



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/16341/2012

THE IMMIGRATION ACTS

Heard at Field House
On 29 July 2013

Determination Promulgated
On 6 August 2013

Before

UPPER TRIBUNAL JUDGE LATTEER

Between

AAMIR HAFEEZ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance
For the Respondent: Ms A Everett, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against a decision of the First-tier Tribunal dismissing the appeal by the appellant against the respondent's decision of 5 July 2012 refusing his application for further leave to remain as a Tier 4 (General) Student Migrant.

2. The appellant has not attended the hearing. His statement and skeleton argument was received by the Tribunal on 19 July 2013 and he asked for the appeal to be decided on the papers. He was notified that the matter would remain listed for hearing so that the respondent could make submissions. He could attend if he wished but need not do so. I am satisfied that the proper course is to proceed with the hearing in his absence.

Background

3. The appellant is a citizen of Pakistan born on 12 August 1996. On 19 June 2010 he was granted leave to enter as a Tier 4 (General) Student until 14 April 2012. On 13 April 2012 he applied for further leave to remain in the same capacity. The respondent was satisfied that he could meet the requirements of Appendix A relating to attributes as the CAS submitted was valid but was not satisfied that he was entitled to the relevant number of points under Appendix C dealing with maintenance. He had sought to rely on a letter of sponsorship from his brother but such financial sponsorship was only accepted from a parent or legal guardian. The appellant was unable to show that he had the prescribed sums available in his own bank statements for the relevant 28 day period prior to his application. The respondent refused to vary the appellant's leave and made a removal decision under s.47 of the Asylum, Immigration and Nationality Act 2006.
4. His appeal was heard before the First-tier Tribunal on 24 October 2012 and allowed to the extent that it was remitted to the respondent to rectify his decision as the decision to refuse leave to remain also included a decision to remove the appellant under s.47. The respondent was granted permission to appeal against this decision and on 11 December 2012 her appeal was allowed and the matter was remitted to the First-tier Tribunal to be determined in accordance with the Tribunal determination in Adamally and Jaferi (section 47 removal decisions: Tribunal Procedures) [2012] UKUT 00414 which held that the correct approach was to determine the variation appeal even though the appeal should be allowed against the removal decision on the basis that it was not in accordance with the law.
5. The appeal was duly listed for re-hearing on 11 February 2013. At [6] the judge set out that it had been clarified at the outset of the hearing that the only two issues in the appeal before him were the question of funds and article 8, the matter having already been to the Upper Tribunal on the s.47 issue. The appellant was unable to show that he was in possession of £1,600 for a consecutive 28 day period [21] and the judge went on to consider the issue of whether the appellant's older brother could be regarded as his legal guardian. He recorded that during the course of closing submissions the appellant's representative conceded that there was no legal guardianship in any formal sense [22] and in these circumstances the judge found that the respondent was right to refuse the application under the Immigration Rules. The judge went on to consider in [27]-[32] whether there would be a breach of article 8 by requiring the appellant to return to Pakistan but found that there would not be.

The Grounds and Submissions

6. In his grounds of appeal the appellant sought to challenge this decision and argued that he had always pleaded and considered that his brother had been his legal guardian. It was also argued that the judge had not properly decided the issue of the two notices, the refusal of further leave to remain and the removal decision, being made on the same occasion and generally that the appellant should not be deprived of his rights under law.

7. Permission to appeal was granted for the following reasons:

“The appellant appealed a decision to refuse him leave to remain as a Tier 4 (General) Student Migrant. First-tier Tribunal Judge J R Jones dismissed the appeal under the Immigration Rules because he was not satisfied the appellant scored sufficient points for Maintenance (funds) under Appendix C of HC 395. This was because the appellant could not rely upon funds from his brother who was not his legal guardian. Further the appellant could not rely upon the funds from the family business as there was no evidence as to what access the appellant had to such funds. These were decisions open to the judge on the evidence before him and which he adequately explained. They did not contain an arguable error of law.

It was conceded on behalf of the appellant at the hearing that his brother was not his legal guardian.

The respondent also decided to remove the appellant under the provisions of s.47 Immigration, Asylum and Nationality Act 2006. The judge made no finding that this decision was not in accordance with the law. This is an arguable error of law. Leave to appeal is granted on this ground only.”

8. In her response to the grounds the respondent indicated that it was conceded that the appeal against the removal decision should be allowed on the basis it was not in accordance with the law. The appellant has submitted a statement and a skeleton argument in support of his appeal accompanied by a letter asking for the appeal to be dealt with on the papers on the basis of the evidence already before the First-tier Tribunal.

9. His submissions deal not only with the issue of s.47 but they argue that the appeal should have been allowed as a whole in the light of the fact that the removal decision was unlawful. They also raise issues about circumstances in which his older brother has been supporting him. Their father died in 1996 and since then his older brother has taken over the running of the family business in which the appellant also has an interest. He describes his older brother as his legal guardian and custodian of the inherited/joint business of their father.

10. However, permission to appeal was only granted on the s.47 issue and I am not satisfied that the appellant’s statement and skeleton argument provide any proper basis for me to re-open the other grounds of appeal.

11. It is clear in the light of the Tribunal determination in Adamally and Jaferi which has been upheld by the Court of Appeal in Secretary of State for the Home Department v Ahmadi [2013] EWCA Civ 512 that the fact that the removal decision is unlawful does not make the variation decision unlawful and that the First-tier Tribunal should determine that appeal on its merits whilst allowing the appeal against the removal decision. The judge was clearly aware that the appeal should have been allowed on that basis and I suspect that the only reason he did not do so was because he wrongly assumed that the decision had been allowed to that extent by the Upper Tribunal.
12. I am satisfied that the judge erred in law. I set aside his decision in respect of the removal decision and substitute a decision allowing the appeal on the basis that the removal decision was not in accordance with the law. That decision remains to be made by the respondent. At the hearing before me Ms Everett was provided with a copy of the appellant's statement and skeleton argument and doubtless the respondent will take those into account when making the decision on removal but in any event it is open to the appellant to make any further representations to the respondent on that issue.

Decision

13. The First-tier Tribunal erred in law in respect of the removal decision I set aside that decision and re-make it allowing the appeal against the decision to remove the appellant on the basis that it was not in accordance with the law.

Signed

Date: 6 August 2013

Upper Tribunal Judge Latter