Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01523/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 June 2013	**On 16 July 2013**
Prepared 7 June 2013	

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT
(No Anonymity Direction)

Appellant

and

SUZON FREDERICK ROZARIO

Respondent

Representation:

For the Appellant: Mr M Hossain, Counsel instructed by Hossain Law Associates
For the Respondent: Mr S Walker, Home Office Presenting Officer

DETERMINATION AND REASONS

1. For the purposes of this determination, although the application for permission to appeal was made by the respondent I shall refer to the

parties as they were referred to in the First-tier Tribunal, that is Mr Rozario as the appellant and the Secretary of State as the respondent.

2. The appellant was born on 31 December 1979 and is a citizen of Bangladesh. He appealed against the decision of the respondent dated 31 March 2013 refusing his application for leave to remain in the UK as a Tier 4 (General) Student Migrant under the points-based system.

3. The appellant made an application on 20 July 2012 for leave to remain in the UK to study an MA degree in Theology (Franciscan Studies) starting on 1 October 2012 which was expected to end on 13 December 2013. Confirmation of Acceptance of Studies was assigned on 20 July 2012.

4. The appeal was heard by Designated Judge of the First-tier Tribunal J M Lewis who dismissed the appeal under the Immigration Rules on the basis that the appellant could not show that he had the requisite minimum scores in his IELTS certificate.

5. However the judge allowed the appeal under Article 8 human rights grounds after applying **Razgar [2004] UKHL 27**. Permission to appeal was granted by Designated First-tier Tribunal Judge Zucker who granted permission to appeal to the respondent on the basis that the judge's approach to the determination of the appellant's Article 8 rights was flawed because there was no consideration of the change of Rule and in particular insufficient regard was had to the public interest. Further, it was arguable that any private life established was not sufficient to justify the appeal being allowed.

Conclusions

6. At the hearing Mr Walker confirmed that he was not relying on the first ground of appeal made by the respondent. That first ground set out that the judge's assessment on Article 8 by reference to case law which predated the relevant provisions of the Immigration Rules. I can accept that the Immigration Rules, and in particular Appendix FM was introduced prior to the appellant's application but further to **Izuazu** (Article 8 – new rules) [2013] UKUT 00045 (IAC) and **Green** (Article 8 – new rules) [2013] UKUT 00254 (IAC), I am not persuaded that all case law which predates the Immigration Rules is otiose.

7. I find no error in the judge's assessment that the appellant's private life had been established as he has been studying, and, as the test has a low threshold for deciding whether the interference has consequences of such gravity, this second limb of **Razgar** was satisfied. Further to the immigration rules the refusal was in accordance with the law and on the face of it necessary to uphold the rights and freedoms of others through the maintenance of immigration policies. However in assessing proportionality sufficient weight must be given to the public interest.

8. I turn to the judge's assessment of proportionality and note that he was correct to state at paragraph 22 that Article 8 does not afford a freestanding liberty to depart from the Immigration Rules. He added that a person who is admitted to follow a course which 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 were ample financial resources available and there were no contrary factors based upon conduct. The judge quoted **CDS (PBS: "available": Article 8) Brazil [2010[UKUT 00305 (IAC)**. He stated that this "describes exactly the situation of the appellant. I treat his Masters degree, as do the appellant and the Centre, as the progression and culmination of his studies. The public interest in the maintenance of effective immigration control, whilst always weighty, yields in this case to the personal circumstances of the appellant."

9. The appellant applied to enter the UK to study the Franciscan International Study Centre's Certificate of Higher Education in Franciscan Studies. The appellant confirmed that he entered this course in June 2012. He then proceeded to apply on 20 July 2012 to study for an MA. It is ***not*** the case that removal was anticipated prior to the end of the appellant's course. Indeed he had finished his course and was applying for a new one and therefore I find the application of **CDS (Brazil)** on the basis that the circumstances were the same was mistaken and thus insufficient weight was attached to the public interest. This error could have made a difference to the outcome and as a consequence I find there is an error of law.

10. I also note that, although not pleaded in the application for permission to appeal or identified by Designated First-tier Tribunal Judge Zucker, the decision by the respondent was a combined decision which included a decision under Section 47 removal. This is not in accordance with the law and I permitted the grounds to be amended to include this.

11. I therefore find that the decision cannot stand in respect of the findings at paragraphs 20 to 22 only.

12. The first four limbs of **Razgar** were answered by the judge in the affirmative. The appellant has been in the UK since October 2011 only. I accept he is a diligent and successful student and committed to his course. He came to the UK in order to study a specific course, which he finished, and on a limited visa whereby his leave expired on 29 August 2012. He had no legitimate expectation to consider that his studies may continue beyond this date and was always aware that he would have to re-apply for further leave to remain in the UK and, if necessary, for his further study of a different course, albeit one which followed on.

13. The appellant gave evidence that his class is finished in two weeks time and the remainder of his time on the course would be spent writing a dissertation. As the judge states **CDS (Brazil)** "does not provide a general discretion in the Immigration Judge to dispense with the

requirements of the Immigration Rules merely because of the way they impact on an individual case may appear to be unduly harsh" (paragraph 17 of **CDS**).

14. I am persuaded that the respondent has shown that the decision to refuse to vary the appellant's leave is not a disproportionate decision. He has only been in the UK since 2011 and confirmed at the hearing that he had studied extensively already in Bangladesh. I note that he cannot continue his MA in Franciscan Studies in the UK but he will have completed his classes, where physical presence is demanded, and there is no reason why he cannot complete his dissertation in Bangladesh.

15. There was also a failure by the First-tier Tribunal judge to consider the legality of the respondent's Section 47 decision and this amounted to an error on a point of law such that it had to be set aside and re-made. I find that the s.47 decision was not in accordance with the law following the Court of Appeal decision in **SSHD v Javad Ahmadi** **[2013] EWCA Civ 512** (which confirmed **Ahmadi (Section 47 decision: validity; Sapkota) [2012] UKUT 00147 (IAC)** and **Adamally and Jaferi (section 47 removal decisions: Tribunal Procedures) [2012] UKUT 00414 (IAC)**).

Order

16. I therefore remake the determination in respect of the decision to refuse leave to remain and dismiss the appeal.

17. The appeal is allowed in respect of the S47 decision alone.

Signed Date 13th July 2013

Judge Rimington
Deputy Upper Tribunal Judge