Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/41051/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 7th July 2014	**On 11th July 2014**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JESSICA SERENCIO

Respondent

Representation:

For the Appellant: Mr M Diwnycz, Senior Presenting Officer
For the Respondent: Mr G Asomaing, Solicitor on behalf of Alpha Shindara Legal

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the decision of the First-tier Tribunal (Judge Ince) who in a determination promulgated on 8th July 2014 allowed the Appellant's appeal against the decision of the Respondent to refuse leave to remain in the United Kingdom on Article 8 grounds outside the Immigration Rules.

2. Whilst this is the appeal of the Secretary of State, for the sake of convenience I will refer to the parties as they were before the First-tier Tribunal.

3. The Appellant is a national of the Philippines born on 16th March 1973. The history of the proceedings can be shortly stated. She first arrived in the UK on 21st July 2008 as a student, having worked as a nurse in the Philippines for seven years and in Saudi Arabia for two years. She came to the United Kingdom to pursue an NVQ level 3 qualification at the Overseas Nurse Training Organisation (ONTO). She was granted successive leave to remain until 14th August 2013 and had progressed in her studies up to level 5 of the NVQ diploma. She had wished to progress onto a degree course and then a master's degree.

4. In respect of her history, it was said that the Appellant had completed all of her level 5 by November 2012 and had submitted her work assignments for assessment. However, there were delays in assessing hers and other students work caused by ONTO's failed attempt to merge with another college and a failure of the college's external verifier, the Institute of Leadership and Management (ILM), to come to the college to assess the work until December 2013. The position of the Appellant was that she had had five assignments still to be marked but in the meantime ONTO's licence had been revoked by the Home Office (it was a "highly trusted" college). Consequently as her assignments had not been marked, her diploma could not be awarded. This had caused her not only financial hardship but meant that she could not obtain from the college any level 5 NVQ certificate to enable her to progress onto another course at another college. The Appellant only had her level 3 qualification.

5. In respect of her private life, during the five years that she had been in the United Kingdom it was stated that she had established a "considerable" private life, had numerous friends and had joined a number of different social and religious organisations. At college she had founded the student council, organised events and attended staff meetings. She had been active particularly in religious matters, especially in relation to children. It was her case that her studies had been curtailed by the college's failures and now its suspension and she wished to be allowed to remain to obtain her NVQ qualification and progress onto a degree course as she had planned to do.

6. The judge noted that in support of her case there were numerous letters from friends and colleagues testifying to her education, commitment and support of those around her, particularly in her religious activities.

7. The Appellant applied for leave to remain in the United Kingdom. The decision of the Secretary of State dated 3rd September 2013 refused that application, considering the matter under paragraph 276ADE of the Immigration Rules. It was noted that she had not been resident in the UK for a continuous period of twenty years, and thus did not fall within paragraph 276ADE(iii) and that as she was 40 years old, she was not under the age of 18, and therefore did not meet paragraph 276ADE(iv) and that also she was not aged between 18 and 25 and thus did not fall into the "half of her life period of residence in the UK" category under paragraph 276ADE(v). Furthermore it was not accepted that she had lost ties in her home country of the Philippines where she had lived previously and therefore 276ADE(vi) did not apply.

8. The Respondent also considered whether there were any exceptional circumstances which would justify granting leave to remain outside the Rules. It was noted that

she wanted to complete her studies whilst remaining in the UK but concluded she could return to the Philippines and complete them there or apply again to come to the UK as a Tier 4 Student.

9. The judge had the advantage of hearing the oral evidence of the Appellant and the submissions made on behalf of both parties. The credibility of the Appellant was not challenged by the Secretary of State (see [19]) and the judge was satisfied that the Appellant had told him the truth concerning all the material aspects of her claim.

10. The judge began from the premise that she could not meet the requirements of the Immigration Rules (see [20]), however, the judge directed himself in accordance with the decision of **Gulshan** and whether there were any "exceptional circumstances" which would result in unjustifiably harsh consequences for the Appellant such that the refusal of the application would not be proportionate (see [26]).

