Upper Tribunal
(Immigration and Asylum Chamber)

CDS (PBS: “available”: Article 8) Brazil [2010] UKUT 00305 (IAC)

THE IMMIGRATION ACTS

Heard at Field House | **Determination Promulgated**

On 23 July 2010

…………………………………

Before

MR JUSTICE BLAKE, PRESIDENT

MR C M G OCKELTON, VICE-PRESIDENT

SENIOR IMMIGRATION JUDGE ALLEN

Between

CDS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: In person

For the Respondent: Mr C Avery, Home Office Presenting Officer

1. Funds are “available” to a claimant at the material time if they belong to a third party but that party is shown to be willing to deploy them to support the claimant for the purpose contemplated.

2. Article 8 does not give an Immigration Judge a free-standing 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 to 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.

DETERMINATION AND REASONS

1.
This appeal was heard on 23 July along with the appeal in the case of FA and AA to which we will make further reference in this determination.

2.

The appellant is a national of Brazil who had been granted leave to enter the United Kingdom as a student on 30 July 2007 and had been granted extensions of stay until 31 October 2009. During this period she had been financially supported by two sponsors, Dr Rodgers and Dr Carroll.

3.
On 26 October 2009 she made an application for extension of stay as a Tier 4 (General) Student Migrant under the Points Based System. The application was refused on 12 January 2010 because it was concluded that she did not comply with Appendix C to the Immigration Rules, concerned with maintenance and available funds. Her maintenance requirement was £2,695, but she had only £1,064.69 in her account on the date of application. She had provided a sponsorship letter from Dr Rodgers and Dr Carroll. Under paragraph 117 of the UKBA Tier 4 Points Based System Policy Guidance a student could only rely on money held in a bank account in another person's name if the account was in the name of a parent or legal guardian and there was evidence to establish both the relationship and the fact that permission to use the money was given.

4.
The appellant appealed and the appeal was heard before IJ Jones at Newport on 18 March 2010. The appellant relied on a statement from the two doctors dated 25 January 2010 that included the following:

"Had Ms de Silva's sponsors been privy to the new rules, suitable maintenance funds would have been made available to Ms de Silva and appeared in her personal bank account in accordance with the 'Maintenance funds' scoring system.

Ms de Silva is now unable to complete her studies and take her examinations: firstly, the rules that allowed her entry into the UK to fulfil her educational aspirations have been revoked before completion of the said course and examinations and, secondly, the UK citizens previously deemed suitable sponsors for an individual wishing to be educated in the UK are no longer deemed suitable."

5.
The IJ determined the appeal by applying the guidance and concluded that the appellant could not meet the definition of sponsor in that guidance and therefore the requirements of paragraph 245ZX(d) were not met.

6.
The IJ went on to consider Article 8 and concluded that there was a private life in the United Kingdom that would be adversely effected by the immigration decision so as to "potentially engage the operation of Article 8". However, in considering the question of proportionality and striking a fair balance between the interests of the community and a well-established student who wished to complete her education in the UK, it was concluded that any interference was proportionate:

"She has not satisfied the requirements of paragraph 245ZX of the Immigration Rules. She also knew, as a student, that she was only permitted to remain in the United Kingdom for a specific period of time. In all the circumstances, and having regard to the need for firm and fair immigration control, I find that the interference with the appellant's private life is not sufficiently serious and I find that Article 8 of the European Convention is not engaged".

7.
Permission to appeal to the Upper Tribunal was granted by the Vice-President on 8 July 2010 in the light of the decision of the Court of Appeal in Pankina v SSHD [2010] EWCA Civ 719.

8.
For reasons we have already given in the case of FA and AA (above) we conclude that the decision in Pankina at [28], [29] and [33] means that Policy Guidance that had not been laid before Parliament before the inception of the Points Based System cannot be relied on by the Respondent as a source of additional mandatory requirements not otherwise spelt out in the Immigration Rules themselves. In Pankina the migrant respondent had not complied with the requirement of the Guidance to have had the requisite funds in the bank account for three months before the date of application.

