



IAC-AH-CJ-V2

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

Appeal Number: IA/50423/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 27th November 2015**

**Decision & Reasons Promulgated
On 17th December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MR ZOHID KUCHIMOV
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No attendance

For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Uzbekistan born on 26th September 1987. The Appellant first applied for entry clearance as a student on 22nd August 2007 with an intention of pursuing an eight week study course but that application was refused due to doubts about his funding. Thereafter he obtained entry clearance as a student on 25th January 2008 to follow a nine month English course with leave due to expire on 31st January 2009. The Appellant subsequently applied for further leave to study an intensive English course having apparently completed a Diploma in General English at Brooks College and was given leave until 28th February 2010. He next

applied for leave to remain to study Business English Upper Intermediate at Victoria English College from 22nd February 2010 to 18th February 2011. Thereafter he applied on 18th March 2011 for leave to study for a Business Information Systems (NQF6) at Victoria English College and was given leave until 1st June 2013. However on 30th December 2011 he submitted a further application to study Business Management at NQF Level 5 at Shakespeare College London until 14th December 2013 and was given leave until 14th April 2014.

2. Shakespeare College's licence was revoked a few months after the Appellant supposedly studied there and the Appellant demonstrated little knowledge of his current course of study. Consequently on 19th June 2015 the Secretary of State, noting that the Appellant had been in the UK as a student for a long period with little evidence that he had a commensurate record of academic achievement, cancelled the Appellant's leave to enter (the Appellant having returned to Uzbekistan for his grandmother's funeral). In making such refusal the Secretary of State noted that had the Appellant been a genuine student there was nothing to prevent his seeking new sponsorship and returning to Uzbekistan to apply for further entry clearance.
3. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Quinn sitting at Richmond on 26th June 2015. It is appropriate to cite precisely the decision of the First-tier Tribunal Judge.

"I allow the appeal as I think the Respondent should have exercised her discretion differently.

I dismiss the appeal on human rights grounds as regards the Appellant's Article 8 claim thereof. Paragraph 276ADE of the Immigration Rules is not satisfied."

4. On 15th July 2015 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. Those grounds are of considerable relevance. They note that the judge intended that the Respondent should have exercised his discretion differently but point out that the leave of the Appellant had been cancelled by reference to paragraph 321A. That Rule states:

"321A. The following grounds for the cancellation of a person's leave to enter or remain which is in force on his arrival in, or whilst he is outside, the United Kingdom apply;

- (1) there has been such a change in the circumstances of that person's case since the leave was given that it should be cancelled or;
- (2) this Rule is mandatory and contains no discretion;
- (3) the refusal of leave to enter was made under paragraph 320(5) which states ... the failure in the case of a visa national, to produce to the Immigration Officer a passport or other identity document endorsed with a valid and current United Kingdom entry clearance issued for the purpose for which entry is sought."

That Rule is also mandatory and contains no discretion.

5. On 1st October 2015 Judge of the First-tier Tribunal Davies granted permission to appeal noting that the judge appeared to have allowed the appeal on the basis that the Respondent should have exercised her discretion differently and that the grounds make it clear that the Rules are mandatory and that the Secretary of State had no discretion. Judge Davies noted that the judge had clearly made his findings on the basis therefore of an error and that the grounds disclosed an arguable error of law.
6. I note that when the matter came before the First-tier Tribunal there was no representative of the Secretary of State in attendance. The Appellant was legally represented. The Appellant remained with legal representation until 26th November 2015 when his then instructed solicitors noted that they wished to withdraw their representation and that all future correspondence be forwarded to the Appellant at his home address. They did however confirm that the Appellant had been advised to attend the hearing.
7. It is on that basis that the appeal comes before me. The Secretary of State appears by her Home Office Presenting Officer Mr Nath. The Appellant does not appear. I am however satisfied that he has been duly served with notice of the hearing. His address is fully disclosed on that notice and indication that he is aware of the hearing has been confirmed by his previously instructed solicitors.

Submissions/Discussion

8. Mr Nath does little more than refer me to the Grounds of Appeal and further seeks to rely on the authority of *Ukus (Discretion: when reviewable) [2012] UKUT 00307 (IAC)*. He points out that the Rules in question are mandatory and that there is no discretion and he therefore asked me to find that there is a material error of law in the decision of the First-tier Tribunal Judge; to set aside that decision and to remake the decision refusing the Appellant's original appeal.

The Law

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
10. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of

credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

11. I am considerably helped in this matter not just by the submissions of Mr Nath but by the very detailed refusal/cancellation of leave to enter/remain report provided by the Secretary of State which I have read in some considerable detail. However the key to this matter is to note that the Appellant of his own volition left the UK to return to Uzbekistan to attend his grandmother's funeral. The Notice of Refusal is dated 19th June 2015. When interviewed on return the Appellant had stated that he had last attended college on 29th September 2014 and that the college had only granted him two weeks' leave but he could not return to the United Kingdom because of health reasons. The Appellant had stated to the interviewing officer that he had not spoken to the college since September 2014 and confirmed that he had missed one whole semester. When interviewed the Appellant had stated that he had started the course in April 2014 but he struggled to recall any of the course content or modules and could not state what ACCA was. In the light of that the interviewing officer was not immediately satisfied that the Appellant qualified for leave and the Secretary of State issued form IS81 thereby suspending his leave and requiring him to submit to further examination. The conclusion of that examination led to termination of leave by way of the Notice of Refusal.
12. The crux of the First-tier Tribunal Judge's determination is to be found at paragraphs 27 and 28 where he stated that he considered it would have been reasonable to give the Appellant 60 days to find another Sponsor and that revoking the Appellant's leave immediately when he arrived at Heathrow was unreasonable in the circumstances. The Grounds of Appeal and the submissions of Mr Nath make it absolutely clear that the Grounds for Refusal pursuant to paragraph 321A and 320(5) are mandatory and contain no discretion. I am consequently satisfied that in indicating that the Secretary of State should have exercised discretion the First-tier Tribunal Judge erred in law. Mr Nath is correct to refer me to the authority of *Ukus* but that authority of course addresses the situation when a decision maker in the purported exercise of discretion vested in him notes his function and what was required to be done when fulfilling it and then proceeds to reach a decision on the basis that decision is a lawful one and the Tribunal cannot intervene in the absence of a statutory power to

decide that the discretion should have been exercised differently. *Ukus* is clearly good law but addresses the situation where there was a discretion applied even in a case where the discretion should have been exercised differently. The Rules are clear that it is mandatory and there is no discretion.

13. In such circumstances I am satisfied for all the above reasons that there is a material error of law in the decision of the First-tier Tribunal Judge and I set aside that decision and I remake the decision allowing the appeal of the Secretary of State thus confirming the position of cancellation of leave to remain issued on 19th June 2015.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law. That decision is set aside and the decision is remade allowing the appeal of the Secretary of State and consequently reinstating the refusal/cancellation of leave to enter/remain issued by the Secretary of State on 19th June 2015.

No anonymity direction is made.

Signed _____ Date _____

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT **FEE AWARD**

No application is made for a fee award and none is made.

Signed _____ Date _____

Deputy Upper Tribunal Judge D N Harris