11. For the reasons that he gave in the determination at [28-29] he reached the conclusion that there were "exceptional circumstances" that existed in relation to her case. He then went on to consider a proportionality balance conducted outside of the Rules taking into account the arguments of the Secretary of State relying on the cases of **Nasim and others (Article 8) Pakistan [2014] UKUT 25 (IAC)** and that of **Patel and Others v SSHD [2013] UKSC 72**. The judge distinguished the factual circumstances of the Appellant's case from the Appellants in the previous cases cited and conducted a proportionality balance at paragraphs [40-41] and reached the conclusion that on the evidence before him the Respondent had failed to demonstrate that the removal of the Appellant would be proportionate. It is plain from the determination that the reason that he had reached that conclusion was that this was an Appellant whose circumstances were analogous to those of the Appellant in **CDS (Brazil)** and thus was distinguished from the Appellants in **Nasim** and **Patel** and that she had not completed her course for the reasons given at [37], that the course was a "significant part of her private life and that her removal would jeopardise what she had so far achieved", and that she had been prevented from completing her studies, not by any change in the Immigration Rules, but by her college not marking her work and then its Tier 4 licence being suspended which had then placed the Appellant in a "very precarious situation indeed as her five unmarked assignments are currently in the college premises and she has no access to them".

12. The judge considered that "if she was required to leave the UK the chances of her recovering those documents will substantially diminish to the point that she will lose them forever". The judge found that "she had not completed her course, through no fault of her own". He found that to be an exceptional circumstance and in the light of a policy of granting students 60 days' leave when a licence had been suspended and he saw no reason why she should not be treated in the same way. Thus he found the decision to be a disproportionate one.

13. Permission was granted by First-tier Tribunal Judge Heynes on 19th May 2014. I should say something about the grant of permission. At paragraph 1, Judge Heynes recorded that the permission application made by the Secretary of State was "in time". In the grounds that accompanied the application it referred to a short delay in making the application due to the staff shortages in the administrative team. There is

no reference to that and I can only find that Judge Heynes when granting permission and by in stating that it was "in time" had in effect extended time and dealt with the application on that basis on its merits. There has been no challenge to the grant of permission on behalf of the Appellant, either by way of a Rule 24 response, indeed there is no Rule 24 response provided on behalf of the Appellant, nor in oral submissions. In those circumstances I intend to treat the permission application as one in which time was extended by the First-tier Tribunal.

14. Mr Diwnycz appeared on behalf of the Secretary of State and relied upon the grounds. He made no further oral submissions.

15. Mr Asomaing submitted that the judge made no misdirection in law and that he had made it clear by applying the settled law that in this case he found on the facts before him that there were "compelling circumstances" in relation to her private life and had distinguished the facts of her case from the other authorities cited within the determination. The judge addressed the issues properly and lawfully and it was open to him to reach the conclusion that her private life would be terminated abruptly and that this would be disproportionate in the particular circumstances of her case. In particular, the five marked assignments would be lost forever as the judge stated and therefore she could not have been said to have completed her course and that that was the basis upon which her application had been made until the issue was resolved. Thus the decision of the judge was that a period of leave should be granted to allow her to have her work marked so that she could resume her studies elsewhere. Thus he submitted the application was misconceived and that the judge correctly identified the issues of law and applied them to the facts of this case.

16. I reserved my determination.

17. The grounds make two principal assertions. Firstly they assert that the judge misdirected himself when reaching the conclusion relating to this Appellant's "private life" and that the findings made under Article 8 were a "material misdirection" as they do not establish the decision to refuse leave was "unjustifiably harsh". In the grounds at (a) and (b) and (c) the findings of the judge appear to be in issue that she would not have severed her ties to the Philippines, that the relationships and friends that she had in the UK could have been maintained in the Philippines and therefore it did not establish that the decision to refuse was "unjustifiably harsh". The second ground asserts that the judge had "no basis to allow the appeal under Article 8" citing the decision of the Supreme Court in **Patel and Others [2013] UKSC 72** and the decision of the Upper Tribunal in **Nasim and others (Article 8) [2014] UKUT 00025**. It is asserted that the decision to allow the appeal "was not lawful".

