purely on the basis of the documents before me, that is without a hearing. The Secretary of State has attended today and through Mr Saunders is, and was, in a position to make submissions in relation to the issues before me. For those reasons I considered that it was appropriate to proceed to an oral hearing. The appellant has decided that she did not want to attend a hearing and thus, there is no prejudice to her in proceeding to a hearing in her absence.

11. Mr Saunders' submissions were to the effect that the only contention in relation to the Article 8 argument is contained in the witness statement whereby the appellant goes no further than stating that she wants to complete her studies in the UK. He submitted that there was nothing to take her case beyond the confines of Article 8 as set out in the Immigration Rules and he asked me to dismiss the appeal.

12. Given that the appeal is to be determined on classic Article 8 principles I apply the principles established in Razgar [2004], UKHL 27. The appellant arrived in the UK in 2009 as a student and has been studying ever since. I am prepared to accept that she has established a private life here but the extent of that private life is hard to gauge without any evidence of it beyond that of her studies. On the assumption that she has established a private life in the UK, the decision of the respondent here would amount to an interference with that private life, that interference for present purposes could be said to have consequences of such gravity as potentially to engage the operation of Article 8, applying the second principle in Razgar. The decision is in accordance with the law and it pursues a legitimate aim. The only question remaining is that of proportionality, assuming that stage is reached.

13. As I have already indicated, there is nothing in the evidence before me in relation to the appellant's private life except the fact of her studies. The course she sought further leave to remain in respect of was a Postgraduate Diploma in Information Systems, the course starting on 15 July 2013 and ending on 31 July 2014. It may well

be that the appellant has spent a sum of money, maybe even a considerable sum of money, on her education and I accept that she wishes to complete the course and that she has been a diligent student who has complied with the Rules in every respect in terms of the Immigration Rules. It is however, misconceived of the appellant to claim that she has a right to education in the UK. She does not.

14. In relation to the assessment of proportionality, I bear in mind the decision in Nasim & Others (Article 8) [2014] UKUT 00025 (IAC). There the Upper Tribunal said that:

> "The judgments of the Supreme Court in Patel & Others v Secretary of State [2013] UKSC 72 serve to re-focus attention on the nature and purpose of Article 8 of the ECHR and, in particular, to recognise that Article 8 limited utility and private life cases that are far removed from the protection of an individual's moral and physical integrity."

It goes on to state that:

> "A person's human rights are not enhanced by not committing criminal offences or not relying on public funds. The only significance of such matters in cases concerning proposed or hypothetical removal from the United Kingdom is to preclude the Secretary of State from pointing to any public interest justifying removal, over and above the basic importance of maintaining a firm and coherent system of immigration control."

15. In this case I am unable to see that the appellant has any arguable case at all in relation to Article 8 in terms of proportionality. Whilst I accept that the evidence, had she submitted it in proper form, may have been able to show that she had sufficient funds to meet the costs of the course and her maintenance, the is she did not establish that she was able to meet the requirements of the Immigration Rules by evidencing those funds at the relevant time; the time of the application. It is recognised that there may be harsh consequences for some individuals who have been unable to meet the requirements of the Immigration Rules. Nevertheless, the Secretary of State is entitled to promote and maintain a consistent and predictable system of immigration control that applies to all applicants. I am satisfied that the Secretary of State has established that the decision to refuse to vary the appellant's leave to remain is a proportionate response to the legitimate aim pursued.

16. In those circumstances, the appeal in relation to Article 8 must also be dismissed, as with the appeal in terms of the Immigration Rules.

17. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal is set aside and the appeal is dismissed under the Immigration Rules and under Article 8 of the ECHR.

Upper Tribunal Judge Kopieczek 11/07/14