Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01888/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 20th June 2013	**On 27th June 2013**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

NANETTE SALDANA MARCELLANA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person, representing herself
For the Respondent: Mr Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant appeals with permission against the decision of the First-tier Tribunal (Judge Freestone) who dismissed an appeal against the decision of the Secretary of State made on 7th January 2013 to refuse to vary leave to remain as a Tier 4 (General) Student Migrant under the points-based system and to make a decision for removal under Section 47 of the 2006 Act.

2. The history of the appeal is as follows. The Appellant, a citizen of The Philippines, was born on 28th October 1973. On 17th November 2008 she was granted leave to enter the UK as a student until 31st January 2010 and subsequently until 17th September 2011. On 16th June 2011 she made an application for further leave to remain as a Tier 4 (General) Student Migrant. Her intended course was at the Royal London College (RLC) to study an NQF level 6 graduate diploma in business management and marketing to run from 1st June 2011 until 30th June 2013.

3. In a letter dated 27th February 2012 the Respondent acknowledged the application that she had made on 16th June 2011 for leave to remain in the UK to study at the Royal London College but informed the Appellant that the licence of the college had been revoked on 9th September 2011. In those circumstances, the Appellant was informed that consideration of her application would be suspended for 60 calendar days. The letter went on to state that during the 60 day period it would be open to her to withdraw the application and submit a fresh application in a different category or to leave the United Kingdom. If she wished to remain as a Tier 4 Student, she would be required to obtain a new CAS for a course of study at a fully licensed Tier 4 educational Sponsor and submit an application to vary the grounds of the original application.

4. On 23rd April 2012 the Appellant wrote to the Respondent stating that she had been looking for an alternative college to sponsor her but they required an up-to-date English test. She had approached a number of examination centres but they all required her original passport to register and take the exam. Thus the Appellant asked for her passport to be returned to her and asked for a further extension until 30th May 2012. The Appellant received no response to that letter of 23rd April 2012.

5. On 28th May 2012 the Appellant wrote again to the Respondent and asked for an extension to 15th July 2012 on the same grounds making it clear that she required her passport so that she could obtain a new CAS and submit a variation application.

6. There was still no response from the Respondent. In those circumstances she submitted an application on 11th June 2012 an FLR(O) application based on compassionate grounds citing the above circumstances. In effect, the Appellant was concerned that she may be treated as an "overstayer" as she had had no reply from the Respondent concerning the return of her passport and her Tier 4 application. She had been accepted to study on a postgraduate diploma in management (NQF level 7) from 1st June 2012 until June 2014. She attached a new CAS issued by Onto Limited.

7. There was still no response from the Respondent to either the application made in April 2012 for her passport back so that she could comply with the letter that she was sent nor the application that was made in June.

8. The Appellant finally received a response on 26th September 2012. An e-mail was sent to her from a case worker who enquired of the Appellant which application she wished to progress; either the FLR(O) application made in June 2012 or her Tier 4 application. The Appellant replied by e-mail, explaining the reason for making the application in June for the reasons set out earlier and confirming that she wished to proceed with her Tier 4 application and again requested the return of her passport. At this stage the Appellant had been requesting the return of her passport from April until October 2012.

9. The Respondent replied on 5th October. In that letter, the Respondent apologised for the delay in failing to respond to the letters dated April and May 2012 and set out the history. In particular the letter noted that she had been given 60 days to withdraw the application or vary it with a new CAS from a new Sponsor. The expiry date was therefore 27th April 2012 and acknowledged that she had replied on 23rd April, four days before the expiry of that period requesting the return of the passport. The letter stated that they were unable to comply with a request for extending the 60 day period. The letter went on to state that as the Respondent did not return the passport when requested on 23rd April 2012, the passport would now be returned. As a result of the delay in returning the passport it was decided to allow the Appellant extra time that she would have had if they had returned her passport immediately upon request. Thus the new expiry date was 9th October 2012.

