



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/01188/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 4 September 2014**

**Determination
Promulgated
On 9 September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

MS MUKTA MAJUMDER

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss C Litchfield, Counsel instructed by A1 Law Chambers
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh and her date of birth is 18 May 1990. She entered the UK on 7 May 2011 having been granted entry clearance as a Tier 4 (General) Student until 26 August 2013. She then made an application to extend her leave as a Tier 4 (General) Student Migrant on 21 August 2013. This application was refused by the Secretary

of State in a decision of 9 December 2013. The application was refused because the appellant had not submitted with her application an Advanced Diploma in Business Administration (level 5) certificate. The respondent made several requests to the appellant to submit the certificate but there was no response. The application was also refused under paragraph 322(9) of the Immigration Rules. The appellant was granted entry clearance to study at Interlink College of Technology & Business, but the appellant switched courses without making a fresh application and thus it was the respondent's position that she has not complied with conditions of leave (Section 50 of the Borders, Citizenship and Immigration Act 2009).

2. The appellant appealed against the decision of the Secretary of State and her appeal was dismissed by Judge of the First-tier Tribunal Kimnell in a decision of 1 May 2014 which was promulgated on 2 May 2014. The appellant was granted permission to appeal by Judge V A Osborne in a decision of 3 June 2014. Thus the matter came before me.

The Decision of the First-tier Tribunal

3. Judge Kimnell heard oral evidence from the appellant and her husband and she made the following findings in relation to the Immigration Rules at paragraphs 25 to 27 as follows:

“25. The submission of the Diploma with the application is mandatory, and I do not accept on the appellant's evidence that the original Diplomas were submitted. The photocopy of the Diploma on which the appellant relies does not specify the level at which the qualification certificate certifies the pass. The CAS assigned on 22nd August 2013 states that the previous course level was QCF/NQF level 5 but the qualification certificate produced to the Tribunal simply does not record that the pass was at level 5 and I do not accept that a valid Diploma would omit such an important detail.

26. I did not find the appellant or her husband credible witnesses. I do not, in fact, believe that either of them are genuine students. Neither knew much about the course their respective spouses were allegedly studying and I do find it extremely significant that when the couple married on 23rd July 2012 neither is described as a student. One, the husband, is described as a restaurant supervisor and the appellant as a beautician.

27. Given that both witnesses were untruthful when they gave their evidence and the photocopy of the certificate said to have been sent in original form to the respondent is unsatisfactory, I do not accept that the certificate were sent at all. Consequently the appeal will be dismissed on that point.”

4. In relation to Article 8 the Judge made findings at paragraphs 28 to 33 as follows:

- “28. As regards Article 8 ECHR there is no question of the appellant meeting the requirements of the Immigration Rules as they regulate Article 8 but the decision is said to be disproportionate in classic terms outside the Rules. I therefore address the give “**Razgar**” questions.
29. Is there family life between the appellant and the sponsor? I find that there is. Has the appellant and/or her husband established a private life in the United Kingdom? I accept that they have having resided here, married here, been studying here and been employed in the UK and that both have developed a private life to an extent.
30. Does the decision give rise to a consequence of such gravity as to engage Article 8 ECHR? I find that it does not. The appellant and her husband are both nationals of Bangladesh. Neither has current leave to be in the United Kingdom, though the appellant’s husband has an application pending which may or may not be successful, but there is no reason why family life should not take place in Bangladesh. Nor is there any reason why the appellant and her husband should not find employment in Bangladesh. Both came to the UK in order to gain an education and both have had the opportunity to do so.
31. Article 8 ECHR is not engaged at all, but even if it is the decision is in accordance with the Immigration Rules and the law generally and in pursuit of a legitimate aim, namely the maintenance of immigration controls in the wider national interest.
32. Is the decision disproportionate? That involves weighing the appellant’s private life rights and those of her husband against the undoubted right and obligation of the United Kingdom to maintain and enforce immigration controls in the wider national interest, a factor that always attracts considerable weight.
33. The private life rights of the appellant and her husband come nowhere near outweighing the public interest side of the balance for reasons given above in relation to whether or not Article 8 is engaged at all. Both are nationals of Bangladesh, both can enjoy their married life in Bangladesh and both are capable of finding work in Bangladesh. Both have completed the studies for which they were admitted to the United Kingdom, and, though both have applied for leave to remain in the United Kingdom the appellant has not met the requirements of the Immigration Rules in that regard and it is yet to be seen whether the appellant’s