18. The grounds as drafted in reality challenge the findings made by the judge concerning the elements of the Appellant's private life and further, in effect, that the judge had no basis in law for allowing the appeal on Article 8 grounds. Those grounds were not expanded upon by Mr Diwnycz on behalf of the Secretary of State.

19. I find that such submissions do not adequately take into account the contents of the determination and, in particular, the judge's analysis of the law including the authorities cited by the Secretary of State in light of the particular findings that he made. Insofar as the first grounds appear to be a challenge to his findings of fact, they are and can be properly characterised as a disagreement with the findings of fact properly reached by the judge on the evidence before him. It was entirely open for the judge to make those findings based on the evidence that was before him. At [19] the credibility of the Appellant was not challenged by the Secretary of State and indeed the judge found that she had told him the truth concerning the factual elements of her claim. It was entirely open to the judge to reach the conclusion on the evidence before him that she had not completed her studies. The judge took into account the submissions made by the Presenting Officer at [37] but reached the conclusion from the evidence before him that whilst she had completed her academic assignments that she was required to complete, they remained unmarked and thus it could not be said she completed her course because she was not entitled to her certificate which had shown that she had completed her course and was entitled to the qualification.

20. Whilst the grounds make reference to the essential elements of her private life being enjoyed outside of the UK, the judge took into account at [40] that she could return to the Philippines and complete her studies there but at [38] and [41] he placed emphasis and weight upon the fact that the circumstances that she presently was in was not "of her own making" and that if she was not in the UK it would be very difficult for her to preserve the evidence of her studies which remained unmarked and obtain from the college what it currently held in relation to her existing qualifications. Thus he found her studies were a "significant part of her private life and her removal would jeopardise what she had so far achieved" and at [41] that the circumstances that the Appellant was in placed her in a "very precarious situation indeed as her five unmarked assignments are currently in the college premises and she has no access to them". He considered that "if she is required to leave the UK the chances of her recovering those documents will substantially diminish to the point that she will lose them forever". He therefore took into account that she had not completed the course through no fault of her own. He further took into account as part of the exceptional circumstances in her case that UKBA did have a policy of granting those a short period of leave who were in a similar circumstance to the Appellant and was not at fault as a result of a suspension of the licence and that also was put in the balance in favour of the Appellant. Thus those findings, I conclude, were ones that were entirely open to the judge to make on the evidence that was before him and, insofar as the grounds appear to challenge those findings, they were properly made on the evidence before him and could not be said to be perverse in the sense that no reasonable judge could have reached such conclusions on the evidence.

21. Insofar as the grounds submit that the findings did not establish that the decision to refuse was "unjustifiably harsh" that has to be seen in the light of the ground in which it is submitted that the judge's decision to allow the appeal was unlawful.

22. It is plain from reading the determination as a whole that the judge properly applied what is now considered to be the settled legal principles. The decision of **R (Nagre) v SSHD [2013] EWHC 720 (Admin)** considered the new Immigration Rules which

were amended in 2012 to address more explicitly the factors according to domestic and Strasbourg case law weighing in favour of, or against, a claim by a foreign national based on Article 8 of the ECHR to remain in the United Kingdom. Those amendments were introduced with the intention to align the Immigration Rules more closely with the approach to be taken under Article 8. Instructions were issued by the Secretary of State regarding the approach to be applied by officials in deciding to grant leave to remain outside the Rules. Those instructions were that if the Rules are not met it will be appropriate normally to refuse the application but leave can be granted where exceptional circumstances in the sense of "unjustifiably harsh consequences" on the individual would result. As Mr Justice Sales stated, there is a dual discretion "fully accommodated the requirements of Article 8". In accordance with the guidance set out in **Nagre** and **Gulshan** as confirmed in **Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC)**, a judge is required to consider the question of proportionality in the context of the Immigration Rules first with no need to go on to a specific assessment of Article 8 if it is clear from the facts that there are no compelling or exceptional circumstances that require that course to be taken. Thus as **Gulshan** stated, after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside the Rules is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

