Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20200/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24th July 2017	**On 01 August 2017**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
(ENTRY CLEARANCE OFFICER)

Appellant

and

DANIEL GORDON
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Mr R Toal, instructed by Wilson Solicitors LLP

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department (brought on behalf of the entry clearance officer), I shall refer to the parties as in the First-tier Tribunal.

2. The Appellant is a national of the United States of America born on 6th February 1976. His appeal, against the refusal of entry clearance, was allowed by First-tier Tribunal Judge I Burnett on human rights grounds on 3rd April 2017.

3. The Respondent appealed on the ground that the judge erred in law in allowing the Appellant's appeal on the basis that there were compelling

and exceptional factors. The judge's findings were inadequately reasoned and he gave weight to immaterial matters. It was further submitted that in assessing proportionality, the judge relied heavily on the findings of Collins J. in relation to the Appellant's previous applications, which were very different. The entry clearance officer [ECO] had allowed the Appellant to enter the UK on several occasions before refusing admission under paragraph 320(2)(c) of the Immigration Rules and the Appellant was midway through his master's degree when the point was eventually taken. On this occasion, entry clearance was being sought to commence a course despite the Appellant falling foul of the general grounds for refusal. This difference was a significant factor and the judge failed to properly direct himself in accordance with Patel & Ors v The Secretary of State for the Home Department [2013] UKSC 72. The decision to refuse entry clearance could not be considered disproportionate on the particular facts of this case and the judge's finding was irrational.

4. Permission was granted by First-tier Tribunal Judge Hutchinson on 9th June 2017 for the following reasons: "It is arguable that the judge has erred in law and has misdirected himself by failing to give adequate reasons why there are compelling and exceptional factors in this case. It is arguable that the judge did not adequately explain why the Appellant's private life is engaged and relied on the findings of a previous appeal which was a different application. Article 8 cannot be used as a general dispensing power."

Submissions

5. Mr Melvin submitted that there were no compelling and exceptional factors in this case and he relied on the grounds of appeal and paragraph 57 of Patel:

> "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."

6. Mr Melvin made three points: firstly, the decision was not adequately reasoned; secondly, the judge had misdirected himself in relation to Patel; and thirdly, on the facts of the case, private life was not engaged and

therefore it was irrational to conclude that the refusal of entry clearance was disproportionate.

7. Mr Toal submitted two authorities and encouraged me not to interfere with the decision on the basis that there was any lack of reasoning. Mr Toal first addressed private life and submitted that the judge's conclusion that there was interference with the Appellant's private life was one which was open to the judge on the evidence before him.

8. Mr Toal submitted that the authorities referred to in the skeleton argument before the judge showed that the social ties and relationships formed during an individual's studies rather, than the course itself, were what formed part of the individual's private life. The judge was well aware of this when considering the Appellant's private life and he quite properly started with the previous decision of First-tier Tribunal Judge Ievins promulgated on 10th July 2015 (OA/15683/2014).

9. First-tier Tribunal Judge Ievins found that the London School of Economics [LSE] was part of the Appellant's community and the social ties he had developed through being accepted on and participating in the course there formed an important part of his life. They had a significant effect on the direction of his future and the direction of his career. The Appellant had established a private life by virtue of his having been allowed leave to enter the United Kingdom to study his master of public administration degree at LSE. Having disclosed his criminal conviction, he was allowed to enter on a number of occasions. That allowed his private life to develop. If the Appellant could no longer enter the United Kingdom to continue his studies, there would be an interference by a public authority with the exercise of the Appellant's rights under Article 8.

10. The case before Judge Ievins was in relation to the Appellant seeking leave to enter to complete his master's degree. Mr Toal submitted that there was evidence of social ties and he referred me to the Appellant's witness statement dated 23rd March 2015 that was before Judge Ievins in which the Appellant stated:

> "12. From the outset of the EMPA Programme, I was not disappointed. I immediately encountered LSE professors and fellow EMPA students with whom I developed close relationships.
>
> ...
>
> 26. The relationships that I have developed with the academics and fellow students at the LSE and with the institution itself have become a very important part of my life and of the future that I am working for.
>
> 27. My academic work depends very much upon social and intellectual engagement with my peers and teachers. It does so

at the level of informing the development of my ideas and the direction that my academic work takes. Academic work is not an isolated activity but takes place within a dense infrastructure of social and academic relationships."

11. Mr Toal submitted that the following evidence was before Judge Burnett in the Appellant's witness statement dated 31st January 2017:

"12. When I was engaged on the master's course I was particularly encouraged by the LSE to pursue a PhD at that institution.

