**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal**
**Number: IA/04203/2014**

**THE IMMIGRATION ACTS**

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| **Heard at Field House** | **Decision &** |
| **Reasons Promulgated** | |
| **On the 19th August 2015** | **On the 4th** |
| **September 2015** | |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MCGINTY**

**Between**

**MR IRFAN SHAHZAD**
(Anonymity Direction not made)

Appellant

and

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Iqbal (Counsel)
For the Respondent: Miss A Everett (Home Office Presenting Officer)

**DECISION AND REASONS**

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Foulkes-Jones that was promulgated on the 12th September 2014.

Background

2. The Appellant is a citizen of Pakistan who was born on the 15th August 1992. The Appellant had initially applied for Leave to Remain in the United

Kingdom as a Tier 4 (General) Student Migrant on the Points Based System (PBS) under paragraph 245 ZX (c) of the Immigration Rules and for a Biometric Residence Permit. However the Appellant's application had been refused by the Respondent on the basis that she was not satisfied that the Appellant had proved that he was competent in the English language at a minimum of level B1 of the Common European Framework of Reference for Languages, or that he was a person who met an alternative requirement.

3. The Appellant appealed that decision, and that appeal came before First-Tier Tribunal Judge Foulkes-Jones on the 15th August 2014, who dismissed the Appellant's appeal. The full reasons for that decision are set out in the determination of First-tier Tribunal Judge Foulkes-Jones. He found at [6] that as at the date of application on 29th December 2013, the Appellant had not achieved or exceeded Level B1 of the Council of Europe's Common European Framework for language learning in all four components (reading, writing, speaking and listening) as the certificates were awarded on the 15th January 2013. He found at [7] that under section 85(4)(a) of the Nationality, Immigration and Asylum Act 2002 he could only have regard to evidence if it was submitted in support of, and at the time of making the application. He further found at [9] that even if the Appellant's application had been put on hold until the replacement certificate was received by the Respondent, the Appellant would not have qualified under paragraph 245ZX(c). The appeal was therefore dismissed under paragraph 245ZX(c). The First-Tier Tribunal Judge went on to dismiss the appeal under Article 8.

4. Within the Grounds of Appeal it is contended that the Appellant had taken the requisite elements of his English language test before his application was lodged, but that due to the Christmas holidays the result was not declared until the 15th January 2013. The Appellant claimed that he had submitted everything that he had received from the City and Guilds with whom he had taken his English Language Test and that he genuinely believed that he fulfilled the requirements of the English Language test and did not know about any missing evidence until he received a letter from the Home Office dated the 17th December 2013 requiring him to provide the original City and Guilds Certificates. He says he contacted the Examination Centre at the London School of Global Business where he

took his test, who told him that he had to contact City and Guilds directly to get a replacement. He says he contacted City and Guilds and was told it would take 6 weeks to get a duplicate certificate. He asserts that he passed the English Language test on the 15th January 2013, before his CAS was issued by the West City College Limited, but that due to an error on the part of City and Guilds only one part of the English Language test certificate had been provided to him. The Appellant says he asked the Respondent to put his application on hold to give him at least 6 weeks so that he could receive and send the certificate to the Respondent in order that he could get a positive decision on his Tier 4 extension application, but the Respondent not did not consider his request and refused the application on the 3rd January 2014.

5. It is argued in the grounds of appeal that the decision of the First Tier Tribunal Judge breached the principle of common law fairness and that it was one of the fundamental rules of natural justice that a person has a right to be informed of any point adverse to him that is going to be relied upon by the Judge and to be given an opportunity stating what his answer is to it and that further the Immigration Judge failed to exercise a discretion properly and refused the application on mere technicalities. It was further argued that the Judge had failed to properly consider Article 8.

6. Permission to appeal was initially refused by Judge of the First-Tier Tribunal Nicholson on the 19th December 2014, but the Appellant appealed to the Upper Tribunal, and permission to appeal was granted by Upper Tribunal Judge King with the following reasons:

"The appellant submitted an application on the 28th December 2012 but did not submit the requisite English Language Certificate as required as at the time of the application pursuant to paragraph 245 ZX (c) of the Immigration Rules.

