Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/46323/2013

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 11 February 2015	**On 19 February 2015**
Prepared on 15 February 2015	

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

F. A.
(ANONYMITY DIRECTION)

Respondent

Representation:
For the Appellant: Mr Dewison, Home Office Presenting Officer
For the Respondent: Mr O'Ryan, Counsel, instructed by Access Immigration Law

DECISION AND REASONS

1. The Respondent, his wife, and son, are citizens of Ghana.

2. The Respondent first came to the UK as a visitor on 10 April 1999, in order to write a project report at Durham University. Between 1999 and 2002 he made a number of visits to the UK as part of an agricultural research project, funded by the DFID.

3. On 5 October 2002 the Respondent was granted leave to enter until 11 March 2003, and he returned to Ghana on 4 March 2003.

4. On 16 February 2004 the Respondent was granted leave to enter as a student until 30 January 2005 in order to study for a Masters degree in geography at Durham University. That course of study was eventually completed in July 2005, and the degree for which he had commenced studying in 2004 was eventually awarded to him in January 2006 [25].

5. The Respondent then enrolled upon a further course of study at Durham University for a PhD. The Respondent completed his work upon his thesis, and submitted it on April 2013. He must undertake a viva examination upon his thesis, and then complete any corrections or amendments required of the thesis by his examiners, before that PhD can be awarded to him. He must also have a grant of leave to remain in the UK before the University will arrange a viva for him in country, and as is now accepted he has been an overstayer in the UK since May 2012.

6. The Appellant had applied in time for a variation of the grant of leave made to him in February 2004, and his leave was duly varied until 30 April 2009. A further in time application for a variation of his grant of leave was refused by the Appellant in July 2009, but the Respondent successfully appealed that decision to the Tribunal on 30 September 2009, and thus in February 2010 his leave was duly varied, until 30 May 2012.

7. On 28 May 2012 the Respondent sought advice from Durham University on the application he proposed to make for a variation of his leave [ApBp51]. It is plain that he was advised, correctly, of the fee due of £394, and also that he had not yet made such an application. The same day the Respondent purchased postal orders payable to the Appellant, for £386 [ApB p55]. The application form is date stamped as having been received by the Appellant on 30 May 2012 [ApB p56].

8. Although the Respondent therefore submitted an application for a further variation of his leave to remain before 30 May 2012, it was properly rejected by the Appellant on 31 May 2012 as an invalid application because he had failed to submit the correct fee [ApB p95]. The fee required was £394, but the fee tendered was £386.

9. The Respondent accepts in consequence that his leave to remain therefore expired on 30 May 2012 and that as a result he became an overstayer on that date. Thus the continuous period of lawful residence that he had accrued by that date, was the period from 16 February 2004 until 30 May 2012 – a period of just over eight years.

10. On 8 June 2012, and thus as an overstayer, the Respondent applied for further leave to remain as a student. His application was refused on 1 November 2012 without any in country right of appeal because he had no valid leave to remain

when he made the application. His application was considered but refused on its merits because he had failed to demonstrate that he had the requisite funds available to him, with the requisite evidence. He had failed to provide any personal bank statements, and had supplied in support of the application only bank statements for a Ghanaian bank account held by a company, "Acheelistics Ventures".

11. The Respondent lodged an application for judicial review of the decision to refuse him an in country right of appeal, which was refused on 15 April 2013 [ApB p127]. HHJ Gosnell refused that application on the bases; i) the Appellant was perfectly entitled to reject as invalid the May 2012 application for failure to tender the correct fee, ii) the June 2012 application was made as an overstayer, and so whilst there was a discretion to consider it on the merits, there was no right of appeal against its refusal, iii) the bank statements submitted in support of the June 2012 application disclosed no obvious connection to the Respondent. Even if he had a right of appeal, the application would have been refused quite properly on that basis.

12. On 25 March 2013, and thus as an overstayer, the Respondent applied for a grant of indefinite leave to remain pursuant to paragraph 276B of the Immigration Rules, which was refused on 16 October 2013. In consequence a decision was taken on the same date to remove him to Ghana as an overstayer.

