



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/49490/2013

THE IMMIGRATION ACTS

Heard at Field House
On 20 November 2014

Determination Promulgated
On 5 December 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JIONGMIAN CHEN

Respondent

Representation:

For the Appellant: Mr S Walker, Home Office Presenting Officer
For the Respondent: None

DECISION AND REASONS

1. The respondent is a citizen of China and his date of birth is 4 September 1993. I will refer to the respondent as the appellant as he was before the First-tier Tribunal.
2. On 17 September 2013 the appellant made an application for leave as a Tier 4 (General) Student. This application was refused in a decision of 1 November 2013. The application was refused on the basis of maintenance.
3. The appellant appealed against the decision and his appeal was allowed by Judge of the First-tier Tribunal Callender Smith in a determination that was promulgated on 2 September 2014 following a hearing at Taylor House on 11 August 2014.

4. The First-tier Tribunal allowed the appeal stating that “it is remitted to the respondent to reconsider the position and that the effect of any decision is stayed until there has been a final ruling by the Supreme Court in the case of **Mandalia (UKSC/0279)**.” He found that there was a legitimate expectation created by the statement on the application form that the respondent would contact the appellant for missing documentation which did not occur. It was accepted that the appellant had paid his course fees and he had to establish living costs of £9,000. His application was refused because he had not provided a translated bank statement and there were missing bank statements.
5. Permission to appeal was granted by the First-tier Tribunal in a decision of 13 October 2014 by Judge Chambers. Thus the matter came before me.
6. The grounds seeking permission argue that the Judge misdirected himself in relation to legitimate expectation and erred in considering the ‘evidential flexibility policy’. In my view the Judge fell into error. The Tribunal is bound by the decision of the Court of Appeal in **Secretary of State for the Home Department v Rodriguez [2014] EWCA Civ 2** (notwithstanding that permission was granted on 19 May 2014 and the matter will be considered by the Supreme Court. The case is now called **Mandalia** and was referred to by the Judge). It was not open to the Judge to decide that the effect of the decision should be “stayed” until the Supreme Court’s judgement.
7. The appellant did not attend the hearing before me. Mr Walker conceded that the documentation that was provided by the appellant at the hearing established that he was in receipt of the requisite funds. The decision maker did not consider exercising discretion under paragraph 245AA of the Rules. It appears to me that the appellant submitted a document in the wrong format and bank statements from a series were missing with the application.
8. In my view the Judge of the First-tier Tribunal made an error of law in relying on legitimate expectation and evidential flexibility. However, the error is not material because in my view there was no lawful decision because the Secretary of State has not considered exercising discretion in accordance with paragraph 245AA of the Immigration Rules.
9. The decision to allow the appeal is maintained (on the basis of my decision not that of the FtT).

Signed Joanna McWilliam

Date 4 December 2014

Deputy Upper Tribunal Judge McWilliam