IAC-AH-DP/DN-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48106/2014

THE IMMIGRATION ACTS

Heard at Manchester Upper Tribunal	**Decision & Reasons Promulgated**
On 7th October 2015	**On 21st December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR YAO LV
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Holt, Counsel
For the Respondent: Ms C Johnstone, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of China born on 2nd December 1992. The Appellant first entered the United Kingdom on 3rd April 2013 with the correct entry clearance conferring leave to enter until 6th October 2013 as a Tier 4 (General) Student. That leave was subsequently extended on 11th October 2013 and on 9th January 2014. On 19th November 2014 a decision was made to refuse to vary leave on the ground the Secretary of State was not satisfied that the Appellant had shown that he was genuinely able to communicate in English.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Parker sitting at Manchester on 4th March 2015. In a determination promulgated on 20th May 2015 the Appellant's appeal was allowed.

3. On 20th March 2015 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. The grounds contend that the Judge materially erred by failing to adequately reason the determination and that the Judge made no findings on the Appellant's own admission that he could not answer the questions posed at interview because he could not understood the interviewer's accent and that he was tired. The Secretary of State submits that this should have been the starting point for the Judge not to concentrate on the number of questions. The grounds go on to state that given that it is in the public domain that there has been widespread cheating on IELTS tests and there is a requirement through the Immigration Rules to be able to demonstrate English language ability and that the First-tier Tribunal Judge's decision is irrational.

4. On 13th May 2015 First-tier Tribunal Judge Wellesley-Cole granted permission to appeal. Judge Wellesley-Cole noted that the Judge's findings and conclusions set out from paragraphs 12 to 14 were brief and did not advance cogent reasons as to why he found the decision was not in accordance with the law and that he could only communicate in English and in that regard she considered that the Judge may have fallen into error.

5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal. The Appellant appears by his instructed Counsel Mr Holt. Mr Holt is familiar with this matter having appeared before the First-tier Tribunal. The Secretary of State appears by her Home Office Presenting Officer Ms Johnstone. I note that this is an appeal by the Secretary of State but for the purpose of continuity throughout the appeal process Mr LV is referred to herein as the Appellant and the Secretary of State as the Respondent.

Submissions/Discussion

6. Ms Johnstone takes me to the First-tier Tribunal Judge's findings and conclusions. At paragraph 12 she points out that the Judge notes that there has been an interview and takes into account that interview but that what the Judge fails to weigh up is the interview record and makes a clear finding at the hearing the Appellant did not speak in English. Thereafter she takes me to paragraph 13 to the findings therein pointing out that the findings of the Judge do not reflect the correct test that should be undertaken, that the Rule is to be found at paragraph 245ZX of the Immigration Rules. She points out that the interview record was available before the Judge and whilst noting the Judge's comment that

> "In this context we do not have a copy of the recorded interview."

She is uncertain as to what the Judge means by this but such a finding is inconsistent with his decision.

7. She submits that the Judge has made no finding on what has been the Appellant's choice not to speak English and that he was only able to answer questions on a very simple matter and that I should give little weight to his decision not to speak English and that therefore there is a lack of reasoning as to why he cannot communicate in English. She asked me to set aside the decision and to remake it dismissing the Appellant's appeal.

8. Mr Holt takes me to the Rule pointing out that it is quite specific and one of the factors to be considered whether or not an Appellant is a genuine student. It is necessary that an Appellant must speak to a standard of English assessed at the Common European Framework of Reference for Languages (CEFR) equal to level B2 and this is exactly what Coventry University has found. Mr Holt submits that at paragraph 13 of his determination the Judge does not criticise the Rules merely pointing out that there is no objective evidence as to what standard is necessary to obtain CEFR B2 and that the Home Office have consistently failed to say what CEFR-B2 actually means and that this point was never put before the Judge. On the basis that the level was never before the Judge it is impossible for him to say with accuracy what that level is.

9. The Secretary of State seeks to raise at this late stage that there is an alleged discrepancy over the tape recording of the interview. Mr Holt points out that that is not raised in the Grounds of Appeal and that the conclusion with regard to the interview is addressed in the conclusions reached in paragraph 13 of the First-tier Tribunal Judge's decision. He emphasises that the ground is not raised in the Grounds of Appeal and that in any event it should therefore be refused but points out that it is a "non-point" any way.

