Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/37580/2014**

THE IMMIGRATION ACTS

At Field House
On 28th August 2015

Decision and Reasons Promulgated On 6th October 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

MR FARHAN AHMED
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance.
For the Respondent: Mr P Nath, Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. The appellant is a national of Pakistan, born on 25th January 1983. He came to the United Kingdom in early 2011 as a student.

2. On 3 July 2014 he applied for a Residence Card as proof of his entitlement to reside by reason of European Treaty free movement rights. This was on the basis of his marriage to Ms Andrea Nistor on 11 February 2014. She is a national of Romania and the appellant said she was exercising Treaty rights as a student. He stated she was

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studying for an advanced Diploma in English at the London State College in Hounslow and he was financing her.

3. His application was refused on 1 September 2014 on the basis his wife was not a qualified person within the meaning of regulation 4 and 6 of the immigration (EEA) regulations 2006 (`the 2006 regulations').

4. Regulation 6(1)(e) provides that a qualified person includes someone who is an EEA national and is in the United Kingdom as a student. Regulation 4 (1)(d)(i) of the 2006 Regulations defines a student as being someone who:

> is enrolled for the principal purpose of following a course of study (including vocational training), at a public or private establishment which is—
>
> > (aa) financed from public funds; or
> >
> > (bb)otherwise recognised by the Secretary of State as an establishment which has been accredited for the purpose of providing such courses or training within the law or administrative practice of the part of the United Kingdom in which the establishment is located;
>
> (ii) has comprehensive sickness insurance cover in the United Kingdom; and
>
> (iii) assures the Secretary of State, by means of a declaration, or by such equivalent means as the person may choose, that he has sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence.

Regulation 4(4) provides that for the purposes of paragraphs (1) (c) and (d) and paragraph (2), the resources of the person concerned and, where applicable, any family members are to be regarded as sufficient if —

> (a) they exceed the maximum level of resources which a British citizen and his family members may possess if he is to become eligible for social assistance under the United Kingdom benefit system; or
>
> (b) paragraph (a) does not apply but, taking into account the personal situation of the person concerned and, where applicable, any family members, it appears to the decision maker that the resources of the person or persons concerned should be regarded as sufficient.

5. In the reasons for refusal letter the respondent said his wife was not a student because the college she was enrolled in was not recognised as bona fide.It was not on the respondent's list of Tier 4 approved sponsors. His wife had to provide evidence she had access to funds of her own and could not rely as she did upon a declaration of financial support from the appellant.

6. In a letter dated 18 November 2014 submitted to the First-tier Tribunal the appellant said there is no requirement for the college to be on the respondent's Tier 4 register. When the application was submitted the college was on the Tier 4 register but not by the time of decision. However, it continued to be listed in the Department of Education and Skills register. He stated he was financially supporting his wife through her studies and has paid her tuition fees. He stated there was no requirement that she have funds on her own account.

The First tier Tribunal

7. His appeal was heard on the papers by First-tier Judge Burns at Glasgow on 14 January 2015. In a decision promulgated on 27 January 2015 the appeal was dismissed. Judge Burns agreed with the respondent's approach as to what was a recognised establishment and that it was for the student personally to have funding. Judge Burns also agreed with the respondent's approach to article 8, namely that if the appellant wanted this considered he should make a separate fee charged application. In the alternative, on the limited information available, the judge concluded the requirements of appendix FM and paragraph 276 ADE were not met and there was no basis for considering article 8 outside the rules.

The leave

8. The appellant sought leave to appeal to the Upper Tribunal on the basis the appellant's situation warranted consideration under article 8 as a freestanding right. It was argued that the decision was disproportionate and this amounted to a material error of law.

9. Permission to appeal was granted, based on a different approach. This was granted on the basis it was arguable the judge erred in finding the London State College did not meet the requirements of regulation 4(d)(i)(bb) of the 2006 regulations given that it was listed in the Department of Education and Skills register. Leave was also granted on the basis it was arguable the judge erred in law in rejecting the financial declaration and the evidence of private sickness cover. Finally, permission to appeal was granted on the basis it was also arguable that the judge should have considered the appellant's article 8 rights.

The Upper Tribunal

10. A letter from Morgan Mark solicitors dated 26 August 2015 is on file. It states that have received no instructions from the appellant and will not be attending. They state the appellant has been informed of the date of hearing and that he would be attending in person. In fact there was no such appearance. I was satisfied the appellant was aware of the hearing and that it is the interest of justice to proceed in his absence.

11. I have not had the benefit of any submissions on the points raised nor have I been referred to any authority. However, having considered the points at issue is my conclusion that no material error of law is disclosed.

12. The definition of a student was amended to reflect the fact that the Secretary of State's mechanism of approving private education institutions is not now via the Department for Education Register of providers but is via a system of accreditation by the Secretary of

State for the Home Department (see the Immigration (European Economic Area) (Amendment) Regulations, 2012/1547, Sch 1, para 2(a) (July 16, 2012). Consequently, Judge Byrns approval of the respondent's approach with regard to the course was correct.

13. No authority regarding resources has been referred to. The provisions of regulation 4 (1) (d) (iii) appears to allow for self-certification whereby the student declares they have sufficient resources not to be a burden. The source of the resources not identified. Presumably a simple declaration would not be sufficient because the respondent must be `assured'. Without further argument I am not in a position to say more. However, even if the judge were wrong in the approach taken it would not be material because the course requirement is not met.

14. The judge did comment on the appellant article 8 rights. The judge's enquiry was limited because, as is the position now, the appellant was not present and no argument was developed. Those rights were considered in the context of the immigration rules, with the judge see no reason for going beyond the rules. It is correct in law that there is no need to go beyond the rules unless there is good reason.

15. The judge's primary stance was that article 8 considerations were premature. In this regard, I find the judge was correct and the position has subsequently been clarified. An amendment to the EEA Regulations 2006, effective from 6th April 2015, means that EEA nationals and their family members will only be able to appeal against an 'EEA decision' on the ground that it breaches their rights under the EU Treaties in respect of entry to, or residence in, the United Kingdom. If they wish to raise asylum or human rights as part of their EEA appeal, they can only do this in response to a section 120 notice issued by the Home Office, or as a new matter raised before the Tribunal, but subject to the Secretary of State's consent.

16. Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC) held that where no notice under section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot bring a Human Rights challenge to removal in an appeal under the EEA Regulations.

Decision.

It has not been established that there is a material error of law in the decision of Judge Burns of the First-tier Tribunal. That decision, dismissing the appellant's appeal, shall stand.

Deputy Upper Tribunal Judge Farrelly

Anonymity.

The First-tier Tribunal did not make an order for anonymity. No application for such an order has been made before me. I see no reason of substance for making one

Deputy Upper Tribunal Judge Farrelly