Seemingly the Appellant had sat the language test before the application but for various reasons did not receive replacement certificates until 15th January 2013.

It therefore seems that he falls foul of the strict requirements under the Immigration Rules.

However, it is arguable that in the circumstances of this case there was a degree of unfairness. On 17 December 2013 the respondent wrote to the Appellant requesting the City & Guilds certificates which showed his scores for the ESOL listening, reading and writing. Notification was given that a failure to reply by the

24th December 2013 would result in a decision being made. It is the case for the Appellant that he responded to that letter asking for time in order to produce the requisite certificates. That letter is to be found at page 12 of the Appellant's bundle as presented before the court. The letter is, however, undated. There needs to be clear evidence as to when in fact it was written and sent. The certificates were acquired shortly thereafter as replacement certificates.

It is arguable that if the appellant was given an opportunity to produce the documents and sought to do so that it may be unfair or disproportionate in all of the circumstances to deprive him of the benefit of his action. The merits are, however, finely balanced in relation to this matter"

Submissions

7. The Appellant had submitted a skeleton argument in support of the appeal. In the skeleton it is argued at [15] that the unfairness in the present case arises from the fact that the appellant had passed the requisite English language test at the time of his application. He met all the substantive requirements. The refusal arose solely from a failure on the part of a third party-LSGB -to supply him with evidence of the same in a timely fashion". It was argued that failure to have regard to the confirmation of the Appellant's test results on the 15th January 2013, even though the full certificates had not been submitted in respect of all of the English language requirements, was procedurally unfair. It was further argued that the period of time given to the Appellant to deliver certificates when the Respondent wrote on the 17th December 2013 of just 2 weeks was unduly and unfairly tight especially after the Appellant had written requesting more time and that by ignoring the request for further time the Respondent is alleged to have departed from her discretion to take account of further evidence submitted, in a manner which is said was designed to prevent the Appellant from complying.

8. The Appellant also produced a witness statement that had been signed and dated by him on the 18th August 2015 in response to Upper Tribunal Judge King's direction that there had to be evidence as to when the Appellant had written to the Respondent asking for the extension in this witness statement at [5] the Appellant says that he informed the Home

Office on the 27th December 2013 about his situation and requested them to allow him extra time to provide the required certificates.

9. In his oral submissions on behalf of the Appellant, Mr Iqbal argued that the First-Tier Tribunal Judge fell into error at paragraph 7 of his decision and reasons section of the Judgement in stating that he could only have regard to the evidence that was submitted in support of and at the time of the making of the application to which the Immigration decision related. The document from the City & Guilds dated the 28th January 2014 post-dated the date of application. He argued that although the Judge may not have been able to take account of such evidence, the Respondent in the exercise of her discretion was able to take account of such evidence and that if the document had been sent to the Respondent after the application had been made, the Secretary of State did have a discretion to consider it and that in this case the CAS had post-dated the date of application and the original City & Guilds certificate had been considered by the Secretary of State. He argued that section 85 A of the Nationality, Immigration and Asylum Act only limited the evidence that could be considered by the Tribunal, rather than by the Respondent herself. He argued that there was a legitimate expectation that the documents would be considered by the Secretary of State if they were sent.

10. Mr Iqbal argued that the 7 day period was too short for the Appellant to comply with, given that it was beyond the Appellant's control that he did not have access to the copy documents and that he had requested those documents which in his statement he says that he had notified the Respondent that he done so and asked for the extension on the 27th December, asking for a 6 weeks extension, but that the decision was made on the 3rd January. He argued that the Secretary of State had a discretion to extend the seven day time limit and he argued simply failed to consider or exercise that discretion. He argued that in such circumstances the decision made was not in accordance with the law and should be remitted back to the Respondent in order that a lawful decision could be made.

11. Mr Iqbal argued that the First-Tier Tribunal Judge was wrong in law in finding that post application evidence could not be considered and that secondly the First-Tier Tribunal Judge had failed to consider whether or not

the Respondent had exercised a discretion at all by failing to reply to the letter asking for an extension of time.