The Respondent's wife and son

13. The Respondent's wife was first granted entry clearance as his dependent in 2002. She returned to Ghana with him in March 2005, and she gave birth to their son in Ghana on 2 June 2005. She and the child remained in Ghana, although the Respondent returned to the UK to resume his studies.

14. The Respondent's wife and son were granted entry clearance as the Respondent's dependent on 17 July 2008. Their leave to remain expired alongside his own on 30 May 2012. Since that date, they too have been overstayers. It would appear that no separate application was made by them for leave to remain in March 2013. If an immigration decision has been made in relation to them, they have made no appeal to the Tribunal against it.

The appeal

15. The Respondent's appeal against the immigration decisions of 16 October 2013 was heard on 6 January 2014. It was dismissed under the Immigration Rules, but allowed on Article 8 grounds, in a Determination promulgated on 17 January 2014 by First Tier Tribunal Judge Henderson.

16. By a decision of First Tier Tribunal Judge Simpson dated 3 April 2014 the First Tier Tribunal granted the Appellant permission to appeal on the basis it was arguable the Judge had erred in her approach to the Article 8 appeal, and had treated this as a "near miss" to the requirements of the Immigration Rules, and

had failed to identify any compelling circumstances why the appeal should be allowed outside the Immigration Rules.

17. The appeal was first called on before me for hearing on 17 June 2014, but during the course of argument as to whether the Determination disclosed a material error of law in the Judge's approach to the Article 8 appeal, it was noted that the Judge had made reference to, and apparently relied upon, the decision of the Upper Tribunal in Rodriguez (Flexibility Policy) [2013] UKUT 42, which had been overturned by the subsequent Court of Appeal decision of Rodriguez [2014] EWCA Civ 2. The Respondent sought, and was granted, an adjournment of the hearing in the interests of fairness in order that Counsel might consider the implications of that point, and because if the conclusion was that the Tribunal had erred it was by then plain that there was inadequate court time in which to rehear the Article 8 appeal. Permission was granted to the Appellant to amend the grounds of challenge to the Tribunal's decision, to take that point (the Respondent having argued that it was not open to her to do so pursuant to the application for, or grant of, permission to appeal) and Directions were made for the relisting of the appeal.

The appeal under the Immigration Rules

18. It was not in dispute before me that the Respondent became an overstayer on 30 May 2012, and that he did not meet the requirements of paragraph 276B of the Immigration Rules for the grant of indefinite leave to remain that he had sought by his application of 25 March 2013. Put simply he did not then have, and could never reasonably have persuaded himself that he did have, the period of continuous lawful leave required by paragraph 276B. The March 2013 application he made was always doomed to failure, and he and his then solicitors (Blavo & Co, who are not his current representatives) must always have realised that.

19. Again it was not in dispute that the Respondent did not meet the requirements of either paragraph 276ADE, or Appendix FM of the Immigration Rules, either when he made his application in March 2013, or, when his appeal was heard by the Tribunal in January 2014.

20. It was thus accepted by Mr O'Ryan that the Tribunal was correct to so conclude, and, that this should have been the context in which the Article 8 appeal was considered by the Tribunal outside the Immigration Rules.

The Article 8 appeal outside the Immigration Rules

21. It is accepted on the Respondent's behalf by Mr O'Ryan that the decision to remove him to Ghana never posed an interference in his "family life" enjoyed by the Respondent with his wife and son, since the Respondent would be able to remove the family together. It is accepted on the Respondent's behalf that the appeal could only properly have been considered on Article 8 grounds on the

basis that the removal decision constituted interference in the Respondent's "private life".

Error of Law?

