



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/11767/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
29 October 2013

Determination Promulgated  
11 November 2013

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Before

Lord Boyd of Duncansby sitting as a Judge of the Upper Tribunal  
Upper Tribunal Judge Rintoul

Between

MD ARIF CHOWDHURY TIPU

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr S Kumal, Legal Representative instructed by Immigration Solutions Ltd

For the Respondent: Ms L Ong, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. This an appeal by the Secretary of State for the Home Department (the Secretary of State) against the decision of the First-tier Tribunal (Judge Lucas) sitting at Taylor House, London and promulgated on 9 September 2013.
2. The claimant is a citizen of Bangladesh. He appealed to the First-tier Tribunal against the decision of the Secretary of State dated 2 April 2013 to refuse to grant him leave to remain in the United Kingdom as a Tier 4 General Student under paragraph 245ZX(b) of the Immigration Rules. On 9 September 2013 the First-tier Tribunal upheld the appeal and directed that the Secretary of State “should grant him an extension of his

Tier 4 status". There was no appearance before the First-tier Tribunal for the Secretary of State.

3. The Secretary of State has now appealed against the decision and leave was granted by the First-tier Tribunal on 24 September 2013. In essence the ground of appeal is that the claimant did not fulfil the conditions in paragraph 245ZX(b) and accordingly it was an error of law for the Immigration Judge to direct the continuation of his Tier 4 status.
4. The claimant was granted Tier 4 status in the United Kingdom from 15 September 2009 until 24 April 2011. On 12 April 2011 he submitted an application for leave to remain as a Tier 4 General Student. This was refused by the Secretary of State on 11 May 2011 on the basis that he had not demonstrated that he had no less than £1,200 in a bank account for a consecutive 28-day period preceding the date of the application. So, while he was awarded 30 points for attributes, he was not awarded any points for maintenance (funds). Accordingly he had not met the criteria in paragraph 245ZX(b) of the Immigration Rules. On appeal First-tier Tribunal Judge Cockrill agreed with the Secretary of State that he had not fulfilled the criteria. However, he adjudged that the claimant had developed a private life in this country because he had been here perfectly regularly as a student since 2009. He had obtained the Bachelor of Law degree from the University of London and was due to complete his LLM from John Moores University Liverpool in December 2011. He had explained that he had passed all his examinations and was due to submit his dissertation. Accordingly, while the appeal in relation to the Immigration Rules was dismissed, it was allowed under human rights grounds (Article 8).
5. Following that decision, on 8 September 2011 the Secretary of State granted discretionary leave to remain until 14 March 2012. On this date the claimant applied for an extension of his leave. This was refused on 4 July 2012. The claimant appealed and it was listed for a hearing on 17 September 2012. On that day the Secretary of State withdrew the refusal decision and stated that she would review the decision. The result was the refusal dated 2 April 2013.
6. The claimant does not meet the requirement of paragraph 245ZX(b) of the Immigration Rules. That appears to be acknowledged by Judge Lucas. However, he concluded that the situation the claimant finds himself in was grossly unfair and an administrative mess. The claimant had at no time asked for discretionary leave but yet because of this he did not qualify for Tier 4 status. He reminded himself of the decision in Naved (Student Fairness) Pakistan [2012] UKUT 001 IAC at paragraph 17 where it stated:

"When a Judge finds that there is a duty to act fairly that this has not been complied with in the particular circumstances of this case, he or she can allow the appeal on the basis that the decision is not in accordance with the law".

He concluded that this was such a situation and directed the Secretary of State an extension [sic] of his Tier 4 status and return his passport immediately.

7. The appeal must be allowed. It is quite clear that the claimant does not fulfil the criteria in paragraph 245ZX(b) for an extension of Tier 4 status. The Immigration Judge's reason for ignoring the plain meaning of the Immigration Rules was that the decision was not in accordance with the law. However, Naved, which he relies upon, is not authority for conferring on the First-tier Tribunal a discretion to re-make a decision which it believes to be grossly unfair. The issue in Naved was the operation of Section 85A(4) of the Nationality, Immigration and Asylum Act 2002 which it was argued by the Secretary of State operated to prevent the First-tier Tribunal looking at material which was not before the Secretary of State. There was no dispute in that instance that had the material been before the Secretary of State the appellant would have been entitled to remain in the UK as a Tier 4 student. The Upper Tribunal concluded that in the very particular circumstances of that case the duty to act fairly had not been complied with and on that basis allowed the appeal. Crucially, and unlike the Immigration Judge in this case, the Upper Tribunal did not re-determine the case but decided that the decision was contrary to law leaving it to the Secretary of State to remake the decision.
8. This case is very different. There is no procedural unfairness. A decision has been taken in accordance with the Immigration Rules by the Secretary of State. The claimant does not contend that he has been denied the opportunity of presenting evidence before the Secretary of State or indeed the First-tier Tribunal and he has had full access to the appeal procedure.
9. Accordingly we allow the appeal on the basis that the decision of the First-tier Tribunal involved the making of an error of law and we therefore set it aside. The decision falls to be re-made. We heard evidence from the claimant and submissions from Ms Ong and Mr Kumal who also presented a bundle of papers in support of his appeal. The only ground on which an appeal against the decision of the Secretary of State could be sustained is on human rights grounds, Article 8.
10. The claimant submitted that he had completed his degree at the University of London and Postgraduate training at John Moores Liverpool University. He was now engaged in two educational courses, one at the London School of Business and Finance for an ACCA and MBA. This is a full-time course which he commenced in March 2012 and according to his evidence is due to end in 2015. Separately he is undertaking the part-time Bar Professional Training Course at BPP University. That was commenced in September 2011 and was due to finish on 30 June 2013 but we were informed that the second year was deferred for a year. The finish date is now 2014. He has paid full fees for one of the course and half of the fees for the other. He has invested a good deal of both time and money in these courses. This would be lost if he was now forced to return to Bangladesh.
11. In cross-examination it was put to him that having failed to get Tier 4 status in 2011 the proper course of action would have been to return to Bangladesh and make a fresh application from there. His answer appeared to be that this would cost money and he did not wish to interrupt his studies to return home to make the application.

