Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/04082/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22 January 2014	**On 31 January 2014**
	……

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR BHAVIKKUMAR VINUBHAI PATEL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Miss J Isherwood, Home Office Presenting Officer
For the Respondent: In person

DETERMINATION AND REASONS

1. For ease of reference purposes the parties are referred to as they were in the First-tier Tribunal so that hereafter Mr Patel is referred to as the appellant and the Secretary of State for the Home Department as the respondent.

2. The background to this appeal is that on 6 November 2009 the appellant was granted leave to enter the United Kingdom as a Tier 4 (General) Student until 31 July 2011. On 7 March 2012 he was granted leave to remain in the same capacity until 24 November 2014. However, on 16 August 2012 his leave was curtailed to expire on 15 October 2012. On 12 October 2012 He made a further application for leave to remain as a Tier 4 (General) Student Migrant. That application was refused on 8 January 2013 and it is that decision that is the subject of this appeal.

3. The appeal came before First-tier Tribunal Judge Hunter who determined it on the papers. The determination was promulgated on 14 November 2013. The judge found that the appellant could not meet the requirements of the Immigration Rules but then went on to allow the appeal on human rights grounds "to the extent of allowing the appellant to remain in the United Kingdom until 30 September 2014".

4. The judge found that the appellant was a student at the UK School of Business from March 2012. However, its licence was suspended in May 2012 although he continued with his studies for some time after that. There is a letter dated 28 September 2012 from UK School of Business which refers to the appellant enrolling and studying with them, but the letter went on to say that unfortunately the appellant would not be able to continue his studies any further as the college's Tier 4 licence had been revoked.

5. Following curtailment of the appellant's leave he found another college at which to study, namely London State College, and was assigned a CAS on 11 October 2012 to undertake a two year course. As found by the judge the appellant thought that he came within the "established presence studying in the United Kingdom" definition under paragraph 14 of Appendix C of the Immigration Rules at the time the application was made. The Secretary of State found that he did not come within that definition as did the judge. If the appellant had come within it, the maintenance requirements would have been at a far lesser sum. As he had not proved an established presence he needed to show that he was in possession of £7,200 for a consecutive 28 day period prior to his application but the bank statements produced showed that for the relevant period he was in possession of no more than £2,651.69 at any time.

6. The judge in what is a carefully considered and reasoned determination found that the appellant could not benefit from any of the cases regarding evidential flexibility or common-law fairness etc. However, he decided that in line with the decision in **CDS (PBS: "available": Article 8) Brazil [2010] UKUT 0035** (and in particular paragraphs 19 and 20 which appear at paragraph 29 of the determination) it would be a disproportionate interference in the appellant's private life to return him to India before he completed his (current) course. He went on "I would propose to allow his appeal under Article 8 to allow the appellant to remain in the UK until 30 September 2014".

7. The difficulty with the reasoning for coming to the conclusion that he did is revealed by looking at **CDS** itself. Paraphrasing paragraph 17 it is apparent that Article 8 does

not provide a general discretion for a judge to dispense with the requirements of the Immigration Rules merely because the way that they impact in an individual case may appear to be unduly harsh. Acknowledging in paragraph 18 that the appellant in that case had been admitted to the UK for the purpose of higher education and having made progress enabling an extension of stay in that capacity since 2007, gave her no right or expectation of an extension of stay irrespective of the provisions of the Immigration Rules at the time of the relevant decision on extension.

8. As set out in the judge's determination, paragraphs 19 and 20 of **CDS** refer to circumstances in which courses of study may amount to private life that deserves respect and a change in sponsorship rules during the course of a period of study had a serious affect on the ability of the appellant to conclude that course. In that case the appellant was able to establish by evidence that she had funds available to support her if needed and the strength of the public interest in refusing her an extension based on somewhat arbitrary provisions of guidance attached to an Appendix to the Rules was, in the panel's judgment, somewhat less than a failure to meet a central requirement of the Rules.

9. In the current appeal there was no change in sponsorship rules. The appellant was never able to meet the Rules once it was clear that he did not have an "established presence" in the United Kingdom. In **Miah [2012] EWCA Civ 261** it was established that there is no near-miss principle applicable to the Immigration Rules. The Secretary of State, and on appeal the Tribunal, must assess the strength of an Article 8 claim, but the requirements of immigration control are not weakened by the degree of non-compliance with those Rules.

10. In **MM (Tier 1 PSW; Art 8; "private life") Zimbabwe [2009] UKAIT 00037** it was established that a student here on a temporary basis has no expectation of a right to remain in order to further these ties and relationships if the criteria of the points-based system are not met. Also, the character of an individual's "private life" relied upon is ordinarily by its very nature, of a type which can be formed elsewhere, albeit through different social ties, after the individual is removed from the UK. In that respect, "private life" claims of this kind are likely to advance a less cogent basis for outweighing the public interest in proper and effective immigration control than are claims based upon "family life" where the relationships are more likely to be unique and cannot be replicated once the individual leaves the UK.

11. Having made the findings that he did and in light of the case law referred to, had the judge properly directed himself he would not have concluded that the appeal should be allowed under Article 8 ECHR. Alternatively, if the judge was to decide that the decision of the Secretary of State to return the appellant to India would be a disproportionate interference in his private life, then the judge needed to provide far better reasons for finding such disproportionate interference than in the event he did. The appellant did not meet the PBS requirements as to maintenance. There was no evidence before the judge that the appellant had ample funds available to him and there were no exceptional circumstances as to why the appellant could not continue his private life abroad. His stay in the United Kingdom was always on a

limited basis and upon completion of his studies he would be required to return to India. He had resided in the United Kingdom less than four years and could fully readapt to life in India.

12. Having found that the judge erred materially for the reasons given above, I set the determination aside. There was no good reason not to proceed with the rehearing straightaway.

13. I heard brief evidence from the appellant in English as to his life in the United Kingdom. He continues to study here but "I am not thinking about after September" as to what the future will bring. He accepted that he could not meet the maintenance requirements of the Rules and as to his private life, he said that he spends most of his time studying.

14. I announced at the hearing that although I had some sympathy for the appellant, the fact is that for all the reasons set out earlier in this determination the respondent has shown that in furtherance of the legitimate aim to maintain an effective system of immigration control the decision to refuse is proportionate. The appellant came here for temporary purposes, in the knowledge that he would be returning to India, he has been unable to meet the requirements of the Rules and he is able to return to India to pursue his private life there. Respect that his private life in this country deserves does not show that the respondent's decision is a disproportionate one.

Decision

15. For the reasons above stated, the judge erred materially in law and the decision is set aside. I substitute for that decision that **the appeal is dismissed under the Immigration Rules and under Article 8 ECHR.**

16. I was not addressed on the matter of anonymity. There has been no anonymity direction made previously and the circumstances of the case do not warrant such a direction being made. Therefore I do not make one.

17. As to the matter of fees, ultimately the appellant has failed in his appeal and therefore there is no fee award made.

Signed Date

Upper Tribunal Judge Pinkerton