23. The judge properly directed himself in this way at paragraphs [22]–[25] and expressly took into account the decision of **Gulshan** and the Secretary of State's guidance concerning "exceptional circumstances" which he set out at length at [24] and [25]. This is the test that the grounds assert the judge did not properly apply. The judge then proceeded to set out whether there were any such "exceptional circumstances" identified from the particular facts of the appeal. At [27] and [28] he reached the conclusion that whilst there were no exceptional circumstances at the date of decision, on the evidence that was before him, the date of the hearing being the relevant date, he found there to be "exceptional circumstances". In that regard he stated as follows:-

> "Since the decision there has been a further development in that ONTO has had its Tier 4 licence suspended. Normally, when that happens, UKBA grant a student affected by such at least 60 days' leave to remain to find another course and to regularise matters. It would appear that the Appellant has no connection to the reasons why the college had its licence suspended and therefore it would appear that this policy should apply to the Appellant and that this development therefore is capable of amounting to an exceptional circumstance. However, as this situation did not pertain at the date of the decision, the Respondent's decision is not in breach of her own policies and is therefore not unlawful. Accordingly, although I conclude that an exceptional circumstance now exists, that does not entitle me to conclude that the decision in September 2013 was in breach of the Rules. However it does entitle me to take that into account when considering the residual Article 8 claim under the ECHR."

24. By stating that, I take it to mean that the judge found that this was a circumstance that could not properly be said to have been considered under the Rules and therefore fell out with the Immigration Rules dealing with Article 8 and led him to the conclusion that he was required to conduct a more detailed analysis outside of the Rules which the judge then proceeded to so do.

25. In this respect the grounds submit that there was no basis on which the judge could properly allow the appeal citing the decisions of **Patel** and **Nasim**. However, the judge gave careful consideration to both of those cases not only citing those decisions in detail but also by distinguishing the factual circumstances of those cases from those of this particular Appellant.

26. In the case of **Nasim**, the judge took into account that the Appellants in **Nasim** had maintained there was an unlawful interference to their private lives due to a change in the Immigration Rules during their courses (which they had all completed) which meant that opportunities to remain in the UK which were available when they commenced their studies were no longer available to them. It is plain from the analysis that the judge undertook that he found this particular Appellant to be in a category distinguishable from that of the Appellants in **Nasim** (that would apply to the Appellants also in **Patel**), on the basis that the Appellant had not completed her studies and that she had been prevented from doing so due to the failure of her college to mark her work and that whilst she had completed the academic assignments they remained unmarked and therefore it could not be said that she had properly completed her course. It was open to the judge to reach that conclusion on the evidence that she had not completed her course.

27. In this respect he considered the decision of **CDS (PBS: "available": Article 8) Brazil [2010] UKUT 00305 (IAC)** noting at [37] that this was a case that was "analogous to that of the Appellant before me". He noted that in the case of CDS, a change in the sponsorship Rules during the course of a period of study was accepted as having a serious affect on the ability of the Appellant to conclude her course of study. The judge reached the conclusion that that scenario was analogous to that of the Appellant in that she had been prevented from concluding her course of study due to the failure of her college to mark her work for over a period of a year. Thus he found that she was in the position of not having completed her course which was different to the Appellants in the cases cited on behalf of the Secretary of State.

