IAC-FH-AR/V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18636/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17th March 2015	**On 30th March 2015**
Prepared on 17th March 2015	

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between
MR MOHAMMAD ARIFUL HAQUE
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: The Appellant appeared in person
For the Respondent: Miss E Savage, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Bangladesh born on 10th December 1987. He appeals with leave against the decision of Judge of the First-tier Tribunal Goodrich sitting at Taylor House who dismissed the Appellant's appeal on the papers against a decision of the Respondent dated 9th April 2014. That decision was to refuse the Appellant's application for further leave to remain as a Tier 2 (General) Migrant and to refuse to

issue a biometric residence permit to the Appellant and to remove the Appellant by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006**.**

2. The Appellant first entered the United Kingdom at Heathrow on 2nd October 2006 with entry clearance valid until 31st October 2009 as a student. On 21st March 2010 he was granted leave to remain until 30th November 2011 as a Tier 4 (General) Student under the points-based system and this was extended until 25th September 2012 and again until 30th January 2014. On 8th April 2014 the Appellant applied for leave to remain as a Tier 2 Migrant stating that he had been appointed to be the data entry and IT manager at a company called 3A Distribution Limited trading as Sententious who were based in Ilford, East London. They had offered him a permanent position by letter dated 20th February 2014 with a starting date of 10th March 2014 at £18 per hour with a 45 hour week. It was the refusal of this application which gave rise to the present proceedings.

Immigration Law and Rules relevant to the Appellant

3. A migrant who has had leave in the United Kingdom as (inter alia) a student or a Tier 4 (General) Migrant must satisfy (inter alia) paragraph 245HD(d) of the Immigration Rules in order to be granted leave as a Tier 2 (General) Migrant. This provides that an applicant must have completed and passed a UK recognised Bachelors or Masters degree and not a qualification of equivalent level which is not a degree.

4. In addition an applicant under a points-based system must score 50 points under Appendix A for Attributes which includes 30 points for sponsorship and 20 points for appropriate salary together with 10 points under Appendix B for English language and 10 points under Appendix C for maintenance funds and in each case provide the specified documents. The burden of proof of establishing that the requirements of the Immigration Rules are met rests upon the Appellant and standard of proof is the usual civil standard of a balance of probabilities.

Documentation Considered

5. On the file was the Respondent's bundle which comprised: immigration information on form PF1; Tier 2 application form received on 31st January 2014; copies of the Appellant's passport; reasons for refusal; notice of appeal against the Respondent's decision with statement of the Appellant, confirmation of acceptance for job issued by Sententious, copy of the University of Hertfordshire award of a degree of Bachelor of Arts with second class honours 19th June 2012 in business administration and transcript of the Appellant's results. The Appellant did not provide any documentation for the hearing.

The Explanation for Refusal

6. The Respondent refused the application for two reasons. The first was that the Appellant had provided a copy of the Bachelors degree issued by the University of Hertfordshire with his application but this was not acceptable as it was not an original document. The Appellant had not provided the documents specified under

Appendix B to show that he had obtained an academic qualification which met or exceeded the recognised standard of a Bachelors degree as the copy document from the University of Hertfordshire was not acceptable. The second reason was that the Respondent was not satisfied that the Appellant had provided a valid certificate of sponsorship reference number in relation to the job offer from Sententious. The letter from Sententious offering the Appellant the position of data entry and IT manager had quoted a Sponsor licence number "04011242YKPB". This was not a valid certificate of sponsorship reference number and thus there was no record to show that the Appellant had been assigned a certificate of sponsorship at the time of the application. He was awarded 0 points for sponsorship and it followed that he could not receive any points for appropriate salary. The Appellant was awarded 10 points for maintenance funds.

7. The Appellant appealed against that decision arguing that he had completed his Bachelors degree at the University of Hertfordshire and was therefore entitled to the necessary points. Further, he had submitted a valid certificate of sponsorship. He had never broken any Rules and had always abided by the law. His removal would breach Article 8.

