Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00608/2015

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 5 July 2016	**On 8 July 2016**
Prepared on 6 July 2016	

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

H. B.
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr Cartmel, Counsel instructed by Kingstons Solicitors
For the Respondent:	Mr Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of India who entered the UK as a student, and whose leave was subsequently varied as a Tier 1 post study work migrant so that it would expire on 21 August 2014. Within time, the Appellant applied on 21 August 2014 to vary his leave once more, on this latter occasion as a Tier 1 (Entrepreneur) migrant.
2. That application was refused on 20 October 2014, and in consequence a decision was made to remove the Appellant from the UK by reference to s47. The Appellant duly appealed against these immigration decisions, and his appeal was heard on 3

September 2015, and allowed under the Immigration Rules by decision of First Tier Tribunal Judge Bircher promulgated on 7 October 2015.

3. By a decision of First Tier Tribunal Judge Andrew dated 1 June 2016 the First Tier Tribunal granted the Respondent permission to appeal on the basis it was arguable the Judge had erred in her approach. It had been conceded before her, and in the application, that the Appellant had not made an investment in his business of £50,000 or more before making his application. There was a shortfall, which he had said in his application was covered by the cash that was available to him to invest in that business, and which he intended to invest in it.
4. It was however conceded before the Judge that the Appellant had not supplied with his application, or subsequently before the date of the Respondent's decision to refuse the application, any evidence of the £16,000 in cash that he had claimed in his application form to have available to him to invest in his business. Thus it was arguable that the Appellant did not meet the evidential requirements of the Immigration Rules.
5. The Appellant has filed no Rule 24 response to the grant of permission.
6. Thus the matter comes before me.

The Bank statement in question

7. It is common ground before me that the Judge's finding that the Appellant had demonstrated that he had invested in his business in excess of £50,000 is simply wrong [29]. That was not his case, and it was not borne out by the evidence.
8. It is also common ground that with his application the Appellant had submitted a series of bank statements, numbering 53 sheets, for a business account held in his own name with Barclays, number xxxxx8. No sheet was omitted from that series of statements, and this series of statements did not establish that he held the cash that he had claimed to have available to him for investment in his business in his application form. Mr Cartmel accepted that his initial submission to me to the contrary was misplaced, and that the Judge's finding to the contrary was also simply wrong [33].
9. At the hearing before the Judge the Appellant had produced, for the first time, a document that was said to be a true copy of a bank statement for a different account; a current account that was also held with Barclays, xxxxx4. Mr Cartmel accepted upon inspection of this document (he had not been provided with a copy of it as part of his instructions, although he had represented the Appellant at the hearing below) that the Judge's description of this document as a statement for the Appellant's

business account was also factually incorrect [25]. It was not, it was a quite different account, although the account holder was also the Appellant, and it was entitled as a current account

10. In the circumstances the Respondent makes out her case that the Judge approached the appeal on the wrong factual basis in a number of respects. I am satisfied that these errors of fact were sufficient, both individually and together, to an error of law.

Paragraph 245AA

11. Neither representative had attended the hearing with a copy of the terms in which paragraph 245AA of the Immigration Rules was cast at the date of the decision. Nor had either of them sought to produce a copy of any policy document that they claimed existed outside the Immigration Rules, which would supplement paragraph 245AA at the date of decision. Nor were they equipped with copies of any relevant jurisprudence concerning what is generically known as the Respondent's "evidential flexibility policy".
12. Accordingly I stood the appeal down, and provided both representatives with copies of the decisions in SH (Pakistan) [2016] EWCA Civ 426 and Mandalia [2015] UKSC 59 and time for them to digest them.
13. The parties now agree that the date of the decision under appeal was 26 August 2014, and that the "process instruction" which was the focus of the decision in Mandalia was in force for only the period 7 February – 6 September 2012 [28]. Thus it is agreed that it was not applicable to this application by the Appellant, or to the Respondent's consideration of it.
14. It is also agreed between them that at the date of the decision the evidential flexibility policy requirements were set out in paragraph 245AA of the Immigration Rules. The Respondent was thus obliged to consider only the documents submitted after the application if they were submitted in response to a request made of the Appellant to submit further document pursuant to paragraph 245AA(b). The Respondent was only obliged to make such a request in certain defined circumstances. Of these it is common ground that only 245AA(b)(i) could be applicable; where a document in a sequence had been omitted, as for example if one bank statement from a series was missing. There existed no obligation under paragraph 245AA to give an applicant a general opportunity to supplement their application in situations outside those stipulated within paragraph 245AA; SH.
15. Mr Cartmel did not seek to argue that the evidential flexibility policy referred to in SH, which came into force in March 2013, offered any additional assistance to the Appellant. He was in my

judgement correct not to do so. Pursuant to that policy the caseworker could only request additional evidence if they had sufficient reason to believe that the missing information existed, but the examples given of the circumstances in which the caseworker should do so replicated the terms of paragraph 245AA(b).

