



IAC-AH-DN-V1

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

Appeal Number: IA/22949/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 7th January 2016**

**Decision & Reasons Promulgated
On 15th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MR SAMUEL ONYENYERECHI NWAOTITE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Nyadi (LR)
For the Respondent: Mr Walker (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Ian Howard, promulgated on 2nd April 2015, following a hearing at Hatton Cross on 10th February 2015. In the determination, the judge dismissed the appeal of Samuel Onyenyerchi Nwaotite, whereupon the Appellant, subsequently applied to, 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 Nigeria, who was born on 7th July 1988. He appeals against the decision of the Respondent dated 8th May 2014, refusing his application for variation of leave, as a person entitled to leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant under paragraph 245ZX of the Immigration Rules.

The Appellant's Claim

3. The Appellant's claim is that in reaching his conclusions, the judge had mixed up the facts. The correct version of the facts were that the Appellant's leave to remain was to expire on 6th April 2014. He made an online application to renew which was received by the Home Office on 4th April 2014. However, the Appellant does concede that he failed to enclose the bank statement from his Sponsor on that date as it had not arrived from Nigeria. The bank statement however arrived on 5th April, the following day, and the Appellant promptly sent his application on the same day. He forwarded the bank statement to the Home Office by recorded delivery number SC992328324GD.
4. This application was posted before the Appellant's leave expired. In fact it was confirmed that the documents were received by the Home Office on 7th April 2014. What the judge states, on the other hand, is that, "He told me that the bank statement in fact arrived on 15th or 16th April 2014 and was sent by him to the Respondent as soon as he had it ..." (paragraph 9).
5. Second, the Appellant also contended that the judge erred in law at paragraph 16 in failing to address the issue of Article 8 rights, and this was irrespective of whether it was phrased before the Tribunal or not. Attention was drawn to the case of **Mukarka [2006] EWCA Civ 1045**. The judge did not give proper regard to the fact that the Appellant was in his final years of study in the United Kingdom as a fee paying student and the proportionality of the Respondent's decision had to be valued during the context of this fact.

The Judge's Findings

6. The judge recorded the evidence that the Appellant had told the Tribunal that, "He did not enclose his Sponsor's bank statement with his application as it had not arrived from Nigeria in time and he did not want to be adjudged an overstayer by not submitting the application to vary leave ..." (paragraph 9). The judge went on to hold that the application was a points-based scheme application and therefore the provisions of Section 85A of the 2002 Act applied. These provisions "Preclude me from considering material that was not submitted at the time of the application unless 'by the qualifications to the second exception as set out in Section 84A' ..." (paragraph 11). The judge went on to hold that the Appellant could not successfully argue that the decision was not in accordance with the law "Because of a failure on the part of the Respondent to follow her own Rules" (paragraph 12).

The Hearing Before RSIJ Martin

7. Permission to appeal was granted on 28th May 2015 on the basis that the Article 8 issue should have been considered by the judge and a failure to do so was an arguable error of law. A Rule 24 response dated 4th June 2015 was to the effect that irrespective of whether Article 8 was raised it was clear that the appeal had no prospect of succeeding under Article 8 given that the Supreme Court had held in **Patel** that however desirable it may be, there is no Article 8 right to complete one's studies in the UK.
8. Nevertheless, when the matter arose before RSIJ Martin on 21st October 2015 the only issue was whether a missing wage slip could be produced, as this was the issue that went to the consideration of Article 8 rights. The "Record of Proceedings" by RSIJ Martin reads as follows:

"It seems (agreed by Walker) that the Appellant meets all the requirements of Appendix FM except for specified evidence as only five months' payslips produced (only five since commencement of employment). If six, could have found, met Appendix FM. Mr Walker will deal with it."

The Hearing

9. At the hearing before me on 7th January 2016, Mr Walker, appeared on behalf of the Respondent. He very candidly submitted that at the last hearing the only question was whether a missing sixth wage slip from the Appellant's wife, who worked as a pharmacist in Tunbridge Wells, could have been produced for October 2015, as she had already produced five since she began her employment, and she had to produce evidence of six months' wage slips. Mr Walker explained that he received a wage slip in November 2015 for the period of October 2015. He explained that, "I forwarded that wage slip to the case owner so that leave could be granted because the parties were married. I now concede that the Appellant succeeds under Appendix FM".
10. Mr Walker initially submitted that the best he could do was to ask the caseworker again to get on with making the decision so as to allow the application on the basis of Appendix FM given that, his having looked at the wage slip, it was clear to him that the requirements of Appendix FM had been met, as indeed had been the position before RSIJ Martin. Mr Nyadi, expressed gratitude at this and indicated that he would be happy to liaise with Mr Walker so as to expedite the making of the decision, in order to prevent the matter returning before this Tribunal again.
11. However, upon reflection, Mr Walker conceded, that since he had already agreed that the requirements of Appendix FM had been met, upon production of this outstanding wage slip, the proper course of action would be for me to allow the appeal.

Error of Law

12. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the determination and remake the decision (see Section 12(2) of TCEA 2007). The reason is quite simply that the judge failed to give any attention to the Appellant's Article 8 rights and Appendix FM was not considered. That is an error in the circumstances of this case. Permission to appeal was rightly granted on this basis and I conclude that the error is such that the decision should be set aside.

Remaking the Decision

13. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today, and the ruling made by RSIJ Martin on 21st October 2015. I note that the wage slip for the wife of the Appellant was sent on 16th November 2015 by the NHS to Tunbridge Wells Hospital and this shows her net pay of £1,252.69. I note that there is no issue taken about the reliability of this sixth outstanding wage slip.
14. On the contrary, I note that Mr Walker, appearing on behalf of the Respondent had before me today expressly stated that, "I concede the Appellant now succeeds under Appendix FM", and had in fact so directed the caseworker to decide the matter after his appearance before RSIJ Martin on 21st October 2015, when she had entered the note that, "Mr Walker will deal with it".
15. In the circumstances, since the requirements of Appendix FM are met, I allow this appeal.

Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed under Appendix FM of the Immigration Rules.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

10th February 2016