Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35126/2014

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 6 April 2016	**On 28 April 2016**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Muhammad Aamir Sardar
[No anonymity direction made]

Claimant

Representation:
For the claimant: Mr I Hussain, instructed by Syeds Solicitors
For the appellant: Ms C Johnstone, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge McAteer promulgated 2.1.15, allowing the claimant's appeal against the decision of the Secretary of State, dated 27.3.14, to refuse his application made on 19.11.13 for indefinite leave to remain in the UK, and to remove him from the United Kingdom pursuant to section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 15.12.14.

2. First-tier Tribunal Judge Macdonald refused permission to appeal on 16.2.15. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Coker granted permission to appeal on 26.5.15.

3. Thus the matter came before me on 6.4.16 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons set out below, I found such error of law in the making of the decision of the First-tier Tribunal as to require the decision of Judge McAteer to be set aside and remade in the First-tier Tribunal, in accordance with the attached directions.

5. The relevant background to the appeal can be summarised briefly as follows. The claimant came to the UK as a student in 2009, with leave until 30.4.13. Within extant leave he applied for further leave to remain, but on 20.10.13 he was informed that as the licence of his college had been suspended, he had 60 days to leave the UK or submit a new application. He did not make a new student application but instead on 19.11.13 applied on form SET(F) for indefinite leave to remain, apparently based on human rights.

6. His case was that his circumstances have changed since he first came to the UK. His mother and 6 siblings had all relocated to the UK to join his father, and all have been given leave to remain and that all 9 members of the family including the claimant reside at the same address. He claimed he had no remaining immediate family members in Pakistan, other than his grandmother, cared for by his uncle. He also claimed to be the carer for his mother, who has had heart surgery.

7. The application was refused under paragraph 322(1) as his application was made for a purpose not covered by the Rules. The Secretary of State went on to consider his private life claim under paragraph 276ADE, but did not accept he had severed all ties including social, cultural and family with Pakistan, the then test under paragraph 276ADE. No exceptional circumstances were found to justify allowing his application outside the Rules on article 8 ECHR grounds. The application was thus refused on 27.3.14.

8. At §13 of the decision of the First-tier Tribunal the judge considered Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 60 (IAC) and in particular that part relating to paragraph 276ADE and the meaning of 'no ties,' as requiring a "rounded assessment of all the relevant circumstances and is not to be limited to 'social, cultural and family' circumstances," and the relevant factors set out in §125 of that decision, including the length of time in the UK, the age the person left that country, language, the exposure to the cultural norms of the country and the extent of family and friends in the country to which he will be removed and the quality of those relationships.

9. At §92 the judge found that the claimant had lived in Pakistan until he was 21 years of age and is able to speak the language of his country. "His time there would, I have found, exposed him to the cultural norms of that country, albeit at a younger age than he is now given he has spent the last 5 years in the UK. That upon the face of it, would provide him with a cultural connection to Pakistan."

10. At §97 the judge found that "viewing the appellant's situation and circumstances as a whole, that he can now be said to have no family ties in Pakistan." The judge found no evidence of any social ties to Pakistan and accepted at §99 that he had established a private life in the UK through his studies and his family. At §100 the judge stated, "Balancing all of the circumstances of the appellant's case, I find that, on the balance of probabilities, the appellant can now be said to have no ties to Pakistan. Such cultural ties as he has to the country are outweighed in the circumstances of this case, I find, by the lack of any effective family, social or other ties to Pakistan."

11. As the grounds explain in some detail, the approach to the 'no ties' assessment was flawed. Ogundimu was quoted extensively by the high court in Bailey [2014] EWCH 1078 (Admin), where it was pointed out that Ogundimu related to a person who had come to the UK as a very young child, aged only 6 and was then 22, and was effectively a complete stranger to the home country. The claimant cannot be described in such a way, or as a complete stranger to Pakistan. He has not severed ties with Pakistan, having left there as an adult in 2009 with the intention to return on completion of his studies. Further, he will have maintained cultural ties by his residence with his extended family now in the UK. There is no reason why he would have any special difficulty in reintegrating into Pakistan.

