Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/12690/2013
IA/12692/2013
IA/12696/2013
IA/12697/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 19 November 2013	**On 4 February 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

TALAT JABEEN
QAMAR IQBAL
MUHAMMAD FAHAD
MOHAMMAD AHMED

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr T Hussain, instructed by Harris & Co, Solicitors
For the Respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The respondents are citizens of Pakistan. The second, third and fourth respondents are dependents upon the application for further leave to remain made by the first respondent, Talat Jabeen. In this determination, I

shall refer to Talat Jabeen as "the appellant" as she was before the First-tier Tribunal; I shall refer to the Secretary of State as "the respondent".

2. The appellant had applied for leave to remain as a Tier 4 (General) Student Migrant. Her application was refused on 5 April 2013. The appellant had failed to demonstrate that she had the necessary English language skills required by the Immigration Rules. She satisfied the other requirements of the Immigration Rules.

3. The appellant appealed against the respondent's decision to the First-tier Tribunal (Judge Thorne) which, in a determination promulgated on 1 October 2013, dismissed the appeal under the Immigration Rules but allowed the appeal on Article 8 ECHR grounds. The Secretary of State has been granted permission to appeal to the Upper Tribunal against that decision. There is no cross-appeal in respect of the dismissal under the Immigration Rules.

4. There is one ground of appeal. It is asserted in the grounds that the First-tier Tribunal misdirected itself in law as to "what amounts to a proportionate interference with private life. Reliance was placed on the judgment of Burnton LJ in ***Miah*** [2012] EWCA Civ 261:

> in my judgment, there was no near-miss principle applicable to the Immigration Rules. The Secretary of State, on appeal as the Tribunal, must assess the strength of an Article 8 claim, but the requirements of immigration control is not weakened by the degree of non-compliance with the Immigration Rules [26].

5. At [52], Judge Thorne wrote:

> "I take into account the following matters:
>
> (a) There was a legitimate interest in maintaining effecting immigration control.
>
> (b) There is a general administrative desirability of applying no Rules if a system of immigration control is to be workable, predictable, consistent and fair as between one claimant and another.
>
> (c) There is a legitimate need to discourage breaches of the law especially serious criminal offences.
>
> (d) The appellant's private life in the UK has been built up by her in the full knowledge that her immigration status in the UK was not secure.
>
> (e) The appellant has invested a large amount of time and money in the UK in furthering her education.
>
> (f) The appellant through her representative requested only that leave now be extended for a further three months to allow the appellant to re-sit her English language test.

(g) There is no dispute that the appellant is able to finance her studies in the UK and could have done so at the date of the decision."

6. The judge went on at [53] to conclude "that in this case the prejudice to the private life of the appellant is so serious as to amount to a breach of the fundamental right protected by Article 8". The judge allowed the appeal "to the extent only that leave to remain for the appellant is granted for three months on the date of this determination to allow the first appellant to re-sit her English language test."

7. Mrs Pettersen, for the Secretary of State, submitted that the fact that the decision to remove the appellant by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006 had been withdrawn by the Presenting Officer at the First-tier Tribunal hearing, the appellant was not, therefore, facing an imminent removal from the United Kingdom and her Article 8 ECHR rights would not be breached.

8. I do not agree with that submission. Judge Thorne was right to go on and consider the human rights appeal notwithstanding the withdrawal of the decision to remove (see *JM* [2006] EWCA Civ 1402). Further, Mrs Pettersen did not submit that the allowing of the Article 8 ECHR appeal on the particular facts of this appeal was necessarily perverse. Consequently, this Tribunal should not interfere with the decision unless the judge's approach to and analysis of the Article 8 ECHR issues are so flawed as to require the determination to be set side. I refer to the determination of the First-tier Tribunal at [52] which I have quoted in full above. The judge has taken a properly structured approach to the Article 8 analysis. He has rightly concluded at [51] that the appeal turned on the question of proportionality. The matters which he took into account at [52] are, in my view, an indication of the even-handed view which he has taken of the evidence, seeking neither to downplay nor overemphasise factors for and against either party. Referring to the grounds of appeal, I can see nothing in [52] which indicates the judge has wrongly adopted a "near-miss" approach although I accept that it is arguable that he should not have been influenced by the fact that the appellant only required a few months of further leave in order to re-sit her English language test (which he has now passed). However, I do not consider that to be an error so great as to undermine the determination. The same is true of the direction he has given for the appellant to be granted three months' leave to remain; the period of leave is properly a matter for the Secretary of State. Although he does not refer to it, I accept that the judge was also told at the hearing that the appellant had been unable to re-sit the examination prior to the First-tier Tribunal hearing because she had been without her passport which was given back to her at that hearing.

9. I find that the outcome of this appeal was available to the judge on the evidence and his reasoning is not so seriously flawed in law as to require the determination to be set aside. Another judge might have reached a different conclusion but that is not the point. For the reasons I have given, I do not intend to interfere with his decision.

DECISION

10. This appeal is dismissed.

Signed Date 21 November 2013

Upper Tribunal Judge Clive Lane