Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23517/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 May 2013	**On 5 June 2013**
Prepared 9 May 2013	

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

DORA AMPOFOAH KOTEY

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Khosla instructed by DJ Webb and Co
For the Respondent: Miss A Holmes, Senior Presenting Officer

DETERMINATION AND REASONS

1. The Appellant, a national of Ghana, date of birth 26 June 1969, appealed against the Respondent's decision of 13 October 2012 to refuse her application of 10 August 2012, for leave to remain as a Tier 4 (General)

Student Migrant under the points-based system. A removal direction under Section 47 of the Immigration, Asylum and Nationality Act 2006 was also made. The appeal against the Respondent's decisions was dismissed by First-tier Tribunal Judge Courtney(the judge) on 13 March 2013 in respect of the refusal to vary leave to remain. The judge allowed the appeal against the removal decision under Section 47.

2. Before the judge it was undisputed that the Appellant who had been a student in the United Kingdom since 2004, at all material times lawfully, could not meet the financial requirements under Appendix C of the Immigration Rules particularly paragraph 14 or 1A(h) of Appendix C of the Immigration Rules.

3. Accordingly the appeal could not succeed under the Rules. Therefore the Appellant had pressed a case with reference to Article 8 ECHR as to the fact of both the duration and type of presence she had had in the United Kingdom constituted a private life as contemplated by Article 8(1) of the ECHR. Reliance was placed therefore upon the case of CDS (PBS: "Available:" Article 8) Brazil [2010] UKUT **305** (IAC) and in that context the exercise in the analysis of an Article 8 claim identified in Razgar v SSHD [2004] UKHL 27.

4. There is no dispute concerning the factual circumstances of the Appellant disclosed by the judge's decision.

5. Permission to appeal the judge's decision was granted by Designated Judge French of the First-tier Tribunal on 4 April 2013. In a nutshell the grounds of challenge, in what are exceptionally poorly laid out grounds, are as follows: First, the judge failed to take into account, when considering proportionality, the weight that should be attached to the Respondent's response to a Freedom of Information Act request concerning the objective behind paragraph 11 of Appendix C of the Rules.

The response to that request was provided after the date of decision 13 October 2012 but was before the judge hearing the appeal.

6. Secondly, the judge failed to make adequate findings on the Appellant's established ability to maintain herself, without recourse to public funds through permitted employment. Thus even though she did not meet the Appendix C requirements she nevertheless over time had demonstrated that she could support herself, meet the costs of her education and not have recourse to public funds. In particular it was relied upon by her representatives that the Appellant had started the course after the date of application, but before the date of the Respondent's decision, for a postgraduate degree in leadership and management at South Thames College, a level 7 degree which was awarded by Edexcel.

7. The Appellant wished to then undertake a masters degree in the same subject, which would be examined by the University of Cumbria, and completed in about July 2014. Essentially the evidence relied upon was the Appellant's ability, through her work with the newsagents WH Smith of which she was a shop manager, to meet the costs of funding her studies and maintenance as indeed she had previously done. The Appellant provided to the judge a statement which set out the background of her financial circumstances, the courses she had been undertaking, and the evidence relating to the maintenance and costs which she previously had met.

8. Thirdly, the judge erred in distinguishing the Appellant's case from that in CDS **(**Brazil) so as to discount the proper consideration of the claim under Article 8 ECHR.

9. For my part I was also concerned, as I indicated to the parties, that the determination by no means clearly set out what factors, if any, had been taken into account by the judge in an assessment of proportionality. There was an additional point of concern, although it does not particularly

form part of the grounds, doing the best I can to read the poorly copied document, that the judge appears to have taken a number of points against the Appellant's credibility or qualified acceptance of the evidence which do not seem to have featured in the cross-examination noted in the Record of Proceedings nor were they raised with the parties in their submissions at the hearing. There is no suggestion that the Appellant would not return to Ghana at the conclusion of her studies or that the application was simply a device to avoid returning to Ghana.

10. The Appellant emphasised to the judge the considerable expenditure that she had embarked upon, the benefits to her from completing studies in the United Kingdom, the effect on her work opportunities that on a return to Ghana would have and the self-evident advantage of having a masters degree obtained in the United Kingdom.

11. The judge in what may be part of the assessment of Article 8 and the implications of removal said

> "I do not consider that it has been shown that Miss Kotey's job prospects would be unduly prejudiced if her appeal is dismissed and she is required to leave the UK."

On what evidence that conclusion was reached is of itself difficult to tell nor does it seem to have been a matter upon which the Appellant was invited to comment by the judge. It is also unclear as to what "unduly prejudiced" is intended to mean. Is it simply prejudice which is of no significance even if it is prejudicial? Or is it a measure of prejudice which moves between prejudice which is not disadvantageous and that which is disadvantageous? Be that as it may Miss Holmes argued that broadly speaking the judge had made decisions on the evidence, findings of fact and essentially the Appellant's challenge was no more or less than arguing that a different decision ought to have been reached on the evidence. If Ms Holmes argument was sustainable then in the light of the case of R

(Iran) [2005] EWCA Civ and E and R [2004] QB 1044 that would not demonstrate an error of law on the part of the judge.

12. I find the third ground of objection is sustainable as a starting point in that in this appeal the judge accepted the Appellant had a private life and one likely to be built up over time with the educational sequence as well as social ties during study. At paragraph 15 of the determination, having accepted the Appellant's evidence or at least not rejected it, the judge stated:

> "... I am prepared to accept that removal would constitute an interference with the Appellant's private life which crosses the minimum level of severity to engage Article 8."

In those circumstances the judge with reference to the questions raised in Razgar moved on to the legality and the purpose of the Respondent's decision and perhaps unsurprisingly found that the Rules served a proper purpose and were justified under the requirements of Article 8(2) ECHR. Miss Holmes submited that CDS is not a case which is on all fours with the Appellant's.

13. However, I find Article 8 private life was engaged, as paragraph 19 of CDS identified, through the Appellant's undertaking the past and current courses. The judge, as I have noted, accepted that there was a private life which was centred around the Appellant's studies and life in the United Kingdom. In CDS the Tribunal stated:-

> "19. 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, the educational sequence for the ultimate personal 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 misrepresentation or criminal conduct have not provided grounds for refusal of extension or curtailment of stay.

20. In the present case a change in 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.

21. 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 the availability of such funds is to be demonstrated and in whose account 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 the somewhat arbitrary provisions of guidance attached to an Appendix to the Rules is in our judgment somewhat less than a failure to meet the central requirement of the Rules."

14. In this appeal the position is that on a fair reading of the determination the judge did not, other than reciting the Appellant's evidence, really address the fact that the Appellant had not been meeting the immigration rules but has paid her way and completed her education thus far. The judge also, of course while noting that there has been an interruption in her education does not seem to have considered that the Appellant was completing what was a logical chain of education founded upon her earlier qualifications and experience.

15. In these circumstances, whilst factually the case is not on all fours with **CDS (Brazil),** the point needed to be considered in assessing proportionality what were the reasons for the financial requirements in the rules? In this respect it is clear that requirements to obtain entry are there so a person knows what they must provide for. The position for someone, who has been allowed into the country and who has, over time, renewed and extended leave to remain is here on a different basis to other students. It appeared from the answers given in response to the FOI request that the Secretary of State acknowledges that for persons who are here and working hard on courses the same limitations and requirements of funding are not looked at in the same way. It might seem to this extent unusual that there is such a relaxation but that is what the Secretary of State's view of the matter is and it cannot be ignored: However, the judge failed to get to grips with its significance in terms of the assessment of proportionality.

16. Miss Holmes reasonably relies upon the generality of paragraphs 17, 18, particularly 20 and perhaps 21 of the determination. However the judge in the assessment of proportionality, whilst making reference to consistent immigration control outweighing the rights of the Appellant to respect for her private life, the analysis never addressed the public interest in the context that there are variations in how the Secretary of State chooses to apply the Rule; however it may be expressed in Appendix C.

17. For the above reasons I find that the judge's assessment of proportionality shows errors of law which demonstrate that the original Tribunal decision cannot stand. I find the only fair and just course is for the matter to be re-made.

18. The parties are in agreement that, on the material before me, I have sufficient upon which I can re-make the decision. I therefore do so on the basis of the evidence that was before the judge which fully set out the

extent of the Appellant's continuing studies and the benefits of a UK-based education on a return to Ghana. It is to be noted there was no issue, taken by the Respondent, that the Appellant has been a poor student or has failed to show progress in her studies nor was it suggested that her intended postgraduate diploma and future masters degree is at odds with her past academic achievement or her abilities or a progression in educational sequence. It was unchallenged that the Appellant has funded for almost nine years her studies in the United Kingdom without claiming benefits or recourse to public funds. Nor was it suggested that there has been some change of circumstance such that there is a reasonable doubt about the future employment of the Appellant in the UK. It is also plain as a fact that the Appellant has met the costs of her present course. Over £5,000 has been paid, not including the costs of books and other materials which have been paid for, but also the Appellant has maintained herself without being a cost to public funds. The accomodation arrangements she has are going to continue. Again it is not suggested that there is some change in circumstances likely to be in the offing so as to affect the assessment of the continuing maintenance ability that the Appellant has previously demonstrated over a significant period of time.

