Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/50214/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 February 2015	**On 12 February 2015**

Before

THE HONOURABLE MRS JUSTICE PATTERSON DBE
DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOSEPHINE OWUSU AMANKRAH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr N Paramjorthy, Counsel, Chris Raja Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of 30 October 2014 by First-tier Tribunal Judge Beach. In that decision the First-tier Tribunal Judge allowed

the appeal of Josephine Owusu Amankrah. In part the appeal had been under the Nationality, Immigration and Asylum Act 2002 against the decision dated 19 November 2013 to refuse to vary leave to remain in the United Kingdom and to remove the then appellant from the United Kingdom.

2. The respondent was not satisfied that the appellant fulfilled the requirements of paragraph 245ZX of the Immigration Rules as the appellant did not have the required level of funds available in her bank account for the requisite period of time.

3. The appellant had contended that she met the criteria for leave to remain under the points-based system and was entitled to a biometric residence permit.

4. In her judgement the First-tier Tribunal Judge found that in the bank statements provided as at 30 July 2013, the balance was £980.24 but as from 25 September 2013 the balance was in excess of £15,000. Under the Rules the appellant was required to have the sum of £6,325 in her account for a continuous 28 day period prior to the application. The application was dated 7 October 2013.

5. In her decision the First-tier Tribunal Judge said at paragraph 15, having set out the financial state of affairs which we have just summarised, "It is clear then that the appellant cannot fulfil the requirements of paragraph 245ZX because the funds available to her via her sponsor were less than those required for the 28 day period."

6. She then said, in paragraph 16:

> "However, the respondent always retains the residual discretion in considering applications and there is no evidence before me that there was any consideration of exercising that residual discretion in favour of the appellant given the fact that the bank balance was clearly well in excess of the required amount for the last five days of the 28 day period."

7. As a result her decision was that the appeal was allowed to the limited extent that the decision is not in accordance with the law and the application therefore remains outstanding before the respondent.

8. On 6 November the respondent appealed on three bases but concentrated on paragraph 16 of the decision letter which I have read out and paragraph 17.

9. Paragraph 17 reads:

> "Furthermore, a decision had been made to remove the appellant from the United Kingdom but the respondent did not consider whether there were any private life or exceptional circumstances such that the removal of the appellant was not required."

10. The grounds of appeal which are relied upon are firstly, that the learned judge failed to followed established authority as restated in the case of **Marghia [2014] UKUT 366**

and, as a result, the judge made an error of law in allowing the appeal as there was no residual discretion.

11. Secondly, there is no discretion within Immigration Rule 245ZX and, thirdly, there were no representations made to the Secretary of State upon which she could exercise a discretion or exceptional circumstances brought to her attention to render the decision unlawful.

12. Permission to appeal was given on 17 December 2014. Those grounds have been elaborated by the respondent before us but can be put succinctly, namely, firstly, that there is no residual discretion contained within the Rules. There is no case law which indicates that the Secretary of State has to expressly articulate that she has considered any residual discretion. Secondly, there is no discretion within the Rules themselves.

13. The applicant submitted through Mr Paramjorthy that the case of **Marghia** is misguided in its application here because the case had been allowed because of the common-law duty to act on the public law principle of fairness which is not the position here. He contends that the case of **Ukus [2012] UKUT 307** is relevant because that deals with the position where a decision-maker has a discretion which is vested in him and that makes it clear that the exercise of that discretion is appealable before the Tribunal.

14. Mr Paramjorthy also made it clear that the case of **Marghia** was not before the Tribunal when it considered the matters. Despite the able way that Mr Paramjorthy has made his submissions we reject them.

15. The relevant Immigration Rule 245ZX(c) reads:

> "To qualify for leave to remain as a Tier 4 (General) Student under this Rule an applicant must meet the requirements listed below. If the applicant meets these requirements leave to remain will be granted. If the applicant does not meet these requirements the applicant will be refused."

