Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18274/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 27 June 2014	**On 8 July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS HASTI ALIZADEHNOORI

Respondent/Claimant

Representation:

For the Appellant: Mr N Bramble, Specialist Appeals Team
For the Respondent/Claimant : Mr T Hodson, In-House Counsel, Elder Rahimi Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the claimant's appeal against the decision by the Secretary of State to refuse to grant the claimant leave to remain as a Tier 1 (Entrepreneur) Migrant, and against her concomitant decision to make directions for the claimant's

removal from the United Kingdom under Section 47 of the 2006 Act. The First-tier Tribunal did not make an anonymity order, and I do not consider that such an order is warranted for these proceedings in the Upper Tribunal.

2. The Appellant is a national of Iran. She applied for leave to remain on the basis that she had access to not less than £50,000 and had previously held leave as a Tier 1 (Post-Study Work) Migrant, and was registered as self-employed or as a director, and was engaged in business activity in an occupation at degree level group d, as part of an entrepreneurial team. Her entrepreneurial team member was a fellow Iranian, Mr Reza Shabgir. As evidence of access to funds, she relied on a sum of £62,313 held in a bank account with HSBC. A printout of a current appointment report from Companies House showed her listed as a company director, and her job title was teacher of English as a foreign language. She had not yet invested any of the funds. The date of the application was 15 February 2013.

3. On 7 May 2013 the Secretary of State gave her reasons for refusing to grant the application. As evidence of access to funds, the claimant had provided bank statements from HSBC for two "North London School of English Limited" business accounts. This evidence did not meet the requirements of Appendix A, because there was no supporting evidence to suggest she personally had access to the funds. Another deficiency in the application was that the contract with students that she had provided did not contain all the mandatory information specified in paragraph 41-SD(c)(iv). The contract did not provide the contact details for the students, including their full address, postal code, landline phone number and any email address.

4. It had therefore been decided to refuse her application under paragraph 245DD of the Rules as she did not meet the requirement of paragraph 245DD(b). In line with paragraph 245DD(l) of the Rules, the Home Office had not carried out an assessment under paragraph 245DD(h) of the Rules as so her application had been refused. But the Home Office reserved the right to carry out this assessment in any challenge of the decision or in future applications for Tier 1 (Entrepreneur) status.

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

5. The claimant's appeal came before First-tier Tribunal Judge S Aziz sitting at Hatton Cross in the First-tier Tribunal on 25 March 2014. The claimant was presented by Mr Hodson, and Ms Karbani of Counsel appeared on behalf of the Secretary of State.

6. The judge received oral evidence from the claimant, and took into account an extensive bundle of documents which included a set of accounts for the company for the financial year ending 31 August 2013. His findings of fact are set out at paragraph 40 onwards in his subsequent determination. He was more than satisfied on the evidence that the claimant was a director in a genuine business called the North London School of English and that her family in Iran had helped her invest £50,000 into the business. It was also very clear from her testimony that she was extremely dedicated and committed to the business's success. The sole reason that the Secretary of State had refused her application was because she had not submitted

documents in a specified format under paragraph 41-SD of Appendix A. The judge was prepared to accept her evidence that her father had genuinely provided her with £50,000 to invest in the business, and he was also satisfied that the money had now been invested in the business. But the Rules were clear that such funds had to be held in a personal bank account and not a business bank account.

7. The judge went on to address a submission by Mr Hodson that the bank account had been printed in the wrong format, and that therefore the claimant ought to have been contacted to be given an opportunity to submit her bank statement in the correct format. He held at paragraph 48 that the evidential deficiency was incapable of being cured. At best, she would have had to transfer the funds from the business account into a personal account and then submit the new bank statements in order to meet the requirements. This would result in submission of evidence which only came into existence after the application was made. He also noted that the claimant had made clear in her evidence she had now exhausted much of the £50,000. Therefore, the claimant was no longer even in a position to transfer the funds from her business account into a personal account.

8. The judge also rejected a submission by Mr Hodson that the Secretary of State should have asked the claimant to submit contracts with students which were in the correct format. So he concluded that the decision was in accordance with the Rules, and was also otherwise in accordance with the law. The decision not to request further documents under paragraph 245AA was correct.