22. In consequence of the acceptance that this was only ever a "private life" appeal, the Judge ought to have considered the appeal in the light of the guidance to be found in the decision of the Supreme Court in Patel [2013] UKSC 72, to which there is no reference in her Determination. The following statements of principle are relevant;

> "a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit" [56].
>
> "It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the rules are not reviewable on appeal: section 86(6). One may sympathise with Sedley LJ's call in *Pankina* for "common sense" in the application of the rules to graduates who have been studying in the UK for some years (see para 47 above). However, such considerations do not by themselves provide grounds of appeal under article 8, which is concerned with private or family life, not education as such. 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." [57]

23. The Judge was plainly troubled by the explanation given to her by the Respondent for how the application he had submitted in May 2012 had been invalid. She noted that the explanation she had been given was not one that was fully explained in the Respondent's application for judicial review of the decision to reject that application as invalid [28, 33]. Indeed she appears to have accepted that it was inconsistent with the explanation that was offered in that application for judicial review [32]. The approach taken in paragraphs 44 and 50 of her Determination appears to have been to review both the decision to reject the May 2012 application as invalid, and the decision to refuse the June 2012 application for failure to meet the evidential requirements of the Immigration Rules.

24. The Judge appears then to have gone on to consider whether the May 2012 application would have succeeded if it had been considered on its merits, and whether the decision to refuse the June 2012 application would have been subject to a successful appeal. She approached the Article 8 appeal on the basis that the Respondent should have been granted the variation to his leave that he then sought. Thus she appears to have accepted the Respondent's new explanation for how the invalid May 2012 application had come to be made. Moreover she appears to have accepted [29-36] that the Respondent had assumed that the documents submitted in support of the June 2012 application would meet the then current requirements set out in the Immigration Rules, because documents of that type had been accepted as doing so when submitted

in support of previous applications for leave to remain. (Those documents related to the trading company in Ghana that the Respondent claims to own outright, and which is the source of the monies used by him to meet his tuition fees, and the maintenance in the UK of himself, his wife, and son.) It is implicit in her decision that she accepted that the documents he had submitted did not meet the then requirements of the Immigration Rules.

25. The Judge considered *the "PBS Process Instruction" on "evidential flexibility"* and found that the Appellant would hold a "*large file*" upon the Respondent, and that it would be "*reasonable*" to expect the Appellant to be aware of the Respondent's ownership of the trading company in Ghana, and that it was "*surprising*" the Appellant did not make further enquiries of the Respondent before making a decision upon his application [36]. It is plain that she did not consider the decision upon the June 2012 application to be one that was made in accordance with the law, for failure to follow the evidential flexibility policy, and that this was the context in which she approach the Article 8 appeal, using that conclusion to attach less weight to the public interest in the removal of the Respondent and his family.

26. In my judgement, although the Judge's initial approach to the Article 8 appeal was quite properly to direct herself that the Respondent never had any prospect of satisfying the requirements of paragraph 276B [38], she nonetheless fell into error in her approach to the proper context in which that Article 8 should be considered. Article 8 did not afford either the Respondent, or the Tribunal, the opportunity to simply side-step or ignore the consequences of his acts, and his failure to make a valid application for a variation of his leave within time, or, his failure to support either that application or his subsequent application with the evidence required of him under the Immigration Rules. Thus the proper context in which the Article 8 appeal should have been considered was that the Respondent had been an overstayer since 30 May 2012, who had made in March 2013 an application for indefinite leave to remain that never had any prospect of success.

27. Instead the Judge's approach to the Article 8 appeal was; a) to review the Appellant's decision to reject the May 2012 application as invalid, and, b) to review the Appellant's decision to refuse the June 2012 application on its merits, and in the light of Rodriguez (Flexibility Policy) [2013] UKUT 42, notwithstanding the lack of any right of appeal on the Respondent's part against that decision, as had been confirmed by the decision of HHJ Gosnell.

28. The Judge's review of the rejection of the May 2012 application as invalid is plainly based upon the very small shortfall between the fee tendered, and the fee required. As the grant of permission to appeal identifies, the Judge was adopting a "near miss" approach to the fee tendered, compounded by her approach to the original explanation offered by the Respondent to the Court for the failure to tender the correct fee, and her acceptance of a different one. I am satisfied that this aspect of the Judge's decision plainly failed to apply the

guidance of the Court of Appeal in Miah [2012] EWCA Civ 261, as confirmed by the Supreme Court in Patel [2013] UKSC 72; there is no "near miss" challenge open to the Respondent.

