IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/49734/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 January 2016	**On 27 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MD SHEHEL RANA MAZUMBER
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Fijiwala, Home Office Presenting Officer
For the Respondent: Mr W Rees of Counsel instructed by Farani Javid Taylor Solicitors

DECISION AND REASONS

Background

1. This is an appeal against the decision of First-tier Tribunal Judge Abebrese promulgated on 23 July 2015, brought with the permission of First-tier Tribunal Judge Frankish granted on 5 November 2015.

2. Although before me the Secretary of State for the Home Department is the appellant and Mr Mazumber is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to

Mr Mazumber as the Appellant and the Secretary of State as the Respondent.

3. The Appellant is a national of Bangladesh born on 10 December 1985. He appealed to the First-tier Tribunal against a decision of the Respondent dated 19 November 2014 refusing variation of leave to remain as a Tier 4 (General) Student and also making a Section 47 removal decision. The Appellant's application for leave to remain as a student had been refused with reference to paragraph 245ZX(c) of the Immigration Rules for reasons set out in the combined Notice of Immigration Decision and 'reasons for refusal' letter. Essentially the Respondent was not satisfied that the Appellant had demonstrated sufficient ability in the English language by reference to the IELTS test certificate that he had produced in support of his application.

4. The First-tier Tribunal Judge dismissed the appeal under the Immigration Rules. There is no challenge to that aspect of the First-tier Tribunal Judge's decision made by Mr Mazumber.

5. However the First-tier Tribunal Judge went on to allow the Appellant's appeal pursuant to Article 8 of the ECHR for reasons set out in his decision. The Secretary of State now seeks to challenge that aspect of the decision of the First-tier Tribunal Judge.

6. As I have indicated there has been no cross-appeal by the Appellant, and indeed no Rule 24 response has been received. Nor has the Appellant filed any further evidence in his case pursuant to the standard directions in respect of preparing for the hearing on the basis that if the Upper Tribunal decides to set aside the decision of the First-tier Tribunal the remaking of the decision may follow at the same hearing – such directions being issued to the parties herein on 7 December 2015. I should also record for completeness that although the Appellant has appeared through Mr Rees of Counsel, the Appellant has not attended in person.

7. The background to the Appellant's case and his immigration history are a matter of record set out in the documents on file and summarised in the earlier parts of the decision of the First-tier Tribunal: in such circumstances I do not propose to re-rehearse such matters here. I have however had full regard to the history at all material aspects of this decision, and will make reference to the facts as is incidental for the purposes of this decision.

8. As indicated above the First-tier Tribunal Judge dismissed the Appellant's appeal under the Immigration Rules but went on to consider his case under Article 8 of the ECHR. The detailed consideration is to be found at paragraphs 15 to 17 of the Judge's decision. I should note however for completeness that the Judge also makes relevant observations and findings at paragraph 14 when considering the nature of the Appellant's history - both in terms of his immigration history and his studies. In that regard, at paragraph 14 the Judge identifies in particular that the Appellant has "*complied with the Immigration Rules*", is "*a genuine student*", and also that he "*has taken steps to suggest he is pursuing his*

studies". Indeed it is these matters that the Judge says justifies going on to consider Article 8 notwithstanding the Appellant's failure under the Immigration Rules.

9. At paragraph 15 of the decision the Judge makes reference to the case of **Razgar** and I accept that it is apparent that in the following paragraphs the Judge attempts to traverse the five **Razgar** questions in an appropriate order.

10. In respect of the first two **Razgar** questions the Judge says this at paragraph 15:

> "The Tribunal… does find that the appellant having been in this country since 2009 that he has established a private life in this country in respect of his studies. Therefore the Appellant has established a private life in this country in respect of his education."

The Judge goes on to say this:

> "…the Tribunal finds also that the appellant's removal from this country would cause severe consequences if he were to be asked to leave the United Kingdom when he has shown that he is a genuine and committed student in this country who has expended considerable sums of money towards his education."

Those matters on the face of it are answers in the Judge's judgment to the first two **Razgar** questions.

11. The third and fourth **Razgar** questions appear to be addressed in the opening sentence of paragraph 16, and thereafter the Judge goes on to consider the issue of proportionality. In this regard there appears a sentence - identified in the grant of permission to appeal - which does not make any apparent sense:

> "The Tribunal further finds that it would not be in the interest of neither to control immigration on the part of the Secretary of State to remove this Appellant from this country as his presence in this country is not contrary to the public interest".

Mr Rees very fairly and appropriately identifies and accepts that that passage is problematic. Nonetheless the Judge goes on to conclude that the Appellant's removal would be disproportionate to the public interest. The Judge also states that "*The Tribunal has taken account of Section 117 of the Immigration Act 2014*".

Consideration: Error of Law

12. In my judgment there are a number of problems with the approach taken by the First-tier Tribunal Judge.

13. My attention has been directed to the case of **Patel & Others [2013] UKSC 72**, and in particular the speech of Lord Carnwath, with whom Lord Kerr, Lord Reed and Lord Hughes agreed, at paragraph 57 - a passage often quoted in cases of this sort. I quote it again:

> "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 (see para 47 above). 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. My attention has also been directed to the case of **Nasim & Others (Article 8) [2014] UKUT 00025 (IAC)** in which the Upper Tribunal sought to consider and apply what was said in **Patel**. In particular I note the following from paragraph 20 of **Nasim**:

> "We therefore agree with Mr Jarvis [the Secretary of State's Presenting Officer] that [57] of **Patel & Others** is a significant exaltation from the Supreme Court to refocus 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 the 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).".