The Proceedings at First Instance

8. On receipt of the notice of appeal the First-tier Tribunal issued form IA37 on 13th May 2014 indicating that the appeal would be heard on Thursday 23rd October at Taylor House. Notice was sent out to the Appellant who was unrepresented and to the Respondent. On 20th October 2014 the Appellant sent a fax to the Tribunal stating that due to his health condition he was not able to attend the court hearing on 23rd. Attached to his fax was a letter from Dr S Khaled of the Eagle House Surgery in Enfield who confirmed that the Appellant was suffering from "persistent diarrhoea and vomiting and is therefore not fit to travel or attend the court hearing next week". The doctor's certificate was dated 17th October 2014 and thus covered the period in which the appeal was due to be heard. The fax was received on 22nd October 2014, the day before the hearing was due to take place.

9. It does not appear that this correspondence was placed before Judge Goodrich because the Tribunal sent an email to the Appellant on 23rd October 2014 in the afternoon (after the Appellant's case had been called on for hearing at Taylor House) stating that the Appellant's correspondence had been passed to Taylor House to be dealt with. The Judge was therefore unaware why, when the matter was called on before her, the Appellant had not attended. She proceeded to deal with the matter in the Appellant's absence. The Judge noted the provisions of paragraph 245AA which relate to documents not submitted with applications. Where an applicant has submitted specified documents in which some of the documents in a sequence have been omitted or a document is in the wrong format, for example not on letter headed paper, or is a copy and not an original document or does not contain all of the specified information, the Respondent may contact the applicant and request the correct documents. However documents will not be requested where the Respondent does not anticipate that addressing the omission or error will lead to a grant because the application would be refused for other reasons.

10. The Judge considered that the Respondent was entitled to decide not to exercise discretion under paragraph 245AA so as to request the original degree certificate because, even if the Appellant were able to provide the original degree certificate, the second issue in relation to the validity of the certificate of sponsorship reference number would remain. The Respondent was unable to verify that the certificate of sponsorship reference number supplied was valid because the reference number was not recognisable. The Respondent's decision not to grant the Appellant's application outside the Rules in exceptional circumstances was correct. Irrespective of the issue of the degree certificate the Appellant could not be awarded the necessary 30 points for sponsorship with a valid certificate of sponsorship. The Judge also dealt with the Appellant's claim under Article 8 and dismissed that as well.

The Onward Appeal

11. The Appellant appealed against the decision of the First-tier Tribunal arguing that he was very surprised that the Tribunal had not given him the chance to justify himself. He had received a reply and acknowledgement from the Tribunal indicating that his request for an adjournment due to ill health had been forwarded on and would be dealt with accordingly when in fact it was not.

12. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Davidge on 17th December 2014. In granting permission to appeal she wrote:

> "The Appellant raises an issue relating to the fairness of the proceedings. The Judge determined the appeal on the papers on 23rd October apparently on the basis that although listed for an oral hearing the Appellant had not appeared and there had been no request for an adjournment. The Appellant attaches evidence with this application that he had in fact applied for his oral hearing to be adjourned."

The Respondent replied to the grant of permission stating that she was unable to comment on the medical documentation adduced or the application which had been made for an adjournment as such documentation had not been provided. The Respondent was not prepared to concede that there was a procedural failing or if there was that it was material.

The Error of Law Stage

13. In consequence of the grant of permission the matter came before me to determine in the first place whether there was an error of law in the determination at first instance. If there was then I would set the determination aside and consider how best the matter should be further dealt with. If there was not, then the decision at first instance would stand.

14. Following the grant of permission to appeal the Tribunal fixed Friday 30th January 201t5 at 2.00 p.m. to hear the Appellant's appeal against the First-tier Tribunal decision. On 29th January the Appellant sent a fax to the Tribunal requesting an adjournment again for health reasons. This time the Appellant produced a letter from Dr Ian Rubenstein at the Eagle House Surgery dated 29th January 2015 which stated "I am sorry but Mr Haque has sustained an ankle injury and he is not fit to travel to give evidence at court". Attached to the Appellant's fax was a statement of

fitness for work signed by the surgery advising that due to "another ankle injury" the Appellant was not fit to work.

15. The application for an adjournment came on the papers before Upper Tribunal Judge Dawson who replied to the Appellant's application as follows:

> "This is the second occasion that the Appellant has requested an adjournment for health reasons. The first was when his case was listed before the First-tier Tribunal which has resulted in the grant of permission to appeal. It is noted that Dr Rubenstein considers that the Appellant is unable to attend court because of his ankle injury. On this occasion the request will be granted. The case will be relisted for a further hearing. It is unlikely that a further adjournment on health grounds will be granted and it is therefore important that the Appellant ensures a representative is in place who can appear on his behalf should the Appellant be unable to do so himself."