10. It is common ground that that letter was received by the Appellant on 12th October 2012 after the expiry of 9th October which was the deadline.

11. On 15th October 2012, the Appellant wrote to the Respondent acknowledging the letter which she had received on 12th October. She asked for a further expiry date because as she set out, the 9th October 2012 had already expired before she had received her letter and it defeated the whole purpose of returning her passport because it was not possible therefore to book and sit an approved English test, enrol with a Tier 4 Sponsor and submit a new Tier 4 application in a matter of days.

12. Nothing further was heard from the Respondent until an e-mail was sent on 28th December 2012. The e-mail requested that the Appellant returned her passports to the Respondent within seven working days.

13. In the intervening period, between the date in October when she received the letter and the e-mail in December, she attempted to book the next available English test with IELTS and Pearson which are the test centres which could issue test results quickly however, due to the unusually high volume of test takers during that period of time as it was near to the Christmas period, the nearest test date that she could obtain was the second week of January 2013.

14. The Appellant had returned her passports on 28th December as required because she was concerned that if she did not, it could be viewed as not complying with any instructions.

15. On 4th January 2013 a further letter was sent to the Appellant by the UK Border Agency confirming that the FLR(O) application had therefore been withdrawn and the documents submitted had been linked with the Tier 4 application. Nothing further was said in that letter concerning her application or her passport.

16. On 7th January 2013 the Respondent issued a decision to refuse to vary leave and made a decision to remove the Appellant under Section 47 of the 2006 Act. The application was refused under paragraph 245ZX(c) with reference to paragraph 116(e) of Appendix A and paragraph 245ZX(d) of the Immigration Rules. The refusal noted that the Appellant had not provided a new CAS by 9th October 2012 and that she had not submitted a variation of her Tier 4 application to study with Onto Limited by the same date. As she had not submitted a new application form as required nor a CAS as required, her application had been assessed on the basis of the documentation previously sent including the original CAS from the Royal London College which was not listed as a Tier 4 Sponsor at the date of decision. Thus the application was refused.

17. The Appellant appealed that decision and on 15th April 2013 the appeal came before the First-tier Tribunal (Judge Freestone) sitting at Taylor House. The facts are not in dispute. The history which I have set out earlier in this determination was accepted by the judge at paragraph 10 of the determination. The judge found the Appellant to be a credible witness and the evidence that she had given, which was contained in a statement and supported by documentary evidence in a bundle of documents, was not challenged in cross-examination by the Presenting Officer.

18. The First-tier Tribunal in a determination promulgated on 30th April 2013 dismissed the appeal under the Immigration Rules and on human rights grounds. The judge made the following findings:-

> "11. This Appellant has been caught up in the very complicated Immigration Rules (the Rules) relating to the points-based system. She is unrepresented and throughout the lengthy process thought that she was complying with the requirements of the Respondent in obtaining a new CAS. Her difficulty is that she failed to complete a new application form as required by paragraph 34E of the Rules. This requirement was pointed out to her in the letters from the Respondent dated 27th February 2012 and 5th October 2012. Her difficulties were compounded by the fact that she could never have complied with the requirements of the second letter because she received it after the deadline stated in that letter.
>
> 12. In her Grounds of Appeal the Appellant submitted that she should have been granted 'a short and reasonable extension' of the 60 day deadline so that she could take her English test. However I note that

> even after she received her passports from the Respondent on 12th October she was unable to book a test until the second week in January. That would have meant an extension for three months. I do not find that it is a short and reasonable extension particularly as she was previously given 60 days. In those circumstances, whilst I accept that the Respondent acted unreasonably by extending a deadline to a date that could never be met by the Appellant, even if she had been granted a short and reasonable extension she would not have been able to comply."

