Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/06972/2014

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court	**Determination Promulgated**
On 6 January 2014	**On 19 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JERRY UGOCHUKWU AJAEGBO

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Ms A Bhachu, instructed by Bhogal & Co Solicitors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal against the determination of First-tier Tribunal Judge Graham that was promulgated on 18 September 2014. Judge Graham allowed Mr Ajaegbo's appeal against the immigration decisions of 29 January 2014 refusing to vary his leave as a tier 2 (general) migrant and to remove him by way of directions to Nigeria.
2. The Secretary of State pleaded two grounds. First, it was argued that the judge failed to properly apply s.85A of the Nationality, Immigration and

Asylum Act 2002. It was evident from her reasoning that she took into account evidence that had not been provided with the application and which was relevant to the acquisition of points. Secondly, Judge Graham failed to deal properly with the issue of common law fairness, not having regard to the Court of Appeal's judgment in Rahman v SSHD [2014] EWCA Civ 11. The Secretary of State argued that she had been under no obligation to give Mr Ajaegbo an opportunity to address the deficiency in the certificate of sponsorship, that deficiency being an issue between him and his employer.

3. Mr Mills relied on these grounds. He submitted that Judge Graham did not engage at all with the provisions of s.85A and therefore the appeal could not have succeeded under the immigration rules. Whether the immigration decisions were otherwise not in accordance with the law would have engaged with issues of common law fairness but even on this point the judge erred because she did not consider the context of such fairness properly. In effect, she ascribed to the Secretary of State the failings of Mr Ajaegbo's employer.

4. In the rule 24 reply prepared by Ms Bhachu, it was argued that the original immigration decision was unlawful because the Secretary of State had no power to make a removal decision at the same time as making a decision to refuse to vary leave. Ms Bhachu admitted that she was not fully up to date with the legal issues on this point and accepted that the law had changed from 8 May 2013 to enable to Secretary of State to make such combined decisions thereafter. As such, there is nothing in this ground of response.

5. I turn to the core of the appellant's response. Ms Bhachu engaged with the issue of fairness and argued that Rahman did not apply to the appellant because her there was not a deficiency in the application or the certificate of sponsorship but a simple human error. Judge Graham had identified at paragraph 15 of her determination that an error had been made by the employer as to which occupational code applied. There was no deficiency that had to be corrected but an error. In such a situation there was a duty on the Secretary of State to act fairly and to advise the applicant of the error so that it could be corrected.

6. In pursuing the case in terms of fairness, Ms Bhachu relied in particular on paragraph 27 of the reported decision of this Chamber, Owolabi (Tier 2 – skilled occupations) Nigeria [2011] UKUT 313 (IAC):

> 27. We would observe, however, that the analysis we have just given is confirmed to the basis on which Ground (2) was advanced before us, namely as a challenge to the meaning of the relevant immigration rules. We do not rule out that in terms of our "in accordance with the law" jurisdiction a failure on the part of the respondent [SSHD] to consider a different job classification might in certain circumstances conflict with the duty to act fairly. But that was not the basis on which Ground (2) was made and the conclusions we reach below on Ground (1) mean there is no need for us to consider the matter in any event."

7. I have considered the competing grounds and submissions and have concluded that the determination of Judge Graham contains an error on a point of law. My reasons are as follow.

8. In allowing the appeal on the ground that the immigration decision refusing to vary leave was not in accordance with the immigration rules, it is evident that Judge Graham relied on evidence not supplied with the application. That is contrary to s.85A of the 2002 Act. Although there are circumstances where post-application evidence can be admitted, Judge Graham does not identify that any of the exceptions were engaged and it is difficult to see how they could be as the requirement to provide a certificate of sponsorship goes to the issue of the acquisition of points under the Points Based System.

9. I recognise this error may not be sufficient to set aside the decision because Judge Graham considered arguments relating to common law fairness. There are no restrictions under s.85A to the evidence that could be considered in that context. Although it was not open to Judge Graham to find that the immigration decision was not in accordance with the immigration rules, it was open to her to find the decision was not otherwise in accordance with the law. Therefore, I consider the issue of fairness.

10. I begin by considering whether there is, as claimed by the appellant, a difference between a "deficiency" and an "error" in an application. Ms Bhachu submitted that the Court of Appeal had decided the case of Rahman in terms of their being a deficiency and not an error. She relied on the Oxford English Dictionary's definitions of "deficiency" and "error" and argued that this also entitled the appellant to distinguish his case.

