



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

Appeal Number: IA/00848/2014

THE IMMIGRATION ACTS

Heard at Field House

On 12 January 2015

**Decision & Reasons
Promulgated**

On 3 February 2015

Before

UPPER TRIBUNAL JUDGE PITT

Between

**JOSEPH MICHAEL PRASAANTHA
(ANONYMITY DIRECTION MADE/NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss P Solanki, Counsel, instructed by Biruntha Solicitors

For the Respondent: Miss A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal brought by the appellant against the decision promulgated on 6 October 2014 of First-tier Tribunal Judge M P W Harris. The decision of Judge Harris refused the appellant's appeal as regards his claim for further leave to remain under the Immigration Rules as a Tier 1 (Entrepreneur) Migrant and his Article 8 appeal.

2. The appellant's case centres on the provisions of paragraph 245DD(e)(vi) which requires him at the time of his application as a Tier 1 (Entrepreneur) Migrant to "have" or "have last been granted" leave as a Tier 1 (Post-Study Work) Migrant. It is not in dispute that this is the only part of paragraph 245DD(e) that could avail this appellant so as to meet the Immigration Rules.
3. It is common ground before me as it was before the First-tier Tribunal that at the time of his application for his Tier 1 leave this appellant did not have leave as a Tier 1 (Post-Study Work) Migrant. He had discretionary leave.
4. How is it then that the appellant says that he can come within the provisions of paragraph 245DD(e) of the Immigration Rule? His argument is based on the fact that in May 2013 the respondent issued a policy entitled "Immigration Directorate Instructions - family members under the Immigration Rules - Section FM1.0 - partner and ECHR Article 8 guidance".
5. At paragraph 5.12 of that policy document, at page 63 of the version before me, the policy indicates, that

"Where an appeal against refusal of an application under the points-based system has been allowed on Article 8 grounds which relate to the initial application e.g. refusal of a student application is held to be a breach of Article 8 because the student would be unable to complete their course, the appellant should be granted leave of the same type and duration and on the same conditions as if the relevant points-based system application had been granted."
6. The appellant maintains that the view of the Secretary of State as expressed in this policy published in 2013 should be read as in some way creating a presumption that the discretionary leave granted to him in 2011 should be considered as if it was post-student migrant leave.
7. I could not see how that could be so. The documents most helpfully provided by Miss Solanki at the hearing before me show that at the time of the previous grant of leave, as above, undisputedly discretionary leave, there was no policy expressed by the Secretary of State guiding her or providing guidance to any appellant as to what the nature of their leave would be. The judge whose decision in 2011 led to the grant of discretionary leave (First-tier Tribunal Judge Cox) allowed the appeal under Article 8. As now, he did not have power in law to direct the respondent as to the length or conditions attached to that discretionary leave even where he made a suggestion that it should be "commensurate" with Tier 1 (Post-Study Work) Migrant.
8. At no time was there any suggestion that the leave should be anything other than discretionary leave. There is nothing before me to indicate that the respondent acted in any way unlawfully or that there was any legitimate expectation provided at any time for this appellant regarding

his previous grant of discretionary leave, the leave that he had at the time of the application that is at the heart of the appeal before me.

9. It is not my view therefore that the appellant can in any way benefit from the policy issued by the Secretary of State in May 2013. He was not entitled to anything other than discretionary leave in 2011 and did not have the requisite leave to be able to qualify as a Tier 1 (Entrepreneur) Migrant at the time of his application on 29 October 2013.
10. This was the conclusion, although somewhat differently reasoned, of First-tier Tribunal Judge Harris who at paragraphs 10 to 11 decided that the fact that the appellant had discretionary leave meant that he could not qualify as a Tier 1 Entrepreneur. I therefore find that no error arises in this regard.
11. Before me the appellant also raises the same issue in a slightly different way, arguing that the respondent's policy as expressed in the May 2013 document created a "fairness" point which should have led Judge Harris to at least consider the issue as part of his Article 8 proportionality assessment and, according to the appellant, have found it sufficient to afford the appeal under Article 8 being allowed.
12. I have indicated above that it is not my view that the appellant ever had any expectation of leave other than discretionary leave. Where that is so the "fairness" argument in the Article 8 context before me must fall away. It additionally falls away, in my view, given that this point was not argued at all before Judge Harris so he cannot be said to have erred in failing to consider it. The fairness points made before him as expressed in paragraphs 40-45 of the skeleton argument do not in any way relate to the discretionary leave point but to an entirely other matter concerning documents provided after the date of the original application but before the respondent's decision.
13. I would merely add that Judge Harris's consideration of Article 8 at paragraphs 29-30 appears to me entirely sound given the appellant's limited residence in the UK and the limited residence of his partner. It is very questionable in my mind that even were there a fairness point to consider under the Article 8 proportionality assessment, that given the backgrounds of the appellant and his partner they could ever have qualified under Article 8 in any event, bearing in mind, in particular, the comments of the Supreme Court at paragraph 57 of the case Patel and others v SSHD [2013] UKSC 72 indicating that those with limited leave coming as students or in similar categories cannot expect Article 8 to afford them the opportunity of remaining longer in the UK as this is not the purpose of that provision of the ECHR.
14. For all of those reasons I do not find an error occurs in the decision of the First-tier Tribunal.

Decision

15. The decision of the First-tier Tribunal does not disclose an error of law and shall stand.

Signed 
Upper Tribunal Judge Pitt

Date: 2 February 2015