



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

Appeal Number: IA/51258/2013

THE IMMIGRATION ACTS

Heard at Field House

On 30 January 2015

**Decision & Reasons
Promulgated**

On 5 February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

MR MD FAKRUL ISLAM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer

For the Respondent: In person

DECISION AND REASONS

1. Mr Islam is a citizen of Bangladesh whose date of birth is recorded as 1 January 1985. He first landed in the United Kingdom on 25 February 2009, in possession of a visa conferring leave to enter until 1 May 2012 subject to a condition restricting employment and recourse to public funds. On 26 September 2012 further leave to remain was granted until 21 February 2014. On 1 July 2013 that leave was curtailed, however, so that it was to expire on 30 August 2013. On 29 August 2013 the Appellant made a combined application for leave to remain in the United Kingdom as a Tier 4

(General) Student Migrant under the Points Based System and for a biometric residence permit. On 21 November 2013 a decision was made to refuse that application on the basis that the application submitted was for study at London School of Technology but a check by the Secretary of State found no confirmation of acceptance for studies ('CAS') assigned to him. There was a CAS assigned by Milburn College of Professional Studies but that had been withdrawn by the Sponsor and in any event no new application for variation of leave was received by the Secretary of State from Mr Islam in respect of that Sponsor.

2. Mr Islam appealed to the First-tier Tribunal and on 19 August 2014 his appeal was heard by Judge of the First-tier Tribunal Blake. He dismissed the appeal under the Immigration Rules having regard to sub-paragraphs 245ZX(c) and (d) noting that Mr Islam accepted that he had acted contrary to his leave in changing college without permission.
3. Though the appeal was dismissed under the Immigration Rules, Judge Blake went on to consider whether to allow the appeal in respect of the decision to remove Mr Islam from the United Kingdom by way of directions, pursuant to Section 47 of the Immigration Asylum and Nationality Act 2006, on human rights grounds. After consideration of various authorities Judge Blake came to the view that the decision of the Secretary of State was disproportionate to the public interest considerations and allowed the appeal pursuant to Article 8 ECHR.
4. Not content with that decision, by Notice dated 24 September 2014 the Secretary of State made application for permission to appeal to the Upper Tribunal. The grounds submit that Judge Blake had failed to identify why Mr Islam's circumstances were so compelling so as to amount to exceptional circumstances warranting leave outside the Immigration Rules. Reference was made to the guidance in ***Gulshan [2013] UK UT00640 (IAC)*** and ***Nagre [2013] EWHC 720 Admin.*** Further reference is made to Section 117B of the Nationality, Immigration and Asylum Act 2002 which provides statutory guidance in the case of Article 8 appeals.
5. On 10 December 2014 Judge of the First-tier Tribunal Nicholson granted permission. He, very helpfully, set out rather fully a pointer to the error of law which was arguable in this case and went on to say at paragraph 8 of his Grant of Permission:-

*"However, [Mr Islam's] private life at [Milburn College] had been established at a time when he had no right to be there and at a time when his immigration status was extremely precarious. The judge was bound by Section 117B to give it little weight in those circumstances. Even if ***CDS (PBS: "Available" Article 8) Brazil [2010] UK UT00305*** is still good law, it concerned a case in which the applicant had previously been lawfully admitted on a course of study at a recognised UK institution for higher education who had built up a relevant connection with the institution - not an applicant*

who had built up a connection with a college where he was not entitled to be studying. In those circumstances it is arguable that the judge failed adequately to explain how [Mr Islam] could succeed on private life grounds. Permission to appeal is granted."

6. In his Statement of Reasons, Judge Blake made reference to the guidance in **CDS (PBS: "Available" Article 8) Brazil [2010] UK UT0030**. However it was made plain in **CDS** that:

"Article 8 does not give an Immigration Judge a freestanding liberty to depart from the Immigration Rules, and it is unlikely that a person will be able to show an Article 8 right by coming to the United Kingdom for temporary purposes. But a person who is admitted to follow a course that has not yet ended may build up a private life that deserves respect, and the public interest in removal before the end of the course may be reduced where there are ample financial resources available."

7. The caveat which made reference to the possibility of building private life deserving of respect is to be read in the context of the factual matrix of that particular case and I can do no better than refer back to the observations of Judge Nicholson when permission to appeal was granted.
8. In the instant appeal, Mr Islam failed to meet the Immigration Rules. That was not in issue. This appeal again raises the question as to when it is appropriate to depart from those rules and determine the appeal under Article 8 ECHR but I do not need to address that question in determining whether or not there has been an error of law in this case because I find that even if were appropriate to consider the issue of proportionality, the finding of Judge Blake simply cannot stand.
9. In the case of **MM (Tier 1 PSW; Art; "Private Life") Zimbabwe [2009] UK AIT00037**, the Upper Tribunal panel said as follows:

"1) Whilst respect for private life in Article 8 does not include a right to work or study per se, social ties and relationships (depending upon their duration and richness) formed during periods of study or work are capable of constituting "private life" for the purposes of Article 8.

*2) In determining a Tier 1 (Post Study) worker case where Article 8 is relied upon, the five stage approach in **Razgar** should be followed.*

3) When determining the issue of proportionality in such cases, 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 as 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. In that respect, "private life" claims of this kind are likely to advance a less cogent basis for outweighing the public interest in proper and effective immigration control than are claims based upon "family life" (or quasi family life such as same sex relationships) where the relationships are more likely to be unique and cannot be replaced once the individual leaves the UK."