28. At [38] he concluded on the **Razgar** analysis the steps in favour of the Appellant noting that it was not in dispute that she had built up a private life consisting of her extensive community contacts through her studies and her church activities and that those would be lost if she retuned to the Philippines. Moreover, he found that she was in a situation that was "not of her own making" and that if she was not in the UK, it would be in his judgment "very difficult for her to preserve the evidence of her studies which remains unmarked and to obtain from the college what it currently holds in relation to her existing qualifications. Her studies are a significant part of her private life and her removal would jeopardise what she had so far achieved". Consequently the judge found that there would be a serious interference of her private life on the basis of those facts if she was required to return home at this time. At [39] he resolved the other questions in the affirmative thus bringing him to the question of proportionality. In this respect the judge set out what could be described as the "countervailing factors" or the factors put in the balance in favour of the Secretary of State. He noted that she had no reason or entitlement to remain in the UK, she knew by the nature of the visa that it was a temporary stay and that she would have to return to the Philippines (although he noted in this context she was not asking to remain in the United Kingdom indefinitely or permanently), that she would be reunited with close family

in the Philippines and she could return to complete studies there or apply to re-enter the UK and that there were no health issues applicable to her.

29. The balancing factors weighing in favour of the Appellant were also set out at [41] noting in favour of the Appellant, that she had been in the UK lawfully for a period of five years, that she had developed a "significant private life and contributed positively to her community". Whilst the judge found that she had not been involved in a criminal activity, he went on to state that that was what he would expect and that was entirely consistent with the decision in **Patel** and **Nasim** in which it was found that not having any criminal convictions did not enhance one's human rights. However, he went on to state that she had studied hard and that she had not contributed to the situation in which she had found herself. He found that her situation was analogous to that of the Appellant in the case of **CDS** and that she had been prevented from completing her studies, not by any change in the Immigration Rules, but by her college not marking her work and then its Tier 4 licence being suspended placing her in a "very precarious situation indeed as her five unmarked assignments are currently in the college premises and she had no access to them". Thus in the balance he considered that "if she is required to leave the UK the chances of her recovering those documents will substantially diminish to the point that she will lose them forever. I reiterate that, in my judgment, she has not completed her course, through no fault of her own". He then went on to place in the balance at [42] that that was an exceptional circumstance that she had found herself in and that UKBA had a policy and that there was no reason why the Secretary of State should not treat her in the same way as any other student in such a predicament.

30. After carrying out the balance at [40], [41] and [42], the judge stated this, "Balancing all these factors together I come, unhesitatingly, to the conclusion that the Respondent has failed to demonstrate that the removal of the Appellant would not be disproportionate".

31. Having considered the determination when read as a whole and in the light of the authorities cited in the grounds and in the determination, I do not consider that it could properly be said that the judge's decision to allow the appeal was "unlawful" on the basis upon which the grounds assert, that the judge had no basis in law upon which to allow the appeal. It is plain from the authorities cited in the grounds and considered by the judge himself that he found as a fact that the Appellant's studies were a "significant part of her private life" and that she had not completed her course, that was a sustainable finding open to the judge. Thus that was a fact capable of being taken into account in the proportionality balance and the reasons given by the judge for her not being able to complete the course. The judge had proper regard to the decision of the Supreme Court in **Patel** and to recognise Article 8's limited utility in private life cases that was far removed from the protection of an individual's moral and physical integrity. The decision in **Patel** at [57] that Article 8 was not a general dispensing power and the judge considered this in the context of the particular Appellants in **Patel** because they could not meet the Immigration Rules and concluded that such considerations did not by themselves provide Grounds of Appeal under Article 8, which was concerned with private and family life, not education as such. The decision in **Patel** made it clear that the wish of a promising student to complete the course, however desirable in general terms, is not itself a right protected under Article 8 (see [57] of **Patel**). In the decision of **Nasim**, the

