



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/11810/2014

THE IMMIGRATION ACTS

Heard at Field House

On 19th February 2015

**Decision & Reasons
Promulgated**

On 5th March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS DHARSHANEE SUMANGALA PREMANATHAN DURAI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Avery, Home Office Presenting Officer

For the Respondent: Mr Khan, Counsel for Louis Kennedy Solicitors, London

DECISION AND REASONS

1. The Appellant in these proceedings is the Secretary of State, however for convenience I shall now refer to the parties as they were before the First-tier Tribunal.
2. The Appellant is a citizen of Sri Lanka born on 7th June 1988. She appealed against the decision of the Respondent dated 18th February 2014 refusing

her leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant under the points-based system (PBS) and for a biometric immigration document under paragraph 245ZX of the Immigration Rules. Her appeal was heard by Judge of the First-tier Tribunal Walker on 3rd November 2014. The appeal was dismissed under the Immigration Rules but allowed on human rights grounds in a determination promulgated on 11th November 2014.

3. An application for permission to appeal was lodged and permission was granted by Judge of the First-tier Tribunal Colyer on 9th January 2015. The grounds of application are that the judge has materially misdirected himself in law as the Appellant cannot show that she meets the requirements of the Rules as they relate to maintenance. The judge holds that this is the fault of the Secretary of State for failing to return the Appellant's bank passbook but the Respondent argues that the Appellant's bank is equally responsible for failing to issue a replacement for a seemingly spurious reason which the judge seems to accept with equanimity. The grounds state that by allowing the appeal under Article 8 of ECHR the judge is guilty of an error identified in paragraph 57 of **Patel [2013] UKSC 72** and that if the decision was either procedurally or substantively unfair the correct approach would have been to make a finding of "otherwise not in accordance with the law" rather than impermissibly allow the appeal under Article 8.

The Hearing

4. There is now a letter on file dated 21st January 2015 from Hatton National Bank which states that it will not issue a passbook unless the previous passbook is lost or stolen or unless the Home Office forward a request to them in a letter for the issue of a new passbook, when they will then issue a temporary passbook. The Presenting Officer had not seen this letter although it was sent to the Tribunal on 4th February 2015.
5. The Presenting Officer submitted that in this claim the Appellant cannot meet the requirements of the Rules as they relate to maintenance. He submitted that it was wrong for the judge to say that the Secretary of State should have sorted this matter out, as the Appellant has to produce evidence from her bank to show that she has the required sums for maintenance for a 28 day period and he submitted that she should have made sure that the bank provided evidence to satisfy the terms of the Rules. He submitted that the reasons for being unable to do this are irrelevant and based on what was before him; the judge found that the Appellant could not satisfy the maintenance terms of the Rules.
6. The Presenting Officer submitted that the judge has allowed the appeal under Article 8 of ECHR but this is not justifiable. He submitted that the judge has not explained how Article 8 applies to the Appellant. The Appellant is in the United Kingdom as a student and has to leave the United Kingdom, in terms of her visa, at the end of her studies. He submitted that she has a limited private life in the United Kingdom based

on her studies. He submitted that the judge's decision to allow the claim under Article 8 means that the judge is guilty of the error identified in paragraph 57 of **Patel** - "Of using Article 8 as a general dispensing power". The Presenting Officer submitted that in reality the situation has nothing to do with Article 8. For whatever reason the Appellant has not provided the required evidence to meet the terms of the Rules. He submitted that to allow the claim under Article 8 is a wrong approach and if the judge had found the Secretary of State's decision to be unfair it should have been remitted back to the Secretary of State for reconsideration. He submitted that to allow the claim under Article 8 is not the correct course.

7. The Appellant's representative submitted that the judge made a proper assessment. The Appellant could not meet the criteria under the Immigration Rules because the bank passbook was with the Home Office. He submitted that the Respondent did not return the passbook to the Appellant and this caused the problem. He submitted that because of the non-action of the Respondent, the Appellant was left in a vulnerable position as the bank was not prepared to provide a new passbook, if the passbook was not lost or stolen. He submitted that the Appellant has been heavily prejudiced and it cannot be right for the Home Office to be able to profit from its own negligence at the expense of an Appellant. He submitted that the responsibility is with the Home Office.
8. The representative submitted that the bank passbook was submitted to the Home Office with a previous application and has not been sent back and is still in its possession.
9. The representative referred to Article 8 and the said case of **Patel**. He submitted that this case does not mean that a student in the United Kingdom has no private life under Article 8. The Appellant has friends and contacts in the United Kingdom because of her life here as a student. She has a private life and this has now been interfered with through no fault of her own. He submitted that the judge has made his decision properly and has dealt properly with proportionality and he submitted that the interference to the Appellant's private life is because of the actions of the Home Office. The representative submitted that it cannot be right to say that the Appellant is responsible for this lack of evidence. She cannot produce the evidence. There is now a letter from the bank which states that a new passbook will not be issued unless the old passbook has been lost or stolen.
10. I was referred to paragraphs 21 and 22 of the determination which refer to the Appellant's representative making subject access requests and the evidence that the bank book was received by the Respondent. The judge accepts the Appellant's evidence that she has not been able to obtain a replacement passbook. The determination refers to the Appellant having confirmation from the bank about the balance in the account but this only relates to the balance at a certain date and is not sufficient for the terms of the Immigration Rules to be met.

11. I asked the Presenting Officer if the only evidence that could be accepted by him would be the passbook and he said that is not the case. The Respondent requires evidence to show that the Appellant had the money for the required period and bank statements, for example, relating to the 28 day period would have been sufficient or other relevant evidence.
12. The Presenting Officer submitted that the bank said it would not give the Appellant a new passbook so what she got was a letter dated in January 2015 but nothing else. He submitted that the judge accepted her evidence but did not have the required documentary evidence before him. He submitted that the bank could have given the evidence in another way but did not do so. He submitted that we still do not have evidence that the required maintenance sums were available for the 28 day period and I was asked to find that there is an error of law in the determination.

Determination

13. This Appellant's appeal cannot succeed because the required evidence has not been obtained by the Appellant. The burden of proof is on the Appellant.
14. The judge did not have before him any evidence relating to the passbook although we now have a letter from the bank stating that it will not issue a new passbook unless the old one has been lost or stolen. The judge accepted that the passbook was not available and was with the Home Office. He also accepted that the Appellant's representative had made access requests and accepted that the Respondent had acknowledged receipt of the passbook. The judge found that on the balance of probabilities the passbook had not been returned to the Appellant and is still held by the Respondent. The Appellant produced to the judge confirmation from the bank of what the balance in her account was but only at one certain date.
15. Because of this situation the appeal could not succeed under the Immigration Rules but the judge has allowed it under Article 8.
16. What the judge has done is used Article 8 as a general dispensing power as the Rules cannot be satisfied. This is an error of law.
17. The Presenting Officer made it clear at the hearing that he would have accepted a statement from the bank for the 28 day period and that the passbook itself was not required. We still have no evidence that the Appellant had sufficient funds in her account for the 28 day period. The judge cannot find on the balance of probabilities that she had this. All the judge knew was that she had a certain amount in the bank at a certain date. As the burden of proof is on the Appellant, the Appellant should have made an effort to obtain satisfactory evidence from the bank so that the terms of the Immigration Rules could be met. She did not do so.

18. In the said case of Patel it is stated that the opportunity for a promising student to complete her course in this country, however desirable in general terms, is not in itself a protected right under Article 8. I do not find that the decision of the Respondent is procedurally or substantively unfair.

Notice of Decision

19. There is a clear material error of law in the judge's determination.

20. I set aside the decision. The claim under the Immigration Rules is dismissed and the claim on human rights grounds is dismissed.

21. Anonymity has not been directed.

Signed

Date

Deputy Upper Tribunal Judge Murray