Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42342/2013

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent	**Determination Promulgated**
On 3rd September 2014	**On 5th September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE COATES

Between

MR RAO KHURAM SHAHZAD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance
For the Respondent: Miss C Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Pakistan whose application for further leave to remain as a Tier 4 (General) Student was refused by the Respondent on the 30th September 2013. His appeal against that decision was allowed on human rights grounds by Judge of the First-tier Tribunal Hague on the 15th May 2014.

2. The Respondent's representative applied for permission to appeal on the grounds that the First-tier Judge erred in law in his approach to Article 8. Permission to

appeal was granted by First-tier Tribunal Judge Nicholson on the 25th June 2014. Thus the matter came before me in the Upper Tribunal on the 3rd September 2014. Neither the Appellant nor his representative attended the hearing. There was before me a letter from the Appellant's representatives, Rana & Co Solicitors dated the 2nd September 2014. The letter states as follows:

> "We have made attempts to contact our client in respect of this hearing but to no avail. Given this we are without any instructions and cease to act for the Appellant in this matter".

3. There was no explanation for the Appellant's failure to attend the hearing in person and there was no application for an adjournment. I was satisfied from the Tribunal file that notice of hearing had been sent to the Appellant at the correct address on the 15th July 2014 by First Class Post. In the circumstances, I concluded, in my discretion, that it was appropriate to determine the appeal in the Appellant's absence.

4. The Appellant's application was made under the Points Based System. He claimed ten points for maintenance but was awarded no points. The Appellant was required to show that he had £3,550 available for a consecutive period of twenty-eight days. He submitted his own bank statements which showed a balance falling substantially short of what was required. He also submitted a bank statement from his father but that was not taken into account by the Respondent because the Appellant had failed to provide his birth certificate showing his relationship with his father as required by Appendix C.

5. The First-tier Judge records that, in his oral evidence, the Appellant said that he had produced an affidavit from his father confirming his sponsorship and the relationship between them. He claimed that this had been sufficient when he made his earlier applications. By the time of the appeal hearing he had submitted his birth certificate confirming the relationship but his representative acknowledged that the birth certificate was inadmissible. It was argued on behalf of the Appellant that he had established a private life in the course of his study and reliance was placed on the decision in **CDS (Brazil)**.

6. The First-tier Judge accepted from the evidence before him that the Appellant was studying on a course that was "amply funded" and that in consequence he has a private life in the United Kingdom. As he satisfied the substance of the requirements of the Rules and had only fallen down on what the Judge refers to as "the technical rules" the Judge was satisfied that the public interest in enforcing the decision against the decision was small. The decision was, therefore, disproportionate.

7. In submissions, Miss Johnstone relied upon the grounds in support of the application for permission to appeal. The grounds referred to **MF (Nigeria) [2013] EWCA Civ 1192** where the Court of Appeal confirmed that the Immigration Rules are a complete code that form the starting point for the decision maker. Any Article 8 assessment should only be made after consideration under the Rules. That was not done in the instant case. It is submitted that the First-tier Tribunal erred in law by not having regard to the Rules and that the subsequent proportionality assessment was thereby unsustainable.

8. Reference is further made to the guidance given by the Upper Tribunal in **Gulshan [2013] UKUT 00640** to the effect that the Article 8 assessment shall only be carried out where there are compelling circumstances not recognised by the Rules. In this case the First-tier Tribunal did not identify such compelling circumstances and its findings are therefore unsustainable.

9. The grounds further argue that it was made clear in **Gulshan** that at this stage an appeal should only be allowed where there are exceptional circumstances. The decision in **Nagre [2013] EWHC 720 Admin** endorsed the Respondent's guidance on the meaning of exceptional circumstances, namely ones where refusal would lead to an unjustifiably harsh outcome.

10. In conclusion, the grounds argue that the First-tier Tribunal failed to provide adequate reasons why the Appellant's circumstances were either compelling or exceptional. There was no reason why the Appellant could not continue his private life in Pakistan.

11. In her oral submission, Miss Johnstone also referred to Paragraph 7 of the determination where the Judge had, in effect, treated the Appellant's situation as a "near miss". Miss Johnstone submitted that such an approach was inappropriate and wrong in law.

12. I note that in his grant of permission to appeal, Judge Nicholson pointed out that there was no dispute that the Appellant could not meet the requirements of the Immigration Rules. He had insufficient funds in his own account to meet the maintenance requirements and although he relied on funds in his father's account he had not submitted his birth certificate as required by the Immigration Rules. By the date of the hearing, the Appellant had submitted the birth certificate (as mentioned above) but that did not help him so far as the Immigration Rules were concerned because it was a requirement that the certificate be submitted with the application. Nevertheless, the First-tier Judge had allowed the appeal under Article 8, relying on the decision in **CDS (Brazil)**.

13. Judge Nicholson considered it arguable that the First-tier Judge should have followed the approach in **Gulshan** and that he erred in considering that **CDS (Brazil)** applied without identifying compelling or exceptional circumstances. In **CDS (Brazil)** the Upper Tribunal acknowledged that:

> "People who had been admitted on a course of study … are likely to build up a relevant connection with the course, the institution, an educational sequence for the ultimate professional qualification sought, as well as social ties during the period of study. Cumulatively this may amount to private life that deserves respect".

In this case, however, the Appellant only started attending City College a few days before his application was refused. He built up his connection to the course at a time when his rights to do so were precarious. Nor did the Judge refer to social ties which were a factor identified in **CDS (Brazil)**. Secondly, in **Patel and Others v SSHD [2013] UKSC 72** the Supreme Court rejected an argument that, if it could be shown that an applicant could have met the substantive requirements of the Rules, the

failure to do so should be regarded as purely formal. Reference is made to the opinion of Lord Carnworth who said:

> "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".

I would add that His Lordship also made reference to the fact that Article 8 should not be regarded as a general dispensing provision.

14. For the reasons given above, I am satisfied that the approach to Article 8 adopted by the First-tier Judge was fundamentally flawed and amounts to a material error of law. The determination falls to be set aside.

15. As already mentioned, the Appellant failed without explanation to attend the hearing before the Upper Tribunal. It is apparent that he has failed to respond to attempts on the part of his representatives to contact him. His unexplained absence suggests a lack of interest in pursuing his appeal. No further evidence has been submitted.

DECISION

The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. I set aside that decision and make a fresh decision to dismiss the appeal under the Immigration Rules and on human rights grounds.

I make no order for anonymity.

Signed Date 4th September 2014

Deputy Upper Tribunal Judge Coates

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeal there can be no fee award.

Signed Date 4th September 2014

Judge Coates

Designated Judge of the First-tier Tribunal