Thus the judge found as she had failed to complete the new application form as required, although obtaining a valid CAS she could not succeed in her appeal. The judge also dealt with Article 8 at paragraphs 14 to 18 but after considering the five-stage test in **Razgar** and the issue of the Appellant's private life, the judge found that the refusal of the application was not a disproportionate interference with her private life and dismissed the appeal on human rights grounds also.

19. The Appellant sought permission to appeal the decision and on 13th May 2013 the First-tier Tribunal (Designated Judge Zucker) granted permission for the following reasons:-

> "1. First-tier Tribunal Judge Freestone dismissed the Appellant's appeal against the decision of the Respondent to refuse her application for leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant under the points-based system and for a biometric residence permit.
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> 2. The judge found the Appellant credible (see paragraph 10).
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> 3. In essence what the Appellant contends is that the decision of the Respondent was unfair and that the judge failed to recognise that when dismissing the appeal.
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> 4. It is arguable that the failure to return to the Appellant, her passport, despite several letters from her, so that she was frustrated in advancing her application, coupled with the judge's finding that the Respondent had acted unreasonably (see paragraph 12) means that the judge should have considered whether the decision of the Respondent was otherwise than in accordance with the law because of 'unfairness'."

20. Thus the appeal came before the Upper Tribunal. The Appellant appeared before the Tribunal unrepresented. Prior to the hearing she had filed and served a bundle upon which she sought to rely. The bundle contained in the main the documents that had been before the First-tier Tribunal including her witness statement setting out the history of the proceedings which was dated 5th April 2013 and a copy of the correspondence between herself and the Respondent.

21. In the grounds for permission the Appellant stated that the judge was in error because there were matters that were not taken into consideration, namely, that the Appellant was not able to make a Tier 4 application in the

first place because the Respondent had only provided the original passport after seven months of repeated written request for that passport so that she could take the required English test. She could only make the Tier 4 application after she passed the English test and could not do so by the deadline given by the Respondent on 9th October because she did not receive her passport until the 12th. She further submitted that she could not have sat her English test because the earliest time that she could obtain one was the second week of January because of the heavy volume of test takers and the Christmas break. Before she could book the test, the Respondent on 28th December demanded that the passports were returned within seven working days. Furthermore, the grounds submit that the judge failed to consider that an application had been made to vary leave on 11th June 2012 using the application FLR(O) after the Respondent had failed to respond to repeated written requests for the return of the passport. She had only withdrawn that application upon query of the Respondent as to which application she wished to pursue. She chose the Tier 4 application because her main purpose was to obtain the UK qualification. She further submitted that it was the unfairness of the Respondent that led to the failure to make the Tier 4 application and the circumstances were "beyond my control". The Appellant further submitted that the Respondent had failed to apply its own published policy of flexibility and provide "excellent customer care to points-based system applicants given the potential of human error." In that respect she had annexed to her bundle at pages 82 to 83 a copy of a letter from Jeremy Oppenheim dated 19th May 2011 in respect of the commencement of Section 19 of the UK Borders Act.

22. In her oral submissions to the Tribunal, she could not add anything further to those written submissions but relied upon them before the Upper Tribunal. She reiterated that she was unable to obtain an English test without her passport and that it had not been provided to her until 12th October, days after the deadline had expired. She did not know the deadline expired because the letter was received by her on 12th October. She could not possibly book the test and due to the delay, the period of time in which she could have booked it had already expired.

23. Mr Avery on behalf of the Respondent, submitted that in this case the Respondent had followed the policy in place namely when a college was suspended or taken off the register a period of 60 days is allowed to find an alternative course. He submitted that it had been regrettable that the Respondent had not returned the passport when she had asked for it. However she did not ask for the passport until very close to the expiry of the period. In this case, the judge noted that she would not have been able to produce the qualification within a reasonable time because she could not get a test date until January. He conceded that the passport was not returned until 5th October (it having been requested as long ago as April) but even if the Respondent had sent the passport when she had asked for it she had only got a few days when she could have made the application. This is not a case when she had been given a fresh 60 days

from October and they had taken into account the delay in the passport. She should have asked for her passport back earlier.

