



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/03964/2012

**THE IMMIGRATION ACTS**

Heard at Field House  
On 3 February 2014

Determination Promulgated  
On 12 February 2014

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ANWAR KHAN  
(No Anonymity Direction Made)

Respondent

**Representation:**

For the appellant: Mr P Deller a Senior Home Office Presenting Officer

For the respondent: Mr E Wilford of counsel instructed by Jinnah solicitors LLP

**DETERMINATION AND REASONS**

1. The appellant is the Secretary of State for the Home Department. I will refer to her as the Secretary of State. The respondent is a citizen of Pakistan who was born on 4 October 1971. I will refer to him as the claimant. The Secretary of State has been given permission to appeal the determination of First-Tier Tribunal Judge Khawar who allowed the claimant's appeal against the Secretary of State's decision of 26 January 2012 to refuse the claimant further

leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant under the Points Based System.

2. The Secretary of State was not satisfied that the claimant was entitled to 10 points for Maintenance Funds under Appendix C because he had not shown that he had the necessary funds for the required 28 day period prior to the date of his application. Furthermore she was not satisfied that he was entitled to 30 points for his Confirmation of Acceptance for Studies (CAS) because he had not shown that he met the English-language ability requirements. In the decision letter the Secretary of State also said that the claimant did not have right of appeal because he still had leave to enter or remain in the UK.
3. The claimant appealed and the FTTJ heard his appeal on 24 April 2012. Both parties were represented and the claimant gave evidence. The FTTJ concluded that he did have a right of appeal. He also found that the claimant had established that he was entitled to the points for both the English language requirements under CAS and Maintenance Funds. He allowed the appeal under the Immigration Rules.
4. In her grounds of appeal to the Upper Tribunal the Secretary of State submitted that the FTTJ erred in law firstly by concluding that the claimant had a right of appeal and secondly in the reasoning leading to the conclusion that he met the English language requirements. His diploma was a professional award and not an academic qualification which did not fall within the claimed exemption.
5. The Secretary of State was granted permission to appeal to the Upper Tribunal. Subsequently Upper Tribunal Judge Chalkley determined the appeal on the papers without a hearing on 24 October 2012. He concluded that the FTTJ had erred in law and set aside his decision. The claimant did not have a right of appeal.
6. Subsequently, it became apparent that the claimant's representatives had sent submissions to the Upper Tribunal which had not been placed before Upper Tribunal Judge Chalkley. He concluded that there had been a procedural irregularity and set aside his own decision of 24 October 2012.
7. It is common ground that in the circumstances my task is to consider whether the FTTJ erred in law and if so whether I should set aside his decision.
8. I have the documents and evidence which were before the FTTJ, a letter from the claimant's representatives dated 4 October 2013, a speaking note from Mr Wilford (in effect a skeleton argument), a further witness statement from the claimant and the reported determination of the Upper Tribunal in Syed (curtailment of leave – notice) [2013] UKUT 144 (IAC).
9. Mr Deller informed me that he believed that there was a Secretary of State's policy not to take decisions such as the decision in this case so close to the

expiry of an applicant's leave to enter or remain. Unfortunately, he had not been able to find it and could not tell me the precise terms.

10. The claimant's solicitors letter of 4 October 2013 submits that the claimant did have a right of appeal because Secretary of State's decision letter dated 26 January 2012 was not received by him until 2 February 2012, after his leave to remain had expired on 31 January 2012. It is necessary for me to consider whether this point was raised at an earlier stage and in particular prior to the hearing before the FTTJ. I see that in the appeal application form to the First-Tier Tribunal the claimant stated that he received the decision by post on 2 February 2012. Whilst I cannot find any reference to this in the claimant's witness statement which was before the FTTJ or in the submissions made to the FTTJ the application to appeal was clearly before him.
11. In the light of this evidence Mr Deller asked for and I granted a short adjournment to enable him to consider the Secretary of State's position. Mr Deller then accepted that the decision of 26 January 2012 was not received by the claimant until 2 February 2012 which was after his leave expired. In the light of Syed he conceded that, whilst the decision of the Secretary of State was a decision which at the date of issue on 26 January 2012, did not carry a right of appeal by the time it was received by the claimant on 2 February 2012 it had "mutated in-flight" and become a fully appealable decision. The effective date of the decision was the date on which it was received by the claimant. Because he was aware of the existence of but was not able to produce what he believed to be a relevant policy he could not accept that there was a general principle in play but did concede that on the particular facts of this case the appellant had a full right of appeal.
12. I find that whilst the FTTJ erred in law in his reasons for concluding that the claimant had a right of appeal it is not an error which should result in the decision being set aside. It was the right decision but for the wrong reasons.
13. There is no appeal against the FTTJ's conclusion that the claimant had established that he was entitled to the required points for Maintenance Funds under Appendix C.
14. This leaves the question of whether the FTTJ erred in his conclusion that the claimant had established that he was entitled to the required points under CAS for his English-language qualification. The Secretary of State's grounds of appeal submits that the FTTJ erred in law in concluding that the claimant had established that he met the English language requirements of paragraph 245ZX having achieved a postgraduate diploma and that he was entitled to the exemption under Appendix A of the Immigration Rules because he had obtained an academic qualification at least equivalent to UK bachelors degree taught in a majority English-speaking country as defined at Appendix A. The Secretary of State argues that paragraph 245ZX(d) does not apply because the claimant's diploma was a professional award and not an academic qualification.

15. The claimant has produced documents which show that he obtained an IELTS test certificate dated 30 November 2011 with an overall band score of 6.0. Neither representative was able to point me to any evidence as to what the precise and binding requirements were at the date of the decision in this case. The guidance contained in Appendix A was found not to be legally binding by the Supreme Court in R on the application of Alvi v Secretary Of State for the Home Department [2012] UKSC 33 and the subsequent guidance incorporated in the Immigration Rules did not come into effect until 30 July 2012.
16. Mr Deller accepted that, as a result of Alvi, there was no binding definition of "academic". In the circumstances he conceded that the claimant had established that he was entitled to the required points for English language qualifications under CAS and that in reaching this conclusion the FTTJ did not err in law.
17. Mr Wilford said that if the claimant's appeal was allowed under the Immigration Rules he did not pursue the appeal on Article 8 human rights grounds.
18. I find that the FTTJ did not err in law and I uphold his decision to allow the claimant's appeal under the Immigration Rules.

.....  
Signed  
Upper Tribunal Judge Moulden

Date 8 February 2014