Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/41609/2013

THE IMMIGRATION ACTS

Heard at Field House
On 6th June 2014
Judgment given orally on day of hearing

Determination Promulgated
On 24th June 2014

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YIWEN XU

Respondent

Representation:

For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: In person

DETERMINATION AND REASONS

1. The appellant in these proceeding is the Secretary of State. However, for convenience I refer to the parties as they were before the First-tier Tribunal. Thus, the appellant is a citizen of China who was born on 15th April 1991.

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2. On 21st August 2013 she made an in-time application for further leave to remain as a Tier 4 Student Migrant. The course for which she sought further leave was an MA in International Business and English at Portsmouth University.

3. In order to succeed in her application she needed, amongst other things, to show evidence of sufficient funds. The funds that she needed to show amounted to £10,400 which consisted of course fees of £8,800 and maintenance of £1,600, making a total of £10,400. Her application was refused and her appeal against that decision came before First-tier Tribunal Judge Ransley who dealt with the appeal 'on the papers' on 3rd February 2014, and whereby she allowed the appeal.

4. Judge Ransley referred to the requirements of the immigration rules in terms of funds and she was aware that the appellant needed to show funds of £10,400, although she miscalculated the amount of outstanding course fees stating at [14] of the determination that it was £8,000 that was needed. However, that slip is not material. The judge referred to the restriction on post-application evidence contained in Section 85A(3) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The effect of that provision is that the evidence to show sufficient funds or maintenance is evidence that needed to be submitted at the time of making the application. Post-application, and certainly post-decision evidence, was not admissible and the judge was not entitled to take it into account. In the appellant's bank statements she did not show, certainly in terms of the evidence that was submitted to the Secretary of State, that she had the necessary funds of £10,400. She had two accounts. One is described as an "easy saver" account with Lloyds TSB, and the other is described as a "classic" account.

5. Some time before the application, on 19th July 2013, a sum of £17,000 was transferred from her classic account into the easy saver account. The effect of that was that the funds in the classic account which was the account that was submitted in support of the application did not show the requisite funds. That only showed funds no greater than £4025.20 during the relevant period. On appeal the judge was provided with evidence that showed that the reality was that at the time of the application the appellant did have sufficient funds, albeit that she did not evidence them in the account used to support the application. The immigration rules require her to have evidenced those funds at the time of the application, which she did not do. Judge Ransley allowed the appeal on the basis that the appellant had sufficient funds, but ignoring the restriction in Section 85A(3) of the 2002 Act.

6. I am satisfied that in taking into account evidence that was not submitted in support of the application, the First-tier Judge erred in law, and that that error of law is such as to require the decision to be set aside to be re-made. No purpose is served in remitting the appeal to the First-tier Tribunal when no further fact-finding is required.

7. In re-making the decision I am bound to conclude that the appellant has not established that she met the requirements of the Rules as at the date of application or decision, because she did not evidence the necessary funds in support of the

application, although I accept that the reality was that she did in fact have the necessary funds. Nevertheless, the appeal under the immigration rules must be dismissed.

8. Judge Ransley did not consider Article 8 of the European Convention on Human Rights (ECHR) but this was understandable because she allowed the appeal under the immigration rules. In the grounds of appeal the appellant does not refer directly to Article 8 of the ECHR, but she does refer to matters which I think could be interpreted as raising that as an issue, namely the amount of money that has been spent on pursuing her education and her wish to complete the course.

9. In considering Article 8 I adopt the structured approach set out in Razgar [2004] UKHL 27. I accept that the appellant has private life in the UK, albeit that her private life is limited: it seems that she arrived in July 2012. It is probably just possible to say that the respondent's decision amounts to an interference with that private life and that that interference will have consequence of such gravity as potentially to engage the operation of Article 8. The interference does nevertheless pursue a legitimate aim and it is in accordance with the law.

10. Next for consideration is the issue of proportionality. I am unable to conclude that the decision is a disproportionate interference with the appellant's private life. Apart from anything else, there is precious little evidence in relation to her private life, although I accept that she has private life here, probably limited to the studies that she has undertaken and her engagement with the course. She probably does have friends here and she probably has a social life, but on the basis of her wish to complete her education, even though she has embarked on the course, I am unable to find that the decision of the respondent is a disproportionate interference with that private life. The appellant told me that she took her exams in May of this year. She is waiting for the results. She also told me that she has a dissertation to complete before the end of the course and the course ends on 30th September 2014. I asked the appellant whether she was able to continue the course from China but she did not know.

11. There is also no evidence before me in relation to whether she would be able or permitted by the university to continue her dissertation even if, as a result of her appeal being dismissed, she has no further leave. Even if not, that does not render the decision disproportionate.

12. There is a removal decision under Section 47 of the Immigration, Asylum and Nationality Act 2006. It is of course up to the Secretary of State what steps are taken, if any, to enforce removal before the appellant's course is completed. That again is not a matter over which I can have any control. It may well be that the Secretary of State will bear in mind the fact that the appellant did have the necessary funds, albeit that she did not comply with the immigration rules in evidencing those funds. Nevertheless, this is not a case where the appellant is short of funds for the completion of her course.

13. In summary, I am satisfied that the respondent's decision to refuse to vary leave to remain and to remove under section 47 of the 2006 Act is a proportionate response to the legitimate aim pursued, and does not amount to a disproportionate interference with the appellant's right to private life.

14. The First-tier Tribunal erred in law. I set aside the decision of the First-tier Tribunal and re-make the decision by dismissing the appeal under the immigration rules and under Article 8 of the ECHR.

Upper Tribunal Judge Kopieczek 23/06/14