13. On the master's course, I wrote a research paper dealing with the effectiveness of government policy in influencing the adoption of clean energy technology…… I have a unique and particular understanding of the workings and functioning of the energy markets. I have been able to draw on my practical trading experience and apply it to academic research….. My paper got a very high grade and attracted a lot of interest. This was a key reason why I was encouraged to continue my studies in a PhD framework.

14. My work was a perfect fit with the LSE which is one of the very few institutions in the entire world that is conducting research and study into the interaction between economics and interrelated climate change factors. The research proposal which I submitted was accepted and the LSE secured funding for the research from the Grantham Institute. It is rare in fact to have this interdisciplinary approach to analysing the workings of the energy market.

…

18. The PhD builds on my master's. I have established relationships with academics at the LSE. I know Dr Ben Groom very well from my master's and this is a unique opportunity to explore and pursue a topic that is of intense personal interest to me and which is at the heart of my aspirations to research and develop an academic career.

19. It would be impossible to conduct the PhD course of studies remotely by Skype or video-link, because the PhD involved direct one to one contact and group participation…. There is a specific class that I need to attend on 29th August 2017. The PhD and research will involve intense discussion, analysis and interactive exchange of ideas with reference to data and economic models. The contact time will be significant and it is totally impossible to conduct a PhD of this nature in this field on this material remotely."

12. There was also an e-mail from Mr B Groom which confirmed that the Appellant had funding and that the course could be deferred until next year whilst the Appellant sorted out his visa. The Appellant was committed to joining the programme in September 2017.

13. Mr Toal referred me to paragraph 58 of the judge's decision which states: "It was asserted on the Appellant's behalf that the PhD course in the UK and at LSE was the appropriate course and this course was best placed to offer the particular course. I was referred to correspondence between the LSE and the Appellant about the course and the nature of the course. This included that the Appellant was required to attend meetings and seminars in the UK as part of his PhD. The correspondence also referred to the funding that had been secured by LSE to support the research."

14. Mr Toal submitted that there was sufficient evidence before the judge to enable him to conclude that the Appellant had established private life in the UK and the refusal of entry clearance interfered with that private life.

15. Mr Toal submitted that the judge's assessment of proportionality was a balanced one. The judge acknowledged the matters weighing against the Appellant and appreciated the distinction between the case before him and that before Judge Ievins. The judge was well aware that this was not an application to come to the UK to complete a course but was an application to come to the UK to start a course. The judge considered all factors which weighed in favour of the Appellant and in favour of the ECO in refusing the application. He gave due weight to the decision of Judge Ievins and took this as a starting point. His conclusion at paragraph 68 that the Appellant had established private life was based on sound legal principles, which were not challenged by the Respondent, and it was adequately reasoned.

16. In relation to Patel, Mr Toal submitted that the Respondent's point was mistaken. Patel was a case where the Appellant was unable to satisfy the Immigration Rules. In this case, the Immigration Rules required the Appellant's exclusion. The relevant Immigration Rule was set out at paragraph 50 of the judge's decision:

> "Grounds on which entry clearance or leave to enter the United Kingdom is to be refused
>
> (c) has been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 12 months but less than 4 years, unless a period of 10 years has passed since the end of the sentence …
>
> Where this paragraph applies, unless refusal would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, it will only be in exceptional circumstances that the public interest in maintaining refusal will be outweighed by compelling factors."

17. This was not a case where the Appellant was seeking to depart from the Immigration Rules, but was advancing his case within the parameters of the Rule. The Appellant's case fell within the Rules and it was a question of whether he should be excluded. The judge considered the Appellant's private life and whether the refusal of entry clearance was proportionate. The judge properly directed himself, attaching little weight to the Appellant's private life at paragraph 80 of the decision. However, the judge concluded at paragraph 87:

> "The public interest in a case is not a fixed entity, when considering the proportionality of a decision. The Appellant will be, once again, only attending the UK for relatively short periods for a stated purpose, to engage in his course and his seminars. He has strong links to the LSE. His wife and children live in the USA. He has conducted himself admirably since his conviction in 2003 and he was stated to be at very low risk of reoffending. He has never committed any crime in the UK."

