Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/25704/2014
IA/30997/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16 July 2015	**On 28 August 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

MR BALA GANGADARA TILAK NIMMAKAYALA
MRS DEEPTI PRASANNA TALLAPANENI

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Kamal of Immigration Solutions Limited
For the Respondent: Mr R Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.

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2. The appellants appeal against the decision of the First-tier Tribunal (Judge Coleman) dismissing the appellants' appeal against a decision taken on 3 June 2014 to refuse to grant further leave to remain in the UK as a Tier 1 (Entrepreneur) and Tier 1 dependant and to remove the appellants from the UK by way of directions.

Introduction

3. The appellants first entered the UK on 10 September 2010; the first appellant having leave as a Tier 4 student until 30 January 2012 and subsequently as a Tier 1 (post study) migrant until 14 April 2014. The second appellant has been his dependent throughout. The current application was made on 14 April 2014. The first appellant indicated in his application that he was investing £52,400 in his business; Kapotaksa Ltd ("the company"). Bank evidence, company documents, an accountant's letter and accounts plus a share certificate showing 52,400 shares of the nominal value of £1 in the name of the first appellant were all submitted with the application. The first appellant was interviewed in relation to his application.

4. The respondent refused the applications under paragraph 245DD(h) of the Immigration Rules ("the Rules") on the basis that she was not satisfied that the first appellant genuinely intended to establish or take over a business, intended to invest £50,000 in the business as required in Table 4 of Appendix A, that the money required was in the appellant's possession or in the financial accounts of the business or available from a third party named in the application and that the appellant did not intend to take employment in the UK other than that permitted within the Rules.

5. The first appellant stated in interview that he had saved £40,000 from working in the UK and had borrowed £10,000 from his father. The respondent decided that the appellant's answers were contradictory and did not set out the exact amount borrowed or saved or where the money came from in the first place. There were no bank statements to show that the first appellant accrued the money to spend on the business. Other factors also caused concern (no evidence to support existence of claimed employees, no evidence of market research, very little advertising, only one contract for work, no evidence of claimed £14,000 expenditure on subcontractors, previous educational experience did not show sufficiently substantial experience to run a business) and the required points were not awarded under paragraph 245DD(k) because the respondent was not satisfied about the genuineness of the application.

The Appeal

6. The appellants appealed to the First-tier Tribunal and attended an oral hearing at Taylor House on 12 January 2015. They were represented by Mr Kamal. The First-tier Tribunal found that the first appellant had simply failed to produce any evidence whatsoever to prove on a balance of probability that he at any time had in excess of £50,000 or that the sum was invested in the company. The first appellant had failed to show that he came within the Rules and dismissing his appeal meant that the appeal of the second appellant must also fail.

The Appeal to the Upper Tribunal

7. The appellant sought permission to appeal to the Upper Tribunal on 3 February 2015 on the basis that the First-tier Tribunal had erred in law. The judge had made a series of errors and the first appellant had demonstrated all of the necessary documents as proof of his genuine business. He had invested not less than £52,400 in the company, a large amount of which was spent on subcontracting. The funds came partly from his own savings and the remainder from his family and friends in the UK and Pakistan. Any deficiencies in the application could have been remedied if the respondent had applied the evidential flexibility policy.

8. Permission to appeal was granted by First-tier Tribunal Judge Levin on 17 March 2015. The judge had failed to consider the appeals on human rights grounds despite Article 8 being raised as a ground of appeal. The judge had also failed to consider paragraph 245AA of the Rules even though evidential flexibility was raised in the grounds of appeal to the First-tier Tribunal. The remainder of the grounds had no arguable merit as they constituted no more than a disagreement with the judge's findings.

9. In a rule 24 response dated 26 March 2015, the respondent stated that the judge made sustainable and reasoned findings to dismiss the appeal. The judge did not make any Article 8 findings but that was not a material error of law because the grounds do not explain how it would be disproportionate to remove the appellants.

10. Thus, the appeal came before me

Discussion

11. Mr Kamal submitted that it is clear that the application was purely refused on the genuineness test. No points were awarded for finance. Despite the clear documentary evidence, the refusal letter says that the respondent was not satisfied about the genuineness of the application. The business is running and it is a genuine business. The interviewer could have asked for further documents such as pay slips and bank evidence. There is no mention of paragraph 245AA in the decision. Not considering evidential flexibility was a legal error. Article 8 was also not mentioned. The first appellant has a masters degree and lives with his wife. He has invested £52,000 in his business and has a legitimate expectation that he can live and work in the UK. He has the education and training but that was not considered in the decision.

