Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11485/2014

THE IMMIGRATION ACTS

Decided at : Field House	**Determination Promulgated**
On : 2 October 2014	**On 2 October 2014**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JULIUS NZERIBE AGWUBUO

Respondent

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Agwubuo's appeal against the respondent's decision of 17 February 2014 to refuse to vary his leave and to remove him by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. For the purposes of this decision, I shall refer to the Secretary of State as the respondent and Mr Agwubuo as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Nigeria born on 2 November 1971. He entered the United Kingdom on 17 August 2012 in possession of a Tier 4 Student visa conferring limited leave to enter until 30 January 2014. On 30 January 2014 he applied, on Form FLR (O), for further leave outside the immigration rules, in order to complete his dissertation and his studies. He claimed that, as a result of the death of his sister in April 2013 and the distress arising from that, he had failed three examinations and had had to re-sit them. He had passed the examinations but was as a result unable to complete his dissertation on time and his course had been extended to 31 August 2014 to enable him to do so.

4. The respondent refused the appellant's application on 17 February 2014 on the grounds that a grant of leave outside the immigration rules would only be made in cases where particularly compelling circumstances existed. It was not accepted that such circumstances existed and the respondent considered that the appellant could pursue his studies in Nigeria.

5. The appellant appealed against that decision on the grounds that the decision was not in accordance with the immigration rules; that the decision was otherwise not in accordance with the law; and that the person taking the decision should have exercised differently a discretion conferred by the immigration rules. It was asserted in the grounds that the respondent had failed to consider the evidence produced by the appellant demonstrating that there were compelling, exceptional and compassionate circumstances to warrant an extension of leave to remain outside the immigration rules.

6. At the appellant's request the appeal was determined on the papers by the First-tier Tribunal, on 28 May 2014. Judge Lloyd considered that to require the appellant to return to Nigeria before completing his course would be unduly harsh and found that the decision to refuse his application lacked adequate reasoning. He allowed the appeal.

7. Permission to appeal was sought by the Secretary of State on the grounds that there was no power to allow the appeal outright under s86 of the Nationality, Immigration and Asylum Act 2002.

8. Permission was granted on 17 July 2014, on the grounds that the judge ought arguably to have allowed the appeal only to the limited extent that it remained outstanding with the respondent for a lawful decision to be made.

9. In a skeleton argument submitted for the appeal, the appellant's representatives asserted that the judge had not erred in law and that it was open to him to allow the appeal in full under the provisions of s86(3) of the 2002 Act.

10. The appellant requested that his appeal be determined on the papers and I have proceeded to consider it on that basis.

Consideration and findings.

11. In my view Judge Lloyd clearly erred in law by not setting out the basis upon which he allowed the appeal. As Judge Coates stated in granting permission, the findings made by the judge suggested that his conclusion was that the respondent's decision was "not in accordance with the law" and that that was the basis upon which he had allowed the appeal. However he did not make that clear.

12. It is the appellant's case, as set out in the skeleton argument submitted, that the judge was nevertheless entitled to allow the appeal outright on the basis of the grounds of appeal before him. The skeleton then goes on to address each ground, although on the basis of arguments clearly not put before the judge.

13. With regard to the first ground, that the decision was "not in accordance with the immigration rules", the skeleton argument invites the Tribunal to consider paragraph 353B, with reference to "exceptional circumstances". As stated that was never a matter previously raised. In any event it is wholly misconceived, since paragraph 353B refers specifically to fresh claims made by applicants facing removal subsequent to the refusal of previous applications and when all appeal rights have been exhausted. In the appellant's case, his application was not in the form of submissions presented as a fresh claim. It was simply an application for leave to remain outside the rules, made at a time when he had extant leave and was not subject to a removal decision. The application having been made outside the rules, there was no basis for an argument that the refusal decision was not in accordance with the rules.

14. The second ground addressed in the skeleton, that the decision was not otherwise in accordance with the law, refers to the Home Office policy in Chapter 53 of the Enforcement Instructions and Guidance. Again, that is a matter that was never previously raised and that, for the same reasons as given above, is wholly misconceived in that it refers to circumstances entirely different to those of the appellant.

15. Furthermore, it was made clear by the Upper Tribunal in AG and others (Policies; executive discretions; Tribunal's powers) Kosovo [2007] UKAIT 00082 that s86(3)(a) did not amount to a power to allow an appeal outright on such a basis. Although AG was concerned with circumstances involving the existence of a policy, the Tribunal made clear at paragraph 44 that the effect of allowing an appeal on the grounds that the decision was not in accordance with the law "would not be to grant the appellant the substantive relief he seeks but merely to set aside the unlawful decision so that a lawful decision (whether in favour or against the appellant) may in due course be made."

16. Finally, in regard to the third ground, that "the person taking the decision should have exercised differently a discretion conferred by the immigration rules", the skeleton argument fails to take account of the fact that this was not a matter of a discretion conferred by the immigration rules. The application, as already stated, was made outside the immigration rules. Accordingly the appellant was unable to rely on the ground of appeal in s84(1)(f) and as found in AG, albeit with reference to a policy, where it is a question of an exercise of discretion outside the immigration rules "the Tribunal has no power to seek to substitute its own decision for that of the decision-maker". Accordingly in the appellant's case, the Tribunal had no power to allow the appeal outright on the basis that discretion ought to have been exercised differently.

17. In all of these circumstances I find that the Secretary of State's grounds are made out and that the judge had no power to allow the appeal outright. For that reason, and given that he did not make it clear on what basis he had allowed the appeal, I set aside his decision as containing material errors of law.

18. In re-making the decision I have considered, as suggested in the grant of permission, whether there should simply be substituted a decision allowing the appeal on the basis of the judge's findings and on the limited basis that the decision was not in accordance with the law and that the matter be remitted to the Secretary of State to make a lawful decision. However, matters have since moved on and the reason why the appellant sought an extension of leave no longer exists, in so far as the completion date of his course has now passed and he has had the benefit of the additional time requested. His evidence before the First-tier Tribunal was that he had no intention of staying in the United Kingdom once he completed his Masters and that he intended to return to Africa to take up the many opportunities open to him there or alternatively take up an offer to pursue studies at the Northern Caribbean University in Jamaica. There is no evidence before me to suggest that those intentions have since changed or that the appellant has not been able to complete his course. Accordingly there is no basis for the Secretary of State giving further consideration to exceptional or compelling circumstances, when it has not been suggested that any now exist and neither is there any basis for concluding that the Secretary of State's decision was unlawful.

19. No Article 8 grounds have been raised, but in any event there is clearly no basis upon which an Article 8 claim could succeed on the evidence available to me. It seems to me that the appeal has simply to be dismissed.

DECISION

20. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed and the decision of the First-tier Tribunal is set aside. I re-make the decision by dismissing Mr Agwubuo's appeal on all grounds.

Signed

Upper Tribunal Judge Kebede