Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04441/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18th August 2017	**On 19th September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR MOHAMMAD SHAMSUDUDDIN TALUKDER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Walsh (Counsel)
For the Respondent: Mr E Tufan (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge I Malcolm, promulgated on 2nd June 2017, following a hearing at Hatton Cross on 8th May 2017.

In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Bangladesh, and was born on 4th January 1980. He appealed against the decision of the Respondent dated 13th August 2015, refusing his application for further leave to remain in the UK as a Tier 2 (General) Migrant. The reason given was that the Appellant had submitted a false statement. This is because the certificate of sponsorship issued by Hawm Consultants, when cross-checked on their systems, did not appear, as stated. Since a false statement had been submitted it stood to be refused under paragraph 322(1A) of the Immigration Rules. Any future applications for entry clearance or leave to enter the UK would also be refused under paragraph 320(7B) of the Immigration Rules.

The Appellant's Claim

3. The Appellant's claim was that, having arrived in the UK in July 2009 as a Tier 4 Student, he subsequently engaged I Core Agency to get him a sponsorship letter, which materialised after his interview with Hawm Consultants, arranged by the recruitment agency of I Core. The Appellant's claim now is that he was defrauded by the recruitment agency in whom he had placed his trust and had no knowledge whatsoever that there was anything wrong with the document with which he had been issued. He also places reliance upon his private life in the UK since he had been in this country genuinely pursuing his studies and had lived here for over seven years. Furthermore, he confirmed that he had paid I Core Agency £500 at a meeting which he had with them. The letter from Hawm Consultants Limited dated 14th August 2014 was given to him at the recruitment agency's office by I Core. The crux of the Appellant's claim is that, having discovered that the certificate of sponsorship that he had been handed by I Core was fraudulent, he sought to amend his application before the Home Office, before the Home Office could make its decision. Accordingly, he could not be said guilty of fraudulent activity and could not be said to have benefited from it.

The Judge's Findings

4. The judge held that "false representations have been made. I find that these were made without the Appellant's knowledge" (paragraph 81). With respect to the Appellant's claim that he had amended his original application, which was not tainted by any fraud, the judge held that "the decision which has been made is a decision on the original application as subsequently varied by application of the Appellant (initially to a Tier 4 application and thereafter to a Tier 2 application)" (paragraph 91). Significantly, the judge stated that,

> "I do not accept the argument that in seeking to vary the original application (from Tier 2 to Tier 4 that documentation submitted in the original application should simply be disregarded (in a similar manner as if the application had

been withdrawn). The facts are that the application was not withdrawn and therefore I consider that any documentation provided in the initial application is still able to be considered (albeit I accept that the COS would not be relevant to a Tier 4 application)" (paragraph 92).

5. Finally, the judge went on to give consideration to the Appellant's Article 8 claims and held that, "in considering the Appellant's case outside the Rules I accept that the Appellant has private life ties in the UK having lived here since 2009 and that removing him would interfere with private life" (paragraph 108). Nevertheless, this did not amount to an unjustified interference with the exercise of the Appellant's right to respect for private life (paragraph 109).

6. The appeal was dismissed.

Grounds of Application

7. The grounds of application state that the judge's approach to Article 8 was flawed because the central issue was whether or not the Appellant was the victim of a deception, or had sought to practise deception upon the Respondent. Since the judge appears to have accepted (at paragraphs 78 and 81) that the Appellant was an innocent victim of fraud, it could not be in the public interest to reject his claim.

8. On 30th June 2017, permission to appeal was granted by the Tribunal.

9. On 13th July 2017, a Rule 24 response was entered by the Secretary of State placing reliance upon **Patel [2013] UKSC 72** which states (at paragraph 57) that "Article 8 is not a general dispensing power" and that "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".

Submissions

10. At the hearing before me on 18th August 2017, Mr Walsh, appearing on behalf of the Appellant made the following submissions. First, the judge had directed himself to the "relevant law" (see paragraph 71) and then determined the matter under paragraph 322(1A) of the Immigration Rules. He had not made a decision under paragraph 320(7)(b), which he was required to.

