



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

Appeal Number: IA 00349 2013

THE IMMIGRATION ACTS

Heard at Field House

On 24 June 2013

Determination

Promulgated

On 1 July 2013

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMMAD MOHSIN

Respondent

Representation:

For the Appellant: Mr A Syed-Ali, Legal Representative,
instructed by Immigration Aid

For the Respondent: Ms M Tanner, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Nicholls allowing the appeal of the respondent (hereinafter the claimant) against the decision of the Secretary of State to refuse him further leave to remain in the United Kingdom as a student.
2. There is no jurisdiction to appeal the decision complained of to the First-tier Tribunal.
3. The claimant has not been helped by inconsistencies in the Secretary of State's documentation dealing with his application but the decision complained of is identified correctly as a refusal to grant of leave to remain made by a person who did not have leave when the application was made. This is not an immigration decision within the meaning of Section 82(2) of the Nationality, Immigration and Asylum Act 2002 and should never have been entertained by the First-tier Tribunal.

4. I have reminded myself of the observations of Sedley LJ in **Anwar & Another v Secretary of State for the Home Department [2010] EWCA Civ 1275** at paragraph 20 where the learned Lord Justice distinguishes between the constitutive and administrative jurisdictions of the Tribunal. This purported appeal is not a matter of adjudicative jurisdiction. The decision complained of is one that cannot be appealed to the Tribunal.
5. That said, I wanted to look at the underlying merits of the appeal in case I am wrong in the ruling set out above.
6. The records show that the claimant has been in the United Kingdom since January 2007. His leave was extended by stages until 6 September 2012 and there is nothing in the history or the evidence before me to suggest that he has been in any way irresponsible during the currency of that leave. The application that led to the challenged decision of the Secretary of State was made late. It was made at the end of September - I think the 28th - by which time the claimant's leave had lapsed. He gave an explanation for that. He said that his mind had been distracted by reason of a serious family illness involving his brother. More details are given in the correspondence and if the explanation is right then only the most hardhearted would fail to have a great deal of sympathy for the claimant putting his family affairs before his immigration obligations.
7. He thought that he had to satisfy the Rules that would have been applicable to a person making an application with leave and in simple terms these required him to have £2,000 in the bank. He had that. He produced the necessary information but the application was refused by the Secretary of State because the Secretary of State took the view, I think clearly correctly, that the claimant had addressed his mind to the wrong Rule. What he should have been doing was satisfying the requirement of the Rule relevant to a person who did not have leave when the application was made. I have seen evidence suggesting that in fact, ironically, the claimant could have complied with that Rule if he had appreciated that this was required of him. There is a bank statement that certainly suggests he had more than the £9,000 that was needed at the relevant time.
8. The Secretary of State dealt with the application that was before her and refused it and it is very hard to criticise that decision. Only real criticisms that can be made of the Secretary of State are in her suggesting at some point that the application decision was appealable.
9. For some reason this difficulty was not picked up by the First-tier Tribunal Judge who not only heard an appeal he should not have heard but he allowed it and he allowed it with reference to the flexible evidence policy. The Secretary of State maintains that this is a completely wrong approach and although the appellant has been represented with polite vigour by Mr Syed-Ali I am quite satisfied that the Secretary of State on this occasion is right. The flexible evidence policy is set out in writing and is appended to the case of **Rodriguez (flexibility policy) [2013] UKUT 00042** which makes it plain that the policy is intended to, and acts to permit the Secretary of State dealing with an application in a regime which is

designed to be extremely inflexible but clear, to show some common decency when something has gone slightly wrong. The paradigm example is where a document is unexplainably missing from a sequence of documents such as one bank statement in a sequence not being copied. The policy gives the Secretary of State's officers power in law, through published policy, to make enquiries to fill the gap. I am entirely satisfied that the policy just does not extend to a situation that exists here where an applicant has made an entirely inappropriate application, albeit possible for very understandable reasons. There is no obligation on the Secretary of State to contact an applicant and say 'Did you mean to make a different application?' That would be going far too far. Certainly no one has drawn to my attention which, properly understood, imposes such an obligation on the Secretary of State.

10. It follows therefore that I am quite satisfied that if this decision was appealable then the appeal should have been dismissed because the evidential flexibility policy relied on does not have the meaning sought by the claimant.
11. The claimant did not raise "human rights". I do not make any adverse comment about that decision. This is not the sort of appeal that one would expect to be allowed on human rights grounds and it would be inappropriate and irresponsible to raise a ground that could not succeed. I make the point that no point was taken so there is no need for me to say anything about the appellant's human rights.
12. It follows therefore that I set aside the decision of the First-tier Tribunal and I substitute a decision saying that the Tribunal has no jurisdiction to entertain the appeal.
13. Nothing that I have said here stops the claimant making a further application and if it is in fact the case that he had the money at the necessary time and made an application late because of family illness as he has always alleged, it may be the case where the Secretary of State will want to take a particular course but that is entirely a matter for her and not something on which I express any view.
14. It follows therefore that I set aside the decision of the First-tier Tribunal. I neither allow nor dismiss the appeal but rather rule there is no jurisdiction to entertain the appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 28 June 2013



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