9. The judge went on to address an alternative claim under Article 8 ECHR. He had much sympathy for the claimant. The application of the Rules had had particularly harsh impact upon her. She was a genuine Tier 1 claimant who had exhausted much of her family's earnings to help run a legitimate business in the United Kingdom. Her circumstances were aggravated by two further factors.

10. Firstly, as she pointed out in her evidence, she could not simply submit a fresh application, as over thirteen months had past since she made her application and she had exhausted the funds provided to her by her family on her business. She would no longer have any leave in the United Kingdom if her application failed, and she would be expected to return to Iran. In such circumstances, she had therefore invested large amount of money to British economy without reaping any real benefit.

11. Secondly, the claimant had made clear in her testimony that before she made her application she sought out a good solicitor who could assist her in making sense of the increasingly complex Immigration Rules. She consulted a number of firms before going with her current solicitor. There was a letter in the claimant's bundle from the solicitor who advised her on her current application. In this letter, the solicitor explained the reasons behind why she interpreted the Rules in the way she did. Incorrect or poor legal advice could never be a ground for allowing an appeal, but it was a factor that he took into account in the balancing exercise under proportionality.

12. The judge held that were arguably good grounds for granting leave to remain outside the Rules, and that there were sufficiently compelling circumstances for it to be necessary to consider the application outside the Rules under Article 8. The judge went on to find that the appeal should be allowed under Article 8. He directed the Home Office to grant the claimant leave in line with an applicant who had made a successful Tier 1 (Entrepreneur) visa application.

The Application for Permission to Appeal

13. The Specialist Appeals Team applied on behalf of the Secretary of State for permission to appeal to the Upper Tribunal. They argued that the judge had made two material misdirections in law. The first was that the judge should have considered the claimant's rights to private and family life under Appendix FM of the Rules. The second was that there were not good grounds for the judge to consider Article 8 outside the Rules. While the circumstances of the claimant's case were unfortunate, she did not qualify under the points-based system and her good immigration history and the money invested in the business did not amount to compelling circumstances to grant her leave outside of the Rules.

The Grant of Permission

14. On 12 May 2014 First-tier Tribunal Judge Heynes granted permission to appeal for the following reasons:

> It is arguable that an error of law has disclosed the approach to Article 8, not least because the judge appears to be evaluating the appropriateness of the Rules rather than considering whether exceptional factors not embraced by them.

The Hearing in the Upper Tribunal

15. At the hearing before me, I drew the parties' attention to the fact that the accounts for the North London School of English for the year ended 31 August 2013 did not disclose the investment of £50,000, or indeed any lesser sum, in the company by the entrepreneurial team members. Accordingly, it appeared to me that the claimant was still within the time limit to make a fresh Tier 1 (Entrepreneur) application relying on the *investment* of £50,000 in the company (as opposed to having *access* to £50,000 *in order to invest* in the company). Mr Hodson agreed, and informed me that this was precisely what had been done by her fellow entrepreneurial team member. His original application based on access to funds had been rejected, but he had successfully reapplied for leave to remain relying on specified documents to show the sum of £50,000 had been invested in the company within the past twelve months. Mr Shabgir, who was present in court, confirmed that he had been granted leave to remain as a Tier 1 (Entrepreneur) migrant on 17 May 2014. Mr Hodson pointed out the difference between Mr Shabgir's position and that of the claimant was that Mr Shabgir had unexpired leave at the time of the original refusal, and was therefore able to make a fresh application before his existing leave expired.

16. On behalf of the Secretary of State, Mr Bramble relied on the following passage in **Patel and Others v Secretary of State for the Home Department [2013] UKSC 72**. At paragraph 57, Lord Carnwarth said:

> It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the Rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the rules are not reviewable on appeal: section 86(6). One may sympathise with Sedley LJ's call in *Pankina* for 'common sense' in the application of the rules to graduates who have been studying in the UK for some years (see para 47 above). However, such considerations do not by themselves provide grounds of appeal under article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8.