29. The Judge also plainly considered the Appellant's approach to the June 2012 application in the light of the decision in Rodriguez (Flexibility Policy) [2013] UKUT 42. She could not have been aware of the decision of the Court of Appeal in Rodriguez [2014] EWCA Civ 2, which was promulgated a few days after her own, and in which the decision of the Upper Tribunal was overturned. Nevertheless, in the light of the decision of the Court of Appeal, her approach was flawed. It was simply not open to her conclude that the Appellant had failed to apply its then published policies to the June 2012 application.

30. Accordingly I am satisfied that the Judge considered the Article 8 appeal in the wrong context. Thus, the Tribunal's decision on the Article 8 appeal must be set aside and remade. Having announced that decision to the parties, whilst explaining I would give full written reasons for it subsequently, I heard evidence from the Respondent and his wife in relation to the Article 8 appeal.

The decision remade

The immigration status of the Respondent's family

31. There is no need to repeat the immigration history of the Respondent. The Respondent's wife was first granted entry clearance as his dependent in 2002. She returned to Ghana with him in March 2005, and she gave birth to their son in Ghana on 2 June 2005. She and the child remained in Ghana until they were granted entry clearance as the Respondent's dependents on 17 July 2008. Their leave to remain expired alongside his own on 30 May 2012, and since that date, they too have been overstayers.

Extended family in Ghana

32. Both the Respondent and his wife have an extended family in Ghana.

The best interests of the Respondent's son

33. The Respondent's son first came to the UK at the age of three. He has benefited from education at public expense in the UK since arrival, and he is now aged nine. The Judge found [47] (and there is no need to revisit these findings) that he had settled well in the UK, and assimilated the culture. He attended Church and was a keen footballer, with friends. He prefers to use English, although he is part of a household in which Twi would be familiar to him, and that even if he was not fluent in Twi, he would be able to become fluent upon return. She also found that English is an important language in Ghana, and that he was young enough to adapt to life there.

34. Following the guidance to be found in EV (Philippines) [2014] EWCA Civ 874 the assessment of his best interests must be made in the context that he and his parents are Ghanaian nationals with no right to remain in the UK. I am satisfied that of his parents are to be removed it is entirely reasonable to expect him to go with them. He has no right, or legitimate expectation to education at public expense in the UK, and his best interests are plainly served by growing up with his parents. Indeed upon return to Ghana he would have the additional benefit of growing up within the extended family that remain in that country.

35. There is no suggestion that this boy would face any lack of safety in the event of return to Ghana, and given his parents' education and relative wealth in the context of Ghana, the evidence does not suggest that he would lack any opportunity there. Indeed given the claims made for his parents' financial circumstances they would be in a position to purchase for him the best education available in Ghana. There is no evidential basis upon which I could assume that this would be better or worse than that which he would obtain at public expense in the UK.

The Respondent's health

36. Mr O'Ryan accepts that the Article 3 threshold is not met in relation to the health of the Respondent.

37. The Judge appears to have accepted that during the currency of his leave to remain in the UK, in 2006, the Respondent fell increasingly ill as a result of a serious thyroid condition. She accepted that this condition was sufficiently serious to prevent him from studying during 2006 and 2007. The Judge also appears to have accepted that in February 2011 the Respondent fell seriously ill once again, this time as a result of a hand injury that had become very badly infected, and that once again his studies were seriously disrupted during at least 2011.

38. As a result of his health issues, Durham University extended to the Respondent a series of extensions of time to allow him to complete his studies. Those extensions were relied upon in the series of applications he then made to vary his leave to remain.

39. The Respondent appears to have accepted before the Judge, and he clearly confirmed in the evidence that he gave to me, that rather than seeking treatment for his thyroid condition in the UK, he had returned frequently to Ghana in order to seek treatment at the Komfo Teaching Hospital, situated in Komasi, the town in which he grew up, and in which his parents lived. It is not necessary to undertake an analysis of the stamps in his passport to reconstruct his itinerary, and the number and length of the periods of time spent in Ghana, because the Respondent has made no suggestion to the effect that the medical facilities accessible by him in Ghana were insufficient to meet his needs, either when the effects of his thyroid condition, or his hand injury, were at their

height, or now. For the avoidance of any doubt I am not satisfied that there is any medical treatment that the Respondent needs that he would be unable to access in Ghana.

