IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/27782/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd February 2016	**On 13th April 2016**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MR MOHAMMAD FIAZ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Not represented. Mr C Wells – McKenzie friend
For the Respondent: Ms R Petterson, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born on 4 September 1967. On 24 April 2014 he made an application for leave to remain as a Tier 4 student. That application was refused in a decision dated 23 June 2014.

2. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge Moan ("FtJ") on 16 July 2015 whereby the appeal was dismissed.

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3. The respondent's decision to refuse leave to remain was on the basis that the appellant failed to meet the requirements of paragraph 245ZX(c), and paragraph 117 of Appendix A because he was not in possession of a valid Confirmation of Acceptance for Studies ("CAS"), and accordingly he was not able to meet the requirements of the Rules for leave to remain as a Tier 4 Student. The maintenance requirement of the Rules was correspondingly not assessed.

4. The appellant did not attend the hearing before the First-tier Tribunal ("FtT"), and the FtJ proceeded in the absence of the appellant, concluding that although there was medical evidence in relation to a health condition, that evidence did not indicate that the appellant was unfit to travel or to attend the hearing. On the merits, she concluded that because the appellant did not have a CAS as required, he was not able to meet the requirements of the Rules.

5. The appellant's grounds before the Upper Tribunal contend that the FtJ erred in law in proceeding in the appellant's absence in the light of his medical condition. It is also submitted that the judge erred by failing to consider Article 8 of the ECHR.

6. At the hearing before me, the appellant was not legally represented. He was assisted by counsel who had appeared in another appeal in the list, helping the appellant as a McKenzie friend.

7. Ms Petterson, in summary, argued that the FtJ was entitled to proceed in the absence of the appellant, having regard to the evidence before her as to his medical condition and taking into account previous adjournments. The evidence did not reveal that he was unfit to travel or attend the hearing.

8. So far as the merits are concerned, the appellant did not have a CAS. The judge took this into account in terms of the appellant's grounds of appeal, as revealed by [23] of the judge's decision.

9. The appellant effectively had two months in order to obtain a CAS but none was ever submitted. The judge pointed out at [26] that there was no discretion to waive the requirement of the CAS and the respondent was not obliged to hold onto an application forever.

10. Even if the appellant had attended the hearing and explained his situation, the appeal would inevitably have been dismissed.

11. The judge dealt with Article 8, albeit briefly, and pointed out that the appellant could reapply for entry clearance as a student. Furthermore, this was not an Article 8 case or an application made on Article 8 grounds, but a student application for leave to remain.

12. Before me, the appellant explained the medical complaint that he suffered from, stating that at the time of the hearing before the FtT he was not able to sit or stand in order to make the journey.

13. He explained that he had not been provided with his results by City and Guilds and he had had to sit another test in July 2014. He had written to the Home Office asking for his passport to be returned so that his results could be released to him. However, the Home Office failed to provide him with his passport.

14. Although the Home Office had delayed for a period of about two months before making the decision in his case, City and Guilds did not give him the complete results, only giving him the speaking result which he sent to the Home Office. They did not provide the reading, writing and listening result.

15. He would not be able to go back to Pakistan and apply for entry clearance because he had spent a lot of money on his education and on three occasions his test results had not been provided.

16. So far as the hearing before the Upper Tribunal is concerned, he had only received the letter for the hearing on 6 February 2016. He would like to be given a period of a few weeks in order to obtain legal representation so that his case could be put more strongly.

17. With the assistance of Mr Wells (counsel who was appearing in another matter before me), he explained that it was only after the respondent's decision on his application for leave to remain that he asked for his passport to be returned. That might have had a bearing on why his test results had not been released in the first place, if the matter concerned an identification issue.

My assessment

18. The application for an adjournment before the FtT was based on medical evidence to the effect that the appellant had been suffering from an anal fistula, since 24 April 2015. There was a letter dated 14 July 2015 from his GP stating that it caused him pain in the anal area particularly when he sat down. He reported to his GP that it was worse after 10 minutes of sitting. The fistula was said to be constantly leaking and the appellant had it dressed weekly. He was on an NHS waiting list. The GP further reported that the appellant was concerned that it would be too painful for him to sit for long periods of time and was worried about the journey to Birmingham and how he was going to manage to sit for long periods of time.

19. The appellant's own letter to the Tribunal dated 14 July 2015 added that he had surgery scheduled for 11 August 2015, although the appellant said that he has to visit his GP on a daily basis to have the bandage changed, in contrast to the letter from the GP which said that it was dressed weekly. The appellant's letter stated that travelling made his condition worse and that he would be unable to travel to the Tribunal to attend the hearing.

20. There had been a previous adjournment of the hearing before the FtT fixed for 18 September 2014, in the light of medical appointments that the appellant had. Although it is not clear from the Tribunal file, those appointments do not appear to have been related to the condition which I have just described.

21. A further hearing fixed for 29 December 2014 was adjourned on the appellant's application, he having had a diabetic eye screening appointment on that date. The matter was then listed before Judge Moan, following which the matter came to the Upper Tribunal.

22. Judge Moan dealt with the adjournment issue at [10]-[17]. At [12] she summarised the appellant's letter, in terms of the assertion that he was in severe pain and could not sit for prolonged periods, and she referred to medical appointment notes and the letter from his GP. She noted that that application for an adjournment had already been refused by a judge.

23. Judge Moan was satisfied that the appellant had notice of the time and place of the hearing, and also noted that the matter had been adjourned on two previous occasions. She noted the date of the respondent's decision, being 23 June 2014.

