**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/01615/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 12 August 2014** | **On 26 August 2014** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL**

**Between**

**MISS BENEDICTA IDOWU**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr W Evans, Legal Representative, instructed by Templeton Legal Services
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS: ERROR OF LAW HEARING**

1. On 12 December 2013, the Secretary of State made decisions to refuse to vary the appellant's leave to remain in the United Kingdom, as a Tier 4 Student, and to remove her by way of directions under section 47 of the

Immigration, Asylum and Nationality Act 2006. Her appeal against those decisions came before First-tier Tribunal Judge Napthine ("the judge") on 28 April 2014. In a determination promulgated on 14 May this year, the judge dismissed the appeal against the adverse decisions.

2. The judge found that the appellant's application for further leave fell to be refused as the requirements of the Immigration Rules ("the rules") were not met in three respects. First, the certificate she relied upon as showing her abilities in the English language expired before her application was made. Second, the bank statements she submitted with her application showed that she held the necessary funds for a period of 27 days, one day short of the 28 days required. Third, the judge found that the appellant had not shown that the course she wished to pursue was other than an NQF level 4 course (the Secretary of State made a similar finding) so she could not show that the requirement of paragraph 245ZX(h) of the rules was met as pursuing her course would result in her having spent more than three years in the United Kingdom as a Tier 4 (General) Student on courses not consisting of at least degree level study.

3. The judge went on to make an Article 8 assessment, in the light of the submission made by the appellant's Counsel that a refusal to allow her to continue with her studies would amount to an unjustified interference with her right to respect for her private life. In this context, the judge considered that the level of the proposed course, which he found did not meet the requirements of the rules, was more fundamental than the other defects in the application for further leave. He noted that the appellant had spent time in the United Kingdom with limited leave as a student, in accordance with the rules. He found that it was not unreasonable or excessive of the Secretary of State to require her to leave the United Kingdom in the light of the failure to meet the requirements of the rules and that it would be open to her to make a further application, if necessary from outside the United Kingdom, for entry clearance to return as a student. The determination shows that the judge accepted that Article 8 was engaged but concluded that the adverse decisions amounted to a proportionate response.

4. An application was made for permission to appeal. It was contended that the judge's decision was vitiated by a perverse finding regarding the level of course being undertaken by the appellant. Evidence contained in the appellant's bundle showed that the level of her course was equivalent to a bachelor's degree and so met the requirements of the rules. The judge had accepted that even if the requirements of the rules were not met, a case could be advanced in reliance upon Article 8 but the adverse findings he made regarding studying below degree level had a clear impact on his assessment of the proportionality of the adverse decisions. The judge also erred in failing to properly weigh a letter from the appellant's mother and a supporting document from the appellant's college in the Article 8 context, having found that this evidence could not be taken into account in

the points-based system context, in the light of section 85A of the 2002 Act.

5. Permission to appeal was granted on 20 June 2014. The judge granting permission noted that the judge gave clear reasons why the appellant failed to meet the requirements of the rules but it was arguable that he erred in finding against the appellant in relation to paragraph 245ZX(h). It was arguable that the judge erred in his Article 8 assessment, having given weight to the appellant's apparent failure regarding the level of her course.

6. In a brief rule 24 response from the Secretary of State, dated 7 July 2014, it was submitted that the judge did not materially err in law. In the light of the judgment of the Supreme Court in Patel & Others [2013] UKSC 72, any error regarding the level of course was not material. There were several reasons why the requirements of the rules were not met and Article 8 was not a general dispensing power and could not be used to mitigate a near-miss.

7. In directions made by the Principal Resident Judge, the parties were advised that they should prepare for the forthcoming hearing on the basis that any further evidence that might be required could be considered at that hearing.

**Submissions on Error of Law**

8. Mr Evans submitted a written skeleton argument, setting out the appellant's circumstances and drawing attention to a number of cases, including GOO & Others [2008] EWCA Civ 747.

9. The appellant's witness statement and grounds of appeal put in issue the level of the course she proposed to study. This was the equivalent of level 6 and so met the requirements of the rules. It was accepted that the application, nonetheless, contained deficiencies. However, the margin by which the appellant failed to meet the requirements of the rules was narrow, although Mr Evans accepted that demonstrating a "near-miss" was not sufficient. The appellant had established a private life here and the proportionality assessment required consideration of her relative ability to pursue her studies in the United Kingdom, rather than Nigeria, and the impact upon her of the adverse decisions. Mr Evans submitted that this was so substantial that it amounted to a disproportionate interference with the appellant's Article 8 rights, in the private life context.

10. Although Patel suggested that the right to pursue education would not generally fall within scope of a person's private life, the ability to express one's hopes and dreams clearly was relevant in that context. The appellant had made excellent progress in her studies and was in a different position from students who were unable to show any real improvement. There was a clear public interest in keeping good students

within the United Kingdom. Sedley LJ emphasised this in paragraph 4 of his judgment in GOO. More recent authorities, including MF, Isuazu, and Nagre showed that even where the requirements of the rules were not met, there would be cases in which exceptional circumstances could be shown and which required assessment under Article 8. This was the appropriate course in the appellant's case. The judge had acknowledged that her case could be put on Article 8 grounds. The key was paragraph 23 of the determination where he found that the level of course and the likely length of studies here below degree level was a fundamental issue. This clearly coloured the rest of the assessment. If the finding that this factor was fundamental were removed, the error would be demonstrated.