12. In granting permission to appeal, Judge Coker considered it arguable that the judge erred in law at §100 by concluding that, "whilst the (claimant) did have (cultural) ties to Pakistan, those ties were negated by his lack of other (family and social) ties. It is appropriate for the Upper Tribunal to consider this approach to the application of paragraph 276ADE."

13. I find that the judge was in error to suggest that the cultural ties found as a fact by the judge, could be outweighed by a lack of family or social ties. Whilst a rounded assessment is appropriate, it is not a balancing exercise or computation between competing ties. On the then wording of paragraph 276ADE, if the claimant has cultural ties to Pakistan he cannot be said to have demonstrated to have no ties.

14. There are other errors in the decision of the First-tier Tribunal. The judge was in error to conclude that the claimant's private life was developed in the UK at a time when his leave was limited but not precarious. Clearly, his continued lawful presence in the UK depended on being granted further leave to remain, and such, as confirmed more recently in AM (Malawi) [2015] UKUT 0260 (IAC), his status was precarious such that little weight should be given to such private life.

15. Further, the appellant's lawful status in the UK was only ever as a student. Whilst each case must be considered on its own facts, the sort of private life a student develops is not within the protection of moral and physical integrity envisioned by article 8 ECHR. In Nasim and others (article 8) [2014] UKUT 00025 (IAC), the Upper Tribunal considered whether the hypothetical removal of the 22 PBS claimants, pursuant to the decision to refuse to vary leave, would violate the UK's obligations under article 8 ECHR. The Tribunal noted that the judgements of the Supreme Court in Patel and Others v SSHD [2013] UKSC 72, "serve to re-focus attention on the

nature and purpose of article 8 of the ECHR and, in particular, to recognise that article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity."

16. The panel considered at length article 8 in the context of work and studies. The respondent's case was that none of the appellants could demonstrate removal would have such grave consequences as to engage article 8. §57 of Patel stated, "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 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."

17. At §14 of Nasim [2014], the panel stated:

> "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."

18. The panel pointed out that at this point on the continuum, "the essential elements of the private life relied on 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, (§15)" and (§20) recognised "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)."

19. It follows that any private life the claimant may have developed in the UK is unlikely to engage article 8 ECHR, but can be developed in Pakistan. He can continue contact with his family now in the UK through modern means of communication and through occasional visits. As an adult he can be expected to make his own way in the world independent of his family members. It follows that the finding of the First-tier Tribunal that the decision of the Secretary of State is flawed and cannot stand.

20. In the circumstances, the decision of the First-tier Tribunal must be set aside for error of law to be remade. I acceded to the submissions of the parties that the remaking of the decision in the appeal should be remitted to the First-tier Tribunal.

21. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the findings are flawed on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. The errors of the First-tier Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

22. In all the circumstances, I relist this case to be remade in the first-tier tribunal, on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusions:

23. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the making of the decision in the appeal to the First-tier Tribunal in accordance with the attached directions.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Deputy Upper Tribunal Judge Pickup

Consequential Directions

24. The appeal is remitted to the First-tier Tribunal at Birmingham to be made de novo, with no findings preserved;

25. There will be two witnesses and the estimated length of hearing is 1.5 hours;

26. The claimant's representative confirmed that no interpreter will be required;

27. The appeal may be heard by any First-tier Tribunal Judge except Judge McAteer and Judge Macdonald;

28. Not later than 10 working days before the relisted hearing the claimant's representatives must serve a single, revised, consolidated paginated and indexed bundle comprising all subjective and objective evidence relied on by the claimant, together with any skeleton argument to be relied on, and copies of any relevant case law. The Tribunal will not accept material submitted on the day of the hearing.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeal remains to be decided.

Signed

Deputy Upper Tribunal Judge Pickup

Dated