



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

Appeal Numbers: IA/41118/2014
IA/41123/2014

THE IMMIGRATION ACTS

Heard at Field House

On 7 October 2015

**Decision & Reasons
Promulgated
On 16 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

**CHARANJIT KAUR
SAAB SINGH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

Respondents

Representation:

For the Appellant: Mr. S. Kandola, Home Office Presenting Officer
For the Respondent: Mr. R. Singer, Counsel, instructed by Paul John & Co
Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge N M K Lawrence in which he allowed the Appellants' appeals against the refusal of the Secretary of State to grant further leave to remain as a Tier 4 student and dependant.

2. For the purposes of this appeal I shall refer to the Secretary of State as the Respondent and to Mrs. Kaur and Mr. Singh as the Appellants, reflecting the positions as they were before the First-tier Tribunal.
3. Permission to appeal was granted on the basis that it was arguable that the judge did not have jurisdiction to allow the appeal, or to remit it to the Respondent to exercise a non-existent discretion, having found that Mrs. Kaur did not meet the requirements of the immigration rules as she had not had sufficient funds in her account for 28 consecutive days.

Submissions

4. Mr. Kandola relied on the grounds of appeal. He submitted that there was no lawful basis for remitting the appeal under paragraph 245XD. There was no discretion under paragraph 245AA regarding evidential flexibility as this was not the case of a missing document. There was no issue of common law fairness or unfair treatment and the appeal should have been dismissed.
5. For the Appellants Mr. Singer submitted that this was as near a near miss as could be imagined. He referred to the case of Patel [2013] UKSC 72. The funds had been in the control of the family and when Mr. Singh transferred the funds he assumed that they would reach his wife's account quicker than they did. I was referred to paragraph [3] of Mr. Singh's witness statement.
6. Mr. Singer submitted that that the judge clearly thought that it was ridiculous that the application had been refused and that decisions to remove the Appellants had been made in these circumstances. He submitted that, although he might have exercised his discretion in a way which was inelegant, uppermost in his mind were the issues of common law fairness, proportionality under Article 8 and the fact that the Respondent had failed to consider granting leave in the circumstances. He submitted that it was clear that the judge wanted the Respondent to consider whether the decisions were proportionate under Article 8.
7. However he accepted that there was no reference in the decision either to Article 8 or to the common law duty of fairness. The complaint of the judge was that the decision lacked commonsense. He submitted that the judge had not considered Article 8 as he had wanted the Respondent to look at this issue, otherwise he himself would become the primary finder of fact.
8. In conclusion he submitted that it was clear that the judge felt a degree of sympathy for the Appellants and wanted the Respondent to consider granting leave on an alternate basis. This is why the appeals were remitted back to the Respondent.
9. In response Mr. Kandola submitted that it had been accepted that the Appellants did not meet the requirements of the immigration rules. Given this, it could not be said that the decision was not in accordance with the law. I was referred to the case of EK (Ivory Coast) [2014] EWCA Civ 1517 on

the scope of common law fairness. Here there was no culpability on the part of the Respondent.

10. In relation to the submission that the judge had remitted it for consideration under Article 8, there was no reference in the decision to Article 8. An application had been made for further leave to remain, not for leave to remain under Article 8. However, the judge could have gone on to consider Article 8. He submitted that the judge would have to have found that there were exceptional or compelling circumstances arising from the failure to meet the requirements of the immigration rules. Mr. Kandola submitted that there were none. The remedy was to make a fresh application.

Error of law decision

11. I found that the decision involved the making of an error on a point of law. The judge did not have discretion to remit the appeal for failure to meet the requirements of the immigration rules. It is clear from the decision, and it is accepted by the Appellants, that they did not meet the requirements of the immigration rules, as Mrs. Kaur had the funds in her account for 27, not 28 days. The judge remitted the appeals without reference either to Article 8 or having found that the decision was unlawful as being unfair at common law. It is not at all clear from the decision on what basis he remitted the appeals to the Respondent.
12. Article 8 was raised in the grounds of appeal before the First-tier Tribunal but the judge did not go on to consider Article 8. He gave no reasons for his failure to consider the appeals under Article 8, but the issue had been raised by the Appellants in the grounds of appeal before him.
13. I announced that I found the decision involved the making of an error of law. I proceeded to remake the decision.