11. Second, the judge did make a decision under Article 8, ECHR but has erred in the manner of his doing so. Relevant to both issues, he submitted, was the background to the case. This was an Appellant who came to the UK in 2009 and had moved from the status of a student to that of a post-study work. In August 2014 he applied to remain as a Tier 2 (General) Migrant. It is agreed by all concerned that the application contained a representation that was incorrect because the COS was false. The point is, however, that the Appellant found this out himself before the Secretary of State could make a decision on his application, and within a week changed his application to that of a Tier 4 Migrant. In December 2014 the Appellant varied the

application again to a Tier 2 application, but it is a different COS that he then relied upon. The two later ones did not contain a false representation.

12. This means that the refusal letter (at page 20 of the Respondent's bundle) ends with the sentence that, "as a false statement has been made … …" (see page 2 of 5 of the refusal letter) that any future applications will be "refused under paragraph 322(1A), of the Immigration Rules".

13. Mr Walsh submitted that it is well-known that an existing application can be varied so long as the Secretary of State has not made a decision on it. The Appellant found out because he went to his employer who told him that they had not issued him with a COS. He then acted promptly on that information.

14. The judge's conclusions (at paragraph 81) were that, "I accept that false representations had been made. I find that these were made without the Appellant's knowledge". However, the error lay in the judge's statement at paragraph 91 where he went on to say that,

> "Accordingly having given consideration to the terms of Section 3C of the Immigration Act 1971 I find that the decision which has been made is a decision on the original application as subsequently varied by application of the Appellant (initially to a Tier 4 application and thereafter to a Tier 2 application)".

15. Mr Walsh submitted that, the fact was that this was such a substantial variation of the application that, notwithstanding it had not been withdrawn as such, it could not be treated as "the original application". The decision now being made was on a Tier 2 application, whereas the original application was a Tier 4 application, and it was a substantial change of application.

16. If the Appellant had formally withdrawn the application, and then submitted a new one, there was no way that the Secretary of State would have said that this was a false application. Given that the Appellant was entitled to vary his application before a decision, it was wrong to reject this on the basis that it was a false application.

17. With respect to Article 8, the judge states that the Appellant could not qualify under paragraph 276ADE, even though "the Appellant has private life ties in the UK having lived here since 2009" (see paragraph 108). The judge's conclusions (at paragraph 110), that there were no good arguable grounds or exceptional circumstances to allow the appeal under Article 8 outside the Immigration Rules, was unsustainable in itself because it is too brief a conclusion, with no adequate reasons being given for why the judge came to this conclusion on Article 8 outside the Immigration Rules.

18. For his part, Mr Tufan, appearing on behalf of the Respondent Secretary of State, submitted that he would rely on his Rule 24 response as far as the decision of the judge on Article 8 grounds was concerned. The Rule 24 response refers to paragraph

57 of **Patel [2013] UKSC 72**, which is to the effect that, "Article 8 is not a general dispensing power" and "the opportunity for a promising student to complete his course in this country is not in itself a right protected by Article 8". Furthermore, we now had the decision of the Supreme Court in **Agyarko [2017] UKSC 11**, which confirmed that "unjustifiably harsh consequences" has a high threshold and is a requirement to be met in such cases.

19. With respect to the application of Section 322(1A) the judge referred to this (at paragraph 71) and referred to the stipulation there of "whether or not to the applicant's knowledge" when a false representation application was being considered. In general terms, submitted Mr Tufan, the judge had found in favour of the Appellant. He had said (at paragraph 81) that the Appellant had no knowledge of the misrepresentation. Nevertheless, the fact remains that the provision is to the effect "whether or not to the applicant's knowledge" and this must be given its full effect.

20. Having said that, submitted Mr Tufan, he would have to accept that the judge had not referred to Section 320(7B), but that is to do with the position in the future, whereby application will be rejected on the basis of past misrepresentation.