12. Miss Everett on behalf of the Respondent argued that no material error of law was disclosed by the decision. She argued that the case being advanced today was that simply because the Secretary of State had exercised some discretion further discretion should have been exercised. She says that the Appellant's argument that it was not his fault that he could not comply with the Immigration Rules did not make the Secretary of State's decision unlawful, nor did it render the First-Tier Tribunal Judge's conclusion that the Appellant did not comply with the Immigration Rules wrong. She argued that irrespective of whether or not the Respondent had replied to the request for further extension of time, that did not render the decision unlawful or procedurally unfair and that the Secretary of State had given more time in any event. She argued that respondent did not have to grant the request for further time or even consider the same and that there was no procedure unfairness.

13. I asked Mr Iqbal as to whether or not the issue regarding procedural fairness had in fact been raised at all as an argument before First-Tier Tribunal Judge Foulkes-Jones, and as to whether or not he would have been required to deal with an argument that had not been put before him. Mr Iqbal argued that it was stated within the original Grounds of Appeal that the Respondent had failed to exercise discretion properly and that further at the bottom of page 32 and the top of page 33 in the initial skeleton argument before the First-Tier Tribunal in the Respondent's initial bundle it was asserted that the Respondent should have provided extra time to address the concerns of the Respondent as alleged in the refusal decision and that as the English language certificate is of vital importance to the outcome of the Appellant's application therefore the Respondent should have afforded extra time to the Appellant to address the concerns. He further argued that in his witness statement at page 35 of the bundle, at paragraph 14 the Appellant said that the Respondent had treated him unfairly and harshly and the appeal could have been avoided should the Respondent have acted judiciously and fairly by providing him with extra time to deal with the required issue. Mr Iqbal argued that these documents were before the Judge, but he was not able to tell me as to whether or not the argument was actually run before First-Tier Tribunal

Judge Foulkes-Jones, as he himself had not represented the Appellant at the First Tier Tribunal, and had only been instructed he said yesterday.

My Findings on Error of Law

14. After having carefully considered the evidence in this case, I am not satisfied that the procedural unfairness argument that is now being sought to be run by Mr Iqbal on behalf of the Appellant was actually fully and properly argued before First-Tier Tribunal Judge Foulkes-Jones. The original notice of appeal to the First-Tier Tribunal simply argued that the decision was against the Immigration Rules, that the Respondent did not pay proper consideration of the evidence presented and the Respondent did not exercise a discretion properly. It was not argued there, that the failure of the Respondent to reply to the Appellant's request for further time to submit his evidence was procedurally unfair or that the decision was in any other way procedurally unfair.

15. Within the skeleton argument before the First-Tier Tribunal it was stated at page 32 of the Appellant's bundle that the Appellant "the Appellant is providing the letter written to the Respondent before the decision was made requesting to give time to get his certificate from City & Guilds. It is also important to mention that the Appellant has provided sufficient evidence to corroborate his version that he passed the English-language test on the 15th January 2013. Please find attached the English language test certificates issued by the City & Guilds. The Appellant asserts that the Respondent should have provided extra time to address the concerns of the Respondent as alleged in the refusal decision. Since the English language certificate is of vital importance to the outcome of the Appellant's application therefore, the Respondent should have afforded extra time to the appellant to address concerns".

16. Further, it was stated within the witness statement of the Appellant at paragraph 14 that:

"I submit to the Tribunal that the Respondent treated me unfairly and harshly and this appeal could have been avoided should the Respondent have acted judiciously and fairly by providing me with extra time to deal the required issue".

17. However, after carefully considering the record of proceedings of the hearing before First-Tier Tribunal Judge Foulkes-Jones, the arguments were in fact put forward by Mr Butt who then represented the Appellant, did not in fact argue that any failure by the Respondent to consider the request for further time thereby rendered the original decision unfair. This argument does not appear to have been actually pursued in the submissions made on behalf of the Appellant before First-Tier Tribunal Judge by Mr Butt. Mr Butt in effect simply argued that the Appellant had taken the exam before he had made his application and that there was a delay in obtaining the results until the 15th January and that he had submitted the document that he had received from the City & Guilds to the Respondent, and that when he received the letter from the Respondent on the 17th December 2013, he had contacted the collage and written to the Home Office saying it would take 6 weeks to obtain copies of this certificate. He relied in this regard upon Article 8 and argued that the given this background the appeal should be allowed uner Article 8, rather than specifically arguing that the decision of the Respondent was procedurally unfair.