16. The Tribunal adjourned the matter until 17th March 2015 when it came before me. At the outset of the hearing the Appellant applied for another adjournment this time on the grounds that he had instructed a solicitor Mr Tariq Mahmood, who was unable to attend court because Mr Mahmood's wife was in hospital. Mr Mahmood had called and texted the Appellant to say he would be unable to represent the Appellant today. There was nothing on the court file from a solicitor and the Appellant himself did not know the name of Mr Mahmood's firm. Nor did he know why Mr Mahmood had not instructed someone else to attend in his absence or indeed why the court had not been informed by Mr Mahmood's firm of Mr Mahmood's inability to attend.

17. It was not at all clear from the Appellant's explanation why Mr Mahmood was unable to attend court to represent one of his clients, in this case the Appellant, while his wife was in hospital. The application for an adjournment was opposed by the Respondent. I noted that this was the third application for an adjournment made by the Appellant. The previous two had been on the basis of the Appellant's own ill health. This third application was now being made on the basis of the ill health of his solicitor's wife. There was no documentary evidence of any kind to support the Appellant's application.

18. I considered the case of **Nwaigwe [2014] UKUT 00418**. The head note to that case reads that in most cases the question will be whether the refusal [to adjourn] deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds it is important to recognisee that the question for the Upper Tribunal is not whether the First-tier Tribunal acted reasonably. Rather the test to be applied is that of fairness. Was there any deprivation of the affected party's right to a fair hearing? **Nwaigwe** concerned a case where the Tribunal had proceeded in the absence of an Appellant. New Procedural Rules had come into operation for the First-tier Tribunal on 20th October 2014. These had provided that the First-tier Tribunal may adjourn or postpone a hearing. In **Nwaigwe** it was said this less proscriptive formula reinforced the necessity of giving full effect in every case to the common law right and principles discussed previously.

19. Importantly at paragraph 11 the President of the Upper Tribunal went on to say:

> "The next question which arises is whether this error of law was material. I consider that it was not since the sole question for the First-tier Tribunal was whether, based on

> an assessment of the documentary evidence, the Secretary of State's decision was sustainable."

The Upper Tribunal went on to find that the Respondent's assessment in that case was unassailably correct. It followed therefore that the refusal to adjourn the hearing was not unfair since the Appellant could not on any showing have succeeded. The Appellant's attendance whether represented or otherwise could not have made any difference to the outcome. In that case therefore it was found that an adjournment and relisting was inappropriate.

20. Applying this case to the instant case before me, there was little doubt that the Appellant had been deprived of a fair hearing by the fact that his application for an adjournment on the grounds of ill health had not been put before the First Tier Tribunal Judge to consider. Whether the trial Judge would have granted the adjournment or proceeded nevertheless was immaterial, the issue should have been put but due to administrative difficulties it was not. I therefore found that there was a material error of law in the determination such that it fell to be set aside.

21. The next issue was whether in those circumstances I should: (a) proceed to rehear the matter; (b) remit the matter back to the First-tier to be heard again or (c) adjourn the rehearing to another date for the Appellant to make arrangements for his representation.

22. I did not consider that the third alternative was a realistic one. There was very little evidence indeed to suggest that the Appellant had arranged representation. There was nothing in support of the Appellant's application for an adjournment from a solicitor in circumstances where the ordinary requirements of professional duty would require a solicitor to inform the Tribunal if his office was unable to arrange representation for a client. The application was somewhat vague as it was not even the case that the solicitor himself was unwell and nothing to say what was wrong with the solicitor's wife that required her husband's constant attention. The Appellant had on at least two previous applications for an adjournment been careful to obtain documentation in support of his application. I took particular notice of the fact that Upper Tribunal Judge Dawson had specifically directed the Appellant to ensure that he had some form of representation on the next occasion. In those circumstances it made it even more pressing that the Appellant would be in a better position to apply for an adjournment and would have something rather more substantial to put before the Tribunal when requesting an adjournment. I was not prepared to adjourn the matter and considered that the test of fairness was such that the case should proceed there and then. I did not consider that this case came within the Senior President's Direction for the remittal of the appeal to the First-tier. The issues in the case were very straightforward and could be readily resolved. The matter thereafter proceeded.

