Upper Tribunal
(Immigration and Asylum Chamber)
IA/00826/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On July 22, 2014	**On August 4, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

MR MUHANAD MOHD AHMAD HATAMLEH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Quattara (Legal Representative)
For the Respondent: Mr McVeety (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant, born June 11, 1979, is a citizen of Jordan. On May 25, 2012 he applied to vary his leave to enable him to remain in the United Kingdom to enable him to secure a suitable sponsor for a Tier 2 application. He had previously been granted Tier 1 leave.

2. The respondent refused his application on December 28, 2012, 2013 on the basis there were no compelling or compassionate circumstances surrounding the case that would persuade the respondent to exercise her discretion and grant further leave. The same day removal directions under section 47 of the Immigration, Asylum and nationality Act 2006 were issued.

3. On January 10, 2013 the appellant appealed under Section 82(1) of the Nationality, Immigration and Asylum Act 2002.

4. The matter was listed before Judge of the First-tier Tribunal Hague (hereinafter referred to as "the FtTJ") on May 9, 2013 and in a determination promulgated on May 17, 2013 he dismissed the appeal finding the section 47 decision was invalid but the substantive application could not succeed because leave to remain outside of the Rules was a discretion conferred on the respondent and was not susceptible to appeal as section 84(1)(f) of the 2002 Act only permits consideration of a discretion conferred by the Rules. This application had been refused for a mandatory reason under paragraph 322(1) HC 395.

5. The appellant appealed that decision on May 24, 2013. Permission to appeal was initially refused by Judge of the First-tier Tribunal Keane on June 4, 2013. Permission was renewed to the Upper Tribunal and on July 17, 2013 Upper Tribunal Perkins found it was arguable the FtTJ had erred because:-

    a. The fact he was not able to satisfy the Rules did not mean he was not entitled to have his application decided.

    b. Refusal had been under paragraph 322(1) HC 395 but this Rule provides as a ground for refusing an application for leave to enter that the application is made for a purpose not covered by the Rules.

    Upper Tribunal Judge Perkins was not at all sure there was an appealable decision but felt there may be a wrong contemporaneous decision to remove that should have been allowed.

PRELIMINARY ISSUES

6. The appellant was not in attendance and Mr Quattara requested an adjournment. His reason for an adjournment was because he had only been instructed last night and was unclear what applications had been submitted. The appellant was ill today and unable to attend the hearing and was believed to have a temperature and was vomiting. Mr McVeety submitted the issue for today was about whether there had been an error and no oral evidence was necessary and he submitted there was no need for an adjournment.

7. I considered this request but refused the adjournment because the appellant had been aware of the hearing for over 28 days and it appears he only chose to instruct solicitors yesterday evening. The representatives were clearly equipped to deal with the error of law hearing.

SUBMISSIONS ON ERROR OF LAW

8. Mr Quattara submitted the respondent had acted unfairly in that she had been aware of the appellant's offer of employment prior to the date of decision but had informed the hospital that the appellant had no status. He submitted the decision was therefore not in accordance with the law. Alternatively, he argued the decision was an "immigration decision" as it was covered by Section 82(2)(d) of the 2002 Act because it was an application to extend his leave and the consequence of refusing the application was he would have no leave to remain.

9. Mr McVeety submitted that there was no immigration decision because he had not made an application under the Rules. He had applied outside of the Rules to extend something (his Tier 1 status) that was not possible. The respondent had correctly refused the appeal under the mandatory ground of refusal paragraph 322(1) HC 395. It was not in dispute that he did not meet the PBS requirements and his application was not a variation application within the Rules.

10. Both parties agreed the FtTJ in addition to finding the removal decision invalid should have allowed the appeal against that decision and remitted it back to the respondent for a decision to be taken.

11. I reserved my decision.

ERROR OF LAW ASSESSMENT

12. In order to understand this application it is necessary to have regard to the appellant's application and status. When he submitted his application he was in the United Kingdom as a Tier 1 (post study worker). His leave expired on May 27, 2012 and he filed Form FLR(O). He ticked the box in section 3 indicating he was applying for a purpose/reason not covered by other application forms. He explained his reason for applying was :

> "I am applying for an extension of my current Tier 1 (post study work) as I am unable to switch into Tier 2 (General) because my new employer is unable to give me a certificate of sponsorship until their licence is renewed"

13. The problem the appellant had was that Tier 1 (Post study work) category closed on April 12, 2012 and in any event there was no provision to extend his stay under this category.

14. The appellant did not apply to extend his stay under any other category and the respondent therefore treated his application as a request to extend his stay outside of the Rules.

15. The FtTJ identified that such a decision was not an immigration decision and during a court room discussion Mr Quattara accepted this to be the case.

16. In Ukus (discretion: when reviewable) [2012] UKUT 00307(IAC) the Tribunal confirmed that where the decision maker has lawfully exercised his discretion and the Tribunal has no jurisdiction to intervene, i.e. because the discretion was a discretion exercised outside of the Rules, then there cannot be a right of appeal for the Tribunal to consider.

17. In assessing the grounds of appeal and the permission I have started from this position. Upper Tribunal Judge Perkins was uncertain about whether there was a right of appeal

18. The application was dealt with under paragraph 322(1) HC 395 and this provides that leave to remain is to be refused where the variation is sought for a purpose not covered by these Rules. The Immigration Decision referred to this provision and there appears to be no dispute that paragraph 322(1) HC 395 is a mandatory

ground of refusal and it therefore follows that unless there was something else to be dealt with then there was no basis for any appeal.

19. The matter was further complicated because in the same decision a removal direction was given under Section 47 of the 2006 Act. The FtTJ recognised that this was an invalid decision but did nothing about it.

20. Accordingly, I find that the substantive application did not attract a right of appeal as it had been mandatory refused under paragraph 322(1) HC 395. However, the section 47 removal was an invalid decision and the FtTJ should have dealt with this at the hearing. Merely identifying it as an invalid decision does not deal with it. The respondent accepts there is a material error in law in respect of this issue.

21. I do make the general observation that this appellant would now appear to meet the Immigration Rules for a Tier 2 application.

DECISION

22. There is a material error of law only in respect of the section 47 removal. I allow the appeal to the extent that I remit the matter back to the respondent for a decision taken on the basis there has been no valid decision taken in respect of removal.

23. In all other respects I uphold the decision.

24. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I do not make a fee award as the main application did not succeed.

Signed: Dated:

Deputy Upper Tribunal Judge Alis