IAC-AH-SC-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00483/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31st July 2015	**On 10th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR MOSTOFA-AL GALIB
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Mahmoud, Solicitor
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh born on 19th October 1987. The Appellant made a combined application for leave as a Tier 4 (General) Student for a biometric residence permit on 29th October 2013. That application was refused by the UK Border Agency on the grounds that the Appellant did not meet the requirements of paragraph 245ZX(ha) of the Immigration Rules.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal P-JS White sitting at Richmond on 19th December 2014. In a

determination promulgated on 26th January 2015 the Appellant's appeal was dismissed both under the Immigration Rules and on human rights grounds.

3. On 4th February 2015 the Appellant lodged Grounds of Appeal to the Upper Tribunal. On 11th March 2015 First-tier Tribunal Judge Colyer granted permission to appeal. Judge Colyer considered that it was arguable that as the Appellant's course of study was ACCA and that this is a professional development course which exempts him from the five year rule that the judge erred in law by following an incorrect approach. In addition the grounds refer to the Appellant's request for an adjournment at the hearing that was refused. Judge Colyer noted the contention that the correct test was not applied and that the Appellant's representatives submit that the judge had failed to follow the test of fairness in accordance with the case of *Nwaigwe (adjournment: fairness) [2014] UKUT 418 (IAC)*.

4. On 27th March 2015 the Secretary of State responded to the Grounds of Appeal under Rule 24. That response highlights the issues. Whilst contending that no material error arises the Respondent states that the ACCA course is a NQF level 7 and pursuant to Rule 245ZX(ha) it is therefore a course "at degree level or above." Further it is submitted that there was no conflict of fact in the case, the sole issue being whether the leave to study NQF level 7 would take the Appellant over the five year limit specified in paragraph 245ZX(ha). The Respondent avers that the Appellant suffered no prejudice as he would have been able to add nothing to a factual application of the law and in any event the First-tier Tribunal Judge had at paragraph 9 made a finding that the evidence before him did not demonstrate that the Appellant was unable to attend.

5. It is on that basis that the appeal comes before me to determine whether there is a material error of law. The Appellant appears by his instructed solicitor Mr Mahmoud. The Secretary of State appears by her Home Office Presenting Officer Ms Everett.

Submissions/Discussions

Preliminary Issue

6. Mr Mahmoud points out that the college concerned has now had its licence revoked and he would like 60 days on his client's behalf to obtain a new college. Ms Everett points out that this is not an issue that is extant before the Tribunal. I agreed and I did not allow any adjournment. If there is to be a new and fresh application made by the Appellant then that is one that he must consider with his legal advisors. It was not pertinent to the issue outstanding before me.

Submission/Discussion – The Authority of Hussain and Akhter Unreported – 28th July 2014

7. Mr Mahmoud seeks to rely on this decision as being supportive of his appeal. This decision was one of my own sitting as a Deputy Judge of the Upper Tribunal. It was the contention of Mr Mahmoud that that decision is supportive of his appeal.

8. I make the following findings thereunder firstly that decision is not binding on me and can be easily distinguished on the facts. Secondly this appeal was allowed with the consent of the Secretary of State and the sole purpose of allowing that appeal was to enable the first Appellant to obtain an extension of his visa in order for him to be awarded his degree under paragraph 245(zy) Immigration Rules. Such circumstances have no bearing on the present case and I conclude firstly that the facts can be distinguished in the present appeal and secondly that the decision in *Hussain* and *Akhter* is of no assistance to the Appellant in this appeal.

General Submissions/Discussions

9. Mr Mahmoud states that the Appellant has passed five out of fourteen of his required exams on the course for which he was originally granted leave but he did not pass all necessary examinations when he took them because it was necessary to pass nine exams. As a result he applied for a diploma in management, a course that would not finish until 2016 and this would have led to him exceeding his five year limit. He contends that the Appellant merely wants to complete his education and that he came here in 2011. He acknowledges because the Appellant only passed five out of his nine exams he was not able to stay at his original college but contends that he will now ask if it is possible for him to return to his original college. Alternatively he seeks to rely on a claim pursuant to Article 8 within the Rules contending that this is a case of exceptional circumstances.

10. Ms Everett in response points out that Article 8 is not appealed. She takes me to the guidance and as to what is indicative therein and that the ACCA leads to a professional qualification, it is not professional development and that any reliance on the authority of *Mirza (ACCA fundamental level qualification not a recognised degree) [2013] UKUT 00041 (IAC)* is ill-conceived and that the judge did not err in finding that the Appellant would go above a degree level course. She submits it is disingenuous to go on a complementary course insofar as it is the same course.

The Law

11. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

12. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

13. Submissions in this matter do not particularly assist the Appellant. I am not retrying this matter, the question is whether or not there was a material error of law in the decision of the First-tier Tribunal Judge. It has to be noted that since the Appellant was first asked to leave his college he has attempted to take his exams on two subsequent occasions in June 2013 and 2014. He has failed them on both occasions and he now seeks to contend that he has been held at a significant disadvantage because he could not attend college.

14. The correct and proper method of approaching this matter is to give due consideration to the approach that has been adopted by the First-tier Tribunal Judge. Firstly he has given full and proper consideration to the application for an adjournment and has set out his reasons for refusal at paragraph 9. It is merely contended that there is an inherent unfairness to the Appellant. That is not a sustainable argument. The judge was fully aware of the circumstances and at paragraph 9 has indicated that he was satisfied there were no facts that the Appellant was unable to attend the appeal, that the appeal had previously been adjourned on another occasion and that it would not be just to proceed to adjourn again. These were findings that the First-tier Tribunal Judge was perfectly entitled to make.

15. Thereafter he has gone on to give his full findings and reasons. He has analysed the basis of the Appellant's application under paragraph 245ZX and has gone on to give full and detailed reasons and made findings which he was entitled to under the Rules that if the appeal was allowed the Appellant would be studying at degree level or above for a period in excess of five years and therefore the appeal fails under the Immigration Rules. Such contention is supported by the Secretary of State's guidance issued on 6th May 2015.

16. The First-tier Tribunal Judge has then gone on to consider the position under Article 8. It is made very clear to me by Ms Everett that there is no appeal extant under Article 8. I agree with that contention but point out that even if it were allowed the facts of this matter are against him. This was an Appellant who failed his initial exams. He appears to have made virtually no effort to have obtained suitable alternative college tuition having merely attended on his own to take the re-sits over a twelve month period. The Appellant's failure to assist himself speaks volumes and even now the Appellant's legal representatives merely state that he would seek to attend college rather than there being any guaranteed certainty that he would be in a position to proceed. It therefore is inconceivable that even if I had been prepared to allow (which I am not) the Appellant to bring a late appeal under Article 8 that he would succeed.

17. This appeal amounts to little more than disagreement with the decision of the First-tier Tribunal Judge. That decision was one that he was perfectly entitled to make. In such circumstances I find that there is no material error of law and the Appellant's appeal is dismissed.

Notice of Decision

The decision of the First-tier Tribunal discloses no material error of law and is dismissed and the decision of the First-tier Tribunal Judge is maintained.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge D N Harris