Upper Tribunal
(Immigration and Asylum Chamber)
IA/09230/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination promulgated**
On August 26, 2014	**On August 27, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR MUHAMMAD NAEEM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Not in attendance
For the Respondent: Mr Deller (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant, born September 26, 1991, is a citizen of Pakistan. He entered the United Kingdom on January 11, 2011 with leave to enter until April 30, 2012 as a student. On June 27, 2012 his leave was extended as a Tier 4 General student until November 30, 2013. On November 25, 2013 he applied to vary his leave to remain in the United Kingdom.

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2. The respondent refused his application and made a decision to remove him under section 47 of the Immigration, Asylum and Nationality Act 2006 on February 4, 2014.

3. On February 17, 2014 the appellant appealed under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 and he argued:

   a. The respondent acted unfairly by failing to give him a chance to submit a CAS statement when the fault for him not having one was not his.

   b. The respondent failed to take into account the appellant's private life based on the fact he had been studying here for sometime.

   c. He was a genuine student.

4. The matter was listed before Judge of the First-tier Tribunal Hindson (hereinafter referred to as "the FtTJ") on May 15, 2014 as a paper case and in a determination promulgated on May 16, 2014 he dismissed the appeal finding the appellant had failed to satisfy the Immigration Rules and there was nothing exceptional about the facts of the case that would lead to an unjustifiable harsh result that justified him considering the case outside of the Immigration Rules.

5. The appellant appealed that decision on May 27, 2014. Permission to appeal was granted by Judge of the First-tier Tribunal Davies on June 23, 2014 who found it arguable the FtTJ may have erred by failing to mention either the burden or standard of proof.

6. The respondent filed a Rule 24 response dated July 11, 2014 in which she argued the decision was reasonable and open to the FtTJ.

7. The appellant did not attend the hearing although he had asked the Tribunal to deal with his appeal on the papers.

SUBMISSIONS ON ERROR OF LAW

8. The appellant argued:

   a. He was a law abiding student who had taken an English test but was awaiting the result that was due to be announced in December 2013.

b. He was advised by his college that if he applied without a certificate the UKBA would request his CAS and at that stage the college said they would issue one.

c. He wanted the UKBA to allow him time to submit his CAS.

9. Mr Deller opposed the application. He submitted that although the FtTJ did not refer to the burden or standard of proof there was nothing in the determination that suggested the FtTJ had erred in his approach to the appellant's appeal. He further argued that evidential flexibility did not apply because the appellant did not have a document. As regards common law duty of fairness it was not the respondent's duty to tell the appellant to sort out his English language certificate and to obtain his CAS in good time. There was nothing more the respondent could have done to assist the appellant. There was no error in law.

10. I reserved my decision on the error of law.

ERROR OF LAW ASSESSMENT

11. The FtTJ considered this appeal on the papers. This was a points based application by the appellant to extend his stay as a Tier 4 (General) Student and in order to succeed the appellant had to satisfy the requirements of paragraph 245 ZX HC 395.

12. Importantly, as a points based application the appeal had to be considered having regard to Section 85A of the 2002 Act and this section restricted the appeal to the position as it was at the date of application.

13. At that date the appellant did not have his CAS. His application was doomed to failure because this is a mandatory requirement. The respondent could not have resolved this issue because the document was not in existence and therefore even if the respondent had written to the appellant the position would have been the same.

14. Permission to appeal was given albeit not specifically on the grounds argued in the grounds of appeal. Judge to the First-tier Tribunal Davies gave permission because the FtTJ had made no reference to the burden or standard of proof.

15. I am satisfied no error is shown on this issue. The FtTJ correctly considered the Immigration Rules and rejected the appeal because the appellant did not have a CAS. The burden of proof was on the appellant and there is nothing in the determination that would suggest an error.

16. The grounds of appeal also raised the following:

    a. Whether the FtTJ treated the appellant fairly.
    b. If he did not how this impacted on his proportionality assessment for article 8.
    c. Did the FtTJ wrongly deal with the case in light of the decisions in Naved (Student-fairness-notice of points) [2012] UKUT 12 (IAC), Thakur (PBS decision-common law fairness) Bangladesh [2011] UKUT 00151 (IAC) and Patel (revocation of sponsor licence-fairness) India [2011] UKUT 00211.

17. In assessing the appellant's original appeal the FtTJ recorded the following:

    a. He noted the grounds of appeal including the section "issue before the learned immigration judge".

    b. The appellant's submission that fairness demands the respondent should have approached the appellant or his sponsor to address the reason for refusal.

    c. The respondent failed to consider his article 8 rights.

    d. The appellant did not provide the CAS and the position remained the same at the date of hearing.

    e. Evidential flexibility did not apply in this appeal.

    f. No evidence of private life outside of his studies was adduced.

    g. The decision of Gulshan [2013] UKUT 640 (IAC) applied in any event and there was no reason to consider this appeal outside of the Rules.

