Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26948/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 June 2013	**On 26 June 2013**
Prepared on 17 June 2013	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS CHERUBY ANN CELINE BOLANOS GACUTAN

Respondent

Representation:

For the Appellant: Mr T Wilding, Home Office Presenting Officer
For the Respondent: No representation, appeared in person

DETERMINATION AND REASONS

1. This is the respondent's appeal from a decision of First-tier Tribunal Judge Buckwell. For ease of reference, throughout this determination I shall refer to the Secretary of State, who was the original respondent as "the Secretary of State" and to Ms Gacutan, who was the original appellant, as "the claimant".

2. The claimant, who was born on 19 April 1990, is a national of the Philippines, who first arrived in this country on 20 September 2009 with leave to enter until 4 October 2010, subject to a condition restricting employment and prohibiting recourse to public funds. She was subsequently granted leave to remain as a Tier 1 (Post-Study work) Migrant from 26 August 2010 until 26 August 2012, without restricting employment but prohibiting recourse to public funds.

3. Before the expiry of that leave, in an application dated 6 August 2012, the claimant applied for a variation and extension of her existing leave to enable her to complete an MSc course as a Tier 4 (General) Student.

4. The claimant's application was refused by the Secretary of State on 1 November 2012, because the Secretary of State found that the claimant had not satisfied the financial requirements under the Immigration Rules. The Secretary of State also decided that the claimant should be removed to the Philippines by way of directions, pursuant to Section 47 of the Immigration, Asylum and Nationality Act 2006.

5. The claimant appealed against this decision and her appeal was heard before First-tier Tribunal Judge Buckwell, sitting at Taylor House on 4 March 2013. Her grounds of appeal included a claim with reference to Article 8 of the ECHR. It was common ground between the parties that insofar as the removal decision was made contemporaneously with the substantive decision, this was not in accordance with the law.

6. In a determination dated 13 March 2013 and promulgated on 21 March 2013, Judge Buckwell dismissed the claimant's substantive appeal under the Immigration Rules, but allowed it on human rights grounds, Article 8.

7. The Secretary of State has appealed against this decision and permission to appeal was granted by First-tier Tribunal Judge Grant-Hutchison on 10 April 2013. In setting out her reasons for granting permission to appeal, Judge Grant-Hutchison stated as follows:

> "…3. The judge noted that the Appellant could not meet the immigration rules and at para 25 of his Demonstration he finds '*As a matter of fact she was unable to demonstrate that and the evidence before me so confirmed*'. The judge relied only on the case of CDS Brazil [2010] UKUT 305 in coming to his decision. It is arguable that the judge did not give adequate reasons for relying on said case particularly in light of the fact that in that case the appellant had the appropriate funds available and there had been a change to the rules."

The Hearing

8. I was addressed on behalf of the Secretary of State by Mr Wilding, who first of all made submissions as to why Judge Buckwell's determination

should be set aside. I then heard evidence from the claimant and Mr Wilding was offered, but declined, the opportunity to cross-examine her. I recorded the proceedings contemporaneously, and as this record is set out in my Record of Proceedings, I shall not set out below everything which was said to me during the course of the hearing, but shall refer only to such part of the submissions and evidence as is necessary for the purposes of this determination. I have, however, taken into consideration everything which was said to me during the hearing, as well as all the documents contained within the file.

9. Mr Wilding submitted that the material error of law was that Judge Buckwell had effectively decided this appeal by applying the principles of a "near miss" and had put too much weight on the fact that this was a "near miss", at paragraph 29 of the determination. What Judge Buckwell was essentially saying was that although the claimant did not satisfy the requirements under the Rules, because there were more than sufficient funds available, the decision was disproportionate. He also placed emphasis on the case of *CDS (Brazil)*, although this decision had fallen away in significance, especially since it had been made abundantly clear in the Court of Appeal decision in *Miah [2012] EWCA Civ 261* that "a miss is as good as a mile". Also, Judge Buckwell had failed to appreciate the considerable distinction between the facts in *CDS (Brazil)* and the facts in this case, because in *CDS (Brazil)* there had been a recent change in the Rules and the issue was whether a certain type of family member could sponsor a relative or not. In this case, the claimant had been required to show that she had a sum of money available to her which she had not done. Although there was nothing detrimental in her personal history, the policy reasons for enforcing the Rules were clear. The points-based system was designed in part to prevent people from forever switching categories which is what this claimant was seeking to do. She needed to show £24,855 in available funds but the bank statements submitted showed no more than £20,000, so she was over £4,000 short. At paragraph 29, Judge Buckwell was not saying there was other evidence, but he took a holistic view that £20,000 was enough bearing in mind she was only here for another few months. The final sentence at paragraph 29 seemed to be saying this.

10. If one looked at the claimant's witness statement, she seemed to accept that position. At paragraph 5 she states that she was of the mistaken impression that she only had to show she had requisite funds for three months, at paragraph 8. She accepts that she needed to show that she had more funds available than she in fact showed. It was the Secretary of State's submission that what this judge had done was to say that although she did not meet the requirements of the Rules, because it was a "near miss" he could allow the appeal under Article 8. This was precisely what the Court of Appeal had said in *Miah* could not be done.

