



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/38792/2013

THE IMMIGRATION ACTS

Heard at Field House
On 17 July 2014

Determination Promulgated
On 25 July 2014

Before

THE HON MR JUSTICE LEWIS
UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ALEEM SYED
(No Anonymity Direction Made)

Respondent

Representation:

For the Appellant: Mr P Duffy a Senior Home Office Presenting Officer

For the Respondent: the respondent attended but was not legally represented

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department (“the Secretary of State”). The respondent is a citizen of India who was born on 16 March 1983 (“the claimant”). The Secretary of State has been given permission to appeal the determination of First-Tier Tribunal Judge Cohen (“the FTTJ”). The FTTJ allowed the claimant’s appeal against the Secretary of State’s decisions of 23 August 2013 to refuse to vary his leave to remain in the UK and to remove him from the UK by way of directions under section 47 of the

Immigration and Asylum and Nationality Act 2006. The claimant had applied for further leave to remain in the UK as a Tier 4 (General) Student Migrant under the Points-based System and for a Biometric Residence Permit.

2. The claimant first entered the UK on 20 December 2009 with entry clearance as a student giving him leave until 25 June 2011. This was subsequently extended until 30 April 2014. On 16 May 2013 the claimant's then current leave to remain as a student was curtailed so as to expire on 15 July 2013. The current application was submitted on 12 July 2013.
3. The Secretary of State refused the application on the basis that the claimant was not entitled to the required 30 points for Confirmation of Acceptance for Studies (CAS). In his English language test, conducted by Pearson, he had scored 61 for Listening, 50 for Reading, 68 for Speaking and 59 for Writing. He was required to score a minimum of 51 points in all four components in order to achieve or exceed level B2 of the Common European Framework for Language Learning (CEFR). Having failed to do so he had not achieved the minimum standard of English required and was not entitled to the points for his CAS. It was accepted that the claimant was entitled to the required 10 points for Maintenance (Funds).
4. The claimant appealed. He said that he had not been advised by his college that the English language test result was unsatisfactory. He had been issued with the CAS. He believed that his Tier 4 sponsor should be held responsible for this mistake. However, in the meantime, he had retaken the test and was awaiting the results. He had made an honest and small mistake and asked to be allowed to continue and finish his studies in the UK.
5. Both parties were represented at the hearing before the FTTJ and the claimant gave evidence. The FTTJ found that the Secretary of State had acted unreasonably. The claimant had achieved level B2 and his results were on the whole excellent. They were sufficient for his college to issue the CAS. The Secretary of State's decision was disproportionate and not in accordance with the law. Furthermore, the appellant had taken a further English language test which did meet the requirements of the Rules. The Secretary of State had accepted that he met the other requirements.
6. The FTTJ went on to consider the appeal on Article 8 human rights grounds, concluding that the interference with his private life would be a disproportionate interference with his Article 8 human rights.
7. The FTTJ allowed the appeal both under the Immigration Rules and on Article 8 human rights grounds. The Secretary of State applied for and was granted permission to appeal. The grounds argue that the FTTJ erred in law in two ways. Firstly it was not permissible to consider the results of the English language test conducted after the date of the claimant's application. The claimant was not entitled to succeed on the basis of a "near miss". There was no obvious lack of admissible evidence which could engage any evidential

flexibility policy. Secondly, in relation to the Article 8 grounds, the FTTJ applied an incorrect standard of proof; the claimant had no family ties in the UK and had acquired his private life as a result of coming here for a limited period in order to pursue his studies. There was nothing in his private life which was either exceptional or very compelling.

8. The Secretary of State's appeal came before one of us (Judge Moulden) on 1 May 2014. I could find nothing in any of the papers submitted by either party which supported the contention in the decision letter of 23 August 2014 that the claimant had failed to achieve level B2 of the CEFR or that the minimum score in each component was 51. I had the Confirmation of Acceptance for Studies Details from the UK Border Agency which appeared to show that the claimant had attained CEFR level B2. It also gave the name of the provider, Pearson, and set out the marks in each of the four components without any indication as to the required minimum mark either in each of them or overall. I also had a single page document entitled "PTE Academic Institutions Score Report" issued by Pearson which, whilst giving the marks for each component, said nothing about whether the claimant had passed or failed or what any minimum requirement might be. In the circumstances, I adjourned the hearing and gave directions for further information and documents to be produced together with skeleton arguments.
9. We now have a substantial bundle of documents and a skeleton argument from the Secretary of State. Mr Duffy relied on the decision letter and the grounds of appeal. He argued that paragraphs 116 and 118 in Appendix A were unambiguous. The claimant was required to achieve or exceed level B2 in all four components namely, reading, writing, speaking and listening. We were referred to the 71 page "PTE Academic Score Guide" and the document entitled "Interpreting the PTE Academic Score Report" in the new bundle. The latter, at Tab C, sets out a detailed explanation and the conclusion that "A score of at least 51 is required for UKBA tier 4 student visas for students wanting to study on a course at or above degree level at an institution that is not a UK Higher Education Institution." Taken in the context of all that is said in this document we find that the requirement is for a score of at least 51 in each of the four components. The claimant scored 51 or more in three of them but fell short with a score of 50 for Reading. The Secretary of State has therefore established that the claimant did not achieve level B2 of the CEFR and was not entitled to the required 30 points for CAS.
10. The claimant told us that he had been misled. He had spoken to Pearson who had not given him any information about the requirement for a minimum score. They had told him that there was no information about this on their website. We went through the document entitled "Interpreting the PTE Academic Score Report" with him. He said that he understood this. He did not dispute the conclusion which we have reached in the last paragraph. Whilst we invited him to do so the claimant said that he did not wish to say anything further in relation to his Article 8 human rights grounds.

