



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/52042/2013

THE IMMIGRATION ACTS

Heard at Field House
On 25 November 2014

Determination Promulgated
On 5 December 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MS G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR TANVEER AHMAD
(NO ANONYMITY ORDER MADE)

Claimant

Representation:

For the Appellant: Miss A Holmes (Senior Home Office Presenting Officer)
For the Claimant: Mr Ahmed (instructed by Maroof solicitors)

DECISION AND REASONS

1. This is an appeal against a determination promulgated before the First-tier Tribunal (Judge Scott-Baker) promulgated on 3 September 2014 in which she allowed an appeal against the respondent's decision dated 21 November 2013 refusing leave to

remain and making removal directions, on the basis that the decisions were not in accordance with the law. For ease of reference I shall refer to the parties as follows, to “the Secretary of State” who is the appellant and to “the Claimant.”

Background

2. The Claimant whose date of birth is 28 December 1985 and is a citizen of Pakistan.
3. Under Tier 1 (Post-Study Work) Migrant provisions the Claimant was required to show evidence of maintenance and fees to cover the first academic year for his course (human geography) which was for twelve months or more. The Claimant needed to show he was in possession of £14,700 for a consecutive 28 day period. The Secretary of State considered the evidence and concluded that between 13 September 2013 and 26 September 2013 the Claimant’s bank statement showed he was in possession of no more than £13,944.09. The figure for the tuition fee was £15,000.
4. At the hearing before the First-tier Tribunal the Claimant produced evidence in the form of a letter dated 5 December 2013 from Jonathan Lloyd, head of the Doctoral Research Office at the University of Reading, which stated that on 3 December 2013 the PhD programme in human geography had been reclassified by the university as a non-laboratory subject which meant that the tuition fee had been reduced from £15,000 to £12,600 for the academic year 2013/14. It was the Claimant’s case that the correct fee was £12,600 and that he met the financial requirements.
5. The Tribunal found that this evidence was post decision and therefore not admissible under Section 85A of the Nationality Immigration & Asylum Act 2002 (“the 2002 act”). However, there was an email dated 18 November 2013 which was a request from the Claimant asking that his course fee should be reduced £12,600 as opposed to £15,000 per annum, because it was a non laboratory subject. The Tribunal expressed sympathy for the Claimant and considered that the structure of the Immigration Rules prevented further evidence from being taken into account and which resulted in fundamental unfairness to the Claimant. The Tribunal concluded that the decision made was not in accordance with the law and that the application should be reconsidered by the Secretary of State under her inherent discretionary powers. The appeal was allowed to the extent that it was remitted to the Secretary of State for reconsideration.

Grounds of Application

6. The Secretary of State argued that the First-tier Tribunal erred in its assessment of “fairness.” There was no fundamental unfairness to the Claimant in this case, as he could not meet the requirements of the Immigration Rules.
7. The Claimant did not meet the requirements of the Immigration Rules, and the appeal was bound to be dismissed. The Tribunal could not “cure” the Claimant’s shortfall in funds by applying a “near miss” principle; **Miah [2012] EWCA Civ 261**.

Nor did the evidence disclose any issue of unfairness in the respondent's approach to the application that was made; **Thakur (PBS Decision - Common Law Fairness) Bangladesh [2011] UKUT 00151 IAC**. At the date of the application the Claimant simply did not have the necessary minimum level of funds to cover maintenance and the course fees; it was immaterial that his college had decided after the date of decision to charge him a lower figure by way of course fees.

Permission

8. Permission was granted by First-tier Tribunal Judge J M Holmes on 20 October 2014. Judge Holmes granted permission on the grounds that the determination arguably "fails to identify any feature in the appellant's circumstances of sufficient substance to render disproportionate the decision to remove the appellant; **Patel [2013] UKSC 72** and **Nasim [2014] UKUT 25**".

The Hearing

Preliminary issue

9. Mr Ahmed sought to call the Claimant to give oral evidence in order to clarify the findings made in paragraph 8 of the decision.
10. I refused this application. I reminded Mr Ahmed that this was an initial hearing to consider whether or not there was an error of law and that reference must be made to the evidence that was before the First-Tier Tribunal. It was not procedurally correct for new oral evidence to be given by the Claimant at this stage.

