



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

Appeal Number: IA/12780/2013

THE IMMIGRATION ACTS

Heard at Field House

**On 4th December 2013
Extempore Judgment**

**Determination
Promulgated**

On 20th December 2013

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

MORSHED ALAM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Hasan (Universal Solicitors)

For the Respondent: Ms S Ong (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal by the Appellant Mr Morshed Alam who is a citizen of Bangladesh born on 27th November 1991. He came to the UK initially in June 2012 with a visa valid until 29th September 2013 with the aim of studying. He was to study at level 5 at Bedford College. However, there were difficulties with that college in that the teaching was inadequate, although there is evidence that he attended. Therefore he

ceased studying at Bedford College and sought leave to remain in the same category as a student on 10th April 2013, this time wishing to study at Waltham Forest College. He made the application therefore as a Tier 4 (General) Student and with it he submitted a CAS issued by Waltham Forest College.

2. The Secretary of State refused the application on 10th April 2013, citing as a reason for doing so that the 30 points claimed under Appendix A for the Confirmation of Acceptance for Studies was unacceptable, it indicated that the previous visa had been issued to study at level 5 and the current application related to study at level 4, and the Secretary of State in the refusal specifically says this:

“You have claimed 30 points under Appendix A of the Immigration Rules for a Confirmation of Acceptance for Studies (CAS) assigned by Waltham Forest College. Your CAS states that you intend to study a BTEC Higher National Certificate in business course at NQF level 4, but you were previously issued leave to study on a diploma in business and administrative management course at NQF/QCF level 5. As you are intending to study a course at a lower level to the course you were previously issued leave to study, your course does not represent academic progression from your previous studies. It has therefore been decided that you have not met the requirements and no points have been awarded for your CAS.”

3. First-tier Tribunal Judge Ross heard the case at Hatton Cross on 25th September 2013. On behalf of the Appellant, the judge was referred to the Secretary of State’s guidance in relation to progression in studies and was specifically referred to paragraph 436 of that guidance which states:

“Sometimes the further study may be at a lower level, but we expect these cases to be rare. Again, you must justify this on the CAS. We will closely monitor the situation.”

4. It can be seen from that policy that the Secretary of State does not rule out the possibility of someone studying at a lower level than he has previously. In deciding that matter the Judge has simply said that this is not the kind of case that he thinks is rare and the judge indicates that he would expect that to be somebody studying a further degree which leads to a more prestigious qualification such as medicine or a professional qualification which is not the case here. That it seems to me is speculation on the part of the judge and also ignores what it seems to me is an error on the part of the Secretary of State in considering the application.

5. The Secretary of State has failed to take into account at all the policy that on occasions study can be at a lower level. She also has failed to take into account the explanation contained in the CAS as to why this study is at a lower level. The CAS specifically states as explanation:

“Student came to the UK to study at IIM Bedford College where he was offered to study the IAM diploma in business and administrative management QCF level 5. The student was not happy with the quality of teaching provided by this college and therefore applied to us. Based on his

academic qualifications we were only able to offer him a place on the HNC business level 4. We have a letter from the previous college confirming the student studied there and had above satisfactory attendance.”

6. It may be, of course I do not know, that this is exactly the sort of situation where the Secretary of State would allow someone to continue studies at a lower level. It is not the case of a student who has completed one course at one level and wants to study a completely different course at the same or a lower level. The student in this case was partway through a course which was highly unsatisfactory and which clearly he was struggling with, and so is now seeking to study at an appropriate level for him. Whether or not that is acceptable is not a matter for me, it is a matter for the Secretary of State because it is her discretion contained in her guidance. However, it is incumbent on the Secretary of State to follow her own guidance and to consider that explanation.
7. The other difficulty in the refusal is in relation to the refusal under Appendix C which relates to funds and maintenance. The Appellant relies upon funds provided by his father. In that part of the refusal the Secretary of State says:

“You have provided evidence of financial sponsorship from Md Mofizur Rahman who is stated to be your father. However, you have provided no evidence of relationship to this person. It has therefore been decided that you have not met the requirements as specified within the Immigration Rules and no points have been awarded for maintenance (funds).”
8. There is evidence with the application that the Appellant’s father is the person named because he is named on the Appellant’s passport. There was also a sworn affidavit or notarised declaration by the father. So there was evidence of who the Appellant’s father was, but unfortunately for him that does not comply with Appendix C in the Rules as to the documentation which has to be provided. What has to be provided is contained in paragraph 13B of Appendix C, which states that an applicant has to provide either his birth certificate showing the names of his parents or a certificate of adoption or a court document naming his legal guardian. He did not provide any of those documents.
9. However, that then brings us onto the evidential flexibility policy and Rodriguez (Flexibility Policy) [2013] UKUT 00042 (IAC) and whether or not the Secretary of State under those circumstances should have asked the Appellant to produce the required documentation. It is clear that she is only required to do so if there is a reasonable expectation that the document exists, and in this case clearly there was because there were two separate documents indicating the name of his father. The Secretary of State did not make that enquiry and Ms Ong on behalf of the Secretary of State before me candidly accepted that the case worker dealing with it would not make that enquiry because they had already decided to refuse it because of the CAS.

10. On that basis the First-tier Tribunal Judge in failing to take either of those matters into account has made an error of law. It seems to me that the original Decision by the Secretary of State was unlawful by reason of her failing to take into account her own policy made worse by also failing to apply the evidential flexibility policy.
11. For those reasons I set aside the determination of the First-tier Tribunal and I remake the decision and allow the appeal to the limited extent that it is remitted to the Secretary of State to make a lawful Decision.

Signed

Date 6th December 2013

Upper Tribunal Judge Martin