18. Dealing with the case law raised before the FtTj I am satisfied that none of these decisions would have assisted the appellant.

19. The decision of Thakur involved the application of a policy which was contained in the respondent's policy guidance. There was nothing in the guidance or any other document that required the respondent to investigate why the appellant did not have a CAS.

20. The decision of Naved also does not assist the appellant as this concerned Section 85A. The appellant had not sought to adduce any additional evidence so I fail to see how or why this decision would have assisted the appellant in his appeal.

21. The decision of Patel also concerned common law fairness but the appellant how or why the respondent acted unfairly. The onus was on the appellant to pass his English test in good time to meet the Rules. He failed to do so and regardless of what the college may or may not have told him the simple fact remains is the appellant had neither passed his test nor obtained a CAS. The Immigration Rules applied to his application and he did not meet them.

22. There is no unfairness by the respondent and this ground of appeal is without merit.

23. In paragraph [57] of Patel the Supreme Court held-

> "It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the rules are not reviewable on appeal: section 86(6). One may sympathise with Sedley LJ's call in *Pankina* for 'common sense' in the application of the rules to graduates who have been studying in the UK for some years … However, such considerations do not by themselves provide grounds of appeal under article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8."

24. The decision of Nasim and others (Article 8) [2014] UKUT 25 (IAC) considered a variety of possible article 8 scenarios including article 8 in the context of work and studies. At paragraph [12] of Nasim the Court considered the above paragraph and stated-

> "…We regard the passage, however, as having a wider import, in seeking to re-focus attention upon the core purposes of Article 8."

25. The Court continued at paragraph [20] in Nasim-

> "We therefore agree with Mr Jarvis that [57] of Patel and Others is a significant exhortation from the Supreme Court to re-focus attention on the nature and purpose of Article 8 and, in particular, to recognise its limited utility to an individual where one has moved along the continuum, from that Article's core area of operation towards what might be described as its fuzzy penumbra. The limitation arises, both from what will at that point normally be the tangential effect on the individual of the proposed interference and from the fact that, unless there are particular reasons to reduce the public interest of enforcing immigration controls, that interest will consequently prevail in striking the proportionality balance (even assuming that stage is reached)."

26. Turning to the facts of this appeal whilst I accept the appellant wished to complete his studies he had not passed the relevant test or obtained a CAS. He had no right to apply for an extension when he did.

27. The court made clear in Patel that merely being good student is not sufficient and the appellant cannot actually even argue that as he had not passed his test or obtained his CAS.

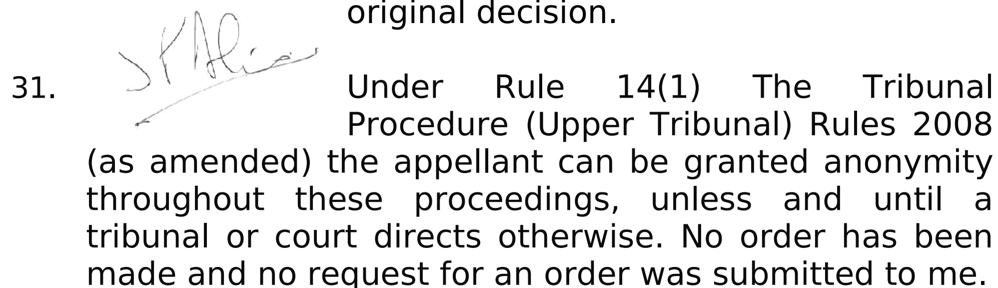
28. The appellant was also unable to satisfy paragraph 276ADE HC 395. Following the decision Shahzad [2014] UKUT 85 I am satisfied there are no compelling reasons that would justify allowing this appeal outside of the Rules. In FK and OK (Botswana) [2013] EWCA Civ 238 the Court found in paragraph [11]–

> "That the individuals concerned in the present case are law-abiding (other than in respect of immigration controls) does not detract from the fact that the maintenance of a generally applicable immigration policy is, albeit indirectly, a legitimate aim for the purposes of article 8.2."

29. I am also satisfied there was no reason for the FtTJ to consider his application to remain outside of the Rules. The Rules provide a complete code for dealing with the Tier 4 PBS applications. If he met the Rules his stay would be extended. He did not so his application was refused. The fact he failed to pass his exam in time is not an exceptional or compellable circumstance. The appellant is seeking to use article 8, outside of the Rules, to address the fact he failed to meet them. The FtTJ properly reminded himself of the test and I find no fault in her approach.

DECISION

30. There is no material error of law and I uphold the original decision.



31. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I do not make a fee award as the appeal failed.

Signed: Dated:

Deputy Upper Tribunal Judge Alis