12. Mr Whitwell submitted that the issue is whether the judge erred in her approach. There are examples of the application of paragraph 245AA at pages 30-31 of the appellants' bundle for the Upper Tribunal. In this case the first appellant did not persuade the decision maker and there was no requirement to ask for additional documents. Any new documents are still not before the Upper Tribunal and there has been no application to adduce further evidence. Paragraph 12 of the decision shows the judge's approach and it is not apparent that there is any documentation that could assist the appellants. Even if the respondent had written to the first

appellant it is not clear that it would have made any difference to the application. Article 8 was raised and not determined but the appellants could not succeed under Article 8 and there is an issue of materiality. The first appellant failed to prove that £50,000 had been invested and there was no legitimate expectation to succeed under Article 8 given the failure under the Rules. The purpose of entry had been completed.

13. Mr Kamal replied that the first appellant is the director of a business. The appellant submitted all of the documents with his application under paragraph 245DD(i) and was called in to interview. Nothing else was asked of him.

14. I find that this appeal has a relatively narrow compass. It is common ground that the judge failed to consider evidential flexibility and Article 8 even though both matters featured in the grounds of appeal to the First-tier Tribunal. The real issue is materiality.

15. I have considered evidential flexibility in the context of the Court of Appeal decision in **Rodriguez [2014] EWCA Civ 2**. There is no obligation on the respondent to make speculative enquiries. The judge found at paragraph 20 of the decision that the first appellant had failed to prove that he had at any time in excess of £50,000 or that sum was invested in the company. Those findings were properly open to the judge and it is difficult to see how any First-tier judge could have reached a different conclusion. In those circumstances there was no prospect of evidential flexibility assisting the first appellant. There is certainly nothing in paragraph 245AA that could justify or require any request for further evidence from the first appellant. No material error of law arises.

16. I have considered **Nasim and Others (Article 8) [2014] UKUT 00025 (IAC)** in relation to Article 8. The following paragraphs are relevant;

> "10. Mr Jarvis's stance, on behalf of the respondent, was uncompromising. In the respondent's view, none of the appellants could demonstrate that removal in pursuance of the decision to refuse to vary leave would have "consequences of such gravity" as to engage Article 8(1) of the ECHR; that is to say, none could demand a positive answer to the second of the five questions posed by Lord Bingham in Razgar v Secretary of State for the Home Department [2004] UKHL 27, at [17][1], with the result that it was unnecessary to determine whether such removal constituted a disproportionate interference with Article 8 rights.
>
> 11. In this regard, Mr Jarvis placed particular emphasis upon the following part of the judgment of Lord Carnwath in Patel and Others v Secretary of State for the Home Department [2013] UKSC 72:-

[1] The questions are:
(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
(3) If so, will such interference be in accordance with the law?
(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

> "57. 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 … 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."

12. In her submissions, Mrs Heybroek, upon whom the other representatives substantially relied as regards their common Article 8 arguments, contended that, in this passage, Lord Carnwath was doing no more than pointing out that a right to education is not per se covered by Article 8. We regard the passage, however, as having a wider import, in seeking to re-focus attention upon the core purposes of Article 8.

13. In order to explain why, the following passage from Human Rights Law and Practice, 3rd Edition 2009 (Lester, Pannick and Herberg, Eds), under the heading "the scope of the right", is instructive:-

> "Of all of the Convention rights, art 8 has by far the widest scope. Like other international human rights guarantees, it demands respect for a broad range of loosely allied personal interests: physical or bodily integrity; personal identity and lifestyle (at least in some respects), including sexuality and sexual orientation; reputation; family life; the home and home environment; and correspondence, embracing all forms of communication. It is this breadth that has led to art 8 being described as 'the least defined and most unruly' of the Convention rights. As regards private life, Lord Rodger observed in the Countryside Alliance case that 'the European Human Rights Commission long ago rejected any Anglo-Saxon notion that the right to respect for private life was to be equated with the right to privacy'. The closest to a unifying theme for such diverse subjects is the liberal presumption that individuals should have an area of autonomous development, interaction and liberty, a 'private sphere', with or without interaction with others free from state intervention and free from excessive, unsolicited intervention by other uninvited individuals. Thus, the notion of privacy is a continuum, starting from an inviolable core of personal autonomy in a private context and radiating out (yet becoming more subject to qualification or justified interference) into personal and social relationships in the wider world."

14. Whilst the concept of a "family life" is generally speaking readily identifiable, the concept of a "private life" for the purposes of Article 8 is inherently less clear. At one end of the "continuum" stands the concept of moral and physical integrity or "physical and psychological integrity" (as categorised by the ECtHR in eg Pretty v United Kingdom (2002) 35 EHRR 1) as to which, in extreme instances, even the

state's interest in removing foreign criminals might not constitute a proportionate response. However, as one moves down the continuum, one encounters aspects of private life which, even if engaging Article 8(1) (if not alone, then in combination with other factors) are so far removed from the "core" of Article 8 as to be readily defeasible by state interests, such as the importance of maintaining a credible and coherent system of immigration control.

