Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/53527/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 24th July 2014	**On 7th August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE HARRIES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR IMRAN HOSSEN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Dey, Counsel
For the Respondent: Miss A Everett, Home Office Presenting Officer

DETERMINATION AND REASONS

The Parties and Proceedings

1. The appellant in this appeal is the Secretary of State for the Home Department. The respondent, Mr Imran Hossen, is referred to hereafter as the claimant. He was born on 2nd March 1987 and is a citizen of Bangladesh. He appealed to the First-tier Tribunal against the decision of the Secretary of State made on 28th

November 2013 to refuse his application for further leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant.

2. The appeal was dismissed under the Immigration Rules but allowed under Article 8 of the ECHR after a hearing at Hatton Cross on 2nd May 2014 before First-tier Tribunal Judge Courtney (the Judge). The Secretary of State was granted permission to appeal against the decision of the Judge to the Upper Tribunal by First-tier Tribunal Judge Parkes for the following reasons:

> The grounds argue that the Judge erred in the approach to Article 8 and did not have regard to the cases of Nagre [2013] EWCH 720 (Admin) or Nasim [2014] UKUT (IAC) 00025 restricting Article 8 to cases where the appellant's moral or physical integrity was in issue.
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> The determination clearly set out the Judge's consideration and is well reasoned until paragraph 16 at which point the Judge ought to have had regard to the cases mentioned and in particular Nasim. The grounds are arguable and permission to appeal is granted.

3. The matter accordingly came before me for an initial hearing to determine whether the making of the decision in the First-tier Tribunal involved the making of an error on a point of law.

Submissions and Findings

4. It is not disputed by the claimant that he failed to meet the requirements of the Immigration Rules in relation to the Maintenance (funds) requirements of Appendix C because he failed to submit the necessary bank statements. The Judge rejected the submissions on behalf of the claimant that he should succeed under paragraph 245AA of the Rules because the Secretary of State should have given him a further opportunity to submit the missing documents before refusing the application. The Judge decided as follows at paragraph 8 of the determination:

> Having regard to the particular informational deficiencies identified by the Secretary of State, I do not consider that the appellant was entitled to the exercise of discretion under the terms of paragraph 245AA.

5. The Judge went on to consider the appeal under Article 8, firstly within the Immigration Rules. In these deliberations the Judge took account of the claimant's presence in the United Kingdom with leave to study since January 2010; he had no family members in the United Kingdom, had not lived continuously in the United Kingdom for 20 years and could not show a lack of ties to Bangladesh. The private life requirements of paragraph 276 ADE were accordingly found not to be met.

6. The Judge then moved directly to a free-standing consideration of Article 8 on the basis of the of the appellant's private life, having found the existence of no family

life in the United Kingdom. He took account of the 4½ years for which the claimant has been in the United Kingdom and found the private life claim to be based solely on student activities. He found that there was no evidence before him of any significant social ties in the United Kingdom and found that there was no evidence that the claimant's course could not be undertaken in Bangladesh.

7. The Judge further found that any contact between the claimant and any UK based friends could be maintained by modern means of communication such as Skype and e-mail. The Judge directed himself in accordance with the case of (CDS (PBS: "available": Article 8) Brazil [2010] UKUT 00305 (IAC); he found that the claimant had at no time during his period of study in the United Kingdom had recourse to public funds or worked illegally. The Judge found that the Secretary of State had at no time suggested that the claimant had not shown progress in his studies.

8. At paragraph 19 of the determination the Judge stated that: "As a matter of common sense, it seems to me that qualifications obtained from a UK educational institution would benefit both the student and the reputation of UK educational institutions." Without further reasoning the Judge then reached his final conclusion at paragraph 20 of the determination as follows:

> 20. This is something of a borderline case. However, taking all these circumstances fully into account, and adopting an even-handed application of the proportionality test, I find that the legitimate aim of maintaining economic well-being and the rights of others by applying a consistent immigration control is outweighed by the right of the appellant to respect for his private life in the UK on the basis claimed.

9. Ms Everett submitted to me on behalf of the Secretary of State for the Home Department that the Judge has materially erred in law in two respects. Firstly, there was no consideration of relevant case law including Nagre [2013] EWCH 720 (Admin) following which the Judge should have looked for arguably good grounds for granting leave to remain outside the Immigration Rules and then any compelling circumstances not recognised by the Rules. Having found that the claimant did not qualify for leave to remain within the Rules the Judge failed to take account of these factors and failed to recognise that a claimant could only succeed under Article 8 outside the Rules in rare and exceptional cases. The Judge had no regard to the case of Gulshan [2013] UKUT 00640 (IAC).

10. The second error made by the Judge was submitted to lie within the proportionality assessment which did not contain reasoning to justify the finding in favour of the complainant; the Judge had misdirected himself in relation to private life. The Article 8 finding was submitted to be unsustainable in the light of the evidence that the complainant's private life consisted solely of studies which could be undertaken in Bangladesh and the Judge failed to consider the claimant's moral or physical integrity. Miss Everett submitted that the Judge had materially misdirected himself in law by failing to make any reference to the cases of Patel and others [2013] UKSC 72 and Nasim and others (Article 8) Pakistan [2014] UKUT 25 (IAC).