10. He submits that the Home Office have not said anywhere that the Appellant fails to meet standard B2 and indeed that they have failed to set out the standard required at the interview. He submits that the decision of the Secretary of State at first instance must in any event therefore be flawed and that the decision of the First-tier Tribunal Judge was perfectly well-reasoned and that he reached a decision that he was entitled to and that the decision of the First-tier Tribunal discloses no material error of law.

The Rule

11. It is important in this appeal to take due account of the Rule and what I am asked to consider. The relevant Rule is Rule 245ZX(da). This states:

> 'The applicant must if required to do so on examination or interview, be able to demonstrate without the assistance of an interpreter English language proficiency of a standard to be expected from an individual who has reached the standard specified in a Confirmation of Acceptance for Studies assigned in accordance with Appendix A paragraph 118(b) (for the avoidance of doubt, the applicant will not be subject to a test at the standard set out in Appendix A, paragraph 118(b)).'

The Law

12. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

13. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

14. I start by reminding myself that the issue extant before me is whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The issue in this matter is narrow. The Judge found the Appellant was genuinely able to communicate in English. The Secretary of State contends that he is not. To that extent the arguments amount to little more than disagreement. It has to be remembered that the First-tier Tribunal Judge heard the evidence. Where the Secretary of State seeks to challenge the First-tier Tribunal Judge's decision is the process he undertook. I am satisfied that the approach of the Judge does not disclose any material error of law. Firstly it has to be noted that the starting point is that the Appellant was studying accountancy, maths and business in a foundation programme at Coventry University and that the course was taught in English. He passed the examination and thereafter began a course for a BA in accountancy and finance and he has so far undertaken four examinations. If the Appellant did not understand English it is difficult in any event to understand how he could have passed these examinations and it is noted that Coventry University have accepted that the Appellant has an English language ability equal to level B2 on the Common European Framework of Reference for Languages. All the Judge has done is to acknowledge this and to comment that there is no objective evidence before him as to what standard the Appellant is supposed to achieve at interview and that the satisfaction of reaching level B2 does not break down the level of English the Appellant is required to achieve thus making

it difficult for the Judge to make an assessment in relation to the interview record.

15. I agree with the Judge as he is not able to assess the Appellant's evidence he has no objective evidence to assess his level of English and that whilst the Appellant could have assisted by speaking English at the hearing he chose not to do so and I agree with the submission made initially by Mr Holt at first instance and reiterated before me that this is not relevant.

16. I do not know whether the First-tier Tribunal Judge opted to hold a discussion with the Appellant in English. It seemed to me that this was a sensible thing to do and we had a chat in English. My conclusions are that the Appellant speaks English albeit not brilliantly. To a certain extent that does not help because it does not show whether he meets the requirement. However that assessment has been carried out by Coventry University. They are satisfied that he meets CEFR B2. That level is not a requirement to speak perfect English. I have given due consideration to paragraph 118(b) of Appendix A. Relevant reference therein must be to paragraph 118(b)(i)(4) that states:

> 'One of the requirements in (i) (ii) (iii) ... is met:
>
> (4) the Confirmation of Acceptance for Studies Checking Service entry confirms that the applicant has a knowledge of English equivalent to level B2 of the Council of Europe's Common European Framework for Language Learning in all four components (reading, writing, speaking and listening), or above ,or that the sponsor is satisfied that on completion of a pre-sessional course as provided for in paragraph 120(b)(i) of this Appendix, the applicant will have a knowledge of English as set out in this paragraph.'

17. That definition does not assist me (nor would it have assisted the First-tier Tribunal Judge much further). The test has been administered by Coventry University. They have been satisfied the Appellant meets the Rules. The Judge has applied a logical and constructive approach to his analysis. If the Secretary of State has a complaint in this matter it is not with the decision of the First-tier Tribunal Judge it is with the assessment made by Coventry University. They assign the analysis of meeting level CEFR LB2 to the University. In such circumstances submissions by the Secretary of State amount to mere disagreement with the finding of the First-tier Tribunal Judge and his determination discloses no material error of law. His decision is reasoned and in such circumstances I uphold the decision of the First-tier Tribunal and dismiss the Secretary of State's appeal.

Notice of Decision

The decision of the First-tier Tribunal Judge discloses no material error of law and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal is maintained.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris