



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11522/2015

THE IMMIGRATION ACTS

Heard at Field House
On 10 May 2018

Decision & Reasons Promulgated
On 20 June 2018

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

DEEPAK BHATTARAI
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Benjamin Hawkin, Counsel instructed by Paul John & Co solicitors

For the respondent: Mr Esen Tufan, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal to refuse him leave to remain as a Tier 2 (General) Migrant. The appellant is a citizen of Nepal.

Background

2. The appellant came to the United Kingdom in 2009, to study for a Diploma in Hotel Management at East Thames Graduate School. In 2011, he was given further student leave to pursue a course leading to a Graduated Integrated Diploma in Hotel Management at Level 4, which he achieved in September 2011. On 17 April 2013, the

appellant took an ETS/TOEIC test at South Quay College, a test which was later found to be invalid and the certificate withdrawn.

3. In 2013, n was given leave to remain to study for a Certificate in Business Accounting with the Chartered Institute of Management Accounting (CIMA) which was awarded in January 2014, after which he was able to apply for the CIMA's Professional Qualification.
4. In 2014, the appellant began studying for a Masters in Marketing and Innovation provided by Aryal Brothers Ltd trading as the London School of Marketing, in association with Anglia Ruskin University, by whom the resulting degree would be awarded. The appellants was awarded his MA in Marketing and Innovation by Anglia Ruskin University in April 2014.
5. The appellant next applied to study for an extended Postgraduate Diploma in Business and Marketing. He began his studies in November 2014 but his Tier 2 leave was refused in November 2015, since by then, Aryal Brothers Ltd had lost their Tier 2 sponsor licence. His Tier 4 leave was curtailed and Tier 2 leave refused.
6. The appellant appealed to the First-tier Tribunal, arguing that the respondent's decision breached his human rights. In his witness statement, the appellant set out his study history and said that he wished to continue his life in the United Kingdom. He said he had never been involved in any immoral or illicit activity whilst in the United Kingdom and had always cherished the laws and freedoms of the United Kingdom. He gave no further family and private life information to support his claim.
7. The respondent's refusal letter erroneously stated that the appellant had a right of appeal against his decision on the basis that the decision was not in accordance with the Immigration Rules and/or not in accordance with law, and/or that a discretion under the Immigration Rules should have been exercised differently. The appellant's case is that the application was made after the changes to appeal rights on 20 October 2014 and that therefore, his claim sounds only in human rights.

First-tier Tribunal decision

8. The First-tier Tribunal Judge found that the appellant was a credible and reliable witness, who had indeed taken the ETS/TOEIC test himself, but dismissed the appeal because he was not satisfied that at the date of decision the appellant could meet the requirements of paragraph 245HD(2) of the Immigration Rules HC 395 (as amended), because the revocation of his sponsor's licence invalidated his November 2014 CAS. He applied the decision of the Upper Tribunal in *R (on the application of Islam and Pathan) v Secretary of State for the Home Department (Tier 2 licence-revocation-consequences)* [2017] UKUT 369 (IAC) and dismissed the appeal.
9. The appellant appealed to the Upper Tribunal, pointing out that the allegation that the appellant had used a fraudulently obtained ETS/TOEIC certificate in his application on 9 May 2013, and an argument about the date of his degree award and the identity of the awarding body (Anglia Ruskin University) had been resolved in his favour. The reason his appeal had been dismissed, that his sponsor no longer had a Tier 2 licence at the date of decision, was challenged in the grounds of appeal on the basis that it was incompatible

with *Patel* (revocation of sponsor's licence – fairness) India [2011] UKUT 00369 (IAC), which concerns the introduction of a 60-day grace period for Tier 4 students in similar circumstances.

10. The appellant argued that the Upper Tribunal had erred in *Islam and Pathan* in finding that the 60-day period should not also apply to Tier 2 applications, and further, that the absence of any Article 8 ECHR finding was a fatal error of law in a human rights appeal. Moreover, the appellant submitted that *Islam and Pathan* was wrong, and that it was a decision on judicial review grounds which could not properly be imported into the analysis of human rights in a statutory appeal.

Permission to appeal

11. Permission to appeal was granted on the basis that the Judge erred in relying on *Islam and Pathan*, and in failing to consider Article 8 ECHR, this being a human rights challenge to the decision of the respondent to refuse Tier 2 leave. In granting leave, Judge Lever said this:

“3. The Judge had found that the two reasons given by the respondent for refusing the appellant's case had no merit. This is yet another case where the respondent relies on the unsatisfactory generic evidence in ETS cases. The Judge had understandably found himself bound by the case of *Islam and Pathan*. It is arguable however that he was not necessarily bound by that case as it was in judicial review proceedings in the Upper Tribunal and the case of *Patel* may have been worthy of further consideration. It is also arguable that the Judge should have looked at the narrow issue of fairness and the facts through the prism of Article 8 ECHR rather than simply the Rules.”

Rule 24 Reply

12. There was no Rule 24 Reply by the respondent.
13. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

14. Before the Upper Tribunal, Mr Hawkin asked for the appeal to be stayed pending the decision of the Court of Appeal as to whether *Islam and Pathan* is good law. Apparently, permission was granted by the Court of Appeal on 30 April 2018, but the First-tier Tribunal decision was sent to the parties on 5 March 2018, almost two months earlier. The outcome of any permission to appeal is always uncertain until the judgment is handed down: it is unarguably no error of law not to have regard to a permission decision which had not yet been granted.
15. Mr Hawkin also argued that *Islam and Pathan* was wrong in law and that the First-tier Tribunal Judge should not have had regard to, or been persuaded by that decision. He continued to rely on the *Patel* decision on Tier 4 leave.

16. For the respondent, Mr Tufan observed that the decision of the Supreme Court in *Patel* expressly referred to students (see [81]) and that in any event, this argument did not engage the appellant's human rights.
17. I reserved my decision, which I now give.

Discussion

18. The appeal at the First-tier Tribunal proceeded without detailed consideration of the appellant's human rights within or outwith the Rules. The same is true of the refusal letter itself. However, apart from an assertion that he would like to remain in the United Kingdom, no human rights arguments are advanced under Article 8 ECHR, either by way of paragraph 276ADE and Appendix FM of the Rules, or outside the Rules on the basis of exceptional circumstances. The error in failing to consider his Article 8 ECHR rights is not, on that basis, a material error of law.
19. The other question for me is whether the First-tier Tribunal Judge erred in law in applying *Islam and Pathan*. He did not. It was a decision of the Upper Tribunal on the precise point in issue (albeit in a judicial review application) and the First-tier Tribunal Judge was entitled to have regard to it and even if not bound by that decision, to find it persuasive.
20. This appeal is dismissed.

DECISION

21. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law I do not set aside the decision but order that it shall stand.

Date: 15 May 2018

Signed [Judith AJC Gleeson](#)
Upper Tribunal Judge Gleeson