18. Mr Toal submitted that, because the Appellant had been allowed to enter the UK on numerous occasions despite his conviction, the judge was entitled to conclude that there was little public interest in his exclusion. It was argued in a previous appeal that the Respondent had been mistaken to permit his entry, but this matter was dealt with by Collins J. in his decision at paragraph 17:

> "Mr Toal has made the point that there is nothing beyond the assertion made on behalf of the Respondent that the entries permitted were permitted by mistake. It would be, to say the least, extraordinary if immigration officers were not aware of the change in the Rule which came into force in December 2012 and over a year earlier. To say that a mistake was made without having any evidence from any of the officers, who should be readily contactable since the stamps in the applicant's passport will identify the officers in question, is it is submitted wholly unsatisfactory. It seems that it is three different officers who would have made, it is said, the same mistake."

19. Mr Toal submitted that the judge took into account all relevant matters in assessing proportionality and his finding that there were exceptional and compelling factors was one which was open to him on the evidence before him. The decision was not incompatible with Patel and the judge had given adequate reasons for what was a reasonable and rational conclusion.

Discussion and Conclusions

20. Paragraph 320(2)(c) is the applicable Immigration Rule and it is clear from that paragraph that entry clearance is to be refused if the Appellant has been convicted of an offence and sentenced to imprisonment of at least twelve months but less than four years, unless a period of ten years has

passed since the end of that sentence. The period of ten years had not passed in this case.

21. However, this paragraph has to be assessed in the light of the Appellant's human rights and the direction given within paragraph 320 is that "it will only be in exceptional circumstances that the public interest in maintaining refusal will be outweighed by compelling factors". Accordingly, the approach taken by the judge, assessing whether the refusal of entry clearance would breach the Appellant's Article 8 rights, was a proper one and was within the parameters of the Immigration Rule.

22. This was not a case where the Appellant was seeking to persuade the judge to depart from the Immigration Rules and allow the appeal on Article 8 grounds. This was a case where Article 8 was in effect incorporated within the Immigration Rule. Accordingly, the decision was not contrary to paragraph 57 of Patel.

23. The next point to deal with is the submission that the judge failed to give adequate reasons for finding: firstly, that private life was established and secondly, that the refusal of entry clearance was proportionate.

24. In MM (Tier 1 PSW: Art 9; "private life") Zimbabwe [2009] UKAIT 00037, the Tribunal held at paragraph 40: "Thus, social ties formed whilst living in a community, working with others or studying at school or other educational institution are aspects of an individual's 'private life' within Art 8."

25. I am satisfied, after hearing the submissions of Mr Toal, that the Appellant has been in the UK studying for some period of time and during that time he has developed social ties and relationships with tutors and fellow students which are capable of constituting private life. I am satisfied from the evidence that has been pointed out to me by Mr Toal that the judge's conclusion that the Appellant had established private life in the UK was a finding which was open to the judge on the material before him. Any lack of reasoning was not material.

26. Accordingly, the issue is whether the judge's findings on proportionality were rational and the reasons adequate. In assessing proportionality, the judge recognised that this case was very far from that set out in CDS (PBS: "available": Article 8) Brazil [2010] UKUT 00305 (IAC) and he acknowledged that little weight should be attached to the Appellant's private life in accordance with Section 117B of the 2002 Act. However, he found that the weight to be attached to the public interest was not considerable, given that the Appellant has been permitted to enter the UK on three separate occasions by three separate Immigration Officers notwithstanding his conviction which he disclosed from the outset. The Respondent did not rely on paragraph 320(2)(c) on three previous occasions when the Appellant was permitted to enter the UK to study.

27. The judge took the decision of Judge Ievins as a starting point and he was entitled to rely on the findings of Collins J. that this was one of the rare cases in which it was improper to refuse leave to remain. Notwithstanding favourable decisions in the Appellant's favour this was only one of the factors that the judge took into account in assessing proportionality. The judge quite rightly put this in the balance in reducing the public interest.

28. The judge took into account all relevant factors in his assessment of proportionality. Although little weight should be attached to the Appellant's private life, the public interest in excluding the Appellant was much reduced by the fact that the Respondent had permitted his entry to the UK on three separate occasions. The Appellant had been allowed to continue his studies in the UK and, during that time, he had built up social ties and relationships with tutors at the LSE. The judge's finding that the Appellant had developed strong links with the LSE and the refusal of entry clearance amounted to a disproportionate interference with his private life was one which was open to the judge on the evidence before him. The judge's reasons were adequate to demonstrate why he came to the conclusion that there were compelling and exceptional factors outweighing the public interest.

29. Accordingly, I find that there is no error of law in the judge's decision to allow the appeal and I dismiss the Respondent's appeal to the Upper Tribunal.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

J Frances

Signed Date: 1st August 2017

Upper Tribunal Judge Frances