



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

Appeal Number: IA/01334/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 10th February 2015**

**Determination Promulgated
On 29th April 2015**

Before

**MRS JUSTICE THIRLWALL DBE
UPPER TRIBUNAL JUDGE DAWSON**

Between

KAYANI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Lourdes instructed by Morgan Mark solicitors

For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against a decision by FtT Judge Sangha of 10th October 2014 (hearing 11th August 2014) dismissing an appeal against a decision by the Secretary of State dated 11th December 2013 refusing to vary leave to remain and giving directions for removal under Section 47 of the Immigration and Asylum Nationality Act 2016. Permission to appeal was granted by a judge of the FtT. We refer to the terms of the grant later in this determination.
2. The history is set out uncontroversially in the FtT decision. The appellant was born on 1st April 1989. He is a citizen of Pakistan. On 20th

September 2010 he was granted leave to enter the UK as a Tier 4 (general) student until 6th June 2012. On 22nd August 2012 he was granted further leave to remain in the UK as a Tier 4 (general) student until 19th November 2013. On 18th November 2013, the appellant made a combined application for leave to remain in the UK as a Tier 4 (general) student under the points based system and for a biometric residence permit. The Secretary of State refused his applications for reasons set out in the letter of 11th December 2013. The appellant needed to score 30 points in respect of attributes for a valid Confirmation of Acceptance for Studies (CAS). In the decision letter the Secretary of State stated that she was not satisfied that the appellant had provided the specified documents listed on the CAS used to obtain the offer of a place on a course from the sponsor as required by paragraph 120 (FD) (a) of Appendix A of the Immigration Rules (the Rules). The missing document was "the Intermediate Certificate examination supplementary 2008 awarded by the Board of Intermediate and Secondary Education Rawalpindi and dated 25.5.10". The appellant could not therefore meet the requirements to be awarded 30 points under Appendix A of the Rules.

3. In short grounds of appeal of his own composition which we reproduce in part below, the appellant said:

"(i) that the Secretary of State had acted contrary to law in refusing the appellant's application;

(ii) the appellant maintains that contrary to section B in order to awarded points of CAS the appellant must supply the specified document listed on the CAS that the appellant used to obtain the offer of a place on a course from the sponsor, in this way appellant was failed to provide the intermediate certificate examination, Rawalpindi dated 25th May 2010 by the Secretary of State. He submitted all relevant documentation to UKBA demonstrating that he is entitled to a Tier 4 student extension. In view of the above, the appellant maintains that the decision to refuse his application should not be allowed to stand. The appellant reserves his right to provide further grounds of appeal upon receipt of hopeful bundle."

4. The issue before the FtT judge therefore was whether or not the appellant had provided to the Secretary of State the intermediate certificate examination Rawalpindi dated 25th May 2010. It was the Secretary of State's case that the document had not been received.

5. The appellant did not attend the hearing which took place on 11th August 2014. A fax message was sent from the offices of Edward Marshall, solicitors, to the IAC in Birmingham on that date. It gave notice of a change of address for correspondence to a "New address: 80 Nightingale Lane, Wanstead E11 2EZ. Kind regards Awayi Kayani." The address given is that of the solicitors.

6. There is no reference in the letter to the hearing that day and no reference to the fact that the appellant would not be attending. No explanation was given to the FtT judge for his absence. Before us it was accepted that the appellant knew of the hearing. We were told that on that day he was feeling unwell, he could not afford a legal representative and so was afraid to come. No complaint is made about the FtT's judge's decision to hear the case in his absence. There was plainly no reason to do otherwise.
7. In setting out the detail of the appellant's claim at paragraph 8 of his decision, the judge accurately set out the history of the matter. He correctly identified that it was the appellant's case that he had submitted all relevant documentation to demonstrate that he was entitled to a Tier 4 student extension. In the course of the hearing before us we clarified other factual matters. Confirmation was given that the original application was sent to the Secretary of State on behalf of the appellant by Edward Marshall, solicitors. The grounds of appeal to which we referred at paragraph 3 were sent by the appellant himself.
8. The judge recorded the appellant's assertion in the grounds of appeal that he had provided the relevant documents but he noted that the missing documents were not in the respondent's bundle nor were they attached to the notice of appeal and grounds. They were not before the tribunal. The judge went on to observe that the appellant had not "attended before me today to give evidence in support of his appeal and nor has he produced either the original or a copy of the certificate referred to above" - he was there referring to the Intermediate Certificate Examination, Supplementary 2008 to which we refer above.
9. Unsurprisingly, therefore, given the totality of the evidence before him the judge concluded that the appellant had not discharged the burden of proof upon him and he found that the reasons given by the respondent justified the refusal to grant the application. The decision of the FTT judge was dated 7th October 2014. It was promulgated on 10th October 2014.
10. The application for permission to appeal to the Upper Tribunal was dated 17th October 2014. It is completed by Edward Marshall Solicitors of 18 Nightingale Street, Wanstead E11 2 Z. It says that the application is made in time as the decision was received on the 14th October 2014. The grounds for permission to appeal are dated 16th October 2014. Paragraphs 1-4 set out the background. We reproduce paragraph 5 verbatim,

"The applicant filed an appeal to the Honourable Court on the ground that the all original certificates are with the Home Office but court passed the remarks that the certificate is not in the although the certificate has to be with the bundle. The applicant was not present in the court that is why there was no statement was presented in the court".