11. In response to these submissions Mr Dey argued on behalf of the claimant that in accordance with the case of Nagre, at paragraphs 30 and 32 in particular, the Judge had not erred in law; Nagre endorsed the guidance given in Izuazu and MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC) that judges called on to make decisions about the application of Article 8 in cases to which the new rules apply, should proceed by first considering whether a claimant is able to benefit under the applicable provisions of the Immigration Rules designed to address Article 8 claims. If he or she does, there will be no need to go on to consider Article 8 generally. The appeal can be allowed because the decision is not in accordance with the rules.

12. Mr Dey submitted that paragraph 32 of Nagre affirms that the effect of the new rules is not to restore an exceptional circumstances test equivalent to that rejected by the House of Lords in Huang, by reference to the old Immigration Rules. He submitted that the claimant in this case can, in any event, show good grounds for the grant of leave outside the Rules and compelling circumstances, although not required in law, because he made a genuine mistake in his application; he is a genuine student with only 6 months of study to be completed.

13. Mr Dey relied on the case of (CDS (PBS: "available": Article 8) Brazil [2010] UKUT 00305 (IAC) and submitted that this claimant's position could be distinguished on the facts from that in Nasim on the basis of post study work; this claimant has yet to complete his studies. He relied on paragraph 41 of Nasim stating that it would 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. Mr Dey submitted that although the Judge found the Article 8 decision for this claimant to be border line it was nonetheless a decision he was entitled to make.

14. Having considered all the submissions before me I announced my decision that the making of the Article 8 ECHR decision in the First-tier Tribunal involved the making material errors on a point of law such that the decision falls to be set aside and remade. Having set aside that part of the decision I heard further brief submissions from the representatives with a view to remaking the decision. Their submission in relation to the error of law were taken forward for the remaking of the decision with the additional submission from Mr Dey that discretion should have been exercised by the Secretary of State for the Home Department to allow the claimant leave to remain until 2015 to complete his studies. The failure to do so was submitted to amount to a decision made otherwise than in accordance with the law. I reserved my final decision and full reasons which are as follows.

15. The Judge found that the claimant had not submitted the necessary evidence of funds for maintenance and that the informational deficiencies before the Secretary of State were such that the claimant was not entitled to the exercise of any

discretion under paragraph 245A of the Immigration Rules; at paragraph 8 of his determination the Judge records that Mr Dey, acting for the claimant in those proceedings as well, did not rely on the case of Secretary of State for the Home Department v Rodriguez [2014] EWCA Civ 2. The Judge found no family life in existence in the United Kingdom and made clear findings that the private life requirements were not met under paragraph 276ADE of the Rules. In my judgment these findings disclose no error, but the Judge falls into error thereafter for all the reasons relied upon by the Secretary of State.

16. I find that the Judge erred by failing to take account of relevant case law starting with the case of Gulshan which decided that a consideration of the nature and extent of the failure to meet the Rules must be a precursor to consideration of Article 8 within the Rules and under the ECHR and only if there are "arguably good grounds" for granting leave to remain outside the Rules was it necessary for the Tribunal for Article 8 purposes to go on to consider whether there are "compelling circumstances not sufficiently recognised by the Rules".

17. The Judge failed to consider the existence of arguably good grounds outside the Rules before allowing the appeal under Article 8 and his findings disclose no compelling circumstances not sufficiently recognised by the Rules. I am satisfied that he erred in these circumstances by undertaking a free-standing consideration under Artilce 8 of the ECHR in the first place. I am further satisfied that the Article 8 conclusions in favour of the complainant are not internally sustainable in the light of his findings or in the light of the case law that he failed to apply deciding that Article 8 is concerned with private or family life, not education as such.

18. In considering paragraph 41 of Nasim, relied upon by the claimant, I accept the submission from Miss Everett that it is not authority as such to distinguish between claimants who are post-study and those who have yet to complete studies. It simply leaves the door open to Article 8 engagement by stating that 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.

19. The findings in the case of Patel were endorsed in Nasim [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. In Nasim [2014] 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.

20. I find that the appellant 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 paragraph 15 of Nasim [2014] 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.

21. When properly weighed in the balance I find that the facts found for the claimant as follows do not outweigh the public interest in immigration control. His private life in the United Kingdom does not consist of relationships or social ties; he has at all times been present in the United Kingdom for the temporary purpose of studying; his private life consists of those studies which have been explicitly

found to be available in Bangladesh. I accordingly remake the decision by dismissing the appeal under Article 8 of the ECHR.

Summary of Decisions

22. The decision of the First-tier Tribunal stands in relation to the dismissal under the Immigration Rules.

23. The making of the First-tier Tribunal decision involved the making of errors on a point of law in relation to Article 8 of the ECHR.

24. The decision under Article 8 of the ECHR is set aside and is remade as follows.

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

26. This appeal made by the Secretary of State to the Upper Tribunal succeeds.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Signed:

J Harries

Deputy Upper Tribunal Judge
Dated: 30th July 2014

Fee Award

The position remains that no fee award was made in the First-tier Tribunal.

Signed:

J Harries

Deputy Upper Tribunal Judge
Dated: 30th July 2014