Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48718/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On Wednesday 23 September 2015	**On Friday 25 September 2015**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR NAZMUL ISLAM

Respondent

Representation:

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Mr M Hossain, Legal representative

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal.

2. The Appellant appeals against the Respondent's decision dated 18 November 2014 refusing his application for further leave as a Tier 4

student and giving directions for his removal to Bangladesh. His appeal was allowed under the Immigration Rules by First-Tier Tribunal Judge Hands in a decision promulgated on 24 March 2015 ("the Decision").

3. Permission to appeal was granted by First-Tier Tribunal Judge Pirotta on 27 May 2015. She found that the Decision may contain a material error of law by failure to refer to evidence in the Respondent's supplementary letter of 30 July 2014 and evidence submitted by the Appellant which was contradicted by his later evidence and cast doubt on his credibility. The matter comes before the Upper Tribunal to determine whether the Decision involved the making of an error of law.

Submissions

4. Although the supplementary letter of 30 July 2014 is referred to in the Respondent's grounds of appeal, neither Mr Jarvis nor Mr Hussain were able to provide a copy of it and it is not to be found in the Tribunal's file. Mr Jarvis could not find reference to it on his file. He very fairly accepted therefore that he could not pursue this ground of appeal. He also very fairly accepted that the Respondent's decision of 18 November 2014 had failed to refer to the interview which the Appellant attended on 16 July 2014 and was therefore in error. He apologised for the error in the Respondent's decision which he noted was due to the fact that this is an Integrated Casework decision which means that there are two references and the caseworker making the decision of 18 November 2014 had failed to note the second reference.

5. In the circumstances, the Respondent's sole ground is to be found in the final sentence of [5] of the grounds, namely that the Judge gave inadequate reasons for the findings at [13] of the Decision that the Appellant is a genuine student. Mr Jarvis drew my attention to what was said in the decision letter of 18 November 2014. The Respondent noted the summary of what the Appellant needed to show in order to be assessed as a genuine student. The decision letter went on to note that in order to assess genuineness, an interview was required. The decision letter (wrongly) stated that the Appellant had failed to attend interview but went on to refuse the application on the basis that the Appellant did not meet the genuineness test.

6. The appeal before First-Tier Tribunal Judge Hands proceeded on the papers as the Appellant did not wish to avail himself of the option of an oral hearing. Accordingly, the Judge was constrained to consider the appeal by reference to the documents before him. At [13], Mr Jarvis submitted, the Judge has given no indication of the basis on which he reaches the finding that he is satisfied that the Appellant is a genuine student. The fact that the Appellant attended an interview as requested is not a reason to find that the Appellant is a genuine student. Mr Jarvis submitted therefore that what the Judge should have done is to find that the Respondent's decision was not in accordance with the law and allow the appeal on that basis, leaving it to the Respondent to make a further lawful decision following reconsideration based also on the notes of the interview.

7. Mr Hossain sought to persuade me that there was in fact material on which the Judge could allow the appeal outright. He noted that the course which the Appellant had already completed as referred to in [13] is in fact the very course which the Appellant applied to follow which led to the Respondent's refusal under appeal in the Decision. He referred to the application form to make good that submission. The sponsor for the application is Cambridge Regional College. There is a letter dated 26 November 2014 from Cambridge Regional College which confirms that the Appellant in fact completed that course on 30 October 2014 (the application refers to the course running from February 2014 to February 2015). I pointed out to Mr Hossain however that this does not appear to have been understood by the Judge. There is reference to the completion of that course at [4] and I would have expected the Judge to note there if he understood that this is the very course for which the Appellant applied leading to the refusal under challenge. Furthermore, at [13], the Judge concludes his findings as follows:-

> *"I note however that the Appellant's course of study started in February 2014 and was due to end on 05 February 2015 so it may be that he has already completed or had to defer his study for a year pending the outcome of this appeal."*

8. Mr Hossain submitted that, even if the Judge had not properly understood this to be the position, any error was not material since the fact that the Appellant had completed his course as noted in the Cambridge Regional College letter was evidence enough to find that he was a genuine student.

9. Mr Jarvis, in reply, pointed out that the Judge had not made his finding based on that letter. The error remained therefore that there was insufficient reasoning for the finding that the Appellant is a genuine student. He noted also that it might have been impermissible for the Judge to take account of the letter given that it post-dated the Respondent's decision (section 85A Nationality, Immigration and Asylum Act 2002). He did not urge that submission strongly since he recognised that there might be an argument against him that genuineness was not part of the points allocation under the points-based system and therefore that section 85A might not apply. However, he submitted that genuineness was part of the same decision and accordingly, in his submission it did preclude the taking into account of the letter.

10. I indicated at the end of the hearing that I was satisfied that the Decision contained a material error of law in relation to the lack of reasoning for the Judge's finding at [13] that the Appellant is a genuine student. I therefore set aside the Decision. I indicated that I would provide my reasons in writing which I now go on to do.

Decision and reasons

11. The question whether the Appellant is a genuine student is put at issue in the Respondent's decision letter. It was therefore incumbent on the Judge to make a finding on that issue if he was able to do so. As the Judge noted at [13], the onus was on the Appellant to establish that he was a genuine student. However, there is no indication in that paragraph of the evidence on which the Judge reached the finding that the Appellant was a genuine student nor does any basis emerge from a reading of the Decision overall. The Judge was quite entitled (as Mr Jarvis rightly accepted) to find (as he did) that the Respondent's decision was not in accordance with the law, for failure to taken into account the interview record (which was not before the Judge). However, it did not follow as the Judge appears to have found that because the Appellant had complied with the request to attend an interview that he was a genuine student, absent the record of that interview. Nor was the Judge able to conclude that the Appellant was a genuine student from the fact that he had completed a previous course. Subject to the point in relation to section 85A, it might have been different if the Judge had understood that the course which had been successfully completed was the course for which the Appellant applied which led to the Respondent's decision under appeal, but it is patently obvious from the last sentence of [13] that the Judge did not understand that to be the position. I find, however, that the Judge was not entitled to take account of the letter dated 26 November 2014 in the appeal since that evidence post-dated the Respondent's decision and did not fall within the permitted exceptions to section 85A.

12. Mr Jarvis rightly conceded that if I found a material error of law in the Decision, I should nonetheless go on to find that the Respondent's decision was not in accordance with the law and allow the appeal on that basis. I therefore allow the appeal on that basis. It will fall to the Respondent to make a further decision on a lawful basis taking into account the interview record and also the letter from Cambridge Regional College noting that the Appellant has already successfully completed the course for which he applied.

DECISION

The First-tier Tribunal decision did involve the making of an error on a point of law.

I set aside the decision

I re-make the decision in the appeal by allowing it on the basis that the Respondent's decision was not in accordance with the law.

Signed  Date 23 September 2015

Upper Tribunal Judge Smith