18. Given that the argument that appears was in fact pursued before First-Tier Tribunal Judge Foulkes-Jones was on the basis that the Appellant had submitted the evidence that he did have and that it was beyond his control that he was unable to submit the further documents requested by the Respondent within the seven-day time period meant that his claim should be allowed under Article 8, rather than it being specifically and clearly argued before the First-Tier Tribunal Judge that the Respondent's failure to deal with that request was procedurally unfair rendering it not in accordance with the law, I do not consider that the First-tier Tribunal Judge could or should in any way be criticised for failing to deal with an argument that was not argued before him in the way that is now being argued by Mr Iqbal on behalf of the Appellant before me. The argument at First Tier level simply put on the basis of Article 8, rather than on the basis

of procedural unfairness rendering the original decision "not in accordance with the law".

19. However, even if I am wrong in that regard, and First-tier Tribunal Judge Foulkes-Jones should have considered an argument that the Respondent acted in a manner which was procedurally unfair such as to render the decision "not in accordance with the Law", I do not consider that any failure on his part to do so, was in any way material. Mr Iqbal on behalf of the Appellant sought to argue that section 85A of the Nationality, Immigration and Asylum Act 2002 only limited the discretion of the Tribunal in respect of the admissible evidence on appeal and did not limit the discretion of the Respondent. However, the discretion of the Respondent in terms of considering documents that was submitted after the application under what was previously known as the "evidential flexibility policy" from July 2012 has now been contained in paragraph 245AA of the Immigration Rules which states at paragraph 245AA (A) that "where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the Entry Clearance Officer, Immigration Officer or the Secretary of State will only consider documents that have been submitted with the application and will only consider documents submitted after the application where they are submitted in accordance with subparagraph (b)".

20. Under paragraph 245AA (b) it is stated that, "if the Appellant has submitted specified documents in which:

(i) Some of the documents in sequence had been omitted (for example, if one bank statement from a series is missing);

(ii) A document is in the wrong format (for example, if the letter is not on letterhead paper as specified); or

(iii) A document is a copy and not an original document; or

(iv) A document does not contain all the specified information;

The Entry Clearance Officer, Immigration Officer or Secretary of State may contact the Applicant or his representative in writing and request the correct documents. Requested documents must be received at the address specified in the request within 7 working days of the date of the request."

21. However, in this case the Respondent had already written to the Respondent on the 17th December 2013 asking for the original City & Guilds certificate showing his scores for ESOL Listening, Reading and Writing stating specifically that the aim was to make a decision on the case promptly and that "to enable us to do this it is essential that you use the enclosed return label and reply by the 24th December 2013. If you fail to produce information requested within the time that has been given, I must warn you that the application will be considered on the basis of the information currently available". The Appellant had therefore been given an opportunity to produce the missing evidence in line with the evidential flexibility policy as set out in paragraph 245 AA of the Immigration Rules, the Appellant only having submitted a certificate at that time in respect of his oral language skills, rather than listening, reading and writing skills.

22. Having already granted the Appellant an opportunity to produce the documents that were missing, I do not consider that it was procedurally unfair on part of the Respondent not to substantively reply or to deal with the request for further time that was made by the Appellant, nor do I consider it procedurally unfair of the Respondent, as it is said that she would do in her letter, deciding the application on the evidence presented, when the requested evidence was not provided within the timescale given.

23. Paragraph 245AA does not provide for any further extensions of time beyond the initial period of time granted, and the Respondent was therefore not in breach of any Immigration Rules or policy by failing to consider or allow a further period for the Appellant to obtain copy certificates. The obligation was on the Appellant to ensure that he actually had all of the requisite documents before making his application.

