IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09294/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
Oral judgment given at hearing On 3 October 2014	**On 5 November 2014**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MR MUHAMMAD USMAN QADRI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No Representative
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant did not attend the hearing today. I am satisfied that he had notice of the hearing or that reasonable steps have been taken to notify him of the hearing (he was sent notice of the hearing to the address notified to the Tribunal) and that it is in the interests of justice to proceed with the hearing in his absence. I have a discretion under rule 38 of the

Tribunal Procedure (Upper Tribunal) rules 2008 to proceed in his absence in these circumstances, which is what I have decided to do.

2. The appellant is a citizen of Pakistan born on 21 October 1992. He made an application on 14 December 2013 for further leave to remain as a Tier 4 Student Migrant. I take the date of the application as being the date on the application form.

3. A decision was made on 28 January 2014 to refuse the application and a decision was also made under Section 47 of the Immigration, Asylum and Nationality Act 2006 to remove him. The appellant appealed and his appeal came before First-tier Tribunal Judge Graham on 21 May 2014, whereby the appeal was dismissed.

4. The basis on which the initial application for further leave to remain was refused was as follows. The appellant was last granted leave pursuant to an application made on 3 August 2012 as a Tier 4 (General) Student Migrant to study with Metro College of Management Sciences. However, according to the notice of decision in the instant appeal, documents had been supplied confirming that he was actually studying at Hendon Business School from 3 September 2012 to 26 June 2013. The current application was made to study with LIT_LON LTD. The application was made after his previous leave expired on 14 December 2013. LIT_LON confirmed that he started studying at their institution on 6 January 2014.

5. Insofar as the decision seems to suggest that he made this application after his previous leave expired, I do not think that is correct. But in any event that is not the basis on which the appeal proceeded before the First-tier Tribunal. The point in issue was that at the time of his leave he was subject to Section 50 of the Borders, Citizenship and Immigration Act 2009 which imposed certain conditions on the grant of leave to remain. One of those conditions was that he study at Metro College of Management Sciences. It seems that the appellant accepts that that was a condition on which he was granted leave or further leave, because he relies on the suggestion that he sent a letter dated 5 September 2012 to the UKBA to the effect that he was proposing to change college to study at Hendon Business School. A copy of the letter that he relies on is in his bundle at page 6.

6. Returning to the decision of the First-tier Judge, she concluded that there was no evidence that that letter requesting a switch of colleges was ever sent. She concluded that there was no confirmation of postage and nothing else to support the contention that it was actually sent. It was on that basis that she concluded that she was “bound to dismiss” the appeal.

7. The decision of the Secretary of State was based on a discretionary ground of refusal which is contained at paragraph 322(3) of the immigration rules, that is to say “failure to comply with any conditions attached to the grant of leave to enter or remain”. That plainly is a discretionary ground of refusal but judging by the way that Judge Graham expressed herself, it

seems that she dealt with the appeal on the basis that this was a mandatory ground of refusal, stating that she was bound to dismiss the appeal.

8. It also appears, and was flagged up in the grant of permission by the Upper Tribunal Judge, that Judge Graham seems to have dismissed the appeal on other bases, contained at [8] and [9] of the determination, being bases that are not founded in the decision of the Secretary of State. One of them relates to bank statements. The first matter at [8] suggests that the appellant had already breached the terms of his leave by switching to Hendon Business School without permission. That conclusion at [8] is more ambiguous in terms of whether it was relied on by the Secretary of State, than the conclusion at [9] relating to bank statements. The issue in relation to the bank statements is undoubtedly is a matter that was not raised by the respondent. The notice of decision does not take issue with the question of maintenance (funds) and the appellant was awarded the points claimed in that respect.

9. So, dealing with the submissions made on behalf of the respondent before me today, Mr Duffy submits that if there was an error of law, and I think it is right to say that it is more or less accepted that there may well have been, it is not an error of law that requires the decision to be set aside as it is not material. He submitted that it was for the appellant to establish why it would be the case that the normal course of events being to refuse an application with reference to the discretionary ground at paragraph 322(3), should not follow in this particular case. He also submitted that, in effect 'reading between the lines' of the judge's determination, it does not seem as if she accepted that the appellant had actually sent the letter requesting a change of college to Hendon Business School from Metro College. He further submitted that sending the letter making a request for a change of course would not have been sufficient. It would have been necessary for the appellant actually to receive consent.

10. I am satisfied that there is an error of law in the decision of the First-tier Tribunal, at the very least in dealing with the appeal on the basis that the appellant was apparently subject to a mandatory ground of refusal when it plainly was a discretionary ground of refusal. The judge earlier in the determination seemed to recognise that fact but in her reasons did not appear to have dealt with it on that basis. Whilst I can see some force in Mr Duffy's submission in terms of it not actually making any difference, I consider that the appropriate course of action is to set aside the decision for the decision to be re-made. In making that judgement I also have in mind that the judge seems to have decided the appeal with reference to a matter that was never raised as an issue by the Secretary of State.

11. So I do set aside the decision and I now proceed to re-make it. The judge's finding to the effect that there was no evidence to show that the letter was sent is a finding that is unaffected by any error of law. There is no need for me to revisit that finding.

12. It follows from that, that it is a fact found by Judge Graham that the appellant did not seek consent to switch courses because he did not send the letter. In any event, even if he had, the Secretary of State did not in fact consent because there is no evidence from the appellant that he received any such consent. His contention in the grounds is that the Secretary of State did not reply to him, but having regard to Judge Graham's finding that the letter was never sent that contention goes nowhere.

13. There is also another matter to be considered relating to whether the discretion to refuse should have been exercised in the way that it was. The letter that the appellant relies on is copied at page 6 of his bundle. It is dated 5 September 2012. It states that he advises the Home Office that he is no longer enrolled at Metro College of Management Sciences, and he refers to problems there. He states that he has managed to enrol himself at the Hendon Business School. In fact, from evidence in a letter dated 22 July 2013 from Hendon Business School, which the appellant produces at page 5 of his bundle, indicates that the course start date was 3 September 2012. That was two days before the appellant purports to have written the letter dated 5 September 2012. It would appear therefore, that the appellant started at Hendon Business School before he ever wrote the letter. Again, one must bear in mind the First-tier Judge's finding that the letter was never sent.

14. It seems to me that there is no basis from which to conclude that the normal course of events involved in a failure to comply with conditions should not follow in this case. The appellant has not presented any arguments or facts upon which it would be possible for me to conclude that the discretion should have been exercised differently. He switched college without permission. He did not ask for permission. He started at the college before he even wrote the letter, which was not in any event sent. It seems to me that there is no basis from which to conclude that the Secretary of State should have exercised her discretion contained within the rules any differently.

15. In those circumstances, I am satisfied that the appellant has failed to establish that he meets the requirements of the relevant immigration rules and the appeal is therefore, dismissed.

16. Article 8 of the ECHR is not raised in the grounds of appeal and therefore does not call for consideration by me.

Upper Tribunal Judge Kopieczek 3/11/14