



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/04895/2013

THE IMMIGRATION ACTS

Heard at Field House

On 12th May 2014

Determination

Promulgated

On 15th May 2014

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Before

UPPER TRIBUNAL JUDGE REEDS

Between

MALIK MUDASSAR AZIZ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In Person

For the Respondent: Mr P Deller, Senior Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Pakistan born on 21st June 1982. He appeals with permission against the decision of the First-tier Tribunal (Judge Kamara) who dismissed his appeal against the decision of refusal by the Respondent to vary his leave to remain in the United Kingdom as a Tier 4

(General) Student Migrant and also to remove him from the United Kingdom.

2. The Appellant was first granted leave to enter the United Kingdom as a student on 23rd April 2005, valid until 31st July 2008. He was further granted periods of leave as a student until 30th November 2009 and leave to remain was granted as a Tier 4 (General) Student until 1st October 2012.
3. On 29th September 2012, the Appellant applied for further leave to remain as a Tier 4 (General) Migrant under the points-based system to continue his study towards a BA (Hons) in Economics and Business Management at Newcastle University. The application was refused by the Respondent under paragraph 245ZX(ha) of the Rules on the basis that the grant of entry clearance or leave to remain to undertake studies at degree level or above were limited to a maximum of five years unless one of the exceptions applied. The Respondent, in the refusal letter, stated that none of the exceptions applied but the Appellant was, however, awarded 30 points for a CAS and the 10 points claimed for funds. There was no separate consideration given to the Appellant's circumstances in relation to the decision made to remove him from the United Kingdom.
4. The Appellant sought to appeal that decision and Grounds of Appeal were lodged on 11th February 2013.
5. Thus the matter was listed before the First-tier Tribunal. The issue that I have had to decide in this appeal relates to what the Appellant has described as a "procedural irregularity" at the time of the First-tier Tribunal hearing. As the determination of Judge Kamara reflects, at paragraph 6, when the matter came before him on the hearing date of 15th October 2013 the Appellant did not appear. At paragraph 6 the judge considered the case file and that the notice of hearing had been sent and therefore decided to proceed with the case in the absence of the Appellant. It appears that the Respondent was represented by a Presenting Officer who made submissions and the judge therefore determined the appeal in his absence in a determination promulgated on 16th October 2013 and dismissed his appeal. In respect of the removal decision he found that to be not in accordance with the law and therefore allowed the appeal to that limited extent. The findings in relation to the Immigration Rules are set out very briefly at paragraphs 10 and 11 referring to the history recited in the refusal letter.
6. The Appellant sought permission to appeal that decision on the basis of a procedural irregularity having been made on the basis that he had not received the notice of hearing and also raised in the grounds that the decision made did not reflect accurately his immigration history and the courses that he had undertaken.
7. The hearing was originally listed before the Upper Tribunal on 30th April 2014. Mr Aziz appeared in person. At that hearing it became plain from documentation that the Appellant produced on that day that the

chronology and history set out in the decision letter was not accurate. He had produced documents to show that he had completed different courses than that in the summary and ultimately in the decision letter. This was relevant to the issue of whether or not five years, the relevant period would have been crossed. At the hearing also Mr Aziz gave an account concerning his absence at the hearing centre when the case was listed. The Respondent was not aware of the courses and, according to the Appellant, the earlier degree course that he had undertaken for which he had been granted leave at Manchester College did not go beyond the first semester because the college was closed down. It was not possible to ascertain from the case file as to what applications had been made for leave to remain as a student and the documentation that had been produced with each application with any certainty. Thus the hearing was adjourned until 12th May for the Respondent to confirm details concerning grants of leave in view of the Appellant's account, which the Respondent had not been aware of before the hearing.