24. As was confirmed by the Court of Appeal in the case of Rodriguez Mandalia & Patel v Secretary of State for the Home Department [2014] EWCA Civ 2, the Secretary of State for the Home Department is not under an obligation to afford Applicants for Leave to Remain as Tier 4 (General) Student Migrants in the United Kingdom any opportunity to remedy defects in their applications, in that case in relation to maintenance and funding requirements under her evidential flexibility policy. The evidential flexibility policy was not designed to give an Applicant the opportunity first to remedy all possible defects in an application and supporting

documentation, so as to save the application from refusal after consideration.

25. The Respondent in this case having exercised to discretion to request the original documents in respect of the other three parts of the Appellant's English language test, as she was entitled to do under paragraph 245AA of the Immigration Rules, she was not then obliged to consider any further request by the Appellant for further time to submit that documentation. Paragraph 245AA lays down the period of time in which such documentation has to be provided and the Appellant did not provide documentation within that timescale, and the fact simply that it would take six weeks because of the Christmas holidays to obtain copy documentations, failed to explain why the Appellant did not in fact ensure that he had obtained all of the requisite documents prior to making his original application. The burden was on him to ensure that he actually had all of the requisite documentation. I therefore do not consider that the Respondent has acted procedurally unfairly in determining the application on the evidence that she had, when the Appellant had not provided the requested documentation within the time limit given. I do not consider that the Respondent was required to deal with the request for further time, other than as a matter of courtesy, but her failure to do so did not render the decision procedurally unfair, nor did any failure on behalf of the Respondent to grant the further six weeks requested by the Appellant render the decision procedurally unfair.

26. Nor was it unfair of the Respondent to actually require the original test certificates to be submitted. As was properly found by First-Tier Tribunal Judge Foulkes- Jones at [8] the CAS itself is not specified document and therefore the fact that the CAS had said that the Appellant's had passed the four components required, such that Mr Butt was arguing before First-Tier Tribunal Judge Foulkes-Jones that the Appellant did not need to supply certificates, was properly rejected by First-Tier Tribunal Judge Foulkes-Jones, and it was not procedurally unfair that the Respondent actually to require the Appellant to produce the specified documents from the English language test provider pursuant to paragraph 118(b) (ii) (4) and paragraph 120-SD (a) of Appendix A. The Judge was perfectly entitled to find the CAS was not in itself sufficient.

27. Further, the First-Tier Tribunal Judge was perfectly entitled to find on the evidence before him that the documents which were produced by the Appellant and submitted to the Respondent dated the 28th January 2014 from the City & Guilds especially stating that "this is not a certificate" was not in itself a specified document as required under the Immigration Rules, such that even if the respondent had placed the Appellant's application on hold as requested, the specified documents as found by First-Tier Tribunal Judge were not provided within that requisite time. This was a finding open to him on the evidence before him.

28. Further, the suggestion in the original Grounds of Appeal that the decision was procedurally unfair on the basis that an Appellant has the right to be informed of any adverse point to be taken against him and not to be taken by surprise following the case of R (Anufrijeva) v Secretary of State for the Home Department [2004] 1AC604 does not assist the Appellant. The Court of Appeal in Rodriguez confirmed that the Appellant does not have to be notified of every reason why his application was going to be refused, and the First-Tier Tribunal Judge did not take a point adverse to him without giving him the opportunity of stating what his answers to it were. The Judge properly dealt with the arguments raised by Mr Butt on behalf of the Appellant.

29. Further, although within the original grounds it was argued that the Judge failed to consider Article 8, it is clear from the decision that the Judge fully and properly considered Article 8 between [12] and [15] inclusive of his decision.

30. The decision of the First-Tier Tribunal Judge therefore does not disclose any material error of law and the appeal is dismissed. The decision of First-Tier Tribunal Judge Foulkes-Jones is maintained.

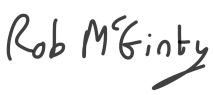
Notice of Decision

The decision of First Tier Tribunal Judge Foulkes-Jones does not contain any material errors of Law and the appeal is dismissed. The decision of First-Tier Tribunal Judge Foulkes-Jones is maintained.

The First-Tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and no application for an anonymity order was made before me. No such order is made.

Signed Dated

20th August 2015



Deputy Upper Tribunal Judge McGinty