Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/15928/2014

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 14 April 2015	**On 22 April 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

TOUKIR AHMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Chowdhury of Universal Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Bangladesh who was born on 5 November 1991. He arrived in the United Kingdom on 16 July 2012 with leave to enter as a Tier 4 (General) Student Migrant valid until 10 May 2014. On 17 February 2014, he made an application for further leave to remain as a Tier 4 (General) Student Migrant under para 245ZX of the Immigration Rules (HC 395 as amended) to undertake an Extended Diploma in Management (NQF level 5) at the Citizen 2000 Education Institute.

2. On 27 March 2014, the Secretary of State refused the appellant's application for further leave under para 245ZX of the Rules and made a decision to remove him under s.47 of the Immigration, Asylum and Nationality Act 2006. The Secretary of State was not satisfied that the appellant met the maintenance requirements of Appendix C, para 1A(h) on the basis that he had not submitted a required bank statement to show that he had available £1,600 for a consecutive period of 28 days prior to the date of application.

3. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 7 November 2014, Judge Britton dismissed the appellant's appeal. First, he was not satisfied that the appellant had, as he claimed before the judge, submitted the required bank statement and, therefore, the appellant could not meet the requirements of the Rules. Secondly, the judge was not satisfied that the "evidential flexibility" rule in para 245AA applied because the required documents, namely a bank statement and bank certificate, were "missing".

4. The appellant sought permission to appeal to the Upper Tribunal on the basis that the judge had been wrong in law: (1) not to accept that the appellant had submitted the required document with his application and; (2) to conclude that paragraph 245AA did not apply; and (3) in failing to consider the appellant's human rights claim under Art 8.

5. On 22 December 2014, the First-tier Tribunal (Judge V P McDade) granted the appellant permission to appeal on those grounds.

6. On 12 January 2015, the Secretary of State filed a rule 24 notice opposing the appeal.

7. Thus, the appeal came before me.

8. The judge dealt with the evidence of the bank statement and certificate at paras 5-8 of his determination and did not accept, on a balance of probabilities, that the appellant had submitted the required documents with his application. The judge said this:

> "5. The appellant in a statement dated 22 October 2014 stated in summary that his overseas bank statement (BRAC Bank Ltd) at the time of his application showed funds of BDT 15,47,105.00 (£11877.00) for 28 consecutive days. The respondent requested the appellant to send further photographs but did not request documents relating to his maintenance. He has paid the full tuition fees in the sum of £2500 for his current course.
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> 6. In evidence the appellant said he sent the bank statements together with photographs with his application. The respondent wrote asking him for copies of the photographs but not for his bank statements. The appellant said the documents he referred to in the Notice of Appeal (p7 of the appellant's bundle) were his bank statements and certificate.
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> 7. The appellant was referred to the Brac Bank statement dated 20 February 2014, but not signed until 26.02.2014. The appellant said he sent his application form with the bank statement on the 15 February 2014 together with all his documents. The appellant's application was received by the respondent on 17 February 2014.
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> 8. It was pointed out to the appellant that he could not have sent the bank statements with his application as the bank certificate and bank statements are

> dated later than 15 February 2014, the date he said he sent them to the respondent. The appellant said the Brac Bank must have made a mistake."

At paragraph 10 the judge then concluded:

> "I find that the appellant did not send his bank statement and bank certificate with his application because they are dated after 15 February 2014."

9. Mr Chowdhury, on behalf of the appellant made three submissions.

10. First, Mr Chowdhury submitted that the judge had been wrong to find that the appellant had not submitted a bank statement and bank certificate as required by the Rules with the application by relying on the fact that they post-dated the application. Both are dated 20 February 2014 whilst the application was made on 15 February 2014. He submitted that the bank statement and certificate before the judge were copies obtained by the appellant after making the application because he failed to retain copies himself. He submitted that they reflected in substance what was contained in the original documents submitted with the application.

11. When I raised with Mr Chowdhury whether there was any evidence before the judge that the documents dated 20 February 2014 were presented to the First-tier Tribunal not as copies of the originals but as subsequently obtained and dated copies, Mr Chowdhury was unable to point to any evidence to that effect. Indeed, as I understood his submissions, the matter had only been raised with the appellant's representatives in the course of preparing for the Upper Tribunal hearing.

12. The only relevant evidence before the Judge was that set out in the appellant's own statement dated 22 October 2014 at para 5:

> "I had submitted my overseas bank statement (BRAC Bank Limited) at the time of my application which showed the funds of BDT15,47,105.00 (£11,877.00) for 28 consecutive days as per the Immigration Rules: **Please see enclosed copy statement from BRAC Bank**."

13. As Mr Richards pointed out in his submissions, the judge was entitled to consider that the bank statement and certificate submitted at the appeal hearing were copies of the actual bank statement and certificate submitted with the application but which, inconsistently with the appellant's case, bore a date subsequent to the application.

14. I also drew to Mr Chowdhury's attention a bank statement and certificate which were dated 10 February 2014 and which had been submitted to the Upper Tribunal by the appellant's representatives under a letter dated 9 April 2015. I enquired how it was that these were dated prior to the application but the appellant's case was he had not kept copies of those he had submitted with his application. Mr Chowdhury accepted these were not before the judge but were also copies obtained by the appellant subsequent to submitting his application. As I understood Mr Chowdhury's submission they were, in fact, copies of what had actually been submitted. I need only say that this is very curious indeed.

15. The appellant's appeal had to be decided on the basis of the evidence relied upon before the Judge. The only documents before the Judge were those dated 20 February 2014 which post-dated the application. There was, in truth, no evidence

before the judge other than the bank statement and bank certificate relied upon were copies of the ones submitted with the application. As such, it was open to the judge to find (indeed the finding was inevitable) that as they both post-dated the application, the appellant had failed to establish that he had submitted these documents with his application. The judge did not err in law in making that finding.