19. I take into account the Secretary of State's answer, dated 14 December 2012, to the request under the Freedom of Information Act 2000. In which the Secretary of State's position is said to be as follows:

> "The purpose of the Tier 4 maintenance requirements are to ensure that applicants can adequately fund themselves during their course without taking illegal employment or accessing public funds. We therefore require students to demonstrate they have sufficient maintenance funds for the length of the course or for nine months whichever is the shorter (nine months is the average length of the course of study lasting one academic year). …"

20. There is no challenge to the fact that the Appellant had not undertaken illegal employment or been in breach of conditions of her leave nor had she accessed public funds, although on what basis she would have been able to do so is difficult to tell. It would appear, if a different view is taken of longer standing students or those currently undertaking education, then the Appellant has done more than might be expected because she has in fact studied, worked and met course and maintenance costs.

21. The Appellant has not been involved in illegal/criminal activities or acted against the public interest in the United Kingdom. On the contrary the Appellant has through paying for her education benefitted UK based educational establishments. The Appellant has not had recourse to housing benefits, public funds or been a cost to the National Health Service.

22. I find weighing up all the circumstances, including the time the Appellant has been in the United Kingdom, and on the basis of the findings of fact made by the Judge that first the Appellant has had and remains with a private life in the United Kingdom. Secondly, the Appellant has undertaken a course of study and is currently undertaking one. In relation to her private life I, as the judge found, the Respondent's decision does give rise to interference of the necessary level of severity to engage Article 8(1) of the ECHR. I therefore find the first two questions raised in Razgar are answered in the affirmative. I find that the Respondent's decision is on the face of it lawful and properly serves legitimate Article 8(2) objectives and the third and fourth questions are answered in the affirmative.

23. I find the public interest is a significant factor to which substantial weight should be given. I fully take into account the Respondent's views on private life issues as demonstrated by the alterations to the immigration rules. Simply for those who do not comply with the Rules, Article 8 ECHR cannot be a way of avoiding the consequences of managed

UK immigration: A near miss is just that (MB [2010]UKUT 282). However, the public interest and objectives of a UK education to overseas students must not be underestimated both in its benefits to the United Kingdom and educational institutions as well as to students who return to their home countries with UK qualifications. In some cases those qualifications may well enhance the person's career prospects and opportunities to take advantage of their training as well as provide long term benefits for trade and UK businesses. I find that the unchallenged evidence as to the Appellant's past conduct, the absence of her acting in breach of any conditions, her self-support and her substantial financial commitment of tens of thousands of pounds indicates that this is one of those cases, of which there will be few, where the Respondent's decision to refuse the application was disproportionate.

24. I do not speculate about the Appellant's future job prospects or the impact of curtailing her education in the UK. It seems to me that, as a matter of commonsense ,if a person has the full set of qualifications obtained from a UK educational institution or institutions that would be a benefit to the student and to the reputation and standing of UK educational institutions. I can find no sensible reason for requiring this Appellant to return to Ghana to make a new application to study here nor was any argued by the Respondent at the hearing

25. I am satisfied that the Appellant has had a sustained period of employment with WH Smith and that she is "permanently part-time employed." I do not find the Appellant's health is a relevant consideration one way or another save insofar as there is nothing to suggest that she has any health problems which has meant recourse to UK medical institutions.

26. Similarly the Appellant's evidence was not cross-examined to on the evidence of her connections and friends with students. Whilst I accept she would be able to make friends and new friends on a return to Ghana I find

that it is a neutral factual issue that takes the decision and the assessment of the public interest and proportionality in no particular direction and is of little assistance. However the presence of the many friends which she has in the UK is an indicator, but no more than that, that she is not the kind of person who could properly be regarded as undesirable to remain longer in the United Kingdom nor has the Secretary of State ever advanced the case on that basis. I therefore find looking at all the evidence in the round that the Respondent's decision is not proportionate.

27. There is no issue that the Appellant's claim does not engage with private life issues arising under the new Immigration Rules.

28. The appeal is allowed on Article 8 ECHR grounds.

Signed Date

Deputy Upper Tribunal Judge Davey

Approval for Promulgation

Name of Deputy Judge issuing approval:	Mr T B Davey
Appellant's Name:	Dora Ampofoah Kotey
Case Number:	IA/23517/2012

Oral determination (please indicate) ☐

I approve the attached Determination for promulgation

Name:

Date:

Amendments that require further action by Promulgation section:

Change of address:

Rep: ☐ Appellant: ☐

Other Information:
