Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06112/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 August 2020 by Skype Hearing	**On 26 August 2020**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR RAJASEKAR GANESAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr P Richardson, Counsel, instructed by Paul John & Co Solicitors

ERROR OF LAW

1. This is an appeal by the Secretary of State against the decision issued on 2 September 2019 of First-tier Tribunal Judge Fitzgibbon QC which allowed Mr Ganesan's appeal under Article 8 ECHR.

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2. For the purposes of this decision I refer to the Secretary of State for the Home Department as the respondent and to Mr Ganesan as the appellant, reflecting their positions before the First-tier Tribunal.

3. The background to this matter is that Mr Ganesan is a national of India, born on 25 July 1987. He came to the UK on 23 September 2017 with leave as a Tier 4 student and retained that leave until 30 November 2019. He did not pass all of his modules, however, and his university did not allow him to re-sit those modules. On 29 August 2019 he made an application for further leave to remain on Article 8 ECHR grounds as he wanted time to either win his appeal to be able to re-sit his modules at his original university or complete his studies at another institution. The respondent refused that application on 16 March 2019.

4. The appellant appealed the refusal of leave and the appeal came before First-tier Tribunal Judge Fitzgibbon QC on 14 August 2019. By the time of that hearing, it is undisputed that the appellant had been accepted for studies at a new university.

5. The First-tier Tribunal said this on the appellant's ability to meet paragraph 276ADE of the Immigration Rules which sets out the respondent's policy as to when an Article 8 ECHR private life can succeed:

> "7. The appellant has not lived in the UK long enough to comply with the requirements of paragraph 276ADE(1)(i) – (v). He maintains that he has established family and private life since his arrival here in September 2017, through friendships, his work as a carer, and as a student. Returning to India would be extremely difficult and would cause hardship (A3, paragraphs 12 – 15). He has given scant details of his social life in the UK, and has not particularised the hardships he says he would face on return.
>
> 8. There is insufficient evidence in my view to show that he would face significant difficulties in integrating back into Indian society. I bear in mind that he came as a student, presumptively with the intention of returning home once he had completed his studies.
>
> 9. His claim under paragraph 276ADE is hopeless."

6. The First-tier Tribunal Judge went on to consider whether the appellant could succeed under Article 8 ECHR outside the Immigration Rules, requiring an assessment of whether the respondent's decision was a disproportionate interference with the appellant's private life. The judge said this in paragraphs 10 to 18 of the decision:

> "10. The real focus of this appeal, however, is on whether he should be permitted to continue his studies, and whether the consequences of the Secretary of State's decision would be a disproportionate interference with his private life, which should include the ability to complete a course of studies. He has adduced evidence from the head of admissions at the University of South Wales, who wrote on 23 July 2019 to inform him that he has secured a place on an MSc course in

business studies for one year, commencing 16 September 2019. As this is a human rights appeal for the purposes of Section 82(1) of the 2002 Act, I am entitled under Section 85(4) to 'consider any matter which I [I think] relevant to the substance of the decision, including a matter arising after the date of the decision'. I can, therefore and do take account of the evidence from the university.

11. The Secretary of State's stance that he had sufficient time between July 2018 and March 2019 to find a college place is intelligible. It would be wrong, however, in my view, to overlook the fact that he is now in a position to resume his studies.

12. In **CDS … Brazil** [2010] UKUT 305 IAC, Blake J held that Article 8 of the European Convention of Human Rights does not give an Immigration Judge a freestanding liberty to depart from the Immigration Rules, and it is unlikely that a person will be able to show an Article 8 right by coming into the UK for temporary purposes. But a person who is admitted to follow a course that has not yet ended may build up a private life that deserves respect, and the public interest in removal before the end of the course may be reduced where there are ample financial resources available.

13. The appellant suffered a temporary setback in his studies, which he can now continue. I accept that he has shown a commitment to studying by first appealing against the assessment of his marks and then by securing a place at the university. I accept, following **CDS … Brazil**, that in doing so he has built up a private life that deserves respect, even though he does not comply with the Immigration Rules.

14. Applying the reasoning prescribed by Lord Bingham in **Razgar [2004] UKHL 27**, I am satisfied that he has established a private life sufficient to engage Article 8 of the Convention; the only issue is whether the consequences of the Secretary of State's decision would be proportionate to the legitimate aim of maintaining effective immigration controls, in the public interest.

15. Following the 'balance sheet' approach prescribed by the Supreme Court in **Hesham Ali [2016] UKSC 60**, I approach the requirements for assessing proportionality in Section 117B of the 2002 Act as follows:

16. The factor that indicates the public interest lies against the appellant's case is the generic public interest in maintaining effective immigration controls.

17. In his favour are the following:

    - The appellant speaks English.
    - He has not been a burden on taxpayers, as he has been employed and has contributed to the economy through his tuition fees, and he will continue to do so.
    - He is financially independent.

- While the establishment of his private life may be said to be precarious, it is inherently so for foreign students, and their presence in the UK is considered to be of benefit to the country.

- The termination of his leave will deprive him of the opportunity to resume and conclude his studies at masters level.

18. Putting these factors in the balance, I am satisfied that the damaging consequences of the Secretary of State's decision outweighed the public interest in maintaining immigration control in this appellant's case."

