



**Upper Tribunal
(Immigration and Asylum Chamber)**
IA/07704/2015

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 16 March 2016**

**Decision & Reasons Promulgated
On 8 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**MR MOHIB ULLAH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Presenting Officer
For the Respondent: Mr K. Manzur-e-Mawle, counsel instructed by
Morgan Hall solicitors

ERROR OF LAW & REASONS

1. The Secretary of State for the Home Department appeals against a decision by First tier Tribunal Judge Sweet promulgated on 15 September 2015 allowing the appeal by the Respondent against a

decision dated 7 February 2016, refusing to grant him leave to remain outside the Immigration Rules.

2. The Respondent, to whom I shall refer as the Claimant, is a national of Pakistan, born on 2 January 1986. He arrived in the United Kingdom in July 2007 as a student and has extended his leave to remain as a Tier 4 student until 2012 following which he obtained a Tier 1 (Post Study Work) visa valid until 15 November 2014. In March 2014 he went to Pakistan for a family visit and on his return to the United Kingdom in July 2014 he was detained and his passport was retained by the Secretary of State for investigation with regard to the English language test. However, his passport was returned to him on 19 September 2014 and his leave to remain was reinstated.

3. On 15 November 2014, the Claimant applied for leave to remain outside the Immigration Rules in order that he could apply for a PhD, his case being that although he had applied to a number of Universities, he was unable to be accepted as a student because he did not have his passport and by the time his passport was returned to him in September 2014, there was insufficient time to apply.

4. This application was refused by the Secretary of State on 7 February 2016 on the basis that the Claimant could have returned to Pakistan and made an entry clearance application from there and the Secretary of State was not satisfied that there were particularly compelling circumstances to justify the exercise of discretion outside the Immigration Rules.

5. The hearing came before Judge of the First tier Tribunal Sweet for hearing on 2 September 2015. In a decision and reasons promulgated on 15 September 2015, the Judge held as follows at 13:

“I am satisfied that his reason for not applying for a PhD course soon after his previous course ended (in 2012) was because he wished to obtain some practical experience of work beforehand. I accept his explanation. The passport was wrongly seized from him on return to the UK from a family visit to Pakistan in July 2014 and by the time the passport was returned to him (by way of a letter date 19th September 2014) it was too late for him to apply successfully for a PhD course. I am persuaded by his explanation and rather than forcing him to return to Pakistan to make an application from that country, I direct the Respondent to grant him a three-month period of limited leave to remain so that he can regularise his stay and approach universities for a PhD course and thereafter make a Tier 4 application.”

6. The Secretary of State applied for permission to appeal, in time, on the basis that the Judge had made a material error of law on the following bases:

(i) it would be realistic for someone intending to study for a doctorate to apply for courses before July 2014 and the Appellant not being in possession of his passport would not have prevented him from having made the necessary application;

(ii) if the Appellant wished to switch to being a Tier 4 student he needs to have appropriate leave – in this instance the FTTJ is directing leave be granted outside the rules to allow the appellant to obtain a place on a PhD course – if this were to be granted it would in fact not allow the appellant to switch to being a Tier 4 migrant.

7. Permission to appeal was granted by First-tier Tribunal Judge Colyer on 20 January 2016 on the basis that it was arguable that the Judge had misdirected himself and that the grounds are arguable.

Hearing

8. At the hearing before me, Mr Clarke for the Secretary of State handed up at copy of paragraph 245XZ of the Immigration Rules and submitted that should the Secretary of State grant the leave directed by the Judge at [13] it would not assist the Appellant because under paragraph 245ZX(b) he must have last been granted entry clearance or leave to enter or leave to remain in the specified categories set out therein. He submitted that the Secretary of State would not be able to grant discretionary Tier 4 leave because the Appellant did not have a CAS [245ZX(b)] nor was there evidence to show that he met the maintenance requirements [245ZX(c)].

9. In response, Mr Manzur-e-Mawla accepted that it is common ground that without having the passport the Claimant is not in a position to proceed with any application and that is a fact. He further accepted that he could not switch to a Tier 4 category if he is granted limited leave outside the Rules. He submitted, however, that the Claimant could have been treated as a prospective student under paragraph 245ZX (viii) although he was unable to assist in respect of whether or not the Claimant met the criteria for assessment as a prospective student.

Decision and reasons

10. I reserved my decision, which I now give with my reasons. I do not find that the grounds of appeal disclose any material errors of law in the findings by the First tier Tribunal Judge. Ground (i) is merely a disagreement with the finding of fact at [13] and (ii) is simply a statement of fact.

11. It was open to the First tier Tribunal Judge pursuant to section 86(3)(b) of the NIAA 2002 to allow the appeal on the basis that a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently. However, I find that the First tier Tribunal Judge erred materially in law in directing the Secretary of State for the Home Department to grant the Claimant three months limited leave to remain in the United Kingdom because firstly, the length and nature of leave to be granted is a matter for the Secretary of State and secondly, as the parties agreed, the direction is ineffective in that it would not achieve the desired aim of permitting the Claimant to switch into Tier 4 leave as a PhD student unless he can show that he falls into one of the categories of case set out at paragraph 245ZX(b)(i)-(xiv).

Decision

12. It follows that the decision of First tier Tribunal Judge Sweet to allow the appeal is upheld. However, it is a matter for the Secretary of State for the Home Department as to the leave she deems fit to grant the Claimant. There was no evidence before me that the Claimant qualified or qualifies as a prospective student and it may be that in order to regularize his stay as a Tier 4 student in order to pursue a PhD that the Claimant will be obliged to return to Pakistan in order to apply for entry clearance.

Deputy Upper Tribunal Judge Chapman

21 March 2016