11. In reply to our questions, Mr Duffy said that if the claimant's original appeal failed he would, within 28 days, be entitled to make a fresh application on the same or a similar basis. If, as the claimant claimed, the Secretary of State was holding his passport and he needed this for any purpose, including applying for and sitting another English language test, we made it clear that on request it should be returned to him without delay.
12. We find that the FTTJ erred in law. On the evidence it was not open to him to conclude that the claimant was entitled to the required points for CAS or that there was any discretion or test of reasonableness in deciding whether he met the requirements of the Immigration Rules for a Tier 4 (General) Student Migrant under the Points-based System. It has not been claimed that there is any relevant evidential flexibility provision within the Immigration Rules or under any separate policy which might benefit the claimant. This is not a case of a missing or incomplete document. He is not entitled to benefit from any "near miss" as is clear from the opinion of Lord Carnwath in Patel & Ors v Secretary of State for the Home Department [2013] UKSC 72. The FTTJ was limited to considering evidence adduced by the claimant in support of and at the time of making his application, which would not include any English language test passed by the claimant after the date of the application.
13. We find that the FTTJ erred in law in relation to the Article 8 grounds as claimed in the grounds of appeal. In paragraph 14 of the determination he applied an incorrect standard of proof. It is not the asylum standard of whether there are "substantial grounds for believing there is a real risk of harm or, alternatively, a substantial degree of likelihood of harm". It is the civil standard of the balance of probabilities.
14. The FTTJ erred in law. The errors are such that the determination must be set aside.
15. For the reasons we have already given the claimant has not established, to the standard of the balance of probabilities, that he meets the requirements of the Immigration Rules for a Tier 4 (General) Student Migrant under the Points-based System. In this respect his appeal under this part of the Immigration Rules fails.
16. It has not at any stage been suggested and we cannot see that the claimant could succeed on Article 8 human rights grounds under the provisions of the Immigration Rules.
17. In the circumstances we apply the principles set out in Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC). The summary of the provisions of Gulshan, prepared by the author of that determination Cranston J states;

"On the current state of the authorities:

(a) *the maintenance requirements of E-LTRP.3.1-3.2 stand, although Blake J in R (on the application of MM) v Secretary of State for the Home Department [2013] EWHC 1900 (Admin) said that they could constitute an unjustified and disproportionate interference with the ability of spouses to live together; he suggested that an appropriate figure may be around £13,400, and highlighted the position of young people and low wage earners caught by the higher figure in the rules;*

(b) *after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);*

(c) *the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new rules) Nigeria [2012] UKUT 393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 45 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.*

The Secretary of State addressed the Article 8 family aspects of the respondent's position through the Rules, in particular EX1, and the private life aspects through paragraph 276ADE. The judge should have done likewise, also paying attention to the Guidance. Thus the judge should have considered the Secretary of State's conclusion under EX.1 that there were no insurmountable obstacles preventing the continuation of the family life outside the UK. Only if there were arguably good grounds for granting leave to remain outside the rules was it necessary for him for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules."

18. The Secretary of State did not address any Article 8 human rights grounds in the decision letter of 23 August 2013. The claimant has no family or family life in this country and his removal would not breach his rights to family life. Whilst the FTTJ found and we accept that he has established a private life here he came to this country as a student and in the knowledge that this would only entitle him to remain for a finite period. He has successfully pursued his studies so far and was unfortunate when he had to change courses because the college he was attending lost its sponsor's license. Although we have a little information about the nature and extent of his private life in this country we accept that he has probably made friends and has a circle of acquaintances.

We take into account Mr Duffy's confirmation that if he does so within 28 days the claimant will be able to make a fresh in country application.

19. We find that there are no arguably good grounds for granting the appellant leave to remain outside the provisions of the Immigration Rules. Even if we had concluded otherwise we would have found that there were no compelling circumstances not sufficiently recognised under the Rules. The Secretary of State has established, to the standard of the balance of probabilities, that it would not be a disproportionate interference with the claimant's right to respect for his Article 8 private life to remove him from the UK.
20. We have not been asked to make an anonymity direction and can see no good reason to do so.
21. Having set aside the decision of the FTTJ we substitute our decision and dismiss the claimant's appeals both under the Immigration Rules and on Article 8 human rights grounds.

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Signed
Upper Tribunal Judge Moulden

Date 19th July 2014