



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

Appeal Numbers: IA/14165/2015  
IA/14173/2015

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 31 July 2017**

**Determination**

**Promulgated**

**On 22 September 2017**

**&**

**Reasons**

**Before**

**UPPER TRIBUNAL JUDGE ALLEN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**SEJAL KANTIBHAI CHAUDHARI  
NIRAVKUMAR MANIBHAI CHAUDHARI  
(ANONYMITY DIRECTION NOT MADE)**

Respondents

**Representation:**

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer

For the Respondent: Mr L Lourdes, Direct Access

**DETERMINATION AND REASONS**

1. I shall hereafter refer to Mr and Mrs Chaudhari as the appellants as they were before the First-tier Judge and to the Secretary of State as the respondent as she was before the First-tier Judge.
2. The appellants appealed to a First-tier Judge against the respondent's decision of 24 March 2015 refusing to vary leave to enter or remain in the United Kingdom to the first appellant (the second appellant's appeal being dependent on hers).
3. The judge noted the appellant's immigration history. She had been granted entry clearance as a Tier 4 (General) Student from 21 October

2009 until 11 March 2012, and on 30 August 2012 she was granted limited leave to remain in the United Kingdom until 26 January 2015 as a Tier 4 (General) Student. The judge noted that according to her witness statement she made an application on 13 January 2015 for further leave to remain as a Tier 4 (General) Student the refusal of which appeared to be the subject of this appeal.

4. The judge dealt with the matter on the papers, by consent. He noted that in the letter of the refusal it was said with respect to the first appellant and her application as a prospective student that she did not have entry clearance as a prospective student and so was not eligible to be granted leave in that capacity. It was also noted that the ability to apply for leave to remain in that capacity was closed to new entrants on 1 October 2013. The judge went on to note that however in the notice of refusal it clearly stated that the first appellant was granted limited leave to remain until 26 January 2015 as a Tier 4 (General) Student which appeared to contradict the letter of refusal. He considered that it appeared that the reasons given for the refusal were not within the law and as the original decision predated the changes in the law of 6 April 2015 he could remit the case back to the Secretary of State for reconsideration, which he did.
5. The Secretary of State sought permission to appeal this decision, arguing that it was correct to note as the decision letter did that the appellant could not be considered as a prospective student as that route was not open to her. She had not made a Tier 4 application, contrary to what her witness statement apparently said and there was no evidence that the Tier 4 (General) Student route could be met. The refusal letter then undertook a comprehensive Article 8 assessment under the Rules and outside. It was argued that the judge had erred in erroneously approaching the appeal as a Tier 4 appeal and should have determined the Article 8 claim. Permission to appeal was granted on all grounds.
6. In his submissions Mr Jarvis argued the judge had materially misunderstood the appellant's immigration history. It was true that the appeal could be decided as being one where the Secretary of State's decision was not in accordance with the law, but the judge had misunderstood the nature of the refusal. The concept of a "prospective student" was a term of art in Part 6A of the Immigration Rules and had a particular meaning.
7. Mr Lourdes helpfully produced the application made by the appellant from which it could be seen that she had applied as a prospective student as was set out in the covering letter. The opportunity to apply as a prospective student had been removed from the Rules in 2013 as was said in the grounds, and the appellant had not been granted entry as a prospective student which would have been necessary. She had been granted leave as a Tier 4 (General) Student. Paragraph 9 of the judge's decision was flawed. He had to consider the representations in the appeal.

8. In his submissions Mr Lourdes argued that the Secretary of State could not now criticise the decision as she had not provided all the documents sent in as was set out at paragraph 6 of the judge's decision. The appellant made it clear in her witness statement of 3 July 2015 that she had not completed her course as the college licence had been revoked and she should have been given a 60 day letter. She had sought a grant of leave to continue her studies which had not been completed. These matters had not been taken into account by the Secretary of State. If the Tribunal disagreed, it would be better for there to be a hearing before the First-tier Judge to re-hear the case. In the interim the Secretary of State could look into the contents of the letter with regard to the revocation of the licence and why the appellant had not been given a 60 day letter.
9. By way of reply Mr Jarvis argued that none of those issues were points which could have been made to the Judge who did not engage with fairness, or the 60 day letter. He had found the underlying decision unlawful for reasons which were erroneous. The application could not succeed under the Rules so if the Tribunal agreed with Mr Jarvis it would be better for it to go back to the First-tier for findings to be made.
10. I reserved my determination.
11. I agree with the submissions made on behalf of the Secretary of State. It is clear from the appellant's application that she applied as a prospective student and that avenue was not open to her, in that it was not a route that could be gone down since 2013 and in any event since she had not had leave previously as a prospective student she could not have not succeeded in that regard in any event. The decision letter therefore was correct as a matter of law and the judge erred in finding that the decision letter was legally flawed. As a consequence the decision to remit the matter to the Secretary of State to reconsider that point was not open to him.
12. Also he did not consider Article 8 which was the essence of the claim that was being made by the appellant. Mr Lourdes today has mentioned such matters as the college licence being revoked and the fact that the appellant was not afforded a 60 day letter. These matters were not before the judge and are not before me in any formal sense. I consider that, having concluded that the judge materially erred as a matter of law, as was agreed between the representatives the appropriate course of action is for the matter to go back to the First-tier Judge to consider the lawfulness of the decision made by the respondent in light of the matters raised in the decision letter. To that extent therefore the Secretary of State's appeal is allowed.



Signed

Date

Upper Tribunal Judge Allen

**TO THE RESPONDENT**  
**FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.



Signed

Date

Upper Tribunal Judge Allen