15. At this point on the continuum the essential elements of the private life relied upon will normally be transposable, in the sense of being capable of replication in their essential respects, following a person's return to their home country. Thus, in headnote 3 of MM (Tier 1 PSW; Art 8; private life) Zimbabwe [2009] UKAIT 0037 we find that:-

> "3. When determining the issue of proportionality … it will always be important to evaluate the extent of the individual's social ties and relationships in the UK. However, a student here on a temporary basis has no expectation of a right to remain in order to further these ties and relationships if the criteria of the points-based system are not met. Also, the character of an individual's "private life" relied upon is ordinarily by its very nature of a type which can be formed elsewhere, albeit through different social ties, after the individual is removed from the UK."…

20. We therefore agree with Mr Jarvis that [57] of Patel and Others is a significant exhortation from the Supreme Court to re-focus attention on the nature and purpose of Article 8 and, in particular, to recognise its limited utility to an individual where one has moved along the continuum, from that Article's core area of operation towards what might be described as its fuzzy penumbra. The limitation arises, both from what will at that point normally be the tangential effect on the individual of the proposed interference and from the fact that, unless there are particular reasons to reduce the public interest of enforcing immigration controls, that interest will consequently prevail in striking the proportionality balance (even assuming that stage is reached).

21. In conclusion on this first general matter, we find that the nature of the right asserted by each of the appellants, based on their desire, as former students, to undertake a period of post-study work in the United Kingdom, lies at the outer reaches of cases requiring an affirmative answer to the second of the five "Razgar" questions and that, even if such an affirmative answer needs to be given, the issue of proportionality is to be resolved decisively in favour of the respondent, by reference to her functions as the guardian of the system of immigration controls, entrusted to her by Parliament…

25. A further seam running through the appellant's submissions was that, during their time in the United Kingdom, they had been law-abiding, had not relied on public funds and had contributed to the United Kingdom economy by paying their students' fees. Their aim was now to contribute to that economy by working.

26. We do not consider that this set of submissions takes the appellants' cases anywhere. It cannot rationally be contended that their Article 8 rights have been

made stronger merely because, during their time in this country, they have not sought public funds, have refrained from committing criminal offences and have paid the fees required in order to undertake their courses. Similarly, a desire to undertake paid employment in the United Kingdom is not, as such, a matter that can enhance a person's right to remain here in reliance on Article 8.

27. The only significance of not having criminal convictions and not having relied on public funds is to preclude the respondent from pointing to any public interest in respect of the appellants' removal, over and above the basic importance of maintaining a firm and coherent system of immigration control. However, for reasons we have already enunciated, as a general matter that public interest factor is, in the circumstances of these cases, more than adequate to render removal proportionate…

29. In Nasim and Others legitimate expectation was amongst the submissions deployed by the appellants and rejected by the Tribunal: [31] to [37]. We heard nothing on 19th December that might even begin to cause us to resile from our findings on this issue. What the present submissions amount to is a contention that Article 8 entitles an immigrant to compel the respondent to continue to apply to that person the Immigration Rules which were in force when the immigrant was granted leave to enter the United Kingdom, or when he or she was subsequently granted leave to remain. This submission is misconceived. It finds no sanction in any case law to which our attention has been drawn. As Mr Jarvis pointed out in his oral submissions, a number of the present appellants arrived in the United Kingdom as students, before the Immigration Rules even contained the provisions concerning Tier 1 (Post-Study Work). Although the present appellants did not, of course, succeed by reference to those provisions, others who applied earlier would have been able to satisfy the requirements, and go on to undertake post-study work, even though the Rules in force on their admission did not permit this. In other words, absent a legitimate expectation, such as occurred in the case of highly skilled migrants, the fact that one must take the Immigration Rules as one finds them cuts both ways. In any event, the essential point is that the ECHR does not have the effect for which the appellants contend."

17. In this appeal, the first appellant wishes to work in the UK. I find that he has no legitimate expectation to do so unless he meets the requirements of the Rules. The appellants do not have any convictions but that does not improve their position because the respondent accepts that they are individuals of good character. They have only been in the UK since 2010 and do not meet the requirements of Appendix FM or paragraph 276ADE of the Rules. There are no compelling or exceptional circumstances such as to justify further consideration of Article 8 outside the Rules. Even if the **Razgar** test is applied in full, the public interest factor in maintaining a firm and coherent system of immigration control is more than enough to render removal proportionate.

18. I therefore find that the appellant's appeals cannot succeed under Article 8. I accept that the appellants are entitled to a decision in relation to their Article 8 clams and remake the decision of the First-tier accordingly.

Decision

19. Consequently, I set aside the decision of the First-tier Tribunal. I remake the decision as follows;

    (i) I dismiss the appeals under the Immigration Rules.

    (ii) I dismiss the appeals under Article 8.

Signed  Date 25 August 2015

Judge Archer
Deputy Judge of the Upper Tribunal