husband does. There are no children to consider and I have serious reservations about whether the appellant's husband is a genuine student at all. If he is a genuine student, and that is proved to the respondent's satisfaction in his current application, there will be nothing to prevent the appellant returning to Bangladesh and obtaining a visa as a student dependent or making an application for further leave as a student herself and that will be dealt with on merits. The decision is most certainly not disproportionate in Article 8 terms."

The Grounds Seeking Permission to Appeal and Oral Submissions

5. Ms Litchfield made oral submissions in the context of the grounds seeking permission. The grounds seeking leave to appeal argue that the Judge made a mistake when concluding that were two certificates that the appellant had, according to the respondent, failed to submit with her application. There was only one document in issue and that was the Advanced Diploma. This mistake highlights a lack of due care. The Judge found that the appellant and her husband were not credible witnesses because they did not know what the other was studying and also because their marriage certificate described them as something other than students. The Judge was misconceived and irrational. The Judge's findings contradict his record of evidence which was that the appellant had previously studied an Advanced Diploma in Business which is what the appellant's husband also confirmed at [14] of the determination. The First-tier Judge goes beyond her remit by suggesting that the appellant and her husband are not genuine students because this was not a basis for refusal and amounts to a procedural impropriety.
6. In relation to the marriage certificate the document does not require those marrying to indicate that they are students, it simply asks for a rank or profession and the parties accurately responded by confirming what work they did do at the relevant time which was in accordance with the conditions of their leave. The Judge failed to give adequate reasons why the appellant and her husband were untruthful.
7. The Judge did not believe that the appellant had submitted the Diploma certificate, but this was contrary to the letters and correspondence between the appellant's legal representatives and the respondent about which the First-tier Tribunal made no finding. It is also the case that the appellant's application form stated that seven documents were submitted which would tally with the appellant having submitted the certificate. The Judge failed to take into account that the CAS that was issued to the appellant indicates that the sponsor considered the certificate. The Judge erred in concluding at [25] that the diploma could not be valid because it omits the level of qualification. The college that issued the most recent CAS had had sight of the certificate and therefore it was not for the respondent to question this because the sponsor was satisfied with the

document. Ms Litchfield stated that the appellant has now produced a replacement certificate and as such she now satisfies the requirement of the Immigration Rules.

8. In relation to Article 8 the Judge failed to address whether or not it would be proportionate to remove the appellant in the light of the fact that her spouse is here lawfully in the UK. It is argued that the First-tier Tribunal erroneously conflated the failure to meet the Immigration Rules with the proportionality assessment and it is well-established that there is no correlation between the Rules and Article 8 and as such no near-miss argument.
9. Mr Melvin made oral submissions in the context of the Secretary of State's Rule 24 response. It is not accepted that the Judge made an error of law for the reasons given by the appellant but the respondent cross-appeals asserting that the Judge erred in consideration of Section 50 of the 2009 Act because the condition concerning no study is part of the Rules and it is clear that the appellant did not comply with the requirements of her previous leave with specific reference to paragraph 245ZW of the Rules.
10. Ms Litchfield argued that the First-tier Tribunal failed to attach due weight to the CAS. The appellant's husband is in the UK lawfully with section 3C leave pending an application and it is not proportionate to expect him to leave the UK having made a valid application and thus there would clearly be an interference with family life.

