Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/36719/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 26 November 2014	**On 10 December 2014**

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

Mr DANISH AHMAD SHEIKH
Respondent

Representation:
For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondent: Miss D Qureshi, Counsel
(instructed by Bukhari Chambers Solicitors)

DETERMINATION AND REASONS

1. The Appellant (the Secretary of State) appealed with permission granted by First-tier Tribunal Judge Colyer on 17 October 2014

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against the determination of First-tier Tribunal Judge Wyman who had allowed (to the limited extent of returning the decision to the Secretary of State to consider granting a period of 60 days leave to enable the original Appellant to be granted a fresh CAS) the Respondent's appeal against the Secretary of State's decision dated 17 August 2013 in a determination promulgated on 4 September 2014.

2. The Respondent is a national of Pakistan, who had applied for further leave to remain as a Tier 4 (General) Student Migrant, which was refused on the grounds that the Appellant had failed to submit a valid CAS with his application. His sponsor was neither a recognised body nor an HEI. The application was refused under paragraph 245ZX(ha) of the Immigration Rules. The reasons for refusal letter conveying the decision to refuse to vary the Respondent's existing leave incorporated a second decision to remove the Respondent by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

3. Judge Colyer considered it arguable that Judge Wyman should not have returned the decision to the Secretary of State as she had not explained the basis of the remittal. Indeed, it was unclear why the decision had been remitted.

4. Standard directions were made by the tribunal, including that the decision would be remade immediately in the event that a material error of law were found.

5. Mr Bramble for the Appellant relied on the onwards grounds and the grant of permission to appeal. The judge had not identified the basis on which the Secretary of State's decision was not in accordance with the law: see [45]. There had been no unfairness by the Secretary of State, simply a failure by the Respondent to comply with the Immigration Rules because of error or incompetence on the part of his college.

6. Miss Quereshi for the Respondent submitted that the Secretary of State's discretion should have been invoked as the judge had proposed. The Respondent had paid fees to his college and was now at PhD level. His legitimate expectations were not met. Miss Quereshi handed up a case note discussing Ukus (discretion: when reviewable) [2012] UKUT 307 (IAC). This stated that only where a decision maker has completely failed to make a lawful decision by exercising a discretion which was required to be exercised that the case should be [ordered to be] reconsidered by the decision maker. Otherwise the tribunal could make its own decision.

Counsel also referred to Kobir [2011] EWHC 2515 (Admin) where the Secretary of State's residual discretion was emphasised.

7. At the conclusion of submissions the tribunal indicated that it found that the judge had fallen into material error of law, for the reasons identified in the grant of permission to appeal, and as further developed in Mr Bramble's submissions. These need not be repeated here. No unfairness in the Secretary of State's decision making process was identified. The fault lay with the Respondent's college or choice of college. His remedy was to make a fresh Tier 4 application accompanied by the required documents, including a valid CAS, as indeed he had been invited to do at section E of the decision letter.

8. The determination must be and is accordingly set aside. The determination must be remade. The original Appellant had not complied with paragraph 245ZX of the Immigration Rules. There was no unfairness of any kind by the Secretary of State, in that this was not a situation where, for example, a sponsor licence had been withdrawn post application without notice to an applicant. For further discussion of these issues and a review of relevant cases concerning fairness see EK (Ivory Coast) v SSHD [2014] EWCA Civ 1517. There was no discretion which required to be exercised because it was a case of non compliance. Nor was paragraph 245AA relevant. As Judge Wyman found (see [35] of her determination), it was unclear why the original Appellant had left the checking of sponsor validity or current registration to the college, when it was up to him to ensure that his application met the Immigration Rules. The appeal must be dismissed.

9. It of course remains open to the original Appellant to submit a fresh application, as indicated in section E of the reasons for refusal letter, although he may not enjoy a right of appeal to the First-tier Tribunal in the event that his application is refused.

DECISION

The making of the previous decision involved the making of an error on a point of law. The appeal of the Secretary of State is allowed.

The determination is set aside and remade as follows:

The original Appellant's appeal is DISMISSED

There can be no fee award as the appeal was dismissed

Signed **Dated 2 December 2014**

Deputy Upper Tribunal Judge Manuell