40. It is plain that the Respondent has over the years received treatment from the NHS in relation to his thyroid condition and his hand condition [26]. There is no evidence to suggest, one way or the other, that he has paid for any of this privately.

The health of the Respondent's wife

41. Mr O'Ryan accepts that the Article 3 threshold is not met in relation to the health of the Respondent's wife.

42. The Judge was told by the Respondent's wife in evidence [ApB p154] that she had suffered a miscarriage in 2009, and had not subsequently been able to conceive. The couple had sought specialist medical advice at the Centre for Life in Newcastle in December 2012, had been advised to take folic acid supplements, and wished and intended to pursue IVF treatment in the UK [14]. The Judge accepted that this was a genuine issue of importance to the Respondent's wife, and that she could apparently only conceive with the assistance of IVF treatment, but noted that the evidence before her did not establish how the proposed IVF treatment would be financed [48].

43. With the passage of time, matters have moved on. The Respondent's evidence is now that specialist medical assistance was sought as early as March 2012, and after a series of tests, and retests, the couple were advised in October 2013 that they would need to undertake IVF treatment in order to have a realistic prospect of conceiving. On 28 March 2014 following further tests, further specialist advice was provided; that in the light of the presence of some fibroids in the womb intra-cytoplasmic sperm injection (ICSI treatment) would be more likely to be effective than IVF treatment. ICSI treatment began in June 2014 [ApB p197-207].

44. A June 2013 fee schedule for privately financed fertility treatment at the Centre for Life, completed in June 2014 by the Respondent indicates that the cost of one course of ICSI treatment is £4,700 including drugs required. There is no schedule of the different tests, consultations, and fertility treatments that the Respondent and his wife have received over the last few years, and no documentary evidence to corroborate the Respondent's claim that he has paid for all of it from funds drawn by him from his business in Ghana, and advances made to him from members of their extended family. The only receipt produced for such a payment is dated 28 March 2014 for £480, which appears to relate to some pre-treatment tests and the consultation with a Consultant Gynaecologist on that date.

45. Although it was not immediately successful, courses of the ICSI treatment have now proved to be a success, because the Respondent's wife is pregnant and due

to give birth on 15 July 2015. The Respondent says in evidence however that this pregnancy is complicated by his wife's history of miscarriage, and by her fibroids. Thus he says, although there is no corroborative evidence to this effect, that the couple have been advised not to travel away from Durham without an assessment being undertaken of whether it is safe for mother or baby to do so. Whilst the routine dating scan undertaken on 7 January 2015 revealed no issue with the pregnancy, the Respondent's wife has reported persistent abdominal pain and blood spotting, and the scan confirmed the 2013 diagnosis of uterine fibroids so that she has an appointment for an anomaly scan, and an appointment with a Consultant Gynaecologist booked for 20 February 2015. There is no documentary evidence to suggest that the Respondent has paid for the post fertility treatment his wife has received from the NHS.

46. The Respondent's wife accepts that she has not yet been advised that she needs any particular treatment, let alone specialist treatment, and she does not suggest that she has been advised that air travel to Ghana poses any risk to herself or her baby. Indeed when asked whether she had been given any advice about travelling she contradicted the claim in the Respondent's witness statement, and said that she had not – the only advice she had received had been to rest, and not to carry anything. The Respondent accepted that he did not yet know what, if anything, his wife would require by way of medical treatment in order to be delivered safely of a healthy baby. Thus he could not say whether or not that medical treatment would be available to her in Ghana.

47. For the avoidance of any doubt I am not satisfied that there is any medical treatment that the Respondent's wife needs that she would be unable to access in Ghana.

The Respondent's income

48. In Ghana it is accepted that both the Respondent and his wife held employment. There is no suggestion that they would be unable to find employment there in the future. Indeed the Respondent's qualifications ought to place him amongst the elite in his field. He does not in fairness suggest that he would be unable to do so.

