



IAC-AH-RG-V1

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

Appeal Number: IA/29006/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 1 October 2014**

**Determination  
Promulgated**

**On 27 October 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SHAERF**

**Between**

**FAIYAZ HUSSAIN SYED  
(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Syed-Ali of Immigration Chambers, E1 2BT  
For the Respondent: Mr S Kandola of the Specialist Appeals Team

**DETERMINATION AND REASONS**

**The Appellant**

1. The Appellant is a citizen of India born on 2 September 1982. On 16 February 2010 he arrived with leave as a Tier 4 (Student) migrant. Before expiry of that leave he sought further leave in the same capacity which on

31 March 2012 the Respondent refused on the basis that the Appellant did not have a valid Confirmation of Acceptance for Studies (CAS). By a determination promulgated on 20 June 2012 Judge of the First-tier Tribunal Rintoul dismissed his appeal on immigration grounds but allowed it on human rights grounds. Subsequently, the Respondent granted the Appellant discretionary leave for the purpose of continuing his studies to expire on 4 May 2013.

2. On 2 May 2013 the Appellant applied for further leave in the same category to continue his course. Mr Syed Ali explained that the Appellant had not been able to continue his studies following Judge Rintoul's determination until he had received leave to remain because his studies were being pursued at an institution which was not publically funded. In consequence, he was unable to complete his studies within the term of his discretionary leave. At some point which is not clear from the documents in the Tribunal file the college at which he was studying lost its sponsorship licence.
3. On 21 June 2013 the Respondent refused the application on the basis of paragraphs 245ZX(c) and (d) of the Immigration Rules because the Appellant did not submit a valid CAS. Additionally, the most recent grant of leave had been on a discretionary basis and was not one of the types of leave specified in paragraph 245ZX(b) of the Immigration Rules which an applicant must have prior to seeking further leave as a Tier 4 (General) Student migrant.

### **The First-tier Tribunal's Determination**

4. The Appellant appealed under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended through his solicitors and requested an oral hearing. He did not attend the hearing in respect of which the First-tier Tribunal was satisfied as to service and the Respondent agreed that the matter could proceed without the Respondent being represented.
5. By a determination promulgated on 5 June 2014 Judge of the First-tier Tribunal Cooper dismissed the appeal on all grounds.
6. The Appellant in his own name sought permission to appeal which on 8 August 2014 Judge of the First-tier Tribunal P J M Hollingworth granted on the basis that it was an arguable error that it was not clear to the Judge why the Appellant's last period of leave had been granted on a discretionary basis. It should be noted that the determination of 2012 by Judge Rintoul was not before Judge Cooper and was only filed at the hearing in the Upper Tribunal.
7. The only other matter referred to in the grounds for appeal was an assertion that Judge Cooper had not dealt with other issues which issues were not specified.

## **The Upper Tribunal Hearing**

8. The Appellant attended and Mr Syed-Ali said he had been instructed only that day. He explained the previous grant of leave had been on a discretionary basis in consequence of the Appellant's 2012 appeal being allowed on human rights grounds. He produced a copy of the Respondent's letter granting that leave which in the early part of the letter made it clear that it was to enable the Appellant to pursue his studies and would be kept under review. Mr Syed-Ali went on to explain why the Appellant had not been able to commence his studies until subsequent to the grant of leave on 1 November 2012 to which I have already referred.
9. He submitted that Judge Cooper had not taken into account the reason why the Appellant had not been able to complete his course of studies which was because of the delay in the issue of the document granting him discretionary leave. This was an error of law. He confirmed the sponsoring college's licence had been revoked. I asked if the Judge had had any evidence before him about the background to the grant of discretionary leave when he determined the appeal without a hearing on the papers in the Tribunal file. He informed me the Judge did not have any such information.
10. I reminded Mr Syed-Ali that the first issue I had to decide was whether there was an error of law in the Judge's determination and it could not be said that there was an error if the Appellant had failed to put the relevant information before the Judge. I commented that it might have been a mistake on the part of the Appellant not to attend the hearing and not to have supplied all the relevant documents to the Tribunal. Mr Syed-Ali maintained that the facts found in the 2012 determination meant the Judge had made a materially incorrect determination which amounted to an error of law such that it should be set aside.
11. I enquired if the Appellant had any other documents or evidence to submit having regard to the directions issued on 27 August 2014 that the parties should have prepared for the hearing on the basis that if there was an error of law the Upper Tribunal could consider any additional evidence and re-make the decision at the same hearing. He confirmed he had no such evidence to submit.
12. For the Respondent, Mr Kandola submitted there was no error of law in the Judge's determination. The Appellant should have raised the issue of the discretionary leave in his original grounds of appeal since he was aware from the terms of the Respondent's decision that it was an issue or he could have sought an extension of his discretionary leave rather than leave to remain under the Points Based System. To support his case he should have submitted the 2012 determination and an explanation with evidence why he had not been able to complete his original course. The Appellant had applied for leave as a Tier 4 migrant and not for an

extension of his discretionary leave outside the Immigration Rules. The fact he had not held previous leave in a category which the Immigration Rules required for an application for further leave as a Tier 4 (General) migrant was a mandatory ground for refusing the application.