10. Judge Nicholson in granting permission questioned whether the guidance in the case of **CDS** was still good law. He may have made that observation because that authority was one of a line of authorities which suggested that there were circumstances in which it would be disproportionate to make an adverse decision in respect of an applicant where there was, "a near miss." That issue has firmly been resolved by the guidance in the case of ***Miah v Secretary of State for the Home Department [2012] EWCA Civ 261***. The guidance in the case of ***Patel and Others v Secretary of State for the Home Department [2013] UK SC72*** affirming the principle that there was no near miss did, however, accepted that, "the practical or compassionate considerations which underlie the policy are also likely to be relevant to the cases of those who fall just outside it, and to that extent may add weight to their argument for exceptional treatment". That was, "somewhat different to saying that there arises any presumption or expectation that the policy will be extended to embrace an applicant".
11. As I already adumbrated it is not necessary for me to consider whether it were open to Judge Blake to go on and take the **Razgar** five stage approach because in my judgment it simply was not open to him on the facts of the case to find the decision of the Secretary of State disproportionate.
12. At paragraph 74 of the Statement of Reasons Judge Blake said:-

"74. I however took into account that all of [Mr Islam's] subsequent actions were to pursue his course of study at another college. I found that the application he had made which resulted in the refusal, giving rise to the appeal before me was in keeping with his explanation that he believed his college had regularised his stay.

75. I found on the peculiar circumstances of facts of the case that it was an exceptional one. I found that [Mr Islam] had been admitted to the United Kingdom for the purpose of study and in fact he had pursued his study diligently and succeeded in it in the course of his stay. "

13. One is bound to ask what was so exceptional about the circumstances in which Mr Islam found himself. He had applied to a college which had had its licence revoked and so he sent to the Secretary of State a CAS in respect of another college without making a fresh application. But what I ask, rhetorically, were the private life factors so worthy of respect which weighed in Mr Islam's favour?
14. By section 117A of the Nationality, Immigration and Asylum Act 2002 Judge Blake was required to have regard to the factors set out in section 117B when considering the public interest question. section 117B provides that the interest considerations applicable in all cases are:
- "1) The maintenance of effective immigration controls is in the public interest.*
 - 2) It is in the public interest, and in particular in the interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –*
 - a) Are less of a burden on the tax payers, and*
 - b) Are better able to integrate into society.*
 - 3) It is in the public interest, and in particular in the interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent because such persons –*
 - a) Are not a burden on tax payers, and*
 - b) Are better able to integrate into society.*
 - 4) Little weight should be given to:*
 - a) A private life, or*
 - b) A relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully.*
 - 5) Little weight should be given to private life established by a person at a time when person's immigration status is precarious.*
 - 6) In the case of a person who is not liable to deportation, the public interest does not require the persons removal when*
 - a) The person has a genuine and subsisting parental relationship with a qualifying child, and*

b) *It would not be reasonable to expect the child to leave the United Kingdom.*"

15. Mr Islam's case was plainly a private life case which required little weight to be given to it. Of course, the statutory provision does not say that *no weight* should be given to private life so that in that sense Judge Blake was right to look for something exceptional in the sense that additional factors were required so as to enhance that side of the scale which was to weigh in favour of Mr Islam. In reality however, all that was advanced before Judge Blake was the desire on the part of Mr Islam to pursue his studies, which he could do legitimately in his home country. Mr Islam had not, as Judge Nicholson pointed out, embarked upon a course at a particular college which, for example, was close to an end but rather, without even seeking permission, intended to pursue a course at the later college which in the event was a college whose licence was revoked.
16. I find a material error of law in the decision of Judge Blake and set it aside.

Remaking of the decision of the First-tier Tribunal

17. I am reinforced in my view that there is an error of law from the evidence of Mr Islam. Although he has had some successes since 2009, he first began a course at London International College but did not finish it because his English was not good enough; he was not permitted to finish. He then pursued a number of courses but after 2011, went to a number of colleges where the licences in each case were revoked. Contrary to what is set out at paragraph 74 of the decision of Judge Blake in which it is said that Mr Islam believed that his college had regularised his stay, Mr Islam told me that that was not part of his evidence. After listening to what Mr Islam had to say I asked him if he could confirm my understanding that the reality of his entire case was based on his hope that he might continue his education in the United Kingdom because an English degree was perceived as more valuable than one from his own country. Mr Islam confirmed that that was indeed his position. I then asked Mr Islam if there was anything else that he would wish to be placed in the scales which might favour his being allowed to remain in the United Kingdom; he said that there was not.
18. In my view, putting aside the issue as to whether or not one should depart from the Immigration Rules, on the factual matrix in this case, proportionality clearly favours the Respondent. The factors in Section 117B clearly point the way. The Secretary of State is entitled to effective immigration control; it is in the public interest. Mr Islam did speak English and no issue was taken concerning his ability to finance himself. His private life however was established at a time when there was no promise that he would be allowed to remain indefinitely in the United Kingdom and absent any other interpretation as to what is meant by the term "precarious", I leave the observation as I have made it. To say Mr Islam should be allowed to remain in the United Kingdom outside of the Immigration Rules simply because, "He would prefer to obtain a degree

from a United Kingdom university rather than one from his own country.”
is simply insufficient reason to find in his favour.

19. In remaking the appeal of the First-tier Tribunal, it is dismissed.

Decision

The Secretary of State’s appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal is remade and dismissed on all grounds.

No anonymity direction is made.

As the appeal has been dismissed no fee award is made.

Signed

Date

Deputy Upper Tribunal Judge Zucker