Paragraph 6 reads:

"The original intermediate certificate of the applicant has received by the applicant on 15.10.2014 from the Home Office. The common practice is

that the sponsor always looks the all relevant documents and then issue the CAS letter.”

Paragraph 7 reads:

“The error of law is very clearly identified in the present determination that the original documents are available which was presented to the sponsor at the time of getting CAS and also at the time of the application made to Home Office.”

Paragraph 8 reads:

“It is requested that the applicant is a genuine student and his intention is to continue his studies but only by mistake certificate was overlooked by the Home Office”.

Paragraph 9 reads:

“The applicant is sending original certificates with the permission to appeal which were received by the applicant from the Home Office on 15.10.2014.”

11. There is on the file a letter from Edward Marshall received at Loughborough support centre on 20th October 2014. It is dated 17th October 2014. It reads as follows, “we have sent application for permission to appeal and the original form by fax on 16.10.2014. The original document put in needs to be dealt with the original application. Yours sincerely Edward Marshall.” It is puzzling that this letter omits to mention that Edward Marshall solicitors had submitted the original application and (if it be the case) that they had submitted with it all relevant documents including the original certificate.
12. We note that the original grounds of appeal against the initial refusal did not mention that it was the solicitor had sent the certificate which the Secretary of State asserted was missing.
13. Original documents, including the 2010 certificate in relation to the 2008 attainment were duly received by the Tribunal and put onto the file.
14. In the reasons for granting permission to appeal, FtT Judge de Haney said:
 - “(2) The grounds of appeal claim that the certificate referred to by the judge (and respondent) has not been produced [we think this should read “as not being produced”] was either in the bundle before the judge or in the respondent’s bundle;
 - (3) the fact that this document is now in the file, having been returned by the respondent to the appellant and resubmitted with the grounds, adds weight to this argument;
 - (4) the grounds reveal an arguable error of law.”
15. It is not entirely clear what arguable error of law was there being referred to. It may be that the FtT judge had in mind that were it the case that there had been a mistake as to fact by the FtT judge as a result of inaccurate and misleading information from the Secretary of State the

decision could arguably be set aside on the grounds that there had been procedural unfairness. We should say that the observation at (3) that the document is now in the file only confirms that Edward Marshall had sent it on the 17th October. There was no evidence that the document sent by Edward Marshall on 17th October had originally been sent to the Home Office and/or to the Tribunal. It may well be that had this been known to the FT judge who granted permission he would have taken a different course. In the event we have considered the appeal.

16. It was not always entirely easy to follow the submissions of Mr Lourdes who appeared on behalf of the appellant. Stripped to their essentials they were three in number, two of them new grounds that had not previously been relied upon or foreshadowed.
17. The first was that the judge had erred in concluding that the document had not been sent. As we have already observed, there was no other possible finding open to him. We turn then to whether, as a matter of fact, the document had been sent to the Home Secretary. In our judgment the evidence comes nowhere near satisfying us of that. In particular, Edward Marshall (who have instructed Mr Lourdes today) have not at any stage produced any evidence in support of the contention that they sent that document to the Secretary of State. On the contrary, in their letter of 17th October they do not suggest that they had sent that document previously to the Tribunal or to the Home Office. While it is asserted in the grounds of appeal that they were able to send a copy on 17th October because it had been received from the Secretary of State on the 15th October there was no statement to that effect either. Nor was there any envelope with a date stamp or indeed any covering letter from the Home Office returning the document. Whilst the Home Office Presenting Officer said he supposed it was possible that some caseworker had simply pushed all the documents into an envelope without a covering letter, the fact that the documents were allegedly received has to mean that there would have been an envelope which would have borne a date stamp and receipt of which would and should have been recorded on the solicitors' file. Nothing was produced.
18. Nothing we heard today led us to conclude that there was any mistake as to fact which led to the wrong conclusion being reached by the FtT judge about the receipt by the Secretary of State of that document.
19. At an early stage of the hearing Mr Lourdes sought to raise a point about unfairness, based on the absence in this case of evidential flexibility by the Secretary of State. This point, raised for the first time, 15 months after the decision of the Secretary of State, was far too late. We did not permit him to argue this ground.
20. Finally, Mr Lourdes sought to argue an Article 8 point. Again, this was the first time that this had been mentioned. This was far too late. We remind ourselves in any event of the observations of the Supreme Court in **Patel and Others against the Secretary of State for the Home**

Department [2013] UKSC 72. At paragraph 57 of the judgment of Lord Carnwath the following appears;

“It is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State’s discretion to allow leave to remain outside the Rules, which may be unrelated to any protected Human Rights.... One may sympathise with Sedley LJ’s call in *Pankina* for common sense in the application of the Rules to graduates who have been studying in the UK for some years. However, such considerations do not by themselves provide grounds for appeal under Article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under Article 8.”

21. It was not clear to us how a successful Article 8 argument could be mounted in this case. For those reasons we are quite satisfied that the decision of the FTT judge was correct. There was no error in his approach. There was no error of law. We are not satisfied on the balance of probabilities that the relevant document was before the Secretary of State. Accordingly, this appeal is dismissed.

Signed

Date 28 April 2015



Pp Mrs Justice **Thirlwall**