Conclusions

11. It is asserted by the Secretary of State that the appellant did not include the relevant certificate with her application. From the correspondence I can see that the Secretary of State, having received the application, e-mailed the appellant asking for the certificate to be submitted within seven days. There is a letter from the appellant's representatives to the respondent of 17 October 2013 stating that they had submitted the HSC (Higher Secondary Certificate Examination) and Advanced Diploma certificate. There is an e-mail confirming this from those representing the appellant to UKBA dated 18 October 2013. In this e-mail it is asserted that they had sent all the original documents to UKBA and as such they only retained photocopies. There is no specific reference to the certificate in issue in this e-mail. There is an e-mail from the Home Office of 28 October 2013 stating that they do not have the Advanced Diploma certificate. It is explained that they received a photocopy of a unit credit certificate but that does not confirm that the appellant has been awarded a Diploma. Again the Home Office asked for the certificate to be sent to them within seven days. The solicitors wrote to the respondent on 6 November 2013 stating that they have spoken to their client and she has confirmed that the document was with the other documents, but that she has been advised to contact the college and that they (the solicitors) are waiting to

hear from her. It is requested that the appellant be given a few more days.

12. The success of this appeal turned on the appellant's credibility. The appellant's case was not that there had been an error and she had failed to submit the document unknowingly. Her case was that she had submitted the document and the respondent was either being untruthful or had made a mistake. In support of this she submitted the CAS which indicates that the sponsor had seen the document in issue. This was not in my view dispositive in the appellant's favour that she had submitted the certificate. Credibility was a clear issue on which the Judge had to make findings and there is no merit in the assertion that the Judge exceeded her remit. The Judge weighed up the evidence and found in favour of the respondent. It is correct that at [14] where the Judge records the evidence of the husband which was that the appellant followed an Advance Diploma in Business, but this in no way undermines her finding at [26] that "neither knew much about the course their respective spouses were allegedly studying". He was not aware of the level of the course. I have also taken into account the record of the appellant's evidence at [9] which supports the Judge's finding. The grounds are an attempt to re-argue the case and a disagreement with the findings. The Judge had the benefit of hearing oral evidence from the appellant and her husband and she did not find them to be credible. She gave adequate reasons for this at [26]. The Judge did not make reference to the correspondence between the appellant's solicitors and the respondent but this is not a material error. The solicitors initially claimed that they had sent the original document to the respondent but then changed their position asserting that the appellant "claims that the document was with the others." The position of the solicitors is inconsistent and equivocal and does not assist the appellant.
13. The issue in relation to the marriage certificate is an attempt to re-argue the case and disagreement with the findings which are not irrational or perverse. I have considered the ground relating to the level of the Diploma. The Judge at [35] questions the format of the certificate produced by the appellant for the hearing. The Judge found that there was an inconsistency between what is asserted in the CAS and the certificate (see [25]). I do not find that this amounts to an error of law. It was a finding that was open to the Judge on the evidence. In any event, if it is an error, it is not a material error. The only issue here was credibility and whether the appellant had submitted the certificate or not and the Judge found against her.
14. It is clear in my mind that the Judge was aware of the relevant issue which was whether or not the appellant had submitted the Advanced Diploma certificate. Although paragraphs 2 and 3 of the determination may not be entirely clear, I have considered the Judge's findings and the determination and it is clear that the Judge was concerned with the certificate in issue.

15. In relation to Article 8 there was no substance in the grounds of appeal. The Judge considered the issue outside the Rules. It is obvious that the appellant could not meet the requirements of the rules in relation to Tier 4 Students or under appendix FM. At [33] the Judge is simply stating a fact and I do not find that she has considered this factor in the balancing exercise. In any event, had I found a material error of law in relation to the Article 8 issue and were I to remake the decision, I would go on to dismiss the appeal under Article 8. I have regard to paragraph 57 of **Patel & Others v Secretary of State for the Home Department [2013] UKSC 72**. The appellant has been in the UK for a relatively short period of time. She has been found to be a witness lacking in credibility. Her husband has an application pending with the Home Office, but the evidence relating to his private life here is scant. That he has a pending application does not tip the balance in favour of the appellant.
16. The decision of the Judge was lawful and the decision to dismiss the appeal under the Rules and Article 8 of the 1950 Convention on Human Rights is maintained. There is no need for me in this case to consider the respondent's cross appeal as it is not material. The Judge did not determine the issue under paragraph 322 (9) and this was an error of law. In the light of the evidence in this case and the correspondence between the appellant and the respondent, I exercise discretion in the respondent's favour and thus the appeal is also dismissed under paragraph 322 (9) of the Rules.

Signed Joanna McWilliam
2014

Date 8 September

Deputy Upper Tribunal Judge McWilliam