49. The Judge accepted that the Respondent owned a trading business in Ghana, based primarily in Kumasi, although with a branch in Accra. The Respondent accepted in evidence before me that he still owned this business, and that it had always been the source of all of the funds used by him to pay tuition fees in the UK, and to support both himself, his wife and son in the UK. The evidence before me does not allow me to evaluate the profitability of this business, since neither trading accounts, nor tax returns for it are produced, only bank statements. Given the Respondent's claim to have been financed by way of his drawings from this business over the years, on any view it must be an extremely successful business. It is plain that it could only continue to prosper with the Respondent's return to Ghana and ability to devote greater attention to

its affairs. Moreover there is no reason to suppose that it would not continue to provide the funds to support the lifestyles of the Respondent, his wife and son, and the costs of any education, or any medical treatment that any of them might require. If the funds the Respondent could draw from that business were sufficient to support the family, his education, and their fertility treatment in the UK, as he has claimed, then it is self evident that there is no basis upon which I could find that the Respondent and his family would lack for anything upon return to their extended family in Ghana.

The Respondent's PhD

50. The Judge accepted, and again there is no need to revisit the finding, that the Respondent's study and work upon his doctoral thesis which had commenced so long ago had been significantly delayed as a result of his ill health. The Judge did not identify however, and perhaps she was never told, that the Respondent commenced work upon his thesis in January 2008, and had completed his work upon his thesis to the satisfaction of his tutor, and had therefore submitted the final draft for consideration by his examiners on 25 April 2013.

51. The Respondent accepted in evidence before me that he has not undertaken any study since April 2013. The Judge's reference to his not having completed his studies is therefore either mistaken, or a shorthand reference to the fact that he has not undertaken his viva examination upon his completed thesis because of his lack of leave to remain.

52. The Respondent accepted that he has not been told what (if anything) his examiners will require of him by way of corrections to his thesis. Once any required corrections are undertaken by him then the PhD will be awarded to him, and if none are required of him the PhD will be awarded outright.

53. By undated letter, but written in reply to an enquiry by his solicitor dated 25 June 2014, Durham University set out its position in relation to the viva examination that the Respondent was required to undertake upon his thesis [224]. It was confirmed that examiners had been selected for the viva. Whilst attendance in person at a viva examination was normal, it was confirmed that it was possible to arrange attendance remotely by video link, with the approval of the Deputy Head of Faculty.

54. There is no evidence to suggest the relevant office holder has ever refused such an approval to the Respondent, or that the Respondent has ever requested such an approval. The clear implication however is that Durham University are, and have always been, quite content for the Respondent to attend his viva by video link. In my judgement it is plain that it is the Respondent who has refused to entertain that notion, or to pursue it. He does not however a veto in this respect, as Mr O'Ryan accepted. Had the Respondent returned to Ghana following submission of his thesis in April 2013, then there is no reliable evidence that

would allow me to find that his viva would not have taken place by video link that same spring, or early summer.

55. In the circumstances I am satisfied that the Respondent could currently attend his viva examination from Ghana by video link. He has offered no reliable evidence to suggest either that such a video link facility is not accessible to him in Ghana, or that such a means of conducting the viva is not now available to him because of a change in the stance taken by Durham University.

56. The Respondent argues however that because of the passage of time he would need to revise for his viva in order to be successful, and that he could only do so in the UK, using the facilities available to him in person at Durham University. The short answer to that argument is that the evidence does not support the argument. He obviously has access to his own research, and to his own thesis, whether he is in the UK or Ghana. Durham University have confirmed that some of the software used in the data analysis is available remotely, and that he could also access the journals and e-books available within the University library remotely [ApB p224].

57. The Respondent argues however in his witness statement of 3 November 2014, apparently in an attempt to rebut the University's evidence, that not all the materials in the University library are available to him online, and that he was unable to access even those that should be available online when he last tried to do so from Ghana. The evidence of the University on this issue is however rather more reliable, and I prefer it to his. Moreover it is clear to me that he could, if he had wished to take that precaution, have kept himself up to date with developments in his field, and with his own research, since April 2013. If he has not done so, then he has only himself to blame. As to specific specialist books that are not available online, it is not enough to show that he has made reference to some of them in some footnotes to his thesis, or in his bibliography – he needs to show some need to actually access them from Ghana either for the purpose of revising for the viva, or subsequently for the purpose of making corrections to the thesis. In my judgement he has not done so. There is therefore no obvious reason why the Respondent could not return to Ghana both ready, and able, to undertake his viva successfully remotely by video link.

