



IAC-FH-AR-V1

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

Appeal Number: OA/07386/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 10th February 2016**

**Decision & Reasons Promulgated
On 26th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**FAIDA HUDA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr S Whitwell, Home Office Presenting Officer

For the Respondent: Mr T Uppal, Glen Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State I refer to the parties as they were in the First-tier Tribunal.
2. The Appellant, a national of Bangladesh, appealed to the First-tier Tribunal against a decision made by the Secretary of State on 21st May 2014 to remove him from the UK under Section 10 of the Immigration and Asylum Act 1999 after having voluntarily left the UK on 29th May 2014. Judge of the First-tier Tribunal Adio allowed the Appellant's appeal and the Secretary of State now appeals with permission to this Tribunal.

Background

3. The background to this appeal is that the Appellant was granted leave to enter the UK as a student on 15th March 2006 until 31st December 2008 and then leave to remain on 18th March 2009 until 31st August 2010. He was granted further leave to remain in the UK as a Tier 1 (Post-Study Work) Migrant on 10th September 2010 until 10th September 2012. His subsequent application for leave to remain as a Tier 1 (Entrepreneur) was refused on 25th March 2013. The Appellant appealed against that decision and in a decision dated 30th July 2013 First-tier Tribunal Judge Devittie dismissed the appeal under the Immigration Rules. The Appellant's application for permission to appeal against that decision was refused in the First-tier Tribunal and his renewed application for permission to the Upper Tribunal was refused by Upper Tribunal Judge Spencer on 13th September 2013.
4. The Appellant made a fresh application for leave to remain as a Tier 1 (Entrepreneur) on 1st October 2013. On 24th April 2014 the Respondent refused that application. The Respondent noted at page 6 of the reasons for refusal letter that the Appellant made an application on 1st October 2013 but that he did not have leave to remain at the time of that application and therefore had no right of appeal against this decision. The Appellant did not challenge that decision.
5. The Appellant was served with Form IS151A on 21st May 2014 and he made a voluntary departure from the UK on 29th May 2014. The IS151A form advised the Appellant that a decision had been taken to remove him from the UK and that he was entitled to appeal against that decision under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 after he had left the UK on the grounds, *inter alia*, that the decision is not in accordance with the Immigration Rules and/or that it was not in accordance with the law. The Appellant lodged Notice of Appeal on 26th June 2014.
6. The First-tier Tribunal Judge noted that the appeal was against the decision to remove the Appellant and considered the detail of the Reasons for Refusal letter of 24th April 2014 and paragraph 245DD of the Immigration Rules. He noted that when the Appellant signed the voluntary departure form he signed a disclaimer to say that he was withdrawing any outstanding applications but considered that, as the last application made by the Appellant had been determined at that point, he could not have withdrawn that application.
7. The judge noted that the Appellant had Section 3C leave up until 13th September 2013, when his application for permission to appeal to the Upper Tribunal was refused, that he made a fresh application on 1st October 2013 and that he was therefore an overstayer between 13th September 2013 and 1st October 2013. However the judge noted that, as that application was made within 28 days of the expiry of leave, that period of overstaying should be disregarded [7].

8. The judge went on to examine the requirements of the Rules, in particular in light of the interview the Appellant had in connection with his Tier 1 (Entrepreneur) application. The judge accepted that the Appellant met the requirement of paragraph 276DD (e) in that he was last granted leave to remain as a Tier 1 (Post-Study Work) Migrant. The judge concluded that the Appellant had given a satisfactory explanation to the points raised by the Respondent in the reasons for refusal letter of 24th April 2014 and found that the reasons given in the reasons for refusal letter are 'basically flawed' because they do not reflect the findings from the entrepreneur interview recommendation[9]. The judge finds on the balance of probabilities that the Appellant meets the requirements of paragraph 245DD of the Immigration Rules in relation to the attributes under Appendix A and in relation to the genuineness and viability of the business.

Error of Law

9. In the Grounds of Appeal to the Upper Tribunal the Secretary of State contends that the judge made a material misdirection in law in relation to Section 3C of the Immigration Act 1971 in that the Appellant's leave expired on 13th September 2013 and that the period of overstaying did not cease on 1st October 2013 but in fact ceased when the Appellant left the UK voluntarily on 29th May 2014. It is therefore contended that the period of overstaying was a period of over eight months. It is further contended that the judge erred by grossly miscalculating the Appellant's period of overstaying and by reaching a decision in the appeal that was irrational and legally flawed on the evidence and facts found.
10. Permission to appeal was granted on the basis that there was an arguable error of law in relation to the relationship between Section 3C and the provisions governing the points-based system applications in the context of the disregarding of the 28 day period.
11. The Grounds of Appeal in this case are unclear. The grant of permission expresses the Secretary of State's grounds of appeal more clearly and succinctly. Mr Whitwell did his best to cast light on the grounds but had to diverge from them somewhat in order to make sense of them. Despite his best efforts I conclude that the First-tier Tribunal Judge did not make any error of law.
12. The real issue in this appeal is the judge's consideration of paragraph 245DD (g) of the Immigration Rules which applied to the Appellant's application for leave to remain as a Tier 1 (Post-Study Work) Migrant. Paragraph 245DD (g) provides:

'To qualify for leave to remain as a Tier 1 (Entrepreneur) Migrant under this Rule, an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.'

Requirements ...

(g) The applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded. ... ‘

13. Mr Whitwell submitted that, as the Appellant became appeal rights exhausted on 13th September 2013 but did not leave the UK until 29th May 2014, his period of overstaying therefore exceeded 28 days. However Mr Uppal submitted that this interpretation could not be right as it would mean that if an Appellant had overstayed by even one day when an application was made the application would have to be refused if it was not decided by the Secretary of State within a period of 28 days.
14. When I put it to him Mr Whitwell accepted that the requirements imposed by the Rules governing applications under the points-based system related to the time of the application. He accepted that, unless the Rules say otherwise, the relevant date for consideration of the requirements of the Rules is the date of application.
15. Mr Whitwell relied on page 9 Home Office guidance on applications from Overstayers of 24th October 2014 which says that, following submission of an application made within 28 days of overstaying, a migrant's previous leave is not reinstated or extended but that the applicant continues to be an overstayer from the point their leave expired and throughout the period their application is pending. The guidance states that, as the applicant has no leave during the period their application is pending, they have no permission to work in the UK. However this guidance covers the practical implications of being an overstayer which is a different issue from that of determining the date at which a period of overstaying is calculated for the purposes of 245DD (g) of the Rules.
16. So, in my view, although the Appellant in this case was an overstayer at the date of the application on 1st October 2013, he had not exceeded the 28 day period at that point. He continued to be an overstayer until he left the UK on 29th May 2014 but this is not relevant for the purposes of consideration of the applicability of 245DD (g). The judge's interpretation of this provision of the Rules was therefore right in law.
17. I accept Mr Uppal's submission that, although the Appellant was challenging his removal from the UK, among the grounds open to him were the grounds that the decision to remove him was not in accordance with the Immigration Rules and that the decision to remove him was not in accordance with the law. I therefore accept his submission that, in finding that the decision of 24th April 2014 was flawed, the judge was effectively finding that it was not in accordance with the law and that the judge was entitled to make that finding in terms of the appeal before him. This view is further confirmed by the failure of the Secretary of State to challenge the judge's finding that the decision of 24th April 2014 was 'flawed'.

18. Mr Whitwell further submitted that in signing the disclaimer in the context of his voluntary departure the Appellant withdrew any outstanding claims or applications but I find that the judge was correct to conclude that the Appellant did not have any outstanding applications because the last application he had made had already been determined.
19. Mr Whitwell also submitted that paragraph 245DD (e) provided that the Appellant must show that he was last granted entry clearance or leave to remain in certain categories and that the Appellant here did not do so. However I agree with the judge's conclusion that the Appellant was last granted leave to remain as a Tier 1 (Post-Study Work) Migrant which is one of the categories under paragraph 245DD(e).
20. In all of the circumstances of this case I am satisfied that First-tier Tribunal Judge Adio did have jurisdiction to consider the appeal against the removal directions, the Appellant having left the UK. I am satisfied that the judge did have jurisdiction to consider whether the decision to remove the Appellant was in accordance with the Immigration Rules and in accordance with the law. I am satisfied that the judge was therefore entitled to consider the basis for the refusal of the Appellant's application for leave to remain as a Tier 1 (Entrepreneur). The judge was right to interpret paragraph 245DD(g) to conclude that, at the date of application, the Appellant was within the 28 day period of overstaying which was to be disregarded in accordance with that paragraph.
21. I therefore find that the judge reached conclusions open to him on the basis of the evidence before him. I find that the grounds of appeal have not been made out.

Notice of Decision

22. The decision of the First-tier Tribunal Judge discloses no material error of law and shall stand.

No anonymity direction is made.

Signed

Date: 24th February 2016

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT FEE AWARD

The fee award made by the First-tier Tribunal Judge shall stand.

Signed

Date: 24th February 2016

Deputy Upper Tribunal Judge Grimes