11. Mr Tufan said that the rule 24 response referred to the immateriality of the level of qualification in the overall assessment. Even if the judge did err in that regard, there were two other reasons why the requirements of the rules were not met and the appellant could not succeed by showing that there had been a "near-miss". The guidance given in Patel fell to be applied. GOO & Others was a case from an era that preceded the introduction of the points-based system. Article 8 was certainly capable of being engaged but students could not, on the whole, simply overcome deficiencies in applications in reliance upon it. Further guidance appeared in the second of the decisions in Nazim, where the Upper Tribunal considered several student cases and the correct approach to Article 8.

12. There were no material errors in the determination. The appellant had a remedy available to her as she could apply again for leave or entry clearance, from abroad.

13. Mr Evans said in a brief response that GOO was relevant in the overall context and the reasons why the United Kingdom had an interest in allowing students to study here. There was nothing in Patel preventing Article 8 from being engaged and relied upon where the requirements of the rules were not met.

## Conclusion on Error of Law

14. The determination shows that the judge accepted a submission made on the appellant's behalf that an Article 8 assessment was required, notwithstanding a failure to show that the requirements of the rules were met. The assessment begins at paragraph 21 of the determination and continues until paragraph 31. It has not been argued by the Secretary of State that the judge's adverse finding regarding the level of course and paragraph 245ZX(h) of the rules was correct. However, as Mr Tufan submitted, and as appears in the rule 24 response, there were two other reasons why the judge found that the requirements were not met. These concerned the validity of the IELTS certificate the appellant relied upon and her failure to show that she held sufficient funds for the required minimum period of 28 days. Even if the judge did err in relation to the

level of course to be pursued, he was entitled to find that the requirements of the rules were not met.

15. It is correct, as Mr Evans submitted, that paragraph 23 of the determination shows that the judge gave more weight to the failure regarding paragraph 245ZX(h) than he did to the other two aspects. Nonetheless, in proceeding to make his Article 8 assessment, he clearly did have regard to the salient features of the case. These included the time the appellant has spent here with leave as a student, in accordance with the rules and the time, effort and funds invested in her studies to date. I find that the judge did not exclude from consideration the supporting letters from her mother and her college. His Article 8 assessment is rather general but sufficient to show that he had the appellant's case clearly in mind.

16. The Secretary of State made an appropriate reference to Patel in her rule 24 response and Mr Tufan developed the point in his submissions. The Upper Tribunal observed in Nazim [2014] UKUT 25 that the Supreme Court's judgment has refocused attention on the private and family life ties a person may have established here and the importance of Lord Carnwath's judgment, at paragraphs 55 to 57, cannot be overlooked. Mr Evans is again correct in submitting that students are not prevented from relying upon Article 8 but the loss of an opportunity to pursue further studies, the primary consequence of failing to meet the requirements of the rules in an application for further leave as a student, is a factor of only modest weight in the Article 8 context.

17. There is no reason to doubt that the appellant has been anything other than a successful and accomplished student but the evidence before the judge showed that she has established only modest private life ties since her arrival in the United Kingdom relatively recently in October 2011. In the witness statement which was before the judge, made in April 2014, she drew attention to her studies and to the investment of funds. There is no detail regarding any particular friendships or associations although it is, of course, very likely that the appellant will have made friends during her studies here. The judge's overall conclusion, in the light of this evidence, that the adverse decisions were proportionate was one which was open to him, even accepting that he erred in relation to the level of course the appellant proposed to take.

18. The determination shows that the judge weighed the competing interests, as he was required to. Taking into account the judgment in Patel and the guidance given in Nazim, his conclusion was open to him on the basis of the appellant's failure to show that the requirements of the rules were met. The margin of failure was slight but it is clear from Patel that a "near-miss" principle has no application in the points-based system (and indeed the judge included in his determination parts of the judgment of the Court of Appeal in Rodriguez [2014] EWCA Civ 2 where the same point is made).

19. I conclude, therefore, that even accepting that the judge erred in relation to the level of the course the appellant wished to pursue, the error was not material and so the decision shall stand.

20. The appellant's case was well put by Mr Evans and, as noted above, there is no reason to doubt that she is anything other than a successful and industrious student. She was advised in the notice of decision that she could make a fresh application. Whether she does so or not is entirely a matter for her. The appellant may also apply for entry clearance from abroad, to return to the United Kingdom for further studies and if she is able to show that all the requirements of the rules are met, she may reasonably expect a favourable outcome although the decision will be one for the Entry Clearance Officer.

**DECISION**

21. The determination of the First-tier Tribunal contains no material error of law and shall stand.

Signed: Dated:

Deputy Upper Tribunal Judge R C Campbell

**ANONYMITY**

There has been no application for anonymity at any stage in these proceedings and I make no direction on this occasion.

Signed: Dated:

Deputy Upper Tribunal Judge R C Campbell