He wished an opportunity to finish his studies. The further qualifications would enhance his earning power at home in Bangladesh.

12. Mr Kumal for the claimant pointed to the documents in the bundle confirming the claimant's attendance on the educational courses. He pointed to the Secretary of State's refusal letters of 4 July 2012, which was withdrawn, and 2 April 2013 which was in virtually identical terms. The appeal on 6 July 2011 had been granted on Article 8 grounds. Immigration Judge Lucas had found that the procedure adopted by the Secretary of State was grossly unfair, it was not the claimant's fault that he had been granted discretionary leave, the Secretary of State's position was a disproportionate interference in the claimant's private life.
13. Ms Ong for the Secretary of State submitted that the only basis for allowing an appeal against the Secretary of State's decision was on Article 8 grounds. It was accepted that he had formed a private life. She referred us to paragraph 276ADE of the Immigration Rules. Clearly the claimant had not lived continuously in this country for 20 years. However she also accepted that the Secretary of State had to comply with Strasbourg jurisprudence. Accordingly the issue was one of proportionality. The fact was that the appellant had begun a new course without any certainty that he would be granted leave to remain. He knew that he had only discretionary leave and specifically that he did not have Tier 4 status. As such he must have known that he could not obtain Tier 4 status while he remained in this country with discretionary leave. The correct course would have been to return to Bangladesh and to have made a fresh application from there.

### Discussion

14. The claimant does not fall within the provisions of paragraph 276ADE of the immigration rules. We have, therefore, proceeded to consider whether, nonetheless, his removal from the United Kingdom would be in breach of his protected rights pursuant to article 8 of the Human Rights Convention. In doing so, we have followed the five steps set out in **Razgar**.
15. We find that the appellant has not established a family life in this country, but we do accept that he has established a private life here. We accept that, in the circumstances, that his removal will interfere with his right to respect for his private life, bearing in mind the low threshold applicable. The interference is in accordance with the law, and has the legitimate aim of maintaining immigration control. We therefore ask ourselves if that interference is proportionate, bearing in mind it is for the Secretary of State to prove that.
16. We accept that the claimant has now embarked on both a full-time and a part-time educational course. He has clearly invested a good deal of time and money in these courses and we accept that this would be lost were he to have to return to Bangladesh. We are not unsympathetic to his position. Nevertheless we do not consider that the decision of the Secretary of State constitutes a disproportionate interference in his private life. Following on the decision of Judge Cockrill in July

2011 the Secretary of State gave him discretionary leave to remain until he finished his studies on which he was then engaged. At the time he was engaged on an LLM course at John Moores University Liverpool which was due to end in December 2011. It was to enable to finish that course that Judge Cockrill allowed the appeal under human rights grounds and presumably the Secretary of State granted discretionary leave on the same basis. That did not entitle the claimant to take the view that he could start further educational courses and complete them without applying for Tier 4 status. To do so he required to return to Bangladesh and make a fresh application. The provisions of paragraph 245ZX (b) have not changed since 2011; they have always provided that to obtain leave to remain as a Tier 4 migrant, an applicant had to have extant leave to remain or entry clearance in one of the listed categories which does not include discretionary leave to remain. We do not accept that he would have been unduly prejudiced by doing so. He informed us that he had deferred one year of one of his courses so it would have been perfectly possible for him to have returned to Bangladesh in order to make such an application. In any event that was what was required of him in order to comply with the Rules.

### Summary

15. We allow the appeal by the Secretary of State and set aside the decision of the First-tier Tribunal. We remake the decision by refusing the claimant's appeal on all grounds.

LORD BOYD OF DUNCANSBY  
Sitting as an Upper Tribunal Judge  
(Immigration and Asylum Chamber)  
Date: 5 January 2014