



IAC-AH-CO-V1

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

Appeal Number: IA/38489/2014

THE IMMIGRATION ACTS

**Heard at Centre City Tower, Decision & Reasons Promulgated
Birmingham
On 10th June 2015**

On 23rd July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MR RAZIQ HUSSAIN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

Appellant:

Respondent:

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge A L B Nixon promulgated on 30th December 2014, following a hearing at Birmingham on 11th December 2014. In the determination, the judge dismissed the appeal of Raziq Hussain. The Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Pakistan, who was born on 27th January 1990. On 18th September 2014, his application for leave to remain as a Tier 4 (General) Student was refused and it was against that decision that the Appellant appealed to the First-tier Tribunal.

The Appellant's Claim

3. The Appellant's claim is that he came as a student in 2012 and had valid leave until 22nd August 2014. He failed the speaking and listening elements of the English test but had a new date set for 2nd September 2014 to enable him to re-sit those tests. He made the application without having the requisite certificate as his leave expired the following day. He was unable to take the test on 2nd September as the Respondent was in possession of his passport and accordingly he was refused entry. He claims that he has been prejudiced by the fact that his passport was not released to him thus disabling him from sitting the English language test as he intended to do.

The Judge's Findings

4. The judge observed that there was no dispute whatsoever that the Appellant could not meet the Immigration Rules applicable to a Tier 4 student as he had not submitted a valid CAS. The Appellant could not succeed under the Immigration Rules of paragraph 276ADE of Appendix FM. Proper regard was given by the judge to the established case law in the form of **Nagre [2015] EWHC 720** and **Gulshan [2013] UKUT 00640** and the case of **Shahzad [2014] UKUT 0085** and the judge observed that, "these cases make it clear that the Appellant must raise arguably compelling or compassionate grounds to cause me to go on to consider this appeal under Article 8". (See paragraph 13).
5. The judge then went on to consider such exceptional or unusual circumstances that may be in this case such as to enable her to go on to consideration of the claim under freestanding Article 8 jurisprudence. She observed that,

"... I have seen evidence to show that he was not permitted to entry sit the test as he was not in possession of his passport. I note from his witness statement that he requested his return the day before the exam date and accordingly, it was unlikely that he would have been given the passport with such a short notice, even if it were the Respondent's policy to return travel documents when the applicant failed to meet the Rules ..." (paragraph 13).
6. Notwithstanding the Appellant's complaints that he had been disadvantaged by the failure to return his passport the judge observed that,

"I do not find this to be unfair. It seems clear to me that the Appellant left his application to the last minute and knew full well that he had failed relevant elements of the English requirements. The burden was always

upon him to show that he satisfied the legal requirements ..." (paragraph 13).

7. For completion, the judge ended by a consideration of the latest Rules in the form of the application of Section 117B of the Nationality, Immigration and Asylum Act 2002 (paragraph 14) and observed that the Appellant could not succeed on the basis that the adequate proportionality assessment went in his favour because it did not (see paragraph 14).
8. The appeal was dismissed.

Grounds of Application

9. The grounds of application state that the considerations of the policy for Tier 4 students is to ensure that properly financed general students are given an opportunity to benefit from the United Kingdom's education service. In the circumstances the public interest in the Appellant's removal is reduced given that he is able to demonstrate that he meets the substance of the requirements to be issued with his student visa (see paragraph 17). As such a broad statement is clearly questionable as it is simply not an accurate reflection of what the broader policy is for student applications.
10. More circumspect and specific is the statement that the judge erred in law because she dealt with the Appellant's proportionality assessment of the case in a cursory manner at paragraph 14 when she stated that, "had I gone on to consider Article 8, my decision would have been the same, the Appellant having failed to show the decision was disproportionate to the need for effective control".
11. Even more significantly, the grounds observe that the judge had not had regard to the latest Court of Appeal judgment of **MM (Lebanon)** which was handed down on 11th July 2014 where Lord Justice Aikens observed that there is no further test of exceptionality as such because, "I cannot see much utility in imposing this further, intermediary test. If the applicant cannot satisfy the Rule, then there either is or there is not a further Article 8 claim" (see paragraph 129).
12. On 6th May 2015, permission to appeal was granted by the First-tier Tribunal on the basis that,

"Even though the judge's decision and reasons was adequate on the basis of the Immigration Rules, it is nonetheless arguable that in relation to Article 8 the judge should have borne in mind the decisions of **MM Lebanon [2014] EWCA 985** and **MK (Pakistan)**" (see paragraph 4 of the grant of permission).

The Hearing

13. At the hearing of 10th June 2014 these were the issues before me and I considered the detailed and well compiled submissions in the grounds of application very carefully. Having done so, I am in no doubt whatsoever that the decision of Judge A L B Nixon was entirely correct on the facts and

there simply is no basis for stating that there is an error of law. There are two reasons for this.

14. First, it is simply not the case that the judge dealt at paragraph 14 “in a somewhat cursory manner” with the question of whether the Appellant had been able to succeed on the basis of freestanding Article 8 jurisprudence. It is not the case that the judge’s reference to proportionality here was inadequate. Quite the contrary is the case. The Appellant was not able to sit the test, as the judge very properly recounted, because he had bizarrely made a request for the return of his passport the day before the exam date and this was properly taken into account when the judge observed that, “it seems clear to me that the Appellant left his application to the last minute and knew full well that he had failed relevant elements of the English requirements ...” (paragraph 13).
15. Second, it is not the case that the judge fell foul of the latest strictures on the application of Article 8 jurisprudence. The grounds make reference to paragraph 1 to 9 of the judgment of Lord Justice Aikens in **MM (Lebanon)** and refer to the fact the applicable Rule can now quite simply be put in terms of the statement that, “if the applicant cannot satisfy the Rule, then there either is or there is not a further Article 8 claim”. The judge did in essence apply this Rule. Her conclusion was that there was no further Article 8 claim.
16. It was as simple as that. But it does not end there. This is because there have been further developments in relation to Article 8, and no less than in the Court of Appeal itself. It is clear from the decision in **Singh [2015] EWCA Civ 74** at 62, 64 and 67 that **MM (Lebanon)**, which is now being relied upon, does not in fact undermine the judgment of Sales J in **Nagre**, and in any event Sales J’s approach in **Nagre** has been endorsed by the Court of Appeal, presided over by the Master of the Rolls in **MF (Nigeria) [2003] EWCA 1192**. That is a complete answer to this challenge. There simply is no error of law.

Notice of Decision

There is no material error of law in the original judge’s decision. The determination shall stand.

No anonymity direction is made.

Signed

Dated

Deputy Upper Tribunal Judge Juss

23rd July 2015

TO THE RESPONDENT

FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge Juss

23rd July 2015