21. With respect to Section 3C of the 1971 Act, reliance was placed by Mr Tufan on **JH (Zimbabwe) [2009] EWCA Civ 78**, which established that a person cannot make a new application "by implication" which the Appellant had purported to do here. He could only vary the original application. The Appellant did not ever inform the Secretary of State that he had got his COS wrong and wished to rectify that.

22. Finally, the suggestion that if the Appellant had withdrawn the application he would have been spared the application of the provisions was misconceived because paragraph 322(2) was in terms that, "where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), …" (paragraph 322(1A). Paragraph 322(2) referred to the making of a false application. That was enough, submitted Mr Tufan, to disqualify the Appellant.

23. In reply, Mr Walsh submitted that, firstly, in relation to Article 8, ECHR, the reliance upon **Patel [2013] UKSC 72**, was misconceived because that was a very different case. Unlike in that case, the judge here had found the Appellant to have private life ties in the UK (paragraph 108) and had found Article 8 to have been engaged (paragraph 109), only then to go on to conclude (at paragraph 110) that there were no "good arguable grounds or exceptional circumstances", but without explaining why. Second, the reliance on paragraph 35 of **JH (Zimbabwe)** was misleading, with respect to the Appellant's variation of his application, because three lines from the bottom of that paragraph, Lord Justice Richards makes it clear that,

> "It is possible to vary the one permitted application. If it is varied, any decision (and any further appeal) will relate to the application as varied. But once a

decision has been made, no variation to the application is possible since there is nothing left to vary" (paragraph 35).

Decision

24. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.

25. First, this was a case where the Appellant had Section 3C leave to remain under the Immigration Act 1971. In **JH (Zimbabwe)** the Court of Appeal considered "how Section 3C operates" (at paragraph 35). The court went on to say that, "during the period of the statutory extension of the original leave, no further application for variation of that leave can be made". It went on to say that "there can be only one application for variation of the original leave, and there can be only one decision (and, where applicable, one appeal).". It ended with the observation that, "it is possible to vary the one permitted application" and once it is varied, "any decision (and any further appeal) will relate to the application as varied" (paragraph 35). In the instant case, the Appellant did vary the application and the decision should have related to the application as varied.

26. As Mr Walsh submitted, the last two variations did not contain a misrepresentation. It was open to the Appellant, who had not been guilty of any false misrepresentation himself, to set out to correct this, provided he did so timeously, and before the decision of the Secretary of State was made. This was the case here. Accordingly, his Section 3C leave survived and he was not culpable on account of making false representations.

27. Second, insofar as Article 8 is concerned, this is a case where the judge does accept that the Appellant had a private life in the UK since 2009 "and that removing him would interfere with private life" (paragraph 108). He did go on to consider whether the removal would "be an unjustified interference" with that right (paragraph 109). Thereafter, however, the judge's determination of this issue is formulaic. There is a reference to there being an absence of "any good arguable grounds or exceptional circumstances to allow the appeal" (paragraph 110). But there is no reasoning to uphold that conclusion. In circumstances, where the judge had already found that the Appellant's private life was engaged, it was incumbent upon him to explain through reasons why there were no exceptional circumstances and no arguable grounds such that it would indeed be a justifiable interference with his rights when it came to the Secretary of State's removal decision.

28. In the circumstances, I am remaking this decision by remitting it back to the First-tier Tribunal, to be determined by a judge other than Judge Sweet under practice statement 7.2 so that proper findings can be made with respect to the Appellant's Article 8 claim, together with the decision as to the Appellant's application under Tier 2.

Notice of Decision

29. I am satisfied that the making of the decision by the judge involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake this decision by remitting it back to the First-tier Tribunal under practice statement 7.2 to be heard by a judge other than Judge Sweet.

30. No anonymity direction is made.

Signed Dated

Deputy Upper Tribunal Judge Juss 19th September 2017