Submissions

11. Miss Holmes relied on the grounds of appeal and submitted that the judge had effectively applied a "near miss" principle. No fundamental unfairness had been identified. The appellant submitted his application confirming that his fee was £15,000. The Tribunal erred by remitting the matter to the Secretary of State for discretion to be exercised where there was no discretion.
12. Mr Ahmed submitted that the Tribunal had made errors in the determination. He was instructed late and was not in a position to produce or refine a response under Rule 24. In any event, it was his submission that documents in the bundle (at pages 21 and 22) had been overlooked by the Secretary of State. These documents were printed from the Reading University website and referred to both sets of fees for the proposed course of study. He submitted that this was evidence to show that the two sets of figures were available in the public domain. The Secretary of State ought to have been aware of this fact and taken it into account when reaching her decision.
13. Mr Ahmed accepted that this documentary evidence was not specifically relied on before the First-tier Tribunal.

14. As regards the discretionary powers available to the Secretary of State Mr Ahmed submitted that the Secretary of State had an inherent discretionary power.
15. Further, it was submitted that the Tribunal was bound to consider whether the decision is compliant with the Human Rights Act and within the scope of Article 8, the issue was not one of "near miss" but an issue of fairness.
16. In response Miss Holmes submitted that the Claimant himself had stated in his application form that the fees were £15,000. The letter confirmed that the fees had been reclassified on 3 December 2013 which was post decision. There was no requirement for the Secretary of State to seek out further information as regards the fees. No case law had been produced to show that the Secretary of State had an inherent discretion in Tier 1.
17. At the end of the hearing I reserved my decision.

Discussion and Decision

18. There are two issues in this matter which are material. Firstly, whether or not the Claimant suffered any fundamental unfairness as a result of the Secretary of State's decision and if so, whether the Secretary of State has an inherent discretionary power under the points-based scheme.
19. The Tribunal considered the evidence and concluded that the relevant Immigration Rules were not met. Understandably the Tribunal sympathised for the Claimant's situation whereby he would have met the financial requirements of the Rules in the event that the fee was £12,600. However, I am satisfied that at the time of making the application he understood that the fee was £15,000 per annum. Although it would seem that an email was sent to the Secretary of State prior to the date of decision indicating that there was a possible alteration to the level of fees, this matter was not pursued by the Claimant nor investigated further by the Secretary of State. It is accepted that the Claimant, when completing the application form, referred to fees in the sum of £15,000. The post decision evidence put before the Tribunal was a letter dated 5 December 2013 referring to a re-classification of the fees in the sum of £12,600 as from 3 December 2013. There was no independent evidence to confirm that the fees had been re-classified prior to that date. I reject the submission made by Mr Ahmed that the Secretary of State was under a duty to investigate the fee levels and that had she done so would have seen reference to two sets of fees on the University of Reading's website. It may well be that such material was in the public domain. However, the Secretary of State is under no duty to pursue such enquiries on behalf of an applicant. The fact of the matter is at the time the application was made and considered the Claimant failed to show that he had sufficient funds to meet the requirements of the Rules. There was no procedural or other fundamental unfairness on the part of the Secretary of State. The Claimant's situation was simply unfair because of the subsequent change in fee, but it was not unfair in the legal sense as

identified the Upper Tribunal in Marghia(procedural fairness)[2014]UKUT 00366(IAC).

20. As to the secondary ground of appeal concerning the discretion, UCAS v ECO (Discretion: When Reviewable) [2012] UKUT established the general principles and see Abdi [1996] Imm AR 148. This appeal related to the points-based scheme which allows for no discretion. Further I am satisfied that the Claimant has not identified any specific or inherent discretion that the Secretary of State arguably failed to apply. Any exercise of residual discretion is a matter for the Secretary of State.
21. There was no argument put on the basis that Article 8 ECHR applied and having regard to the issues and evidence there is no ground for an Article 8 consideration following Patel(cited above) and Nasim [2014]UKUT 25.

Decision

22. **There was a material error of law in the First-tier Tribunal decision. That decision is set aside.**
23. **I substitute a decision to dismiss the appeal on immigration grounds and on human rights grounds.**

NO ANONYMITY ORDER MADE

Signed

Date 4.12.2014

Deputy Upper Tribunal Judge G A Black

FEE AWARD - as I have dismissed the appeals there can be no fee award.

Signed

Date 4.12.2014

Deputy Upper Tribunal Judge G A Black