16. The wording in our judgment of the Rule is clear. If the requirement under the Rule is met leave to remain will be granted. If it is not leave to remain will be refused. The Rule, therefore, imposes an absolute requirement in two ways. Firstly, on the applicant to meet the requirement of the Rule and secondly, on the respondent to grant leave to remain if that requirement is met. If it is not met the obligation is to refuse leave to remain. There is no discretion within that Immigration Rule. To be granted leave to remain a Tier 4 Migrant must satisfy the Immigration Rules and score points against two sets of objective criteria to achieve an overall pass mark of 40 points.

17. An applicant's score is made up of two component parts. First, Attributes (Confirmation of Acceptance for Studies) in respect of which 30 points is awarded. Secondly, Maintenance (Funds) for which 10 points is awarded. In the instant case

the applicant scored 30 points for the Confirmation of Acceptance for Studies but nothing under the heading of maintenance.

18. The initial decision letter of the Secretary of State dated 19 November 2013 explained that the applicant needed to show that she was in possession of £6,325 for a consecutive period of 28 days to meet the Tier 4 (General) Student Migrant maintenance funds requirements as required under paragraph 1A of Appendix C of the Immigration Rules. As set out the bank statements submitted did not show the requisite amount for the required period of time. In other words the funds available to the appellant via her sponsor were less than were required for the 28 day period. As such the First-tier Tribunal Judge found that the applicant could not fulfil the requirements of Rule 245ZX(c) of the Immigration Rules.

19. The question then of whether there was any residual discretion became critical to the success or otherwise of the application. As the case of **Marghia** makes clear in paragraph 10 where it says this:

> "It was a matter for the Secretary of State as to whether or not she exercised any residual discretion to permit the claimant to have a further Tier 4 visa notwithstanding her clear inability to meet the criteria set out in the Rules. That exercise of such residual discretion which does not appear in the Rules is absolutely a matter for the Secretary of State and nobody else including the court. (See **Abdi [1996] ImmAR 148**). The Court should not have sought to impose its own view. This trespassed upon the proper functions of the executive. Nor could there be any suggestion of any procedural unfairness in this case. The mere fact that the judge in question may have had sympathy for the claimant or regard the substantive decision of the Secretary of State as 'unfair' is not to point."

20. In paragraph 11 the judgment continues:

> "This was a case in which the Rules were crystal clear and the failure to meet the breach of Rules was manifest. It was therefore open to the Secretary of State to makes the decision that she did in her decision letter of 12 December 2013, the claimant having failed to meet the requirements of paragraph 245ZX(i) of the Immigration Rules the judge erred in law and we set aside the decision and remake it."

21. As in the case of **Marghia** it is a matter exclusively for the Secretary of State as to whether she exercises any residual discretion to permit the applicant to have a further Tier 4 visa notwithstanding the applicant's inability to meet the Rules. There is no requirement within the Rules or any case law which makes it incumbent upon the Secretary of State to go further and articulate whether she has considered any residual discretion which exists outside the Rules and to set out the basis upon which she considered that it was inappropriate to so exercise.

22. It follows therefore (1) That on the plain and ordinary language of the Rules the applicant was unable to comply with them. There is no residual discretion within

the Rules enabling a First-tier Tribunal Judge to allow the appeal. (2) There is no residual discretion outside the Rules available to the First-tier Tribunal Judge to enable her to allow the appeal. In those circumstances ground 3 falls away but we do note that there was in fact no material before the Secretary of State in any event upon which any residual discretion could have been exercised.

23. The decision of the First-tier Tribunal contained a material error of law and is set aside. In the circumstances of this case, the inevitable consequence of this is that we substitute a decision dismissing Ms Owusu-Amakrah's appeal to the First Tier Tribunal. For those reasons we allow this appeal.

Notice of Decision

The appeal is allowed.

Signed Date 09/02/2015

Mrs Justice Patterson