Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02957/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22 September 2014	**On 20 October 2014**
Prepared 22 September 2014	

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JABER AHMED

Respondent

Representation:

For the Appellant: Mr P Deller, Senior Presenting Officer
For the Respondent: Mr B Aupoo, Legal Representative, SEB Solicitors

DETERMINATION AND REASONS

1. In this determination the Appellant is referred to as the Secretary of State and the respondent is referred as the claimant.

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2. The claimant, a national of Bangladesh, date of birth 8 December 1988, made an application on 17 October 2013 for leave to remain as a Tier 4 (General) Student Migrant. The application was refused by the Secretary of State on 15 November 2013 on the basis that the Claimant had not provided the requisite documents and in particular had failed to provide evidence required as to his birth certificate or other material evidence.

3. The appeal against that decision came before First-tier Tribunal Judge Harrington (the Judge) who, on 18 July 2014, dismissed the appeal under the Immigration Rules but allowed the appeal on human rights grounds to enable the Claimant to complete a BA management course.

3. Permission to appeal that decision was given to the Secretary of State by First-tier Tribunal Judge Heynes on 5 August 2014.

4. At the hearing before me I was satisfied that as a fact in relation to the grounds on which permission was granted that the Judge whilst reciting the case of Gulshan [2013] UKUT 640 (IAC) had nevertheless failed to put her mind to the relevant considerations under MF (Nigeria) [2013] EWCA Civ 1192 and Nagre [2013] EWHC 720 (Admin) and MM (Zimbabwe) [2009] UKIAT and Patel and Patel [2011] UKUT157. Rather the Judge having in her own way expressed the exercise that she was looking at, having satisfied herself that the appellant could not meet the requirements of Appendix FM and paragraph 276ADE of the Immigration Rules (the Rules) concluded that there were compelling circumstances to show why Article 8 was engaged outside of the Rules.

5. In the circumstances, in paragraph 32 of the determination the Judge said

> "… In my opinion there are compelling circumstances such that it is necessary to consider Article 8 outside the Rules, namely the Rules do not specifically consider a case such as this where the interference is

with an almost completed course of study embarked upon at considerable expense to the appellant."

6. As a matter of approach, as Mr Deller points out, it would be quite exceptional to find Rules couched in such terms to enable someone who has embarked on a course and carrying it on without leave covering the course, to then turn round and say "Well I have nearly finished it and therefore I ought to succeed either under the Rules or under Article 8". It is hard to imagine factual circumstances of this kind that provision could be made for under the Rules in any event. Be that as it may, the fact of the matter was the Judge had really not put her mind to the issue of how a student under an obligation to make the necessary and correct application, who failed to do so, through entirely his own fault, can therefore fall back on Article 8 to say "Well, in any event allow me to remain". The Judge has not cited CDS (Brazil) [2010] UKUT 305 but it could have been in her mind. However even CDS (Brazil) was not directed at the situation the appellant found himself in at the material times and nor was CDS (Brazil), even if it stands as originally stated, enabling people to remain for the purposes of completing a course of which they never had any permission to undertake.

7. I find the Judge's reasoning falls far short of showing how the appellant's circumstances engaged consideration of Article 8 ECHR outside of the Rules.

8. The Judge in fact in giving her reasoning for concluding that the Secretary of State's decision was disproportionate appears to rely upon three matters. First, the fact of delay in removing the appellant between the hearing and the end of his course is very limited. It is hard to see how that can amount to a material consideration of weight when assessing the individual's circumstances and the public interest.

9. Secondly, the Judge regarded the fact that the appellant had paid for his evidence as material but the fact is there is nothing to outweigh the general public expectation that an appellant will pay for their education. The fact that this appellant has done so really added nothing to the matter and certainly did not to show why the public interest was outweighed.

10. Thirdly, the Judge looked at the matter on the basis that the appellant had undertaken the majority of the course while waiting for a decision. The fact of the matter is the delay was, certainly in part, the result of the appellant exercising his right of appeal. The benefit of the delays has enabled him able to complete the BA management course. How the Judge thought that her decision to extend time to complete the course, for which there was no permission to undertake, amounted to a the exercise of private life rights is not properly reasoned.

11. The original Tribunal’s decision cannot stand and it will have to be remade.

12. Having heard representations from the parties as to whether it can be remade in the Upper Tribunal on the basis of the finding of facts made, and in respect of the Judge’s findings on the reliability of the appellant's recollection as to the documentation and its nature which he submitted, it seems to me that it is appropriate the appeal is remade in the Upper Tribunal and on the basis of the findings made. Subject to any further submissions within 14 working days of promulgation in writing on that issue I shall remake the appeal on the papers before me.

Signed Date 22 September 2014

Deputy Upper Tribunal Judge Davey