



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/22842/2013**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 2 June 2014**

**Determination
Promulgated
On 3rd June 2014**

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr SHEHZAD GUL

Respondent

Representation:

For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Respondent: Ms A Mohsin, Counsel
(instructed by S Z Solicitors)

DETERMINATION AND REASONS

1. The Appellant appealed with permission granted by First-tier Tribunal Judge Pirodda on 23 April 2014 against the determination of First-tier Tribunal Judge Coutts who had allowed the Respondent's appeal to the extent of finding

that the Secretary of State's decision dated 23 May 2013 was not in accordance with the law in a determination promulgated on 4 March 2014. The Respondent is a national of Pakistan, who had applied for further leave to remain as a Tier 4 (General) Student Migrant, which was refused on the grounds that the Appellant had not submitted a valid CAS with his application. He had not provided an English language test certificate from an approved provider. The application was refused under paragraph 245ZX(c) of the Immigration Rules. The reasons for refusal letter conveying the decision to refuse to vary the Respondent's existing leave incorporated a second decision to remove the Respondent by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. Judge Pirotta considered it arguable that Judge Coutts should not have concluded that the Secretary of State should have exercised discretion and applied her Evidential Flexibility Policy, because the English language test certificate was not in the wrong format: on the contrary it did not exist at the material time. (The issue of maintenance had been conceded by the Secretary of State at the hearing: see [10] of Judge Coutts's determination.)
3. The reasons for refusal letter dated 23 May 2013 stated that the Respondent had claimed 30 points for his CAS but the Secretary of State was not satisfied that the Respondent's Tier 4 sponsor had ensured that the Respondent was either competent in English language at a minimum of level B2 of the CEFR or that the Respondent met an alternative requirement. His CAS was to study for a Diploma in Strategic Management, which was at NQF level 7, above degree level and so required the Respondent to show English language at level B2. The CAS produced was not accompanied by a hard copy certificate or score report. The scores on the CAS were shown as "to be confirmed". Such evidence was not acceptable. The Respondent met no applicable exemption.
5. No such test certificate has ever been produced by the Respondent.
6. Mr Avery for the Appellant submitted that the decision to refuse had been based solely on the Appellant's CAS, which was not compliant with Appendix A. The Respondent

had not complied with the English language test certificate requirements. There was no scope for the application of the Evidential Flexibility Policy because there was no reason for the Secretary of State to have believed that there was a compliant English language test certificate in existence. This was not a format error. The judge had fallen into material error of law to have considered otherwise. The appeal fell to be dismissed because the Immigration Rules in force at the date of decision had not been met.

7. Ms Mohsin for the Respondent submitted that the judge had been right. The reasons for refusal letter had stated that the Appellant had obtained the B2 level, so an enquiry should have been made. Moreover, the Respondent had previously passed an English language test so there was reason to believe that he would have done so on this occasion: the certificate was from the University of Hertfordshire and was dated 20 January 2011. In discussion, Ms Mohsin accepted that any dispute about responsibility for the CAS was between the Respondent and his college, and was not a matter for the Secretary of State.
8. At the conclusion of submissions the tribunal indicated that it found that the judge had fallen into material error of law. There was insufficient evidence for the Evidential Flexibility Policy to come into play: see Rodriguez [2014] EWCA Civ 2. The terms of the Appellant's CAS, which stated expressly that the test scores were "to be confirmed," tended to show that the results were not available at all. That was compounded by the absence of a hard copy test certificate. At [11] of his determination the judge recorded "The Appellant explained to me how he had tried to obtain the original English language certificate but had met barriers from the institution when making enquiries... it had proved difficult to find someone who would take responsibility for sorting this issue out." On that evidence alone it is plain that the test certificate was not available either at the application stage or the appeal stage and that the Appellant's own efforts to obtain it had been unsuccessful. There is no reason to think that the Secretary of State might have done any better.
9. Indeed, paragraph 245AA(c) of the Immigration Rules states "The UKBA (now to be read as the Home Office) will

not request documents where a specified document has not been submitted (for example an English language certificate is missing)...”

10. The fact that the Respondent had passed an English language test in 2011 was not relevant as the Respondent had to produce a certificate valid for the current application. There would be no reason for the Secretary of State to have checked a previous application for that purpose. Even if that had been done, there would in any event have been no reason for Appellant to have made any further enquiries in the face of paragraph 245AA(c).
11. Thus while it is possible to see why the judge felt some sympathy for the Respondent, the only course open to the judge was to have dismissed the appeal under the Immigration Rules.
12. Accordingly the Upper Tribunal must allow the Secretary of State’s appeal, sets aside the determination and remakes the decision so as to dismiss the appeal
13. Ms Mohsin accepted in further argument that any claim based on the Respondent’s private life in the United Kingdom as a student under Article 8 ECHR could take matters no further. The Respondent was not part way through a course (as in CDS (Points Based System: “available”: Article 8) Brazil [2010] UKUT 00305 (IAC)) and he could return to Pakistan without serious difficulty or expense to make a fresh entry clearance application from there if he wished to undertake another course of study in the United Kingdom. There would be no unduly harsh consequences: see Gulshan (Article 8 - new rules - correct approach) [2013] UKUT 00640 (IAC). Any interference with the Respondent’s private life would thus be proportionate to the legitimate objectives set out in Article 8.2 ECHR.
14. Alternatively, as the Respondent has married a British Citizen since he commenced his studies in the United Kingdom, as appears from the Respondent’s bundle for the First-tier Tribunal appeal hearing, although it was not a live issue before the First-tier Tribunal, he could make a fresh application on that basis. Again it would be proportionate to expect that of him and there was no evidence to suggest otherwise. The appeal is dismissed.

DECISION

The making of the previous decision involved the making of an error on a point of law. The Upper Tribunal sets aside the decision, which is remade as follows:

The appeal is dismissed

Signed

Dated

Deputy Upper Tribunal Judge Manuell
FEE AWARD

The appeal has been dismissed and so no fee award can be made.

Signed

Dated

Deputy Upper Tribunal Judge Manuell