13. Mr Kandola also made the point that even if Judge Cooper had had notice of the 2012 determination it would have made no difference because the Appellant sought further leave as a Tier 4 (General) Student migrant and not further leave outside the Rules on a discretionary basis.
14. Any appeal relying on Article 8 of the European Convention outside the Rules would now have to meet the requirements of Section 117A(b) of the 2002 Act and additionally the Appellant's college was no longer a licensed Sponsor. He concluded the determination should stand.
15. In response, Mr Syed-Ali noted the Appellant had originally entered with leave under the Points Based System, his appeal in 2012 had been allowed under the principles of fairness set out in *CDS (PBS: "available" Article 8) Brazil [2010] UKUT 305 (IAC)*. The Judge could have considered the appeal as a refusal of further discretionary leave. It was unfortunate he did not have all the relevant information before him.

## **Findings**

16. I noted the Appellant's application leading to the 2012 decision had been refused under the Immigration Rules and he eventually obtained further leave on human rights grounds. His application for permission to appeal leading to the hearing before me had been made out of time and he had failed to prepare himself so as to comply with the provisions of standard directions issued by the Upper Tribunal on 27 August 2014.
17. There was no evidence of any educational or other achievements or what studies he would pursue and where, if his appeal was eventually successful.
18. The burden of proof is on the Appellant. He had failed to discharge this before Judge Cooper in the First-tier Tribunal and was not in a position to discharge it in the Upper Tribunal in the event that an error of law was found.
19. *E and R v SSHD [2004] EWCA Civ 49* considered the issue of the late submission of evidence by way of reference to the principles enunciated in *Ladd v Marshall [1954] 1 WLR 1489*. The Appellant has not given any reason for the failure to submit the evidence of the 2012 determination and the November 2012 grant of discretionary leave to the First-tier Tribunal. He has not sought to argue before the Upper Tribunal that it should be considered by the Upper Tribunal. Unlike *E and R* who had a full right of appeal to the Immigration Appeal Tribunal, the Appellant has a right limited, at least initially, to the ground that there is an error of law: see paragraph 92 of *E and R*.

20. In *R (Iran) and Others v SSHD [2005] EWCA Civ 982* the Court of Appeal reviewed the judgment in *E and R*. At paragraph 9 it gave a summary of the points of law which will most frequently be encountered in practice in considering whether there is an error of law and at paragraph 28 addressed whether unfairness resulting from a mistake of fact could amount to an error of law which was the basis put forward by Mr Syed-Ali. The mistake of fact claimed in this case is that the Judge did not know of the 2012 determination. The Court of Appeal referred to paragraph 64 of the judgment in *E and R* noting that the ordinary requirements for a finding of unfairness amounting to an error of law included that the Appellant or his advisors must not have been responsible for the mistake. They evidently were in this case. It is of note that the original grounds for appeal to the First-tier Tribunal were submitted by representatives for the Appellant who continued to represent him until four days before the First-tier Tribunal hearing.
21. Mr Kandola made the point that even if the Judge had had before him details of the 2012 determination the appeal would inevitably have failed under the Immigration Rules because the Appellant previously did not leave in a category which permitted the grant of further leave as a Tier 4 (General) migrant. The grounds of appeal to the First-tier Tribunal contained a claim under Article 8 of the European Convention yet other than the mere assertions in the Appellant's witness statement there was no evidence before the First-tier Tribunal or which could have been submitted to the Upper Tribunal in support of his claim to show that his private life, as a student or otherwise, engaged rights protected under Article 8 the European Convention.
22. On the basis of the evidence before the Judge there was no error of law in his determination. The Appellant has failed to persuade me that the evidence comprised in the 2012 determination should now be admitted because he has not shown that there are sufficiently strong reasons to admit it. The Appellant has not explained his failure to prepare a proper bundle in support of his appeal in the First-tier Tribunal. Similarly, he has not explained why he has also failed adequately to prepare himself for the Upper Tribunal hearing and I have in mind, amongst other matters, the obligations imposed by the second of the Upper Tribunal's direction of 27 August 2014.

### **Anonymity**

23. There was no request for an anonymity order and having considered the papers in the Tribunal file and heard the application consider that there is no need for such.

### **DECISION**

**The First-tier Tribunal's determination did not contain an error of law and shall stand.**

Signed/Official Crest  
2014

Date 23. x.

Designated Judge Shaerf  
A Deputy Judge of the Upper Tribunal