24. As to the submission concerning evidential flexibility, that policy related to missing documents that are nothing to do with this particular appeal thus the policy did not apply, the decision in **Rodriguez (flexibility policy) [2013] UKUT 00042 (IAC)** therefore did not apply.

25. I reserved my decision.

26. In this case the facts are not in dispute as set out early in the determination. The history given of the application and the ensuing correspondence was accepted by the First-tier Tribunal at paragraph 10 of the determination in which the judge was satisfied that the Appellant was a credible witness. Her evidence was not challenged in cross-examination by the Presenting Officer.

27. The thrust of the submissions made on behalf of the Appellant relate to the decision making process in respect of the application that she made to vary her leave in the United Kingdom as a Tier 4 (General) Student Migrant under the points-based system. The original application was made as long ago as 16th June 2011 and it appears that the licence for the Royal London College was revoked at least on or before 9th September 2011 however, the Respondent informed the Appellant of that in February 2012 some five months after the revocation of their licence. The Appellant takes no issue with the way in which the Respondent dealt with the revocation which was that they had suspended her application for 60 calendar days but considers that the decision making process thereafter and the Respondent's inaction led to her application being refused unfairly and thus was "not in accordance with the law."

28. I have considered with care the determination of the First-tier Tribunal. I have set out earlier paragraphs 11 to 12 where the reasons were given for dismissing the appeal. In effect, the judge, whilst recognising that the Respondent acted unreasonably by extending a deadline to a date that could never be met by the Appellant, even if she had been granted a short time, she would not have been able to comply because her evidence in the appeal was that she could not obtain a test until the second week in January. As set out in the grant of permission, the basis of the appeal was whether or not the judge should have considered whether the decision of the Respondent was otherwise than in accordance with the law because of "unfairness." That was based on the failure of the Respondent to return to the Appellant her passport, despite several letters from her, which resulted in her being frustrated in advancing the application.

29. The current appeal is based on an argument of fairness of the UKBA to act in accordance with established public law principles. They have been summarised at paragraph 70 of the Court of Appeal judgment, **R (on the application of Q) v The SSHD [2003] EWCA Civ 364** which dealt in part with the place of fairness in the immigration system.

30. The Tribunal have considered the issue of procedural fairness in a number of cases including **Naveed (student – fairness – notice of points) Pakistan [2011] UKUT 0014**, **Patel (revocation of sponsor licence - fairness) India [2011] UKUT 211** and **Thakur (PBS decision – common law fairness) Bangladesh [2011] UKUT 154 (IAC)**. The facts of those cases are dissimilar to the facts of this particular appeal but all the cases deal in general terms with the issue of fairness. The Appellant in **Thakur** was a case where the Tribunal proceeded on the basis that the Appellant was unaware that the college had lost its Sponsor's licence and that he had had not adequate opportunity of finding an alternative college. In the case of **Patel**, unbeknown to the Appellant, the college was removed from the list of approved Sponsors by the Home Office during the time it was considering the application and the removal of the college from the list of Sponsors was taken at about the same time as the decision to refuse the application, therefore there was no opportunity for the Appellant to be informed of the consequences on his application of the Respondent's action. Nonetheless those cases deal in general terms with the issue of fairness. The Tribunal in **Patel** at paragraph 14 stated:-

> "We also note the decision of procedural fairness in De Smith's Judicial Review (Sixth Edition 2007) at paragraphs 7-003 to 7-009. We accept the author's proposition that the law has advanced from imposing a public law requirement of fairness in particular situations. To the general proposition that wherever a public function is being performed there is an inference that the function is required to be performed fairly; in the absence of an express indication to the contrary."

