



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

Appeal Number IA/35643/2013

THE IMMIGRATION ACTS

Heard at Field House

**Decision and Reasons
promulgated**

On 4 December 2014

On 22 June 2015

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Secretary of State for the Home Department

Appellant

and

Rana Muhammad Usman
(No anonymity order made)

Respondent

Representation

For the Appellant: Mr. S. Whitwell, Home Office Presenting Officer.

For the Respondent: In person.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Adio promulgated on 26 August 2014 allowing Mr Usman's appeal against the decision of the Secretary of State dated 13 August 2013 to refuse to vary leave to remain and to remove him from the UK.
2. Although before me the Secretary of State is the appellant and Mr Usman the respondent, for the sake of consistency with the proceedings before

the First-tier Tribunal I shall hereafter refer to Mr Usman as the Appellant and the Secretary of State as the Respondent.

Background

3. The Appellant is a national of Pakistan born on 28 August 1989. The Appellant was granted successive periods of leave as a Tier 4 (General) student, initially from 14 March 2011, and more recently from 7 August 2012 until 20 April 2014. This latter period of leave was to enable the Appellant to undertake a course at City of London Academy. However, on 20 February 2013 the Respondent received information from the City of London Academy to the effect that the Appellant had ceased studying there. In such circumstances the Respondent decided on 2 April 2013 to curtail the Appellant's leave with effect from 1 June 2013. (This in effect gave the Appellant a period in which he could seek to regularise his status.) On 1 June 2013 the Appellant made a further application for leave to remain as a Tier 4 (General) Student migrant.
4. The Appellant's application was refused for reasons set out in a combined Notice of Immigration Decision and 'reasons for refusal' letter dated 13 August 2013, which also communicated a decision to remove him from the UK pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006. The decision to refuse variation of leave to remain was taken with reference to paragraph 245ZX(d) of the Immigration Rules. Essentially the Respondent was not satisfied that the Appellant met the maintenance requirements. The Appellant had provided evidence of sponsorship by his brother, but the requirements of paragraph 13 of Appendix C of the Rules required any such funds if not held by the applicant himself or an official financial sponsor, to be held by a parent (or parents), or a legal guardian (or guardians).
5. The Appellant appealed to the IAC.
6. The First-tier Tribunal Judge allowed the appeal to the extent that the Respondent's decision was not in accordance with the law.
7. The Respondent sought permission to appeal which was granted by First-tier Tribunal Judge Colyer on 4 November 2014.

Consideration

8. The First-tier Tribunal Judge found that the Appellant could not meet the requirements of the Rules. Both of his parents were dead and "*there is no satisfactory documentary evidence to show that the Appellant's brother is now the legal guardian in law*" (paragraph 8).
9. However, the Judge noted that the Appellant had been granted a variation of leave to remain as a Tier 4 (General) Student migrant on 7 August 2012 pursuant to an application which had also relied upon financial sponsorship from his brother. No issue had been taken at that time in

respect of the requirements of paragraph 13 of Appendix C (which as Mr Whitwell acknowledged before me had come into effect on 21 April 2011).

10. In such circumstances the Judge accepted that there was *“an issue of fairness here and the legitimate expectation created in the mind of the Appellant that his application will be dealt with in a similar way in which it was dealt previously”*, such that the Judge concluded that *“the Respondent’s decision is not in accordance with the law”* (paragraph 8). See further at paragraph 9: *“If the Respondent wants to depart from this [i.e. accepting financial sponsorship from the Appellant’s brother as previously] then adequate notice should have been given to the Appellant”*.
11. The Respondent seeks to impugn the decision of the First-tier Tribunal with reference to the decision in **Marghia (procedural fairness) [2014] UKUT 00366 (IAC)**, which is relied upon in support of a submission that the Judge erred in determining the case on the basis of ‘substantive’ rather than ‘procedural’ fairness. Further to this it has been argued that the effect of the Judge’s decision was to negate the Respondent’s ability to set, change, and administer the Immigration Rules. In so far as the Appellant had any legitimate expectation it was only that any application would be determined in accordance with the Rules and law.
12. I reject the Respondent’s challenge. This is not a case where the Judge has essentially determined that the factual merits fairly required a particular outcome – and had thereby misunderstood or otherwise misapplied the notion of ‘procedural fairness’. This is exactly a case where the Judge determined that the procedures adopted by the Respondent were unfair in that the Respondent had changed her approach to the Appellant without prior notice (or indeed subsequent explanation) in circumstances where there had been no relevant change of the Rules or otherwise any change in the law. Whether or not any particular sequence of events or circumstances constitutes procedural unfairness is a mixed question of fact and law. I do not detect any misdirection in law, and in my judgement it was open to the Judge on the facts to conclude that the procedure adopted in respect of the Appellant was unfair.
13. I do not find any material error of law, and accordingly the decision of the First-tier Tribunal stands.
14. I pause to make the following observation. The Appellants’ parents are both dead. Moreover the Appellant is of an age where it would be absurd for him to have a legal guardian given that he does not lack legal capacity by reason of age or mental disability. There is no very obvious public policy justification for declining to accept genuine and legitimate financial sponsorship from a close relative in lieu of a parent. Whilst I acknowledge that Mr Whitwell did not have instructions on the point, I also note that nothing obvious occurred to him by way of justification. Why should a genuine student of full age and legal capacity, and who meets all other requirements of the Rules but is personally impecunious, be prevented

from pursuing studies when he has genuine sponsorship from a third party relative in circumstances where he cannot have such sponsorship through a parent because he is parentless? It is unclear whether it was just such thinking that led to the acceptance of the Appellant's brother as a financial sponsor when leave was granted in August 2012; however, the Respondent will no doubt wish to give consideration to such matters when reconsidering the Appellant's application in accordance with the law.

15. In this latter context the Appellant indicated that since the application and decision that are the subject of the appeal, matters have moved on in respect of his studies. It was indicated to the Appellant that he may wish to seek advice as to what additional information and/or variation of his earlier application he might now wish to put to the Respondent for consideration.

Notice of Decision

16. The decision of the First-tier Tribunal Judge contained no error of law and stands.
17. The appeal of the Secretary of State is dismissed.
18. Mr Usman's appeal remains allowed to the extent that the Respondent's decision was not in accordance with the law.

Deputy Judge of the Upper Tribunal I. A. Lewis 17 June 2015