11. It was accepted on behalf of the Secretary of State that if this Tribunal were to find an error of law, it would then have to consider the situation as it was now, but it was the Secretary of State's submission that it was not

disproportionate to expect someone to meet the requirements of the Rules. Unlike the situation in *CDS (Brazil)*, where there had been a change in the Rules, in this case those factors did not apply. This claimant had come here to study and had then varied her leave, and this was her first application to go back into the category of a student. In order to succeed in her application she needed to show that the requirements of the Rules were satisfied. It was the Secretary of State's submission that an error of law was established, and that the Secretary of State's decision was not a disproportionate one.

12. In my judgment, there was a material error of law in Judge Buckwell's determination, in that his finding at paragraph 29 that "there are more than sufficient funds provided by the claimant's parents to cover all costs of fees and maintenance" is not adequately reasoned. Nor is his statement that "there is absolutely no doubt whatsoever that the claimant would be in no financial difficulty in respect of the sufficiency of maintenance until her course is concluded". Given that the only evidence which is referred to within the determination is of the money that was shown in the bank accounts, which was not sufficient to show adequate maintenance under the Rules, and that as at the date of Judge Buckwell's decision on 13 March 2013 the claimant would have had to remain in this country for at least another six months, before she had completed her course, it is not at all clear how he could have found that she had sufficient funds available for this purpose.

13. It follows that the decision must be re-made by this Tribunal.

14. As already noted above, I went on to hear evidence from the claimant herself, who told the Tribunal that currently there was £28,000 in the bank account of her parents in the Philippines, which sum of money was available to her. The relevant statements were currently with her lawyers, whom she had been expecting to attend at the hearing, but they had not arrived without any explanation.

15. With regard to her failure to provide sufficient evidence with regard to her finances, this was because she had made an honest mistake and had believed that because she had an "established presence" in this country, she did not have to show more than that she had the funds necessary for the three months after the date of the application. She realised now that she had been wrong in so believing. However, the Tribunal should appreciate that the full tuition fees of £17,000 had been paid. Half had been paid in September of last year and the balance this January. Had she known that she had to show additional sums, she could have shown this at the time of making the application. The funds were available, but were not shown in the bank accounts which were submitted.

16. With regard to the current course for which the fees had been paid in full, the claimant had nearly finished her studies. She had to submit her dissertation by 25 September this year (that is a little over three months away) and her degree (an MSc) would then be awarded in November. She

confirmed that she would be able to submit her dissertation and leave this country by the end of September this year.

17. As already noted above, Mr Wilding quite properly chose not to exercise his right to cross-examine the claimant.

Discussion

18. The only issue before me is whether, on the particular circumstances of this case, on the basis of the evidence which is before the Tribunal now, this claimant should be allowed to remain, at least until the end of September, pursuant to her Article 8 rights. I of course ask myself the questions posited by Lord Bingham in *Razgar*, and conclude as follows. To require this claimant to leave the UK now, does amount to an interference with her private life, such as to engage her Article 8 rights. This is because it is, in my judgment, an important part of her private life now to be enabled to conclude the course for which she has been studying and for which a considerable sum of money has already been expended. However, such interference would be for a lawful purpose and would also be necessary for the legitimate and important purpose of maintaining the economic wellbeing of this country through the maintenance of an effective, fair and consistent system of immigration control. The real issue in this case, as it so often is, is whether in the particular circumstances that exist here, the decision is proportionate for this purpose.

19. Having considered all the factors very carefully, I have concluded that in this particular case, the removal of this claimant now, when she is so close to finishing her studies, would not be proportionate. I accept her evidence that there is currently £28,000 in her parents' bank account, which is available to her and which sum is sufficient to enable her to be maintained adequately until she leaves this country (it being considerably more than would be required under the rules were she now obliged to show she had sufficient funds for her maintenance until the end of September). I also accept that she will in fact leave before the end of September this year, as she has said. Providing she does, there is no real detriment to this country in allowing her to stay for this relatively short period, so that the funds that she has expended so far are not wasted and she can complete her course. On the particular facts of this case, I do not consider that a rigid adherence to the Rules is required for the legitimate purpose of maintaining confidence in these Rules.

20. Accordingly, this claimant's appeal must succeed to the extent that she should be allowed to remain in this country lawfully until the end of September this year. (There has in any event not yet been a lawful decision with regard to her removal, and it follows from my decision in this appeal that any decision to remove this claimant before the end of

September this year would also be in breach of her Article 8 rights.) I should, however, make it clear that on the facts as I have found them to be, I consider that requiring this claimant to leave this country by the end of September this year **would** be proportionate and I have accepted her assurance that she will leave before this date.

Decision

I set aside the determination of First-tier Tribunal Judge Buckwell as containing a material error of law and substitute the following decision:

The claimant's appeal is allowed on human rights grounds, Article 8.

Signed: Date: 24 June 2013

Upper Tribunal Judge Craig