31. The Tribunal in **Patel** at paragraph 28 also made it clear that:-

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

32. In the decision of **Thakur** the Tribunal took into account the concept of fairness taken from the decision of **ex parte Doody**. At paragraph 18 the Tribunal stated:-

> "We emphasise the guidance given by Lord Mustill that the principles of fairness are not to be applied by rote identically in every situation and that what fairness demands is dependent on the context of the decision and the appellant's particular circumstances."

33. There is no dispute that the Respondent began the decision making process in accordance with its own policy by providing the Appellant an opportunity before refusal of the application to vary that in the light of the revocation of the Sponsor licence. The issue relates to whether the First-tier Tribunal took into account the decision making process as a whole in

the context of any "unfairness". There is no reference in the determination to the common law duty of acting fairly in the decision making process, or any reference to the cases that I have cited earlier. Whilst it is not necessarily an error of law not to set out those decisions, I do not consider that the judge dealt with the principle of fairness sufficiently in the determination. There is, some consideration of the decision making process at paragraph 12. Indeed the judge found as a fact that the Respondent had acted "unreasonably by extending a deadline to a date that could never be met by the Appellant."

34. The evidence before the First-tier Tribunal, was that the Appellant had asked for her passport on 23rd April 2012. It is right that that was shortly before the expiry of the 60 day period. Mr Avery submits that she should have applied for her passport earlier. However, that does not take into account the subsequent actions of the Respondent which was to keep the passport despite repeated requests for the passport to be returned to her between April and October, which is a considerable period of time. There was evidence before the First-tier Tribunal that the Appellant's priority during the period from February until April was to find a course provider that could offer her a course and to accept her application. It is reasonable to assume that once she found a course that it would not take such a long period to submit the form and obtain the necessary documentation. However, it is clear from the evidence before the First-tier Tribunal that before she could even register for the new English test, which was a requirement to obtain the CAS and submit with the form, that she required her original passport. It seems to me that the judge failed to consider that explanation concerning the delay between February 2012 and 23rd April which was material. The Appellant wrote to the UKBA on a number of occasions requesting her passport and making it clear that she would be unable to comply with their request in February unless she obtained her passport and set out very clearly the reasons why she could not comply with their request. Their inaction led to her submitting an application in June by way of a last resort in a further attempt to obtain her passport. She did that for entirely credible reasons. The only communication from the Respondent was in September to ask whether or not she wished to proceed with the FLR(O) application or her Tier 4 application. There was no recognition of their failure to act by returning her passport to her which was the reason why the FLR(O) application had been made in the first place. As the Appellant stated before the First-tier Tribunal, the only reason why she had made the application was to in effect, force some action from the Respondent so that she could obtain her passport. She did not wish to remain in the UK unlawfully and could see no other way of obtaining her passport.

35. The passport was eventually enclosed along with the letter of 5th October. The Appellant did not receive that passport by way of recorded delivery until 12th October 2012. The deadline for her to provide her documentation was given in that letter to be 9th October, thus the deadline had been reached and expired before she had even received notice of it. The judge found that to be unreasonable action on the part of the

Respondent but failed to take into account the whole decision making process by placing weight on the fact that she was not able to obtain a test until January, which was some months after the return of her passport.

36. It seems to me, that the failure to consider the whole of the decision making process and thus the issue of fairness is an error of law and I have reached the conclusion that this was an issue that required consideration before the Tribunal. In those circumstances, I set aside the decision.