Decision on remaking

14. It is accepted that the Appellants cannot meet the requirements of the immigration rules for failure to meet the financial requirements of paragraph 245XD, and accordingly I dismiss the appeals under the immigration rules.
15. I find that there was no culpability on the part of the Respondent such as to lead to a finding that there was any unfairness in the decision. Mrs. Kaur failed to meet the requirements of the rules for a reason in her control. She failed to arrange her finances such that the necessary funds were in her account for 28 days.
16. I have considered the Appellants' appeals under Article 8 in accordance with the steps set out in Razgar [2004] UKHL 27. It was not submitted that the decision was a breach of their right to family life. The Appellants will be returning to India together. No evidence of any other family in the United

Kingdom was provided. I find that the decisions do not interfere with their family life.

17. In relation to private life, the Appellants have been in the United Kingdom since November 2010. Mrs. Kaur came as a student and Mr. Singh came as her dependent. I find that they have been here for over four years and, given the low level at which private life is established, I find that they have established a private life sufficient to engage the operation of Article 8.
18. Continuing the steps set out in Razgar, I find that the proposed interference with this private life would be in accordance with the law, as being a regular immigration decision taken by UKBA in accordance with the immigration rules. In terms of proportionality, the Tribunal has to strike a fair balance between the rights of the individual and the interests of the community. The public interest in this case is the preservation of orderly and fair immigration control in the interests of all citizens. Maintaining the integrity of the immigration rules is self-evidently a very important public interest. In practice, this will usually trump the qualified rights of the individual, unless the level of interference is very significant. I find that in this case, the level of interference would not be significant and that it would be proportionate.
19. I have taken into account the provisions of Section 117B. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. I have taken into account the fact that the Appellants have failed to meet the requirements of the immigration rules.
20. In relation to the other factors in section 117B, the Appellants speak English (117B(2)). In relation to their financial independence, the Respondent was not satisfied that they met the financial requirements of the immigration rules as Mrs. Kaur failed to meet the requirements of paragraph 245XD. Although I find that the immigration rules were not met, I find that Mr. Singh had transferred the money to Mrs. Kaur's account, and that the Appellants had the required funds between them, but they had not arranged their finances properly for the purposes of paragraph 245XD (117B(3)). However a positive finding in respect of English language skills and financial independence is not enough on its own to outweigh other relevant factors.
21. In relation to the nature of the failure to meet the requirements of the immigration rules, I am also mindful of paragraphs [56] and [57] of Patel, "a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit".
22. The Appellants came to the United Kingdom with temporary leave. Their private life has been established when their leave to remain was precarious, so little weight can be attached to it (117B(4)). There was no expectation that leave would be granted on a permanent basis.

23. Mrs. Kaur initially came to the United Kingdom with a student visa valid for two years until May 2012. In February 2012 she finished the course for which she had been granted a visa. She was then granted an extension for two years until August 2014. In her witness statement she said that she has done the work for this course, but the college has closed and her work has not been sent to the awarding body. The course she has applied for is at the same level but is only for one year.
24. I find that Mrs. Kaur has already had an extension of two years in order to reach level 7. She has achieved the aim for which she came to the United Kingdom, completing the first course in February 2012. There is nothing to stop her from continuing her studies in India, the country where she has spent the vast majority of her life. Neither is there anything to stop her from making a fresh application.
25. I find that the Appellants will be returning to India, their country of origin, where they have spent the vast majority of their lives. I find that they have social, cultural, family and linguistic ties to India. No evidence was provided that either of them has any medical needs. Mrs. Kaur will be returning with the benefit of the education she has received here.
26. There is a significant public interest in refusing leave to remain to those who have not satisfied the requirements of the immigration rules. I find, taking into account all of the circumstances of the Appellants, that they have failed to show on the balance of probabilities that the decision is a breach of their rights to a private life under Article 8 or indeed any other rights protected by the Human Rights Act 1998.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside.

I remake the decision, dismissing the appeals under the immigration rules and on human rights grounds.

Signed

Date 15 October 2015

Deputy Upper Tribunal Judge Chamberlain