



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/04537/2013

THE IMMIGRATION ACTS

Heard at Field House
On 9 August 2013

Determination Promulgated
On 14 August 2013
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Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

MR SUJAN SHARMA MUKHIYA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Not legally represented
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal has its origins in the respondent's decision of 22 January 2013 refusing the appellant's application of 28 September 2012 for leave to remain as a Tier 4 (General) Student Migrant under the points-based system.
2. In refusing to grant the appellant leave to remain pursuant to paragraph 245ZX of the Immigration Rules the respondent awarded the appellant zero points under the maintenance requirement of Appendix C to the Rules. It was observed that the

appellant had been required to demonstrate that he had been in possession of £8,600 for a consecutive 28 day period prior to 24 September 2012, that being the date of the bank statements provided by the appellant with his application. It was further observed that at no time during the entire relevant 28 day period did the funds in the appellant's bank account surpass the £8,600 requirement. Indeed their high point was a balance of £8,204.23. The respondent further relied upon the fact that the appellant had not provided the relevant documentation proving his relationship to the person whose funds he relied upon, the appellant purporting such funds to be his mother's.

3. The appellant challenged the respondent's decision before the First-tier Tribunal. First-tier Tribunal Judge Place determined, and dismissed, the appellant's appeal on 13 May 2013; this being done without a hearing pursuant to a request made by the appellant in his notice of appeal.
4. In relation to the Immigration Rules the judge agreed with the reasons and conclusions of the Secretary of State relating to the sufficiency of the funds within the bank account relied upon by the appellant. The judge additionally observed that prior to 6 September 2012 [this should have been stated as 4 September] the balance of monies in the account relied upon by the appellant was minimal.
5. When dealing with human rights grounds the First-tier Tribunal Judge concluded as follows:

"10. The grounds of appeal also raise the question of the refusal breaching the appellant's human right to education. He states that his career will be ruined if he is unable to finish his degree and that his parents have spent their life savings on him. Whilst the European Convention on Human Rights does provide that no-one shall be denied an education, there is no obligation on a contracting state to provide anyone with a particular level of education. I find that the appellant has not shown that there is any breach of his human rights involved the respondent's decision."
6. In his grounds of appeal to the Upper Tribunal the appellant asserted that he had provided further documentation to the First-tier Tribunal which had not been considered and that such documentation demonstrated that the figure relating to the course fees he had been required to pay, as stated on the CAS form, was inaccurate; it recording the figure of £8000 for the course fees instead of the correct sum of £6,440; this now having been corrected. Additionally the grounds assert that the First-tier Tribunal failed to consider the case properly and that justice was not done.
7. First-tier Tribunal Judge Sharp granted the appellant permission to appeal by way of a decision dated 31 May 2013, observing when doing so that the grounds relating to the Immigration Rules had no merit. In relation to the human rights issues the judge said as follows:

"4. ... However the grounds of appeal clearly raise human rights issues within the principles of CDS (Brazil). The appellant had relied on the fact

that his parents had already spent £70,000 on his education and that all he needed was to be able to remain until May 2013 to complete his course.

