



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

**Appeal Number: IA/45866/2014**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 1 February 2016**

**Decision & Reasons**

**Promulgated**

**On 12 February 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE J M LEWIS**

**Between**

**RAJIB BARTAULA**  
(ANONYMITY DIRECTION NOT MADE)

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr V Makol, instructed by Maalik & Co Solicitors  
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

**DECISION AND REASONS**

**The History of the Appeal**

1. The Appellant, a citizen of Nepal, appealed against the decision of the Respondent to refuse his application for leave to remain as a Tier 4 (General) Student. He failed to attend the hearing of his appeal on 27 April 2015. It was adjourned, and subsequently listed for determination on the papers. Judge Povey did so, sitting at Newport, on 20 May 2015. In a decision dated and promulgated on 1 June 2015 he dismissed the appeal under the Immigration Rules.
2. Permission to appeal was refused on 9 September 2015 by Judge Foudy in the following terms:

- “1. The Appellant seeks permission to appeal, in time, against a decision of the First-tier Tribunal Judge Povey who, in a determination promulgated on 1 June 2015 refused the Appellant’s appeal against refusal to vary student leave.
  2. The grounds are difficult to understand but appear to argue that the Judge erred in his approach to Appendix C of the Immigration Rules and the requirements to provide specified documents.
  3. The grounds are largely a critique of the Respondent’s failure to exercise evidential flexibility rather than a demonstration that the Judge erred in law. The Judge was not satisfied that the Appellant could satisfy the Immigration Rules and gave clear reasons for those findings. Those findings were open to him on the evidence. Contrary to what is argued in the grounds, the Judge did consider paragraph 245AA of the Rules and made cogent findings upon that aspect of the appeal.
  4. In truth the grounds amount, at best, to nothing more than a disagreement with the findings made however it is well-established law that the weight to be given to any particular factor in an appeal is a matter for the Judge and will rarely give rise to an error of law (**Green (Article 8 - new rules) [2013] UKUT 254**).
  5. The grounds disclose no arguable error of law.”
3. On second application Judge Kebede granted permission to appeal on 4 November 2015 in the following terms:
- “1. The appellant, a citizen of Nepal, appealed against the respondent’s decision to refuse his application for leave to remain as a Tier 4 (General) Student Migrant. First-tier Tribunal Judge Povey dismissed the appeal.
  2. The appellant’s application for leave to remain was refused on the basis that he had failed to show the required level of funds for maintenance for the relevant 28 day period under the immigration rules. The grounds assert that the judge erred in his approach to the evidential flexibility provisions in paragraph 245AA of the rules which, if properly applied by the respondent, would have assisted the appellant in the particular circumstances of this case. In light of the recent judgment in Mandalia v Secretary of State [2015] UKSC 59 there is arguable merit in the grounds, albeit that the judgment post-dated the appellant’s appeal before the judge.”
4. These two decisions encapsulate the issues in the appeal.

5. In a Rule 24 response the Respondent submitted that the judge correctly found that the Appellant had not evidenced possession of the requisite funds for the requisite 28 day period.
6. The error of law hearing took the form of submissions which I have taken into account.

## **Determination**

7. At paragraphs 18 to 21 Judge Povey found that the Appellant had provided evidence of funds in excess of the requisite minimum for a period of 26 out of the requisite 28 days; there was no “near miss” rule; and there was no breach of paragraph 245AA of the Immigration Rules nor of the Respondent’s evidential flexibility policy. But for **Mandalia v Secretary of State for the Home Department** [2015] UKSC 59 I would have determined the appeal in the way in which Judge Povey approached it and upheld the decision.
8. It is however the Appellant’s good fortune that in **Mandalia** the Supreme Court reversed decision of the Court of Appeal. The question, at paragraph 1, was whether the Respondent acted unlawfully in refusing the application without having first invited the Appellant to supply further bank statements showing that he had held the requisite amount throughout the six missing days of the requisite period. Its answer, at paragraph 36, was affirmative. The Respondent’s refusal of the application was unlawful because, properly interpreted, the process instruction obliged that the Appellant first be invited to repair the deficit in his evidence.
9. In the present appeal the Respondent did not take this step. It follows, albeit on the basis of supervening authority, that the decisions of the Respondent and of Judge Povey were erroneous in law. I accordingly set aside the decision of Judge Povey.
10. In this event, both representatives were content for me to re-determine the appeal rather than to remit it to the Respondent. The Appellant subsequently submitted an additional bank statement showing that he held the requisite funds for the requisite period. This is the only issue in the appeal, which accordingly succeeds.

## **Notice of Decision**

11. The original decision contained an error of law, and is set aside.
12. The appeal is allowed under the Immigration Rules.
13. No anonymity direction is made.
14. If the Appellant has paid a fee I make a full fee award.

Signed  
February 2016

Dated: 9

Deputy Upper Tribunal Judge J M Lewis