58. Although the Respondent claims to have been told that statistically those who do so are less successful than those who do so in person, there is no reliable evidence to support that claim. Even if his belief were accurate, and soundly statistically based (he offers none) then such statistics would not necessarily indicate an impediment to those undertaking the viva in that way, they may merely indicate a trend either in the nature of research conducted remotely, or in how well such students had prepared for the viva. There could be all sorts of reasons for either of those.

59. The Respondent's final argument is that he might not be able to make from Ghana the corrections to his thesis that his examiners might require of him, due

to his inability to access remotely from Ghana some of the specialist software he had used when in Durham to marshal his research. This is speculation upon speculation and there are at least two answers to it.

60. First, it is at present pure speculation that any corrections would be required at all, or, that any major corrections would be required of him that would require his use of specialist software to make them. The Respondent's tutor was presumably content with the final draft of the thesis he submitted, after so long a gestation. The Respondent has not offered any evidence from his tutor to suggest that he has reservations about its content, depth or scope. The University policy [ApB p230] makes clear that the examiners would have three choices at the conclusion of the viva. They could make an unconditional award if the thesis were free of typographical errors, and they were content with it. They could require minor corrections, but these would not entail further research or any further substantial work. It would only be if the examiners required major corrections that any further research would, or might be required. There is quite simply no evidence upon which I could infer that major corrections would be required of the thesis by the Respondent following his viva.

61. Second, even if major corrections were required, and the Respondent needed to access specialist software to do so, he has identified only three such software packages. Durham University have confirmed that the Respondent would be able to access SPSS software remotely [ApB p225]. The Respondent has produced prices for single user licence to the two other specialist software packages; Strata 13, and NVivo10. Even if one were to assume that he needed one, or both of these packages in addition to SPSS in order to undertake any major corrections to his thesis required of him, and that had to buy the licence in Ghana to do so – the evidence shows that he could afford to do so, and would be able to do so. The price quoted for these software packages [ApB p212-215] means that for a man of his means they would be affordable, and thus accessible to him. The cost is in fact quite modest compared for example to the price of airfares to Ghana, or specialist fertility treatment. Whilst I note the Respondent's complaints about his difficulties in the past in accessing a secure internet connection in circumstances allowing him to study I am not satisfied that he would be unable to make the necessary arrangements should he put his mind and means to the matter.

62. In conclusion therefore I am not satisfied the Respondent is unable to undertake his viva successfully from Ghana, or that he has demonstrated that there is any real impediment to his undertaking it and thus completing the work needed for the award of his PhD.

Sections 117A, 117B of the 2002 Act

63. Since I am remaking the decision after 28 July 2014 I must (in particular) have regard to the considerations listed in s117B to the 2002 Act in considering

whether an interference with a person's right to respect for private life is justified under Article 8(2).

64. I note that the maintenance of effective immigration controls is in the public interest; s117B(1). I note that little weight should be given to a "private life" established by a person when their immigration status is precarious or they are in the UK unlawfully; s117B(4)(5). I am satisfied that at all material times the Respondent has either had a lawful immigration status that is nonetheless precarious, or he has been in the UK unlawfully.

65. I note that the Respondent's son is not a "qualifying child", and that his wife is not a "qualifying partner".

66. The fact that the Respondent speaks English, and claims to be financially independent, does not mean that he enjoys thereby a right to a grant of leave to remain that he does not otherwise qualify for pursuant to the Immigration Rules. Nor do those factors give substance to an Article 8 appeal that is otherwise without merit.

Conclusions

67. In my consideration of the Article 8 appeal pursued by the Appellant I have to determine the following separate questions:

- Is there an interference with the right to respect for private life (which includes the right to physical and moral integrity) and family life?
- If so will such interference have consequences of such gravity as to potentially engage Article 8?
- Is that interference in accordance with the law?
- Does that interference have legitimate aims?
- Is the interference proportionate in a democratic society to the legitimate aim to be achieved?