9.
Mr. Avery submitted, on instructions, that the decision in Pankina was confined to the dis-application of the three month rule and pointed to the conclusion on the constitutional issue at [37]. We cannot agree. In our judgment the Court of Appeal was applying the answers to the constitutional questions it posed at [21] to the particular provision of the Policy Guidance that had led the applicants to fail in their extension applications. We further note that Foskett J concluded that Pankina was of wider application in his judgment in English UK [2010] EWHC 1726 (Admin) at [74] to [77].

10.
We are satisfied that in applying the guidance as a source of mandatory additional obligation as to the identity of permissible sponsors the IJ erred in law. We set aside the determination and remake it for ourselves. There is no need to hear further evidence. We were informed that the appellant has continued to make progress with her studies and has been able to continue to maintain and accommodate herself without recourse to public funds.

Compliance with Appendix C

11.
HC 314 provided that with effect from 31 March 2009 Tier 4 General Students must score 10 points for funds and

"10 points will only be awarded if the funds shown in the table below are available to the applicant and the applicant provides the specified documents to show this".

12.
We are satisfied from the evidence that Drs Rodgers and Carroll had a combined income of over £300,000. They had the necessary resources at the relevant time and were willing to transfer such funds as were needed to ensure that the appellant met the maintenance requirements of the Immigration Rules were met, in this case some £1,631 to bring the balance in the appellants account up to £ 2,695.

13.
In the absence of specific additional requirements of the Immigration Rules, it seems to us that funds are "available" to a claimant at the material time if they belong to a third party but that party is shown to be willing to deploy them to support the claimant for the purpose contemplated. Gifts of money have always been acceptable for visitors who need to show they have resources available to them. The need for Immigration Rules to have unambiguous provisions preventing recourse to financial assistance from other persons, if that is what is intended, was spelt out in Mahad v ECO [2009] UKSC 16 [2010] 1 WLR 48 at [26] to [30]. That decision was concerned with the maintenance and accommodation requirements of working holiday makers, but its implications go beyond this category of applicant.

14.
Accordingly, we are satisfied on the facts of this case that the appellant had sufficient funds "available" to her to meet the objective requirements of Appendix C at the relevant time. The word "available" can not be read restrictively to mean "available to her with no assistance from any other person save a parent or guardian", by reference to the Policy Guidance, and neither can such a requirement be imported by the reference in the Immigration Rules to proving maintenance by relevant documents.

Article 8

15.
In case we are wrong on our construction of Appendix C, we will also address Article 8 ECHR.

16.
In Pankina, Sedley LJ giving the lead judgment in the Court of Appeal recognised:

1.
"There appears to me, in this situation, to be no escape from the proposition that in exercising her powers, whether within or outside the rules of practice for the time being in force, the Home Secretary must have regard and give effect to applicants' Convention rights. This will mean in most cases evaluating the extent and quality of their family and private life in the United Kingdom and the implications, both for them and for the United Kingdom, of truncating their careers here.

2.
That in turn will require consideration of the significance of the criteria by which their eligibility has been gauged and found wanting. It is one thing to expect an applicant to have the necessary academic and linguistic qualifications: here a miss is likely to be as good as a mile. It is another for an applicant to fall marginally or momentarily short of a financial criterion which in itself has no meaning: its significance is as a rough and ready measure of the applicant's ability to continue to live without reliance on public funds. Having £800 in the bank, whether for three continuous months or simply at the date of application, is no doubt some indication of this; but people who are able to meet the test may fall on hard times after obtaining indefinite leave to remain, and others who fail it would, if allowed to remain, never become a charge on public funds. The Home Office has to exercise some common sense about this if it is not to make decisions which disproportionately deny respect to the private and family lives of graduates who by definition have been settled here for some years and are otherwise eligible for Tier 1 entry. If the Home Secretary wishes the rules to be black letter law, she needs to achieve this by an established legislative route.

3.
So long as the rules are what the Immigration Act 1971 says they are, they must in my judgment be operated in conformity with s.6 of the Human Rights Act."

1.
The House of Lords in the case of Huang had also considered how Article 8 was to apply to people who had failed to meet the requirements of the Immigration Rules but who had a family life in the UK that required respect:

"17. The authority will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under article 8(2). There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of

applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on.