5. These facts were not considered by the judge which omission constitutes an arguable error of law. Permission will therefore be granted. All grounds may be argued. It should be said in conclusion that the appellant would be advised to ensure that all material evidence is available for the next stage of his appeal.”
8. Thus the appeal came before me.
9. The appellant did not attend the hearing and provided no explanation to the Tribunal for his failure to do so. A perusal of the Tribunal file confirms that the appellant was served notice of the date, time and place of the hearing before the Upper Tribunal by first class post to the address held for him by the Tribunal. At the outset of the hearing Mr Avery informed the Tribunal that the appellant had been in contact with the Secretary of State approximately one month prior to the hearing, to request the return of his passport so that he could ‘proceed to return to his home country’. Unfortunately, because the appeal was pending before the Upper Tribunal the Secretary of State did not accede to this request.
10. In all the circumstances and having considered the Tribunal Procedure (Upper Tribunal) Rules 2008 I concluded that it was just and appropriate to proceed with the hearing of this appeal in the absence of the appellant.
11. Mr Avery submitted that the determination of the First-tier Tribunal ought to remain standing. In relation to the Immigration Rules he asserted that even if the appellant were correct in the assertion set out in his grounds of appeal, the inaccuracy could not possibly have made any difference to the outcome of either the Secretary of State’s or the First-tier Tribunal’s decision, given that prior to 4 September the balance in the bank account relied upon by the appellant was minimal; consequently he could not demonstrate that he had the required sum of money in the account for the relevant 28 day period, even if that sum were to be taken as less than that posited by the Secretary of State in the refusal letter. Mr Avery additionally reminded the tribunal that the First-tier-Tribunal were required to consider only those documents which were sent to the Secretary of State with the appellant’s application and consequently it had been correct to proceed on the basis of the information detailed in the CAS letter provided by the appellant with his application.
12. As regards the Article 8 ECHR, although Mr Avery accepted that the tribunal had erred in failing to engage in any meaningful way with this ground, he submitted that such error was not material given that the appellant’s case had always been that he required only to remain in the United Kingdom until he had completed his degree, which he had now done. Consequently, requiring the appellant to return to his homeland would be proportionate.
13. I see force in all of Mr Avery’s submissions. Section 85A of the Nationality, Immigration and Asylum Act 2002 requires the First-tier Tribunal in points-based

cases to take into account, when dealing with grounds relating to the Immigration Rules, only such evidence as was put before the Secretary of State with the application. In the instant matter the evidence provided by the appellant relating to his course fees was that detailed in the CAS document sent with the appellant's application. This is the document which the First-tier Tribunal relied upon when coming to its conclusions and consequently it cannot be said to have erred. In any event, even if the sum for the appellant's course fees is taken as the corrected figure now relied upon by the appellant, it is plain that the appellant still could not meet the maintenance requirement set out in Appendix C to the Immigration Rules, given the balance of monies in the bank account prior to 4 September 2012.

14. As to the appellant's rights to education, this was dealt with by the First-tier Tribunal, albeit briefly. The First-tier Tribunal's analysis of the right to education (found in Article 2 of the first protocol) was plainly sufficient given the terms of the decisions in Holub [2001] ELR 401 and R (On the application of Mdlovu) v SSHD [2008] EWHC 2089.
15. Turning now to the Article 8 ECHR ground, as observed by the judge granting permission to appeal there was evidence before the First-tier Tribunal which related directly to the appellant's private life in the United Kingdom and to the proportionality of requiring him to leave whilst he is studying here. The First-tier Tribunal failed entirely to deal with this evidence or to come to any reasoned conclusions as to why the appellant's appeal ought to fail on Article 8 grounds. In this respect the First-tier Tribunal erred. Nevertheless, I do not propose to set aside the First-tier Tribunal's decision despite such error.
16. The appellant has been in the United Kingdom studying since 2008 and there is no suggestion that he is not a genuine student. He plainly indicates in his grounds of appeal to the First-tier Tribunal that his parents have spent some £70,000 on his studies and that his ultimate goal is to obtain a degree; the final year of which concludes at the end of May 2013. In his application form for an extension of his leave to remain the appellant identifies the date on which his course of study ends as 24 May 2013. Turning back to his grounds of appeal to the First-tier Tribunal the appellant states with clarity that he intends to return to his home country at the end of his studies in May 2013. That date has now long passed and the appellant has given no indication to this Tribunal that he intends to do anything other than that which he set out in his grounds i.e. return to Nepal. This is consistent with the information conveyed by Mr Avery at the outset of the hearing before the Upper Tribunal. Clearly in these circumstances even if the appellant does have a private life worthy of respect, any interference with that private life would plainly be proportionate given that on the available evidence the appellant neither has a desire to undertake any further studies or employment in the United Kingdom, nor indeed a desire to remain here at all.
17. In all the circumstances, although I find the First-tier Tribunal to have erred in law by failing to engage with the Article 8 ECHR ground, such error does not lead me to set

aside its determination. I have found no other error in the First-tier Tribunal's determination.

Decision

For the reasons given above the determination of the First-tier Tribunal is to remain standing.

Signed:

A handwritten signature in black ink, appearing to read 'M. O'Connor', with a horizontal line underneath.

Upper Tribunal Judge O'Connor
Date 12 August 2013