Conclusions

16. As set out above I am satisfied that the Judge did make factual errors that amounted to errors of law in her analysis of the evidence. The Appellant did not provide with his application the evidence required to demonstrate that he met the requirements of the Immigration Rules for the variation of leave to remain that he sought. The Judge's conclusion to the contrary must be set aside, and the decision upon the appeal remade.
17. It is conceded before me that the evidence submitted in support of the application did not demonstrate that the Appellant met the requirements of the Immigration Rules.
18. This was a PBS application, and thus s85A of the 2002 Act disabled the First Tier Tribunal from considering evidence that was not produced by the Appellant in support of his application. The document upon which the Appellant's case turns was such a document.
19. Given the factual concessions that are now made (but which were not made by the Appellant before the Judge below) the appeal therefore turns in my judgement upon whether the Appellant can demonstrate that the omission of the document that was produced to the Judge at the hearing (which is said to be a copy of a statement for account number xxxxx4), from the material provided with his application, was such as to engage paragraph 245AA, and/or the evidential flexibility policy which came into force in March 2013.
20. It is in my judgement plain that the omission of a statement for account number xxxxx4 cannot be an omission from a series of documents that relate to account number xxxxx8. Mr Cartmel accepted that.
21. Although Mr Cartmel did not draw my attention to their existence during the hearing, and thus he appears to have been unaware of them, I have found upon the file in the course of preparing this decision, copy bank statements that do relate to account number xxxx4. I proceed on the basis that they were submitted to the Respondent with the application.
22. These bank statements consist of the following. First, a series of 19 sheets numbered in the top right corner as such, which is complete, and which together covers the period 9 July 2013 – 8 July 2014. They record a closing credit balance of £2,047.

Historically they record a credit balance on the account which has varied from a nominal one to a maximum of £6,300. Second, a series of 3 sheets numbered in the top right corner as such, which is complete, and which together covers the period 26 June 2014 – 12 August 2014. They record a closing credit balance of £2,678, with historic movements similar to those taking place during the previous twelve months.

23. These bank statements are therefore a complete series for the period 9 July 2013 to 12 August 2014 for account number xxxx4. They do not indicate that the credit balance on the account has ever reached £16,000 during that period, and nor do their contents offer any indication that it would do so at any point subsequently.

24. The bank statement for account number xxxx4 which is now relied upon covers the period 17 July 2014 to 19 August 2014. It records a series of transactions in the period 14 August to 19 August which (inter alia) credit a number of sums to the account derived from a number of sources, so that the closing credit balance on 19 August 2014 was £16,069.62. The material produced with the application, and in the application form, does not indicate that these credits would be made to the account, or offer an explanation for those which would appear to be outside the ordinary historic usage of the account. I also note that the net profit before tax for the Appellant's business in the eight months to 31 July 2014 was a mere £12,105.

25. Accordingly I find that this was not a "missing sequence" case as described by Davis LJ in Rodriguez [2014] EWCA Civ 2 @ 102. The bank statement now relied upon covered the succeeding period to the sequence of statements that were provided for account number xxxx4. It would have been complete speculation on the part of the Respondent to assume that such a statement might show the availability of funds in the requisite sums. This was not a situation comparable to that in Mandalia.

26. In the circumstances I am not satisfied that the Appellant has established that the Respondent failed to properly apply paragraph 245AA, or, to follow any applicable policy when considering the application.

27. The Appellant's grounds of appeal did not raise an Article 8 appeal.

28. In the circumstances, I deal with Article 8 only for completeness. Even if Article 8 is engaged by the removal decision under appeal, it could only be engaged in relation to the Appellant's "private life", since he does not suggest that he has established any "family life" in the UK. His witness statement for the appeal

made no reference to his "private life" beyond his engagement in his business. He is plainly able to return to India in safety.

29. I note the guidance to be found upon the proper approach to a "private life" case in the decisions of Patel [2013] UKSC 72, and Nasim [2014] UKUT 25. The Appellant has only ever had a grant of temporary leave for purposes that are now complete. The following passage in Nasim sets out the relevant principles;

> *"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.*
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> *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:-*
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> > *"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."*
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> *16. As was stated in the earlier case of MG (assessing interference with private life) Serbia and Montenegro [2005] UKAIT 00113:-*
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> > *"A person's job and precise programme of studies may be different in the country to which he is to be returned and his network of friendships and other acquaintances is likely to be different too, but his private life will continue in respect of all its essential elements."*
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> *17. The difference between these types of "private life" case and a case founded on family life is instructive. As was noted in MM, the relationships involved in a family life are more likely to be unique, so as to be incapable of being replicated once an individual leaves the United Kingdom, leaving behind, for example, his or her spouse or minor child.*
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> *18. In R (on the application of the Countryside Alliance) v AG and others [2007] UKHL 52, Lord Bingham, having described the concept of private life in Article 8 as "elusive", said that:*
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> > *"… the purpose of the article is in my view clear. It is to protect the individual against intrusion by agents of the state, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose" [10].*
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> *19. It is important to bear in mind that the "good reason", which the state must invoke is not a fixity. British citizens may enjoy friendships, employment and studies that are in all essential respects the same as those enjoyed by persons here who are subject to such controls. The fact that the government cannot arbitrarily interfere with a British citizen's enjoyment of those things, replicable though they may be, and that, in practice, interference is likely to be justified only by strong reasons, such as imprisonment for a criminal offence, cannot be used to*

restrict the government's ability to rely on the enforcement of immigration controls as a reason for interfering with friendships, employment and studies enjoyed by a person who is subject to immigration controls.

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."

30. To the extent that the Appellant relies upon his undoubted good character the following passage in Nasim is applicable;

"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."

31. To sum up then, the Appellant's appeal did not rely upon the core concepts of moral and physical integrity. In my judgement the evidence placed before the Judge did not establish that there were any compelling compassionate circumstances that meant the refusal to grant him leave, and the consequential decision to remove him, led to an unjustifiably harsh outcome. In the light of the provisions of s117A-D, and the guidance to be found in AM (s117A-D) Malawi [2015] UKUT 260 I am satisfied that the removal decision is a proportionate response given the public interest in the maintenance of immigration controls.

32. In the circumstances I remake the decision so as to dismiss the appeal.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 7 October 2015 did involve the making of an error of law that requires that decision to be set aside and remade.

I remake the decision so as to dismiss the appeal

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Deputy Upper Tribunal Judge JM Holmes
Dated 6 July 2016