68. This is an appeal that turns upon the issue of the proportionality of the decision to remove. I note the guidance to be found upon the proper approach to a "private life" case in the decisions of Patel [2013] UKSC 72, and Nasim [2014] UKUT 25. I note the public interest in removal; the following passage in Nasim sets out the relevant principles;

> 14. 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.

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:-

> "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."

16. As was stated in the earlier case of MG (assessing interference with private life) Serbia and Montenegro [2005] UKAIT 00113:-

> "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."

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.

18. In R (on the application of the Countryside Alliance) v AG and others [2007] UKHL 52, Lord Bingham, having described the concept of private life in Article 8 as "elusive", said that:

> "… the purpose of the article is in my view clear. It is to protect the individual against intrusion by agents of the state, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose" [10].

19. It is important to bear in mind that the "good reason", which the state must invoke is not a fixity. British citizens may enjoy friendships, employment and studies that are in all essential respects the same as those enjoyed by persons here who are subject to such controls. The fact that the government cannot arbitrarily interfere with a British citizen's enjoyment of those things, replicable though they may be, and that, in practice, interference is

likely to be justified only by strong reasons, such as imprisonment for a criminal offence, cannot be used to restrict the government's ability to rely on the enforcement of immigration controls as a reason for interfering with friendships, employment and studies enjoyed by a person who is subject to immigration controls.

20. We therefore agree with Mr Jarvis that [57] of Patel and Others is a significant exhortation from the Supreme Court to re-focus attention on the nature and purpose of Article 8 and, in particular, 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 its fuzzy penumbra. The limitation arises, both from what will at that point normally be the tangential effect on the individual of the proposed interference and from the fact that, unless there are particular reasons to reduce the public interest of enforcing immigration controls, that interest will consequently prevail in striking the proportionality balance (even assuming that stage is reached).

21. In conclusion on this first general matter, we find that the nature of the right asserted by each of the appellants, based on their desire, as former students, to undertake a period of post-study work in the United Kingdom, 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.

69. To the extent that the Appellant relies upon his good character, and his desire to undertake complete his PhD whilst physically present in the UK the following passage in Nasim is applicable;

25. A further seam running through the appellant's submissions was that, during their time in the United Kingdom, they had been law-abiding, had not relied on public funds and had contributed to the United Kingdom economy by paying their students' fees. Their aim was now to contribute to that economy by working.

26. We do not consider that this set of submissions takes the appellants' cases anywhere. It cannot rationally be contended that their Article 8 rights have been made stronger merely because, during their time in this country, they have not sought public funds, have refrained from committing criminal offences and have paid the fees required in order to undertake their courses. Similarly, a desire to undertake paid employment in the United Kingdom is not, as such, a matter that can enhance a person's right to remain here in reliance on Article 8.

27. The only significance of not having criminal convictions and not having relied on public funds is to preclude the respondent from pointing to any public interest in respect of the appellants' removal, over and above the basic importance of maintaining a firm and coherent system of immigration

control. However, for reasons we have already enunciated, as a general matter that public interest factor is, in the circumstances of these cases, more than adequate to render removal proportionate.

70. To sum up then, the appeal does not rely upon the core concepts of moral and physical integrity. In my judgement the evidence relied upon does not establish that there are any compelling compassionate circumstances that mean the decision to remove the Respondent and his family to Ghana, leads to an unjustifiably harsh outcome.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 17 January 2014 did not involve the making of an error of law in the decision to dismiss the appeal under the Immigration Rules and that decision is accordingly confirmed.

The Determination did however involve the making of an error of law in the decision to allow the Article 8 appeal that requires that decision to be set aside and remade. I remake that decision so as to dismiss the appeal on Article 8 grounds.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Respondent is granted anonymity in the interests of his son. No report of these proceedings shall directly or indirectly identify any member of the family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Deputy Upper Tribunal Judge JM Holmes

Dated 15 February 2015