7. There was consensus before me that the respondent's grounds encompassed a rationality challenge. The second ground also argued that the First-tier Tribunal did not apply correctly the ratio of Agyarko v SSHD [2017] UKSC 11. In paragraph 47 of Agyarko, the Supreme Court said:

> "47. The Rules therefore reflect the responsible Minister's assessment, at a general level, of the relative weight of the competing factors when striking a fair balance under Article 8. The courts can review that general assessment in the event that the decision-making process is challenged as being incompatible with Convention rights or based on an erroneous understanding of the law, but they have to bear in mind the Secretary of State's constitutional responsibility for policy in this area, and the endorsement of the Rules by Parliament. It is also the function of the courts to consider individual cases which come before them on appeal or by way of judicial review, and that will require them to consider how the balance is struck in individual cases. In doing so, they have to take the Secretary of State's policy into account and to attach considerable weight to it at a general level, as well as considering all the factors which are relevant to the particular case. This was explained in Hesham Ali at paras 44-46, 50 and 53."

8. As above, the respondent's policy here was reflected in the provisions of paragraph 276ADE. The judge found the appellant's case in that regard to be "hopeless". Following Agyarko, he was required to take that failure to meet the legitimate expression of the respondent's policy on Article 8 ECHR into account and "to attach considerable weight to it at a general level". Nothing shows that the First-tier Tribunal took into account in the assessment outside the Immigration Rules that the appellant's case under those Rules was "hopeless". The absence of any consideration of the legitimate statement of policy reflected in the Immigration Rules amounts to a material error on a point of law requiring the decision to be set aside to be remade.

9. Further, the judge states in paragraph 13 of the decision that the appellant's private life deserves respect. That is uncontentious. However, the judge did not anywhere apply the provision in section 117B (v) of the Nationality and Immigration Act 2002 for little weight to attract to that private life in the proportionality assessment, however. Nothing in the

evidence suggests that there was a significant factor capable of showing that the private life that the appellant had established was deserving of more weight. This is also sufficient to make the assessment irrational, unsustainable and require remaking.

10. In addition, in paragraph 48 of Agyarko, the Supreme Court identified that if the Immigration Rules setting out the respondent's policy on Article 8 were not met but:

> "… the refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave will be granted outside the Rules on the basis that there are 'exceptional circumstances'".

For this case to succeed, there had to be "unjustifiably harsh consequences". The respondent is correct to submit that it was irrational for the judge to find for the appellant given that his case under the Immigration Rules was "hopeless" and his private life attracted little weight.

11. Further, the case of CDS (PBS: "available": Article 8) Brazil [2010] UKUT 00305 (IAC) concerned a student who could not meet the Rules as the definition of a sponsor therein changed during her course of study, the Rule change being outside her control. That is a different factual scenario to that of this appellant who failed to pass the required modules for his course, something within his control.

12. Further still, CDS (Brazil) was issued prior to the learning of the Supreme Court on the correct approach to a free-standing Article 8 ECHR assessment in Patel and others v Secretary of State for the Home Department [2013] UKSC 72. The Supreme Court said this at [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 (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."

13. In addition, in paragraph 17 of the decision, the First-tier Tribunal Judge places positive weight on the appellant's profile as someone who speaks English and is financially independent of the taxpayer, factors arising from s.117B. The case of Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58 indicates at [57] that this is an incorrect approach. These factors did not add weight to the appellant's side of the balance but were neutral.

14. For these reasons, the Article 8 ECHR assessment in the decision of the First-tier Tribunal is shown to be in error and must be set aside to be remade.

15. The appellant did not put forward further evidence and the appeal could therefore be re-made on the basis of the evidence that was before the First-tier Tribunal after hearing the submissions of the legal representatives.

16. The reasons set out above for finding an error of law in the decision of the First-tier Tribunal also show that the appellant cannot succeed in an assessment of his circumstances under Article 8 ECHR outside the Immigration Rules. His case under the Immigration Rules was “hopeless”. This has to be given considerable weight in the free-standing assessment. There must be unjustifiably harsh consequences to outweigh the public interest in maintaining the Immigration Rules. The appellant’s private life is based upon his studies with the usual social contacts established during a limited period in the UK. It is unexceptional. The evidence does not show that it can attract anything other than “little weight” as provided in s.117B (5). The fact that the appellant speaks English and is independent financially and so not a burden on taxpayers are neutral factors. The decision does not deprive him of the right to continue tertiary level studies in the UK. He can reapply. He can return to India and reapply or continue tertiary studies there. Having obtained the offer of a place at a new university is not a factor capable of outweighing the public interest side of the balance.

17. It is therefore my conclusion that there is little weighing on the appellant’s side of the balance and nothing showing unjustifiably harsh consequences such that the decision could amount to a disproportionate beach of the appellant’s private life. The Article 8 ECHR appeal must therefore be refused.

Notice of Decision

18. The decision of the First-tier Tribunal discloses a material error on a point of law and is set aside to be remade.

19. The Article 8 ECHR appeal is refused.

Signed: S Pitt
Upper Tribunal Judge Pitt

Date: 25 August 2020