8. The appeal came before the Tribunal on 12th May. Mr Deller, Senior Presenting Officer appeared on behalf of the Respondent. He produced a short schedule of applications relating to Mr Aziz. However, as he conceded, whilst the record had been prepared from the case information database, in the short time available to access the file, it was not possible to provide any further detail concerning the previous applications. Thus the schedule was not complete. Mr Aziz also produced at the hearing further documentation including a copy of the Respondent's guidance. It became abundantly clear that the factual basis of the Appellant's case was different from that set out in the decision letter and that was relevant to whether paragraph 245ZX(ha) applied. It was further plain that from hearing from Mr Aziz that he stated that one of the exemptions applied in his case based on the studies that he had undertaken which had not been taken into account by the Respondent and this included having studied a foundation course between September 2006 and August 2007 but also again between the date of September 2008 and May 2009. Furthermore whilst he had been given leave to enrol in September 2007 to undertake a Degree in Business Administration at the Manchester College of Professional Studies in mid-August of 2008 the college was closed down and thus he took no exams and had only completed the first semester. It was his case that he had not undertaken degree level study in the way set out in the decision letter.
9. The principal issue that I have to decide relates to whether or not there was a procedural irregularity. As noted in the grant of permission by First-tier Tribunal Judge Nicholson, the history in respect of the Appellant and his conduct was a relevant factor in reaching a conclusion on this issue. The case file and evidence from the Appellant demonstrates that on 9th April 2013 the Appellant wrote to IAC Bradford requesting an oral hearing. Originally the case had been listed as a paper appeal. On 15th May 2013 a letter was sent to the Appellant noting his request for an oral hearing and asking for additional payment to be made. It appears that that additional payment was made and the appeal was listed for hearing at North Shields

on 3rd October 2013 which was the nearest hearing centre to the Appellant's address at that time in Newcastle. The Appellant then requested a change of venue by fax in view of a change of address as he was moving to the south of England. A further hearing date was sent for 15th October 2013 for the appeal to be heard at Taylor House. The notice of hearing does give the address of the Appellant. He states that he did not receive it. Having heard Mr Aziz and having considered the case file, I am satisfied on the balance of probabilities that there was a procedural irregularity and that it is more likely than not that he did not receive the notice of hearing. It is plain from the history that I have just recited that Mr Aziz sought to pursue his appeal at the time it was listed, seeking an oral hearing and also paying the additional expense but also seeking a change of venue when he had changed address. He has also appeared before the Upper Tribunal and thus I am satisfied that he was actively seeking to pursue his appeal and in those circumstances I accept that it is more likely than not there was a procedural irregularity which led to the Appellant not receiving the notice of hearing. As the grant of permission notes, the judge was not at fault he could not have known but in the light of that irregularity, and the fact that the Appellant does wish to put forward to the Tribunal his case, it is in the interests of justice to set aside the decision of the First-tier Tribunal.

10. I canvassed with Mr Deller, what the appropriate course should be for the next stage. In the light of the error of law being one of a procedural irregularity, he submitted that in the normal course of events and in the interests of justice, that the Appellant should have his opportunity to put his case to the First-tier Tribunal. Furthermore, the Appellant submitted that in the light of the complex issues before the Tribunal that he would wish to have the opportunity to seek legal advice and have a solicitor to act on his behalf and therefore the appeal could not proceed.
11. In those circumstances I am satisfied that the appropriate course is for the decision of the First-tier Tribunal to be set aside and to determine the appeal with a fresh oral hearing by way of remittal to the First-tier Tribunal. This is based on the nature of the error of law in this case, namely procedural unfairness or irregularity that had occurred and therefore it fell within the Practice Statement at paragraph 7.2(a) (as amended).
12. Due to the nature of the error of law, the Tribunal will be required to hear the oral evidence of the Appellant and consider the documentation provided on his behalf and factual findings will have to be made. Also the Respondent will be required to procedure a complete chronology of the applications made and evidence produced on behalf of the Appellant in respect of each course. Therefore having given particular regard to the overriding objective of the efficient disposal of appeals and that there is an issue of procedural irregularity that has occurred in respect of this appeal and that there are issues of fact that require determination which have not been accessed when the case was before the First-tier Tribunal I therefore remit the appeal. The case is to be remitted to the First-tier Tribunal at

Taylor House in accordance with Section 12(2)(b) of the Tribunals, Courts and Enforcement Act and paragraph 7.2 of the Practice Statement of 10th February 2010 (as amended).

13. The following directions are made:

- (i) The Appellant shall file and serve upon the Respondent and upon the Tribunal a statement setting out his full immigration history and appending to that statement any documentation relevant to that chronology no later than fourteen days before the hearing.
- (ii) The Respondent shall file and serve an updated chronology concerning the applications made on behalf of the Appellant for leave to remain, such a document to be filed no later than seven days before the hearing.
- (iii) Any policy guidance relied upon by the Appellant shall also be filed and served by him no later than seven days before the hearing.

Decision

The First-tier Tribunal made an error of law and the decision is set aside. The appeal is to be remitted to the First-tier Tribunal at Taylor House for a hearing in accordance with Section 12(2)(b) of the Tribunals, Courts and Enforcement Act and paragraph 7.2 of the Practice Statement of 10th February 2010 (as amended).

Signed

Date 14th May 2014

Upper Tribunal Judge Reeds