

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/03487/2013

THE IMMIGRATION ACTS

Heard at Glasgow
On 8 July 2013

Determination Promulgated
On 11 July 2013

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

ALITA THAPA CHETTRI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr M McSherry, Solicitor Advocate
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

- 1) The appellant appeals against a determination by First-tier Tribunal Judge Scobbie, promulgated on 15 April 2013, dismissing her appeal against refusal of extension of leave to remain as a Tier 4 (General) Student Migrant.
- 2) Permission to appeal to the Upper Tribunal was granted on the view the judge might have failed properly to consider an issue of fairness. A change in the Immigration Rules caused the appellant to be caught by a provision against studies below degree level being carried on for more than 3 years.
- 3) Mr McSherry said that the appellant arrived in the UK on 14 September 2009 and had leave as a student until 2012. Her proposed course led to an HND (Higher National Diploma) but on arrival at Motherwell College it transpired that there was no access

course, and she therefore had to enrol initially for an HNC (Higher National Certificate). She applied for an extension of leave on 5 October 2012, which was refused on 18 January 2013. She alleged unfairness, not through the absence of the access course, but because of the respondent's failure to make transitional provisions. The Rules changed against her in a way of which she could have had no foreknowledge. She had acted on advice from the college. She has spent £15,500 on course fees. Her leave was extended during the appeal process under section 3C of the 1971 Act, and she has completed her HND. Her graduation is due to take place on 23 October 2013. She wishes to attend her graduation and intends then to return to Nepal.

- 4) Mr Mullen argued that the fact that the Rules changed without transitional provisions did not expose an issue of fairness, on the authority of Adelola v SSHD [2009] UKHL 25.
- 5) I raised the question whether the appellant's case ought to have been considered in terms of Article 8 of the ECHR, on the basis of her private life interest in completing her studies. Mr Mullen submitted that there was no such ground of appeal either to the First-tier Tribunal or to the Upper Tribunal, and that there was in any event no disproportionate interference.
- 6) I indicated that the appeal would be allowed under Article 8 of the ECHR.
- 7) The argument based on fairness is not a good one, on the authority of Adelola. However, the same circumstances are relevant to Article 8 of ECHR. It is incumbent upon the Secretary of State and upon Tribunals to ensure that all decisions are compliant with Article 8.
- 8) It was common ground that leave granted to a student is usually for such a period as to complete the formalities of the course and to attend for personal graduation.
- 9) The appellant plainly had a private life interest in completing her course. Her conduct is not to be criticised in any way. There is always some public interest in enforcing the Rules as they stand, but there was no significant interest in insisting upon their strict terms so as to prevent the appellant from completing her course. Now that she has done so, there is no significant interest in insisting upon her leaving the country prior to attending her graduation. Of course, this is not a question of preventing an interference which goes to the essence of a fundamental human right; but the public interest side of the balance is even lighter.
- 10) In those particular circumstances, it would be disproportionate to insist upon the appellant leaving the country prior to attending her graduation ceremony.
- 11) The determination of the First-tier Tribunal is set aside. The appeal is allowed to the extent that the appellant should be granted further leave to enable her to attend her graduation before she leaves the UK (until, say, the end of October 2013).

12) No anonymity order has been requested or made.

9 July 2013
Judge of the Upper Tribunal