24. At [16] she concluded that it was in the interests of justice to proceed with the appeal, having regard to the delay, and stating that the appellant had been given numerous opportunities to attend the hearing and had given no indication of when he would be able to attend another hearing. She concluded that the medical evidence did not suggest that he was not fit to travel or attend a hearing and observed that appeals should be heard within a reasonable period of time.

25. At [17] she further concluded that she did not believe that the prospects for the appellant's appeal would be enhanced by his attendance or by any further evidence that could be provided. She also observed that compliance with the Immigration Rules is to be judged at the time of the application and not at the time of the appeal hearing.

26. Although Judge Moan did not refer to the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, she clearly had in mind the overriding objective set out at rule 2, the overriding objective being to deal with cases "fairly and justly". That includes under rule (2)(2)(e) avoiding delay, so far as compatible with proper consideration of the issues.

27. I am satisfied that the FtJ gave appropriate consideration to the evidence in relation to the appellant's ability to attend the hearing, not only in terms of the appellant's account of his circumstances but also in respect of the medical evidence that was provided. The letter from Dr Abubacker, his GP, dated 14 July 2015, although describing the appellant's medical condition and the appellant's concerns about travelling, does not actually say that he was not fit to attend a hearing and was not fit to travel. Thus, where the judge concluded at [16] that "The medical evidence did not suggest that he was not fit to travel or attend a tribunal hearing", she was correct.

28. Furthermore, the judge was entitled also to take into account that there had been two previous adjournments of hearings before the FtT. A further relevant factor was the extent to which any evidence from the appellant could have had any material bearing on the outcome of the appeal.

29. I am not satisfied that there is any error of law in the judge's decision to proceed with the hearing in the absence of the appellant. It is evident that the judge did decide that issue on the basis of what fairness demanded. There is no error of law in her conclusions in that regard.

30. So far as the merits of the appeal are concerned, I similarly cannot see that there is any error of law in the judge's assessment. The fact of the matter is that the appellant was required by the Rules to provide a CAS with his application for further leave to remain. This he did not do. Whilst he explained in the grounds of appeal his reasons for not having done so, it is evident that the judge took that information into account, she having summarised the position at [23].

31. The appellant made his application for leave to remain on 24 April 2014. In a letter dated 21 May 2014 to the respondent he stated that his results from the English language test would be processed in 32 days from the date of the test (23 April 2014) and that since he had not received the English language certificate he had not yet been able to obtain a new CAS. He therefore requested the respondent to "hold your decision" until such time as he was able to forward the English language test result and the CAS.

32. There was also a letter dated 19 May 2014 from the administrator of the London College stating that the appellant had taken his test on 23 April 2014 and that the results would be processed in 32 working days.

33. From the date of the appellant's application, 24 April 2014, was a period of two months until the respondent's decision. At the time of the application the appellant did not have a CAS. In those circumstances, the application for leave to remain was bound to have been refused.

34. The information provided to me by the appellant at the hearing, to the effect that he had written to the Home Office asking for his passport to be returned, does not advance his appeal at all. He accepted that any such letters in that regard were sent after the respondent's decision. The appellant was required to demonstrate his meeting the requirements of the Rules as at the date of the application and decision. This he was not able to do.

35. Although it may well be, as the appellant suggested before me, that his test results had not been released by the test provider, that is not a matter that the respondent is responsible for.

36. In his grounds of appeal before the FtT, the appellant said that it was due to the high volume of English tests which resulted in the delay in the processing time of 32 days. That, and the letters to which I have referred, was the information before the FtJ upon which she made her decision. Even if the appellant had explained the issue in relation to the Home Office being asked to provide his passport, that was not a matter that could have affected the outcome of the appeal.

37. In any event, the issue in relation to the passport was not something that was raised by the appellant in his correspondence to the respondent post-application, and is not a matter mentioned in the letter from the London College in terms of why there was any delay in providing the test result.

38. What the appellant stated in his grounds before the FtT about there having been no assessment of funds, again does not take his appeal any further, since whether or not he was in possession of sufficient funds to meet the maintenance (funds) requirement of the Rules is neither here nor there if he was unable to meet the requirement of having to have a CAS.

39. So far as Article 8 is concerned, as was pointed out on behalf of the respondent before me, this was not an application for leave to remain on the basis of Article 8. In addition, it does not appear that any evidence of any Article 8 rights was put before the respondent.

40. Whilst the FtJ's decision in relation to Article 8 was brief, it was legally sufficient in the circumstances. The judge said at [28] that the appellant is not known to have any family or private life ties to the UK. He had arrived in the UK in 2009 but she pointed out that it was not known whether he had been in the UK continuously since that time. She correctly pointed out that the appellant can have had no legitimate expectation of remaining in the UK. Her conclusion was that it was not disproportionate to require him to leave the UK, and that he would be able to reapply for leave to remain or entry clearance as appropriate when in possession of a CAS.

41. I do not consider that the judge was in fact even required to undertake an Article 8 assessment, that not having been the basis of the application for leave to remain, and not being a matter raised in the grounds of appeal before the FtT. Her conclusion in relation to Article 8 was in any event one that is free from any error of law.

42. In the circumstances, I am not satisfied that there is any error of law in the judge's decision in any respect. Her decision to dismiss the appeal therefore stands.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to dismiss the appeal therefore stands.

Upper Tribunal Judge Kopieczek 23/03/16