Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/38290/2013
IA/38294/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13 August 2014	**On 28 August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE GIBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ESPERANZA REQUILME DUMAGAN
ROMULO BARBON DUMAGAN
(NO ANONYMITY ORDER MADE)

Respondents

Representation:

For the Appellant: Mr S Walker, Home Office Presenting Officer
For the Respondents: None (and the appellants did not attend)

DETERMINATION AND REASONS

1. This was an appeal that was allowed at the First-tier. The appellant before the Upper Tribunal is therefore the Secretary of State. In the interests of clarity and convenience, however, I am referring to the parties as they were at the First-tier.

2. The appellants are wife and husband, and the second appellant's application and appeal is dependent on that of the first appellant, who was in the UK as a student, with the second appellant here as her dependant. Both appellants are citizens of the Philippines. The appellants were both refused further leave, as a student and student dependant respectively, on 22 August 2013. Following a hearing at Taylor House before Judge of the First-tier Tribunal Herbert OBE their appeals were allowed on Article 8 grounds. The appellants attended the hearing but were not represented. The respondent was not represented because the appeals were on the float list.

3. The appeals were allowed on Article 8 grounds only, on the basis that removing the appellant before the conclusion of her course in August 2014 would be disproportionate. The refusal had been on the basis that the appellant had switched to a different college, which was prohibited by section 50 of the 2009 Act.

4. Permission to appeal was granted to the Secretary of State by First-tier Tribunal Judge Chohan on 27 June 2014.

The Hearing

5. The appellants did not attend the hearing, and did not send any message explaining their absence or asking for an adjournment. They were not legally represented. There were no telephone numbers on the file, and it was not possible for a call to be made to enquire as to their whereabouts.

6. I decided to proceed with the hearing in the absence of the appellants, in accordance with Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008. I was satisfied that the appellants had been notified of the hearing, or that reasonable steps had been taken to do so. Notice of hearing had been sent to the first appellant, at the only address provided, on 7 July 2014. I noted the fact that the appellants had not responded to the decision granting permission to appeal to the respondent, which was also sent to them, along with directions. In deciding to proceed, taking account of the test in Rule 38 of whether it would be in the interests of justice, I also took note of the fact that the judge's decision referred to the first appellant's course being due to end in August 2014. Taking account of all the circumstances I decided that it was in the interests of justice to proceed with the hearing in the absence of the appellants.

7. Mr Walker, for the respondent, made brief submissions. He relied on the grounds. He also sought leave to add an additional ground in relation to the judge's decision on the lawfulness of the section 47 removal decisions in paragraph 14 of the determination. I gave leave for that ground to be added.

8. I have decided that the judge's decision allowing the appeals on Article 8 grounds did involve an error on a point of law. Since the decision of the

Supreme Court in **Patel and Others v SSHD [2013] UKSC 72** the practice of using Article 8 to allow students to complete courses where they have failed to comply with some of the requirements of the Immigration Rules, which followed the Upper Tribunal decision in **CDS (Brazil)**, has been brought to an end. This is made clear by paragraph 57 of the Supreme Court judgment, which ends with the following sentences:

> "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."

9. This is not to say that the door has been closed on Article 8 for students as a whole. It may that there will be particular cases where students have significant family or private life ties, which could lead to an appeal being allowed on Article 8 grounds. What does appear to me to be clear, however, is that the **CDS (Brazil)** route of using Article 8 as a way of allowing students to complete courses, where a technical failure to meet the arcane and complex requirements of the points-based system leads to unfairness, is a route that has been closed by the Supreme Court decision in **Patel**.

10. On that basis, for failure to consider the effect of the Supreme Court judgment in **Patel**, it appears to me that the judge's approach in allowing the appeal involved an error on a point of law.

11. The judge, at paragraph 14 of the determination, treated the section 47 removal decisions as being unlawful following the principle in **Adamally and Jaferi [2012] UKUT 00414**. The decisions in these appeals were made on 22 August 2013. The legal status of section 47 removal decisions changed on 8 May 2013, well before this date. This change was brought about by section 51 of the Crime and Courts Act 2013. The judge's finding that the section 47 removal decisions were not in accordance with the law therefore involved an error on a point of law.

12. The decision allowing the appeals under Article 8 therefore falls to be set aside, as does the decision that the section 47 removal decisions were not in accordance with the law.

13. In remaking the decisions I have decided that the appeals fall to be dismissed under Article 8. Nothing further has been put forward by the appellants, and there is no basis for any consideration of family or private life rights that go beyond the desire to complete the course.

14. I note that the first appellant was due to complete her course in August 2014. Due to the delays in the appeal process it may well be that the first appellant has in fact been able to complete her course, and this may

explain her absence, on the basis that the matter has now become academic, in more ways than one.

15. It was not suggested that there was any need for anonymity in these appeals. The First-tier Judge made fee awards. Having remade the decisions in the appeals by dismissing them there can be no fee awards.

Decision

16. The judge erred in law in allowing the appeals on Article 8 grounds and those decisions are set aside. The appeal of the Secretary of State is therefore allowed.

17. The decisions in the appeals are remade by dismissing the appeals under the Immigration Rules and on human rights grounds.

TO THE RESPONDENT
FEE AWARD

Having dismissed the appeals, in remaking them, there can be no fee awards.

Signed Date

Deputy Upper Tribunal Judge Gibb