decision of **Patel** was considered further. At [20] the Upper Tribunal agreed with the Secretary of State that **Patel** was a significant exhortation from the Supreme Court to refocus attention on the nature and purpose of Article 8 and to recognise its limited utility to an individual where one has moved along the continuum from that Article's core area of operation towards what might be described as the "fuzzy penumbra". At [21] the Upper Tribunal considered the particular Appellants in **Nasim** who were former students seeking to undertake a period of post-study work. They considered that this "lies at the outer reaches of cases requiring an affirmative answer to the second of the five 'Razgar' questions and that, even if such an affirmative answer needs to be given, the issue of proportionality is to be resolved decisively in favour of the Respondent, by reference to her functions as the guardian of the system of immigration controls, entrusted to her by Parliament". The Upper Tribunal also considered the scope of the decision of **CDS (Brazil)** at [39-42]. The Upper Tribunal distinguished the facts of **CDS (Brazil)** from the Appellants in **Nasim**, in a similar way as this First-tier Tribunal Judge did in the light of the particular facts of the Appellant with whom he was concerned. In the Upper Tribunal, the Appellants in **Nasim** had all finished their course. This led the Tribunal at [41] to consider the submission made by the Secretary of State in that case that the obiter remarks in **CDS** regarding Article 8 were no longer good law in the light of **Patel and Others**. The Tribunal did not accept that. The Tribunal said this:-

> "41. … We find that would go too far. It is true that the Tribunal in CDS made reference to the particular passage of the judgment of Sedley LJ in Pankina regarding the need for the Home Office 'to exercise some common sense', which drew comment from Lord Carnwath at [57] of Patel and Others (see above). The Tribunal did, however, expressly acknowledge that it was unlikely a person would be able to show an Article 8 right by coming to the United Kingdom for temporary purposes. The chances of such a right carrying the day have, we consider, further diminished, in the light of the judgments in Patel and Others. It would, however, be wrong to say that the point has been reached where an adverse immigration decision in the case of a person who is here for study or other temporary purposes can never be found to be disproportionate. But what is clear is that, on the state of the present law, there is no justification for extending the obiter findings in CDS, so as to equate a person whose course of study has not yet ended with a person who, having finished their course, is precluded by the Immigration Rules from staying on to do something else."

32. Therefore in the light of paragraph 41, it cannot be said the judge had no legal basis whatsoever to allow the appeal as the grounds submit. As the Upper Tribunal said in **Nasim** at [41] it would be wrong to say that the point had been reached by reference to the decision in **Patel** that where an adverse immigration decision in the case of a person who was here to study or other temporary purposes can never be found to be disproportionate.

33. In those circumstances it was therefore open to the judge to reach the conclusion when carrying out the proportionality balance and on the particular facts of this case to reach the conclusion that he did. In considering that balance of proportionality, it is plain from the determination that he had regard to the general principles enunciated in **Patel** and **Nasim** and relating to Article 8 and gave express consideration at [35] to the view that Article 8 is not a general dispensing power but

on the particular facts of this case, after conducting the balancing exercise, the judge reached the conclusion that the Respondent had not demonstrated that her removal was proportionate. In carrying out the balance he looked at all material matters including factors in favour of the Appellant and those against her. Whilst this might not have been the only possible outcome on the facts of the case, the judge directed himself correctly in law and plainly had regard to the competing arguments and struck balance by taking into account all those relevant matters. As noted in the decision of **Mukarkar v SSHD [2006] EWCA Civ 1045**, the mere fact that one Tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law and in those circumstances, even if it might properly be said as a generous decision, it does not disclose any legal error.

34. It is also further plain from reading the determination that the judge envisaged a short period of discretionary leave (see [40] and [42] and [43]) and that it will be open to the Secretary of State to grant leave in accordance with the decision of the judge and on the particular facts of this appeal.

Decision

The decision of the First-tier Tribunal does not involve the making of an error on a point of law. The decision shall stand.

Signed Date 10/7/2014

Upper Tribunal Judge Reeds