17. Mr Bramble submitted that the judge had fallen in the trap of granting Article 8 relief to the claimant as a consolation prize, she having failed to bring herself within the Rules. He confirmed that there was a window for the claimant to make a fresh application under the Rules, namely a period of 28 days from the date when her appeal rights were deemed to be exhausted.

Reasons for finding an Error of Law

18. The judge arguably erred in law in not following a two stage approach in his Article 8 assessment: that is to say, in not analysing the claimant's private life claim under Rule 276ADE, before going on to ask himself if there might arguably be good grounds for granting leave to remain outside the Rules. However, I do not consider that on the facts of this case there was a material error in the judge's approach in this regard. This was not a case where applying the requirements of Rule 276ADE, which the claimant clearly did not meet, was going to assist the decision maker in assessing whether there were arguably good grounds for granting leave to remain on private life grounds outside Rule 276ADE.

19. The judge reminded himself of the test set out in **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC)** at paragraph 61 of his determination. So the real issue is whether he erred in law in finding that the high threshold test for consideration of her private life claim outside the Rules was met; and/or whether he erred in law in finding that there was a disproportionate interference with the claimant's right to respect for her private life.

20. On the current state of the law, it is very difficult for a student or economic migrant to mount a successful Article 8 private life claim outside the Rules as there is no human right per se to work or study in the country of one's choice. The claimant was also, on her own account, the author of her own misfortune in choosing to invest her family's money in the business at a time when she knew that her application for leave to remain had been refused. Moreover, the claimant could recoup her investment by selling her stake in the business, or the company could pay her an

annual dividend: in neither case, did the claimant need to be in the UK. The judge did not take the above into account.

21. However, my main reason for finding that the decision on the Article 8 claim was erroneous in law is that the judge fundamentally misdirected himself at paragraph 69, where he said that the claimant did not have the option of submitting a fresh application because over thirteen months had passed since she had made her original application and she had exhausted the funds provided to her by her family.

22. The claimant could not submit a fresh application relying on access to funds in a personal account. But Paragraph 45 of Appendix A provides an alternative route for a Tier 1 (Entrepreneur). Instead of relying on access to funds in a personal account *prior to investment*, the applicant can rely on the fact that he or she has already invested the funds in a new or existing business. The requirements for proof of such investment are set out in paragraph 46-SD of Appendix A. The time constraint is that the investment should have been made not more than twelve months before the date of application: paragraph 45. So the judge was wrong to proceed on the premise that at the time of the hearing before him it was too late for the claimant to make another application, and therefore the only route by which she could remain in the United Kingdom in order to play an active role in the business was through the grant to her of Article 8 relief.

23. In conclusion therefore the decision of the First-tier Tribunal was vitiated by a material error of law, such that it should be set aside and remade.

The Remaking of the Decision

24. As I have indicated in my error of law ruling, I do not consider there are compelling circumstances which justify the claimant being granted Article 8 relief outside the Rules, as it is open to her to submit a fresh application relying on the same specified documents as those successfully relied on by her entrepreneurial team member. Elder Rahimi Solicitors act for both entrepreneurial team members, and so the bundle of specified documents in compliance with paragraph 46-SD which they have compiled for the other team member's successful application can easily be redeployed for the claimant's application.

25. Following **Adamally and Jaferi**, a Section 47 removal decision used to be unlawful. This is no longer the case, following an amendment to Section 47 made by Section 51 of the Crime and Courts Act 2013 which received Royal Assent at the end of April 2013. But the amendment did not come into force until 8 May 2013, whereas the decision against the claimant was made on 7 May 2013. So I rule that the decision to remove the claimant was unlawful. But even if I am wrong about that, I do not consider that the claimant being under the shadow of a Section 47 removal decision is a barrier to her presenting a fresh application within the window of opportunity acknowledged by Mr Bramble.

Decision

The decision of the First-tier Tribunal allowing the claimant's appeal under Article 8 contained an error of law, and accordingly the following decision is substituted: the claimant's appeal against the decision to refuse to vary her leave is dismissed under the Rules and under Article 8 ECHR; but the claimant's appeal against the concomitant decision to remove her under Section 47 of the 2006 Act is allowed on the ground that this decision was not in accordance with the law.

Signed Date

Deputy Upper Tribunal Judge Monson