37. It was not necessary to hear any further evidence as the Appellant's account was not in dispute before the First-tier Tribunal. The facts are set out clearly earlier in this determination. I have therefore considered the whole of the decision making process in this appeal. As I have set out earlier, there is no dispute that the Respondent began the decision making process in a fair manner by providing the Appellant with a 60 day period in which to make a variation of her application originally made in June in view of the Sponsor's licence being revoked. It is entirely clear to me that the evidence before the First-tier Tribunal was that her priority was to find a course provider who could offer her course. It is reasonable therefore to assume that it would not take a long period to submit the form and thus the delay that took place between February and 23rd April was entirely reasonable in the circumstances. It was during that period of time that she was informed that before she could even register to take an English test, which was required to comply with the matters set out in the letter of February, she required her original passport. The Appellant did all she could, in my judgment, to obtain that passport from the Respondent. It is entirely clear from the correspondence that she had requested her passport, setting out the reasons why she could not comply, in that correspondence. The Respondent failed to answer that correspondence within a reasonable time. The Appellant, even took the opportunity to make an application under the FLR(O) provisions as a second attempt to obtain her passport. Thus from April till October the Respondent did not comply with the request made by the Appellant in order for her to complete the process for which she had been given the 60 day extension. When the passport eventually was returned to her it came with a letter informing her that she had until 9th October to provide the variation application and the necessary documentation.

38. It is common ground that by the time she received the letter on 12th October 2012, the deadline had expired. It is clear from that letter, that the Respondent accepted some responsibility for the failure of producing the passport to the Appellant when she had asked for it. They recognised that she had been late in asking for her passport but that their inaction had led to a period where she could not obtain her English test thus the period was extended. In my judgment it appears to be a recognition that the Appellant had not been able to comply with the request in their letter of February because they had kept hold of her passport and that the application had been frustrated because of that. The difficulty is that by sending the passport after the expiry of the deadline further frustrated her

opportunity to obtain the test. Whilst she had a date for January, which seems to be a long time after 5th October letter, that has to be seen in the light of the time of year. Her evidence before the Tribunal was that that was a particularly busy time due to the high volume of students requiring an English test at the end of the year and due to the Christmas period. That was a matter entirely outside her area of control. The position may have been entirely different if she had been sent her the passport when it had been requested; this would not have been during the busy end of year /Christmas period which appears to have been the reason why she could not obtain a test during that time of the year when she did receive her passport , albeit after the deadline had expired. It was further compounded by the request by the Respondent to return her passport on 28th December and thus she could not have obtained her test any earlier because her passport had been sent back to the Respondent as requested on 28th December.

39. Having considered the decision making process as a whole, and the recognition by the Respondent in their letter of 5th October that she could not have complied with the requirements because they had retained her passport, despite her requests, I find that her application had been frustrated. By extending the deadline until 9th October, but not making that clear to her until after it had expired frustrated her application. She could not comply with a deadline that she had been unaware of. She could not comply in any event until she had received her passport. To enable her to register for the test she required her passport and she had been asking for this since 23rd April.

40. It has been held by the Tribunal in **Contractor (CAS – Tier 4) [2012] UKUT 00168 (IAC)** at paragraph 13 that "fairness is always a matter of fact and degree, as demonstrated by **Patel**." Whilst the facts of the case are entirely different, I consider the Tribunal was right to note as a matter of principle that when considering issues of fairness it is a matter of "fact and degree". In this case I am satisfied that the critical factor in this case was the frustration of her application by the failure of the Respondent to produce her passport to her when requested or in good time so that she could comply with those requirements. In those circumstances, I am satisfied that there was a course of action that prevented the Appellant from drawing information to the decision maker. I am satisfied that having considered the documentation and the particular facts of this appeal, that procedural unfairness has occurred during the decision making process on the part of the Respondent. In those circumstances, I allow the appeal on the basis that the decision is not in accordance with the law. Thus, no lawful decision has been made on the application and the application remains to be determined by the Respondent or the relevant officer. The Appellant shall be provided with her passport and should be given a reasonable period of time in order to allow the Appellant a fair opportunity to provide the application form and the necessary documentation.

Decision

The First-tier Tribunal made an error of law; the decision is set aside. The appeal is re-made as follows:

The appeal is allowed on the basis that the decision of the Respondent was not in accordance with the law.

Signed Date: 27th June 2013

Upper Tribunal Judge Reeds