IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/01025/2015
IA/01034/2015
IA/01039/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 January 2016	**On 10 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NIRAVKUMAR KANUBHAI KAKADIYA
BINALBEN NIRAVKUMAR KAKADIYA
J K
(ANONYMITY ORDERS NOT MADE)

Respondents

Representation:
For the Appellant: Mr S Whitwell, Home Office Presenting Officer
For the Respondents: No Attendance

DECISION AND REASONS

Background

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1. These are linked appeals against the decisions of First-tier Tribunal Judge Freer promulgated on 28 July 2015 brought with the permission of First-tier Tribunal Judge White granted on 5 November 2015.

2. Although before me the Secretary of State for the Home Department is the appellant and Mr and Mrs Kakadiya and their daughter are the respondents, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to the Kakadiyas as the Appellants and the Secretary of State as the Respondent.

3. The personal details of the Appellants are a matter of record on file, as are their respective immigration histories: it is unnecessary to repeat those matters here.

4. This appeals arise in circumstances where the First Appellant, Mr Kakadiya, had previously held leave as a Tier 4 student migrant, and his wife and child had held leave in line as his dependants. A decision was taken by the Respondent to curtail leave such that leave would expire on 8 August 2014, which would afford the First Appellant 60 days in order to find a new academic institution.

5. Just at the end of that period the Appellants made an application for further leave to remain by way of application forms FLR(FP) together with a covering letter from their representatives dated 8 August 2014. The covering letter has the subject line *"Application for further leave to remain for a period of three months"*, and its opening paragraph is then in these terms:

> "We have been instructed by the above named applicant to assist him in his immigration matter. He is submitting his application along with his dependent wife and daughter for further leave to remain in the United Kingdom under Article 8 of ECHR and on humanitarian and compassionate circumstance."

6. The rest of the letter sets out the difficulties that the Appellants had experienced in obtaining a further sponsoring course provider for the First Appellant to continue to pursue his studies, and in essence what is asked in that letter is more time to resolve the matter: e.g. see paragraph 8 of the letter.

7. The Secretary of State refused the Appellants' applications for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 12 December 2014. The basis of the reasons are summarised at paragraphs 5-9 of the decision of the First-tier Tribunal. It is to be noted that the Secretary of State considered the applications by reference to Appendix FM of the Immigration Rules and also by reference to paragraph 276ADE. It was additionally said by the Respondent that there were no exceptional circumstances in respect of Article 8 'outside' the Rules.

8. The matter was considered on the papers before the First-tier Tribunal: see paragraph 21. I pause to note that although the matter has been listed for an oral hearing today before the Upper Tribunal correspondence has been received from the Appellants' solicitors by way of a letter dated 7 January 2016 indicating that the Appellants wish the appeal to be considered in their absence. The letter also enclosed some supporting documents (as set out in the index, which is a matter of record on file), and submissions by way of a Rule 24 response.

9. In the circumstances I am satisfied that the Appellants have had due notice of the hearing today and that it is appropriate to proceed in their absence.

Consideration: Error of Law

10. The First-tier Tribunal Judge allowed the Appellants' appeals with reference to Article 8 of the ECHR. Having set out some Article 8 related case law, the Judge says this at paragraph 27:

> "The decision maker did not consider Article 8 adequately after the Rules. The short extension sought was not a run-of-the-mill request for additional years of leave. It is hard to find the public interest in refusing it, as the situation is not attractive to future students who would bring a large influx of income with them."

11. Much of the rest of the First-tier Tribunal's decision thereafter is a recitation of Article 8 itself, the case of **Razgar**, and the provisions of section 117B and 117D of the 2002 Act. Paragraph 32 then states this: *"The refusal of a short extension is wholly disproportionate on the facts."* There is then some reference to the difficulties suggested to have been encountered in obtaining English language testing relevant to the Appellant's studies.

12. It seems to me absolutely clear that the First-tier Tribunal Judge has not made any attempt to go through the five **Razgar** questions. Nowhere does the Judge identify the nature or the quality of the family and/or private life said to be enjoyed by the Appellants in the United Kingdom. The reference at paragraph 32 to a 'disproportionate' decision is not obviously an Article 8 balancing exercise because there is no evaluation of the private/family life element. Rather it appears that the Judge merely considers the decision to refuse an extension of a short period of time for the First Appellant to seek to put himself in a situation where he could support an application to continue his studies to be 'harsh' or 'unfair'. In the alternative, if it was indeed the Judge's view that the decisions disproportionately interfered with any aspect of private or family life, the decision is deficient for a lack of analysis and an absence of findings as to private and/or family life.

13. More particularly in this regard any such analysis would have had to have taken on board the decision in **Patel** – a matter that was clearly influential

in the grant of permission to appeal by Judge White. In **Patel [2013] UKSC 72** at paragraph 57, in the now well-known speech of Lord Carnwath, it is stated:

> "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 "commonsense" 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."

14. In my judgment the decision of the First-tier Tribunal Judge plainly runs contrary to the principles and guidance to be derived from the case of **Patel**, and the First-tier Tribunal Judge nowhere identifies any basis for distinguishing those principles and guidance of the facts of this particular case.

15. Accordingly, in all the circumstances I am satisfied that there was a material error of law which requires that the decisions of the First-tier Tribunal Judge should be set aside.

Remaking the decisions

16. I proceed to remake the decisions in the appeals.

17. As I have already identified, the Appellants were in effect asking for a short period of leave to enable the First Appellant to make arrangements whereby he could be in a position to apply for further leave as a student - it being his case that he had not had sufficient time so to do. It seems to me that it is unfortunate in those circumstances that any reference was made to Article 8 in the application letter drafted by his representatives at all. It may well be that it is because of that reference that the Secretary of State's decision-maker embarked on no more than a consideration of the case against the framework of the Immigration Rules relating to family and private life.

18. The reality is that the Appellants were not seeking to secure leave under the Rules by reference to Appendix FM or paragraph 276ADE, but were in fact asking for a short period of leave outside the Immigration Rules. In effect, recalling the passage from **Patel** quoted above, the Appellants were inviting exercise of "*the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right*".

19. In my judgment the RFRL does not engage with the application in that manner, and to that extent I am satisfied that the decision of the Secretary of State was not in accordance with the law. In short, the Secretary of State failed to engage with an application based on a request for a short period of discretionary leave outside the Rules.

20. It is beyond the jurisdiction of this Tribunal to make a substantive decision on the basis of discretion outside the Rules, and accordingly I conclude that the appeal is to be allowed to the extent that the decisions of the Respondent were not in accordance with the law, and the Appellants' applications in effect remain outstanding before the Secretary of State and now requires to be determined in accordance with the law.

Notice of Decisions

21. The decision of the First-tier Tribunal contained material errors of law and are set aside.

22. I remake the decisions in the appeals.

23. The appeals are each allowed on the basis that the decisions of the Respondent were not in accordance with the law, and accordingly the Appellants' applications now require to be decided by the Secretary of State in accordance with the law.

24. No anonymity orders are sought or made.

The above represents a corrected transcript of an ex tempore decision given at the conclusion of the hearing.

Signed: Date: 4 February 2016

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeals and because a fee has been paid or is payable, I have considered making a fee award. I have decided to make a whole fee award because the Respondent has failed to engage with the real basis of the Appellants' applications.

Signed: Date: 4 February 2016

Deputy Upper Tribunal Judge I A Lewis