



**Upper Tribunal
(Immigration and Asylum Chamber)**
Number: IA/28940/2015

Appeal

THE IMMIGRATION ACTS

**Heard at Birmingham Employment Decision promulgated
Tribunal on 15 August 2017 on 16 August 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**MILANKUMAR DEEPABHAI CHAVDA
(anonymity direction not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Jafferji instructed by Highcross Law Solicitors

For the Respondent: Mrs H Aboni Senior Home Office Presenting Officer

DECISION AND REASONS

1. On 6 April 2017, the Upper Tribunal found First-tier Tribunal Judge O'Hagan had materially erred in law in allowing the appellant's appeal for the reasons stated and set aside that decision. The matter comes before the Upper Tribunal today for the purposes of a Resume hearing to enable the decision to be remade.

2. Mr Jafferji on behalf of the appellant raised a number of preliminary issues which can be summarised as being (a) that the decision under challenge is unlawful, (b) that the assessment of the maintenance element under Appendix FM should have been reassessed in light of the decision of the Supreme Court in *R(on the application of MM (Lebanon) and Others) v Secretary of State for the Home Department [2017] UKSC 10*, and, (c) that further disclosure of documents relating to the ETS element of the appeal were required.
3. In relation to the assertion the decision is unlawful, Mr Jafferji referred the Tribunal to an earlier decision, a copy of which was in the bundle before the First-tier Tribunal, dated 22 October 2014 in which an application for leave to remain as a Tier 4 (General) Student Migrant was refused with no right of appeal. The decision maker acknowledged that the appellant had applied for such leave on 18 August 2014 but in Section B: Appeal Rights stated the appellant was not entitled to a right of appeal as he still had leave to enter or remain valid to 9 February 2015 and the current conditions of that leave continued to apply. It was asserted on the appellant's behalf that he did not have valid leave as claimed as the application on 18 August 2014 was made on the last day his previous leave expired meaning that his leave continued thereafter solely by virtue of Section 3C.
4. Mrs Aboni confirmed the appellant had been granted leave to remain as a Tier 4 Student but that a previous refusal, dated 16 June 2014, had curtailed that leave as the college at which he was studying had lost their licence, which had been revoked, so as to expire on 18 August 2014. It was accepted on the respondent's behalf that when the appellant made the application on 18 August 2014 it was an 'in time' application. It was accepted that the statement in the refusal of 22 October 2014 that the appellant had extant leave was wrong as it appears the decision-maker on that occasion did not appreciate, or was not aware of, the fact that the appellant's previous leave had been curtailed. It was accepted that as a result of the error the appellant should have been given a right of appeal against the decision of 22 October 2014 and that a valid decision on that application is still awaited.
5. It was further accepted by Mrs Aboni that the statement in the decision that is the subject of this appeal, that the appellant is an over stayer, is also incorrect.
6. It was accepted by Mrs Aboni that the decision currently under challenge is therefore not a lawful decision as it is based upon an incorrect assessment of the appellant's immigration status.
7. Accordingly, there is no need to consider the further the submission relating to the failure of the decision-maker to reassess the maintenance aspects of the application in light of the decision of the Supreme Court or the request for further disclosure of documents relating to the ETS case.
8. Mrs Aboni was asked whether the Secretary of State wished to withdraw the decision under challenge but she stated that it would be

better if the Upper Tribunal allowed the appeal on the basis of an unlawful decision.

9. The Upper Tribunal therefore allows the appeal on the basis the decision under challenge is an unlawful decision and the appellant still awaits a lawful decision on both the application of 18 August 2014 and the current application.
10. Mr Jafferji was asked to inform Mrs Aboni in writing of those issues he considered required further investigation which he agreed to do. It is hoped that that information will be considered by any subsequent decision-maker to ensure that when a further decision is produced there are no outstanding issues that will prevent the First-tier Tribunal being able to determine the merits of any appeal that may arise at the first opportunity.

Decision

11. **The First-tier Tribunal Judge has been found to have materially erred in law and that decision set aside. I remake the decision by allowing the appeal on the basis the decision is an unlawful decision and the appellant awaits a lawful decision upon both his application of the 18 August 2014 and the current application.**

Anonymity.

12. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....

Upper Tribunal Judge Hanson

Dated the 15 August 2017