18. **...** It is a premise of the statutory scheme enacted by Parliament that an applicant may fail to qualify under the Rules and yet may have a valid claim by virtue of Article 8.

19.
In de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 , 80, the Privy Council, drawing on South African, Canadian and Zimbabwean authority, defined the questions generally to be asked in deciding whether a measure is proportionate:

"whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

This formulation has been widely cited and applied. But counsel for the applicants (with the support of Liberty, in a valuable written intervention) suggested that the formulation was deficient in omitting reference to an overriding requirement which featured in the judgment of Dickson CJ in R v Oakes [1986] 1 SCR 103, from which this approach to proportionality derives. This feature is (p 139) the need to balance the interests of society with those of individuals and groups. This is indeed an aspect which should never be overlooked or discounted. The House recognised as much in R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27 , [2004] 2 AC 368 , paras 17-20, 26, 27, 60, 77, when, having suggested a series of questions which an adjudicator would have to ask and answer in deciding a Convention question, it said that the judgment on proportionality

"must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage" (see para 20).

20.
In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality.”

2.
It is apparent from these principles that Article 8 does not provide a general discretion in the IJ to dispense with requirements of the Immigration Rules merely because the way that they impact in an individual case may appear to be unduly harsh. The present context is not respect for family life that can in certain circumstances require admission to or extension of stay within the United Kingdom of those who do not comply with the general Immigration Rules. It is difficult to imagine how the private life of someone with no prior nexus to the United Kingdom would require admission outside the rules

for the purpose of study. There is no human right to come to the United Kingdom for education or other purposes of truly voluntary migration.

3.
However, the appellant has been admitted to the UK for the purpose of higher education and has made progress enabling extension of stay in that capacity since her admission in 2007. We acknowledge that that gives no right or expectation of extension of stay irrespective of the provisions of the Immigration Rules at the time of the relevant decision on extension.

4.
Nevertheless people who have been admitted on a course of study at a recognised UK institution for higher education, are likely to build up a relevant connection with the course, the institution, an educational sequence for the ultimate professional qualification sought, as well as social ties during the period of study. Cumulatively this may amount to private life that deserves respect because the person has been admitted for this purpose, the purpose remains unfilled, and discretionary factors such as mis-representation or criminal conduct have not provided grounds for refusal of extension or curtailment of stay.

5.
In the present case a change in the sponsorship rules during the course of a period of study has had a serious effect on the ability of the appellant to conclude her course of study. Some requirements of the Immigration Rules or applicable public policy scheme may be of such importance that a miss is as good as a mile, but this is not always the case.

6.
The points-based system aims to provide objective criteria for what funds are needed to be demonstrated before an extension of stay is granted. If we are wrong on our first conclusion, we shall here assume that it may also set strict criteria as to how such the availability of such funds is to be demonstrated and in whose accounts the funds may be. But where the appellant establishes by evidence that she has funds available to support her if needed, the strength of the public interest in refusing her an extension based on somewhat arbitrary provisions of guidance attached to an appendix to the rules, is in our judgment somewhat less than the failure to meet a central requirement of the Rules.

7.
But even central requirements are not determinative if the countervailing claim is of sufficient weight. Mrs Huang could not meet the dependant relative rules because she had not reached the minimum age required, but nevertheless the particular circumstances of her history required the strength of her family life to be taken into account. Sedley LJ in Pankina contemplated that some points-based claimants may not meet the minimum funding requirements for a short period due to unforeseen circumstances.

8.
Here the same sponsors who ensured that the appellant had sufficient funds at the beginning of her course were available with ample financial support to ensure that she met the substantive requirements of Appendix C in order to continue with her studies. If minds had been applied to the problem the necessary funds could have been transferred to her account so both the letter and the purpose of the Policy Guidance was met.

9.

In our judgment, the application to this appellant of the Policy Guidance that prevented her from obtaining the extension at the time and in the circumstances set out above, was a disproportionate interference with private life that deserved respect as long as she continued to meet the other requirements of the Rules and make appropriate progress in her course of studies here.

10.
We would accordingly have allowed her appeal on this basis as well.

Signed

C M G Ockelton

Vice-President of the Upper Tribunal

(Immigration and Asylum Chamber)

Date