



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

Appeal Number: IA/08515/2013

THE IMMIGRATION ACTS

Heard at Field House

On 22nd January 2014

Determination

Promulgated

On 27th January 2014

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

JAFAR THOTTUNGAL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Islam, Legal Representative, London Law Associates

For the Respondent: Mr P Duffy, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge M A Khan made following a hearing at Hatton Cross on 1st August 2013.

Background

2. The Appellant is a citizen of India born on 2nd April 1988. He was granted leave to enter the UK on 13th December 2010 as a Tier 4 Student until 30th October 2012 and made an in time application for combined leave to remain as a Tier 4 (General) Student Migrant under the points-based system. He was refused on 7th March 2013 on the grounds that he had not provided an English language test certificate from an improved English language test provider nor bank statements which showed that he met the required level of funds.
3. The Appellant appealed. His case was that he had sent a letter with his English language certificate and bank statements to the Respondent on 17th January 2013 i.e before the decision was made.
4. The judge found the Appellant's evidence in relation to the postage of the certificate and the bank statements to be vague and evasive. The documents were not in the Respondent's file and there was no record of them being received. The Appellant initially maintained that he sent a covering letter with the documents but then said he did not send a letter which the judge found to be inconsistent. He concluded that the Appellant had failed to show that he had sent the documents as claimed and dismissed the appeal.

The grounds of application

5. The Appellant appealed on the grounds that the judge had failed to appreciate the factual scenario of the case, the determination was against the concept of common law fairness and was irrational. He had failed to take into account that the Appellant had provided proof that the documents were sent, that the judge had failed to consider the decision of the Upper Tribunal in Rodriguez (flexibility policy) [2013] UKUT 00042, failed to consider that the principle of common law fairness had been breached as in Thakur (PBS decision, common law fairness) Bangladesh [2011] UKUT 00151 and failed to consider the Appellant's Article 8 rights.
6. The application was considered by First-tier Tribunal Judge Davidge. The heading on the decision is a refusal of permission to appeal but in the penultimate paragraph she stated that the original judge had failed to deal with Article 8 and, although on the facts the claim was weak, the judge should have dealt with all of the Grounds of Appeal unless they were not pursued. She said in the body of the decision that the grounds revealed an arguable error in respect of Article 8 and although she saw no merit in the other grounds she granted permission on all grounds.
7. The matter was renewed before an Upper Tribunal Judge. On 2nd December 2013 Upper Tribunal Judge McGeachy stated that the application could not succeed under the Rules but it was arguable that the judge should have considered the Appellant's Article 8 rights and on that basis he granted permission to appeal.

8. On 15th December 2013 the Respondent served a reply opposing the appeal.

Submissions

9. It was agreed between all parties that in view of the confusion in relation to the grant of application all grounds could be argued.
10. Mr Islam submitted that the judge had erred in finding that the bank statements and the English language certificate had not been sent. He pointed to the evidence in the Appellant's bundle as to proof of postage and receipt. In any event the Appellant was not required to file an English language certificate because the CAS referred to his having supplied one to the college.
11. So far as Article 8 was concerned, the Appellant had come to the UK and completed his Masters course and wished to be an accountant. He had invested a large amount of money in his course and his private life would be destroyed if this application was to be refused. He had the requisite funds and fairness dictated that the appeal ought to have been allowed.
12. Mr Duffy submitted that there was no error of law in the decision, the judge having made findings open to him. The policy of evidential flexibility was not applicable to the Appellant because there were two grounds of refusal; the Secretary of State would not write to the Appellant in relation to missing documents in these circumstances. So far as Article 8 was concerned he relied on the Supreme Court decision in Patel and Others v SSHD [2013] UKSC 72 which held that Article 8 was not a general dispensing power and to be distinguished from the Respondent's decision to allow leave to remain outside the Rules. Article 8 was concerned with private or family life and not education as such and the opportunity for a promising student to complete his course in the UK was not in itself a right protected under Article 8.

Findings and Conclusions

13. There is no error of law in this decision. The judge was entitled to consider the oral evidence of the Appellant and to find that it was contradictory and to conclude that he had not sent all of the documents to the Respondent as he claimed. The proof of postage in the Appellant's bundle does not identify what documents were sent and does not establish, as the Appellant claims, that he included the bank statements and the English language certificate with the CAS. In any event the bank statements did not establish that he had the required level of funds for the required period.
14. There is no unfairness on the part of the Respondent. The Appellant was required to provide evidence to show that he met the requirements of the Rules and he did not do so.

15. Neither is there any breach of the Respondent's policy on evidential flexibility. In SSHD v Rodriguez and Others [2014] EWCA Civ 2 the Court of Appeal held that there was no obligation on the Secretary of State to conduct a check of all applications to consider whether they are accompanied by the specified documents and to contact applicants where this is not the case.
16. The original judge did not deal with Article 8, which was raised as a Ground of Appeal, but there was nothing in the grounds particularising any consequences of the Appellant's removal in respect of his private or family life and no reference to Article 8 in the witness statement. The judge could only have dealt with the matter on the basis that the Appellant had not put forward any evidence to show that there would be a breach of Article 8 by his removal. As the Supreme Court said in Patel the Appellant's right to continue his education in the UK is not in itself one protected under Article 8.

Decision

17. There is no error of law in the original decision which shall stand. The Appellant's appeal is dismissed.

Signed

Date

Upper Tribunal Judge Taylor