



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/48001/2013

THE IMMIGRATION ACTS

Heard at Field House
On 28 August 2014

Determination Promulgated
On 28 August 2014

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Haowei Mao
[No anonymity direction made]

Claimant

Representation:

For the claimant: Not represented
For the respondent: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimant, Haowei Mao, date of birth 28.1.90, is a citizen of China.
2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Colvin, who allowed the claimant's appeal against the decision of the Secretary of State, dated 29.10.13, to refuse his application made on 27.9.13 to vary leave to remain in the UK as a Tier 4 (General) Student under the Points Based System (PBS) and to remove him from the UK by way of directions under the

Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 9.5.14.

3. First-tier Tribunal Judge Hollingworth granted permission to appeal on 8.7.14.
4. Thus the matter came before me on 28.8.14 as an appeal in the Upper Tribunal.
5. There was no attendance by or on behalf of the claimant. I note that he did not have any appointed legal representative. Attempts to contact him during the course of the morning were unsuccessful. However, Mr Avery was able to locate a minute sheet to show that the claimant had booked a flight for 2.9.14 and further information that his course concludes on 16.9.14. It would appear therefore that the claimant is making a voluntary departure from the UK. I proceeded to deal with the appeal in his absence, noting that he has made no Rule 24 response to the grounds of appeal or the grant of permission to appeal. In the circumstances, I proceed on the assumption that the claimant has no case to put before the Tribunal to challenge the submissions of the Secretary of State.

Error of Law

6. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Colvin should be set aside.
7. The application was refused because the claimant failed to qualify for the necessary 10 points under Appendix C for maintenance funds. He failed to demonstrate by specified documents that he had the necessary funds (£9,000) for a consecutive 28-day period between 18.8.13 and 14.9.13.
8. For the reasons set out herein, the decision was wrong and Judge Colvin was completely in error as to the application of any evidential flexibility policy.
9. At §11 of the determination Judge Colvin correctly noted that pursuant to section 85A of the Nationality Immigration and Asylum Act 2002 the Tribunal can only consider evidence adduced by the claimant submitted in support of and at the time of making the application to which the immigration decision related. However, at §13 and §15 of the determination the judge effectively ignored this statutory provision by purporting to find, on the basis of post-application evidence from the claimant that when a second bank account, not submitted with his application, was taken into account “it is clear that the appellant had sufficient funds in excess of the £9,000 he was required to show during this period, (§13),” and (§15) “It should also be noted that I have made the finding that the appellant did indeed have the required funds for the specific period under the Immigration Rules in relation to the Tier 4 visa.” Those findings amount to an error of law in that the Tribunal was not able to take into account or consider the evidence not submitted with the application.
10. Further, between §11 and §15 of the determination Judge Colvin proceeded to find that the evidence submitted by the claimant was sufficient to trigger the ‘evidential

flexibility policy' creating a duty on the Secretary of State to make enquiries of the claimant as to the submitted banking evidence before making her decision. The judge concluded that in failing to make such enquiries the Secretary of State did not act in accordance with the law. Judge Colvin also purported to find that the claimant had the necessary funds for the specified period under the Immigration Rules.

11. First, Judge Colvin purported to rely on the outdated authority of Rodriguez (Flexibility Policy) [2013] UKUT 00042, when that decision had been overturned by the Court of Appeal in January 2014 in SSHD v Rodriguez and Others [2014] EWCA Civ 2, where it was held that the Secretary of State was not under any obligation to afford applicants for leave to remain as Tier 4 (General) Student Migrants any opportunity to remedy defects in their application under an evidential flexibility policy. The Court of Appeal noted that the evidential flexibility policy was not designed to give an applicant a general opportunity first to remedy any defect or inadequacy in an application or supporting documentation so as to save the application from refusal after consideration.
12. The common law principle of fairness does not impose any such obligation and nor do the specific provisions of paragraph 245AA of the Immigration Rules, which came into force in relation to PBS cases in September 2012. In effect, in relation to PBS cases no evidential flexibility policy survived the introduction of paragraph 245AA. The preceding policy, the 'Process Instruction', effectively mirrors the format of paragraph 245AA when introduced in September 2012.
13. At §12 of the determination, Judge Colvin referenced paragraph 245AA but appears to ignore its provisions when making the decision in the appeal. The provisions are set out below:

"245AA. Documents not submitted with applications

(a) Where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the Entry Clearance Officer, Immigration Officer or the Secretary of State will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with subparagraph (b).

(b) If the applicant has submitted specified documents in which:

(i) Some of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing);

(ii) A document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or

(iii) A document is a copy and not an original document; or

(iv) A document does not contain all of the specified information;

the Entry Clearance Officer, Immigration Officer or the Secretary of State may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received at the address specified in the request within 7 working days of the date of the request.

(c) Documents will not be requested where a specified document has not been submitted (for example an English language certificate is missing), or where the Entry Clearance Officer, Immigration Officer or the Secretary of State does not anticipate that addressing the omission or error referred to in subparagraph (b) will lead to a grant because the application will be refused for other reasons.

(d) If the applicant has submitted a specified document: (i) in the wrong format; or

(ii) which is a copy and not an original document; or

(iii) which does not contain all of the specified information, but the missing information is verifiable from:

(1) other documents submitted with the application,

(2) the website of the organisation which issued the document, or (3) the website of the appropriate regulatory body;

the application may be granted exceptionally, providing the Entry Clearance Officer, Immigration Officer or the Secretary of State is satisfied that the specified documents are genuine and the applicant meets all the other requirements. The Entry Clearance Officer, Immigration Officer or the Secretary of State reserves the right to request the specified original documents in the correct format in all cases where (b) applies, and to refuse applications if these documents are not provided as set out in (b)."

14. The judge failed to provide any cogent explanation why the Secretary of State was required to apply some other flexibility policy despite the operation of paragraph 245AA, stating only that from the submitted bank statement it was clear that the claimant had transferred £15,500 to another account in his own name. "This might reasonably have put the decision maker on notice that the appellant had another account holding this amount of money but had failed to give details of this other account and this, in itself, trigger(s) the evidential flexibility policy so as to make enquiries of the appellant before an adverse decision was made."
15. Quite apart from that fact that this conclusion flies in the face of both the current case law and the Immigration Rules, a transfer of funds out of an account does not "trigger" or reasonably require the Secretary of State to speculate that the money might be available to the claimant elsewhere, rather than dissipated or used for other purposes. Further, the judge failed to explain why the Secretary of State was not entitled to rely on the provisions of paragraph 245AA to consider only those documents submitted with the application.
16. As Judge Hollingworth noted when granting permission to appeal, "It is plainly the case that there is no duty on the Secretary of State to communicate with each and

every applicant where there is some deficiency in the application. Fairness does not require the Secretary of State to address any deficiency. It is for the appellant ultimately to retain responsibility for ensuring that his application meets the requirements laid down by the Rules. It is arguable that the Judge's conclusion at paragraph 14 is wrong."

17. In the circumstances, the decision of the First-tier Tribunal was flawed by reason of such error of law in the making of the decision that it cannot stand. For the reasons given herein, the appeal should have been dismissed. It is inevitable that the appeal must fail. In fact, it was doomed from the outset and there was no merit whatsoever in the appeal.

Conclusions:

18. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by dismissing it.



Signed:

Date: 28 August 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: There was no merit in the appeal and it has been dismissed.

A handwritten signature in black ink, appearing to read 'J. Pickup', is positioned above the printed name of the judge.

Signed:

Date: 28 August 2014

Deputy Upper Tribunal Judge Pickup