The Re-hearing

23. The Appellant indicated that he had brought with him to court the original of the University of Herefordshire Bachelors degree certificate. As to the certificate of sponsorship, he had received an email from the Respondent asking for further information as the Respondent said they could not find the certificate of sponsorship

from their system. He had approached Sententious about the query over their sponsorship number and they had said they could not take the matter any further unless they were requested to do so in which case they help him if needed with any paperwork.

24. In closing for the Respondent it was argued that it was entirely unclear why, if Sententious had a valid sponsorship number, that had not been produced as this was now the third hearing which had been scheduled. The appellant had had ample time to obtain the necessary documents. In closing the Appellant indicated that he had contacted Sententious about their sponsorship documentation.

Findings

25. The main difficulty in this case for the Appellant is that he has not produced a valid certificate of sponsorship number indicating that Sententious was entitled to offer him the position of data control. I accept the Appellant's evidence that he now has the original of his University of Hertfordshire degree certificate. He said he was reluctant to send it to the Respondent in case it was mislaid. That was not in my view a good reason. The Respondent was entitled to see the original and the Appellant should have provided it to the Respondent. However, the Respondent was under no obligation to ask for the document under paragraph 245AA of the Immigration Rules if the Appellant's application was bound to fail in any event for some other reason. In this particular case the application was bound to fail in any event because the Appellant could not provide a valid certificate of sponsorship number. The Appellant could not satisfy the Immigration Rules on the issue of the certificate of sponsorship (see below) and in those circumstances there was no reason why the Respondent should have requested the original degree certificate since it would have made no difference to the eventual outcome of the case.

26. He has known what the objection to his application was since April 2014 when the refusal notice was issued. The Appellant has had almost one year to make enquiries of Sententious as to why they quoted an invalid sponsorship number and if appropriate what the correct sponsorship number was. He has not done that. All he has done is to refer the matter to Sententious only to be told that they would provide the necessary paperwork if requested. They have not done that. In those circumstances the conclusion is inescapable that he has not been able to produce evidence to show that Sententious had a valid certificate of sponsorship number because they do not have such a number. The conclusion must be that they were not entitled to employ the Appellant as a Tier 2 (General) Migrant under the points-based system. The Appellant's evidence to me on the point was vague and somewhat confused. What both sides did agree on was that that Appellant had been asked by the Respondent for further information about the certificate of sponsorship number by an email but as the Respondent pointed out, there had been no substantive reply to that email. The Appellant had no answer to the objection taken by the Respondent as long ago as April 2014.

27. The Appellant had argued in his notice of appeal against the Respondent's decision that it breached Article 8. It is difficult to see how such as claim could be made out. The Appellant does not claim to have any family life in this country but has

established a private life of sorts in the last eight years or so whilst studying in this country. That private life would be interfered with by requiring him to return to Bangladesh but would be in accordance with the legitimate aim of immigration control since the Appellant has produced documentation in the form of a claimed certificate sponsorship number which was not correct.

28. In assessing the proportionality of the interference with the Appellant's private life by his removal which occurs pursuant to the legitimate aim pursued, I bear in mind the requirements of Section 117A-D of the Nationality, Immigration and Asylum Act 2002. The Appellant's private life has been established whilst his status here was precarious, being that of a student. He cannot now bring himself within the Rules and therefore he seeks to remain in this country outside the Immigration Rules under Article 8. Given that his private life was established while his status was precarious, little weight is to be ascribed to it in the balancing act. On the other side of the equation, however, there are substantial reasons why the Appellant should be removed, particularly given the fact that he has sought to submit a false certificate of sponsorship number to the Respondent. The decision to remove is proportionate to the legitimate aim pursued and I dismiss the appeal under Article 8.

Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside.

I have re-made it by the decision by dismissing the Appellant's appeal under the Immigration Rules and under the Human Rights Convention.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 27th day of March 2015
…….
Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As I have dismissed the Appellant's appeal there can be no fee award.

Signed this 27th day of March 2015

…….
Deputy Upper Tribunal Judge Woodcraft