16. Further, Mr Chowdhury submitted that, nevertheless, the judge should have found in the appellant's favour under the Immigration Rules on the basis of the 20 February 2014 documents. That argument is without merit. The effect of s.85A(3) of the NIA Act 2002 is that the judge could only consider documents which were submitted with the application to determine whether the requirements of the Rules were met.

17. Having found these documents were not submitted with the application, the judge inevitably had to dismiss the appellant's appeal under the Immigration Rules.

18. Secondly, Mr Chowdhury submitted that the judge had erred in law by failing to consider the appellant's claim under Art 8 of the ECHR.

19. He submitted that the appellant had been in the UK for two years, had made significant progress and had completed his course in January 2014 and was now seeking leave for a new course. If the appellant were not allowed to remain, he would suffer significantly in his future prospects and money spent on his previous course would have been ineffective to achieve what he wished. There was also a risk that his family would not support him in the future.

20. On behalf of the respondent, Mr Richards submitted that it was not clear whether the appellant had actually relied upon Art 8 at the hearing although Art 8 was raised and relied upon in the appellant's grounds of appeal to the First-tier Tribunal. However, he submitted that even if it was raised, there was no evidence of family or private life beyond the fact that the appellant had studied in the UK. The grounds put the appellant's case on the basis of "fairness" but in the absence of any relevant factor to the appellant's claim under Art 8 beyond the fact that he had studied, that claim was bound to fail and the judge's error in failing to consider Art 8 was not material.

21. There is no doubt that the appellant relied upon Art 8 in his grounds of appeal (see paras 12-15 of the grounds). It is not clear from the determination, however, whether the appellant, through his legal representative, actually relied upon Art 8 at the hearing. For the purposes of this appeal, I will assume that the appellant did continue to rely on Art 8. As a consequence, the judge erred in law by failing to consider a ground of appeal relied upon (see s.85(2) of the NIA Act 2002). However, in my judgment that error was not material to the decision. I agree with Mr Richards' submission that the Art 8 claim was bound to fail.

22. There was very limited evidence indeed about the appellant's private life in the UK restricted, effectively, to the fact that he had studied for a little over two years at the date of the hearing. He had successfully completed his study up to that point. However, his present application for leave was to undertake a new course of study. The judge was, no doubt, aware of the appellant's evidence contained in his written statement (at para 11) that he had spent money on his studies in the UK and that he claimed that it would affect him "socially and economically" if he was unable to

complete his studies. However, the appellant's Art 8 was palpably weak. As the Supreme Court pointed out in Patel and Others v SSHD [2013] UKSC 72 at [57] *per* Lord Carnwath:

> "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 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 'commonsense' in the application of the Rules to graduates who have been studying in the UK for some years (see para 47 above). 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."

23. In this appeal, the appellant did not rely upon any family life in the UK. His private life was restricted to the fact that he had undertaken courses successfully for some two years prior to the hearing. He now wished to undertake a new course. He could not establish that he met the requirements of the Immigration Rules, in particular the maintenance requirements in Appendix C. His inability to further his studies may, no doubt, have had some implications for him in the future although those are necessarily speculative. But, he had no human right protected under Art 8 to continue his studies *per se*. Even if his private life is interfered sufficiently seriously to engage Art 8.1, given all the circumstances of his case and the limited evidence of his private life in the UK, the inevitable conclusion must be that any interference with that private life was proportionate. The failure to grant him leave under Art 8 outside the Rules could not be demonstrated to have unjustifiably harsh consequences so as to outweigh the public interest in effective immigration control (see s.117B(1) of the NIA Act 2002 inserted by s.19 of the Immigration Act 2014).

24. Consequently, for these reasons, the judge's failure to consider Art 8 was not material to his decision as, in my judgment, no rational judge could conclude on the basis of the evidence before the First-tier Tribunal that the appellant could succeed under Art 8 (see AJ (Angola) v SSHD [2014] EWCA Civ 1636 at [49] *per* Sales LJ).

25. Thirdly, Mr Chowdhury indicated that the appellant's previous sponsor had now been removed from the sponsors' register and the appellant was required to find a new sponsor. Since his English language certificate was out of date, he had to take the language test again. For this, Mr Chowdhury indicated that he required a certified copy of his passport which was currently held by the Home Office. Mr Chowdhury invited me as a matter of justice to direct the Secretary of State to provide any certified copy of the appellant's passport. He told me that the appellant's representatives had written to the Home Office about a month ago but had not yet received any reply.

26. As I indicated at the hearing, this is a matter between the appellant's legal representatives and the Secretary of State it is not a matter for the Tribunal which has no power to make a direction as sought by Mr Chowdhury.

27. One final point. In the course of his submissions, I asked Mr Chowdhury whether he continued to rely upon the judge's approach to para 245AA and the so-called

'evidential flexibility' policy. He indicated that he had no submissions to make in relation to para 245AA.

28. Of course, reliance upon para 245AA is, in a sense, contrary to the appellant's primary submission that he sent the documents to the Secretary of State. However, the judge was undoubtedly correct to conclude that para 245AA could have no application to "missing" documents which were not part of a "sequence" (see para 245AA(b)(i)). As para 245AA(c) makes clear, the "evidential flexibility" rule does not apply simply where a "specified document has not been submitted". That was precisely the situation found to be the case by the judge and therefore he was correct that para 245AA could not assist the appellant.

Decision

29. For these reasons, the First-tier Tribunal did not materially err in law in dismissing the appellant's appeal. That decision stands.

30. The appellant's appeal to the Upper Tribunal is, accordingly, dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

A Grubb
Judge of the Upper Tribunal