15. Mr Rees argued that the Tribunal should be cautious in its consideration of the observations in **Nasim**, submitting that **Nasim** took matters further than was strictly warranted by the decision in **Patel**. In my judgment I do not see that that is the case. I consider that the Tribunal in **Nasim** appropriately applied the findings and guidance to be gleaned from the Supreme Court, and did not in any inappropriate or unauthorised manner develop or extend such guidance.

16. The real difficulty, in my judgment, for the Appellant in this particular case in seeking to resist the Secretary of State's attack on the decision of Judge Abebrese is that Judge Abebrese has had no reference or regard to either **Patel** or **Nasim** in considering the issue of whether or not the Appellant has established a private life in the United Kingdom. It is absolutely clear that the Judge only identifies matters of 'private life' relevant to the Appellant's studies: I have already quoted from paragraph 14 those aspects of the Appellant's individual circumstances that the Judge considered warranted some consideration pursuant to Article 8, and it is the same matters that find echo at paragraph 17 of the decision. The Judge identifies no other aspect beyond the Appellant's involvement in, and pursuit of, studies that might be relevant to private life issues. In those circumstances nothing is said to take the matter beyond the simple fact of studies, and in such circumstances I can find no factual basis for distinguishing this case from the observations made in **Patel** that the opportunity for a promising student to complete his course in this country is not in itself a right protected under Article 8.

17. In my judgment the decision of Judge Abebrese flies in the face of that exaltation from the Supreme Court accepted and applied by the Upper Tribunal in the subsequent case of **Nasim**. The Judge, as I have indicated, does not offer any engagement with this guidance and does not otherwise make reference to any matters that would warrant departure from those principles.

18. It seems to me that there are further errors in the decision of Judge Abebrese. He refers, at paragraph 15, to "*the severe consequences*" in the event that the Appellant were to be removed from the United Kingdom, but fails to identify at all what such consequences might be, or why they might be 'severe'. Moreover in this context Judge Abebrese does not apparently give any consideration to the extent to which any such consequences might be remediable by the Appellant re-applying to enter the United Kingdom as a student - in other words, that his removal from the United Kingdom would not be fatal to his subsequent wish to pursue studies whether in the UK or indeed elsewhere.

19. It is now trite law that in considering Article 8 outside the scope of the Immigration Rules, the Rules need to be taken as a starting point as informing the expected 'balance' from which departure is invited. In that regard, although this is an application as a Tier 4 Student, in my judgment it would have also been appropriate for the Judge to have regard to paragraph 276ADE of the Immigration Rules as a starting point for 'private life', and to observe therein the way in which the Appellant might or might not satisfy the requirements. It is startlingly obvious that the Appellant would not meet any of the requirements in respect of time spent in the United Kingdom, and in the absence of him advancing any case that he would not be able to re-settle in his country of origin, on the face of it the Appellant did not have a case to make out under 276ADE. The Judge should have expressly recognised as much as a starting point to any non-Rule based consideration of proportionality.

20. Yet further I am not satisfied that the Judge has demonstrated that he has had due and proper regard to section 117B of the Nationality, Immigration and Asylum Act 2002. Not only does the Judge wrongly describe the relevant provisions in his decision (by referring to the wrong Act), he makes no express reference to them. In particular section 117B(v) is of relevance – "*little weight should be given to a private life established by a person at a time when the person's immigration status is precarious*". Mr Rees appropriately and properly points out that that provision refers to *little weight* being attached rather than *no weight*, but the reality is Judge Abebrese has not given any indication of a specific consideration to that provision, or how he has factored that provision into the overall balancing exercise. Of course it has to be said that the overall balancing exercise would not in any event have been reached had the Judge properly applied the guidance of the Higher Courts and the Upper Tribunal to the first two **Razgar** questions.

21. In all of the circumstances and for the reasons given I am satisfied that the Secretary of State has made out her case that the First-tier Tribunal Judge erred in law to an extent that the decision requires to be set aside.

Remaking the decision

22. I invited the representatives' submissions as to how to proceed in respect of re-making the decision. Ms Fijiwala invited the Tribunal to re-make the decision for itself on the basis that the primary findings of fact of the First-tier Tribunal Judge could stand in respect of the Appellant's history and his education and that it was not necessary for there to be any further oral evidence. Mr Rees suggested that the appropriate course would be to remit the matter to the First-tier Tribunal, but when invited to do so was unable to identify any specific matter by reference to available evidence that was presently unresolved or required to be resolved. In this context I again remind myself of the standard directions that were issued to the parties by which they should file any further evidence upon which they might wish to rely in the event of a finding of error of law to be in a position to proceed to deal with the re-making of the decision immediately upon the finding of error of law. No such further evidence has been filed. In all such circumstances in my judgment it was appropriate that the Upper Tribunal proceed to re-make the decision for itself.

23. Neither party had anything further to advance by way of evidence, and as I have indicated the Appellant has elected not to attend the hearing in person. In those circumstances, and in any event pursuant to that which is inherent in the observations made above in respect of the error of approach to the principles and guidance of **Patel** and **Nasim**, it seems to me that the inevitable outcome is to conclude that the Appellant has not demonstrated that he has anything to advance by way of private life beyond his education, and that his education is not sufficient to get him over the first two **Razgar** questions.

24. That really is the end of his case under Article 8 - and in those circumstances I re-make the decision by dismissing the appeal.

Notice of Decision

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

26. I remake the decision in the appeal. The appeal is dismissed under the Immigration Rules and on human rights grounds.

27. No anonymity direction is sought or made.

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

Signed: Date: 25 January 2016

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

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

Signed: Date: 25 January 2016

Deputy Upper Tribunal Judge I A Lewis