Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01894/2016
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THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29.01.18	**On 07.02.18**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

(1) MR SARCYZ SHRESTHA
(2) MRS DURGA SHRESTHA
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D. Coleman, Counsel
For the Respondent: Ms A. Everett, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The first appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge O'Rourke sitting at Newport on 8 May 2017) dismissing his appeal against the decision of the Secretary of State to refuse to grant him leave to remain outside the Rules in order to enable him to find a sponsor and to obtain a CAS so that he could complete his education the UK, which he said had not been completed for reasons

beyond his control, including illness. The second appellant, his wife, joins in his appeal as his dependent. The First-tier Tribunal did not make an anonymity direction, and I do not consider that such a direction is warranted for these proceedings in the Upper Tribunal.

The Reasons for Refusal

2. On 31 March 2016 the Secretary of State gave her reasons for holding that there were not exceptional circumstances. There was no set timescale or guarantee that he would be ultimately successful in obtaining a sponsor. The fact that he had been unable to secure a sponsor prior to his application was testament to this. He could re-apply for a student visa from Nepal, *"once you are in a position to actually make a student application".*

The Hearing Before, and the Decision of, the First-tier Tribunal

3. The appeals were heard in the absence of the appellants, who had written to the Tribunal shortly before the scheduled oral hearing with a request that their appeals be decided on the papers. As they had not written to the respondent, a Presenting Officer attended the hearing.

4. In her closing submissions, the Presenting Officer submitted that the first appellant could have had no legitimate expectation of remaining in the UK, once his last leave was curtailed. For much of his time in the UK, his immigration status had either been illegal or precarious; and there were no compelling circumstances that justified consideration of Article 8 outside the Rules.

5. The Judge's findings of fact were set out in paragraphs [25] to [30] of his subsequent decision. At paragraph [26] he observed that, while not strictly relevant to the issues in the appeal, the first appellant *"did not comply with the terms of his student visa".* He had overstayed for two years between 2011 and 2013. After being granted short periods of leave to remain in October 2013 and February 2014, *"he failed to comply with the requirements of that leave, as the college he attended lost its licence".* It did not matter that it was not his fault. He had not provided evidence of any attendance at any college, nor any evidence of efforts to approach other colleges and their stated responses that he needed a valid visa. *"Nor has he attended to give evidence today at this hearing, indicating to me that he has probably never been a legitimate student during his time in the UK."*

6. At paragraph [28] the Judge held that there was no evidence of any particular private life in the UK that might be worthy of protection, or could not be replicated in Nepal.

The Reasons for the Grant of Permission to Appeal

7. On 27 November 2017 First-tier Tribunal Judge Mailer granted the appellants permission to appeal as it was arguable that his findings on the

first appellant's immigration history were factually incorrect, and *"this may have affected the proper assessment of Article 8 private life".*

Discussion

8. Some of the findings of fact referred to in paragraph [5] above were not reasonably open to the Judge on the evidence that was before him. It was not the respondent's case in the refusal letter that the first appellant had been an overstayer or that he had breached the terms of his student visa.

9. It appears that the first appellant had section 3C leave between 2011 and 2013. In July 2011 he was refused leave to remain as he had not been assigned a CAS. On 15 September 2011 Judge Katherine Gordon allowed an appeal by him and his wife on, in effect, Article 8 grounds outside the Rules. She found that his leave had expired by the time that he had provided the necessary evidence to the college to obtain a CAS. But she held that the college ought not to have refused him a CAS on the ground that his leave had expired.

10. The decision of Judge Gordon does not disclose a finding of common law unfairness on the part of the respondent. This may explain why there was a two year delay before the first appellant was granted 60 days to find a new sponsor and to obtain a CAS, which he managed to do. Hence he was not present in the UK illegally between 2011 and 2013.

11. The first appellant was granted leave to remain until 19 February 2015, but his leave was curtailed on 24 November 2014 to expire on 27 January 2015 as his college had its licence revoked. There is no suggestion that he was implicated in the reasons for revocation. The reason why he applied for leave to remain outside the Rules on 27 January 2015 was that he had not been able to obtain a new CAS within 60 days.

12. Mr Coleman informed me that the appellants asked for their appeal to be decided on the papers because of the cost and inconvenience of travelling from London to Newport, and back, with a small child in tow. The Judge was not aware of this explanation. Nonetheless, there was no proper evidential basis for him drawing the adverse inference that the first appellant's non-attendance arose from the fact that he had never been a genuine student.

13. In opposing the appeal, Ms Everett has a strong case on materiality. There were, and are, formidable difficulties in an appeal of this nature succeeding, when there is no discernible common law unfairness and when due note is taken of the relevant domestic jurisprudence on Article 8 claims by students, of which **Nasim and Others (Article 8) [2014] UKUT 0025 (IAC)** is the most pertinent. At paragraphs [14] and [15] of **Nasim**, the Tribunal observed that 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 as to which, in extreme circumstances, 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), 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. On 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. A student here on a temporary basis has no expectation of a right to remain in order to further his social ties and relationships in the UK if the criteria of the points-based system are not met.

14. The Tribunal went on in paragraph [16] to cite with approval **MG (assessing interference of private life) Serbia Montenegro [2005] UKAIT 00113** as follows:

> 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.

15. The Tribunal at paragraph [20] reached the following conclusion:

> We therefore agree with Mr Jarvis that [57] of **Patel and Others** is a significant exhortation from the Supreme Court to refocus 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 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).

16. The Tribunal went on to address the scope of **CDS (Brazil) [2010] UKUT 305 (IAC)**. At paragraph [41], they declined Mr Jarvis's invitation to find that the obiter remarks in **CDS** regarding Article 8 were no longer good law in the light of **Patel and Others**. But the Tribunal in **CDS** did however expressly knowledge that it was unlikely a person would be able to show an Article 8 right by coming to the United Kingdom for temporary purposes:

> The chances that such a right will prevail have, we consider, further diminished, in the light of the judgments in **Patel and Others**. It would, however, be wrong to say that the point has been reached where an adverse immigration decision in the case of a person was here for study or other temporary purposes can never be found to be disproportionate. What is clear is that, on the state of the present law, there is no justification for extending the obiter findings in **CDS**, so as to equate a person whose course of study has not yet ended with a person who, having finished their course, is precluded by the Immigration Rules from staying on to do something else.

17. However, the fact that the Judge could have crafted his decision in such a way that his conclusions on the merits were unimpeachable is not determinative. Justice must not only be done, but must be seen to be done. The Judge's erroneous findings of fact appear to affect his assessment of Article 8 private life. He failed to carry out a detailed assessment of the first appellant's particular circumstances as set out in paragraphs 12 to 14 of his witness statement, because his erroneous starting point was that nothing which the first appellant said in this witness statement had any prima facie credibility.

18. Accordingly, the appellants were deprived of a fair hearing in the First-tier Tribunal, and the decision is thereby vitiated by a material error of law, such that it must be set aside in its entirety and remade.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside.

Directions

As agreed by the representatives at the hearing, this appeal shall be remitted to the First-tier Tribunal Taylor House for a fresh oral hearing (Judge O'Rourke not compatible), with none of the findings of fact of the previous Tribunal being preserved.

The agreed time estimate is 2 hours.

Signed Date

Deputy Upper Tribunal Judge Monson