11. This ground must fail because it is clear from the case of Rahman that the Court of Appeal described Rahman's situation in various ways, describing it in paragraphs 27 and 32 as being the result of a "mistake" of the college. As per Ms Bhachu's submissions (and paragraph 12 of the rule 24 reply), an error is defined in the dictionary as a mistake. Hence, it is clear that the Court of Appeal was not drawing a distinction between deficiency and error as suggested by Ms Bhachu and this argument must fail.

12. I move on to consider what the Upper Tribunal said in Owolabi. It is clear that the Upper Tribunal was not providing guidance on when a conflict between a simplistic application of the immigration rules and the duty to act fairly might arise. Earlier in its decision, the Upper Tribunal identified that it was for the sponsoring employer to identify the relevant occupational code and not the role of the Secretary of State. It is difficult to see when, therefore, it might be open to a judge to consider the issue of fairness. No submissions were made to me about such situations but one would appear to be where it comes to light that the information in a certificate of sponsorship is not correct because of human error.

13. The issue of when the Secretary of State might go behind the information contained in a certificate of acceptance of studies (CAS) has been considered by the Court of Appeal in a number of relatively recent cases. None deals specifically with the issue of certificates of sponsorship but as

they fulfil very similar functions to CAS letters under the Points Based System it seems appropriate to draw analogies. I draw on two specific judgments: R (Global Vision College Ltd) v SSHD [2014] EWCA Civ 659 and Pokhriyal v SSHD [2013] EWCA Civ 1568.

14. In simple terms, the issue in the former related to the question of when the Secretary of State or other guardian of immigration control could go behind the information in sponsorship documentation. It was confirmed that the Secretary of State could do so to check the truthfulness of the content of the document in order to prevent fraud. It also confirmed there was no requirement to check each case. In the latter the issue was who should assess academic progress and it was accepted this was the role of the sponsoring college unless there was fraud. Without such suspicions, going behind such points would not be lawful. From both cases it is clear that there is no duty for the Secretary of State to go behind the contents of the sponsorship documentation and it was open to her to assume that the information contained therein was accurate. These points weaken Ms Bhachu's arguments significantly.

15. Ms Bhachu's arguments are completely undermined by the Court of Appeal's consideration of common law fairness in Rahman. I mentioned at the hearing that a different composition of the Court had reached similar conclusions in respect of the duty of common law fairness in EK (Ivory Coast) v SSHD [2014] EWCA Civ 1517. The principles in both are clear. It is for the appellant to provide the relevant evidence of sponsorship and they have a contractual relationship with their sponsor. To ensure the smooth operation of the PBS system, which is in the public interest in terms of efficiency, there is no duty on the Secretary of State to question why a sponsorship document has been withdrawn by a sponsor. It can be assumed that such a withdrawal has been done for a legitimate reason. The fact that such a withdrawal might be because of a mistake or error does not impose a duty on the Secretary of State to allow the error to be corrected since it is open to the applicant to make a fresh application with the correct document. Such an application might be made from within or outside the UK but that will depend on the specific circumstances. Where a person suffers some loss, they will have recourse against their sponsor and not against the Secretary of State.

16. I can find nothing to distinguish the existing case from the above principles even though this case revolves around the issue of a certificate of sponsorship and not a CAS letter.

17. Judge Graham did not consider any of these issues. All of the authorities other than EK (Ivory Coast) were available to her but do not appear to have been considered. The principles set out in those authorities were binding and there is no explanation why Judge Graham thought this case could be distinguished from them. It follows that I must find that Judge Graham erred on a point of law by finding that the immigration decision originally appealed against was not otherwise in accordance with the law.

18. For the above reasons I not only find that the determination is infected with errors on points of law but that they are such that I must set the decision aside and remake it.

19. There was no need to adjourn the hearing. The Upper Tribunal had issued directions prior to the hearing reminding the parties that it might proceed directly to remaking the decision and that any additional evidence should be provided in case that happened. No further evidence was provided by either party. Therefore, the remaking of the decision relies on the evidence previously submitted to the First-tier Tribunal.

20. The witness statement of 4 August 2014 does not refer to any issues relating to Mr Ajaegbo's private life rights other than the issue of fairness because the error in the certificate of sponsorship resulted from his employer as his employer had confirmed.

21. It is clear from my findings and considerations above that the original appeal cannot succeed under the immigration rules or under the "otherwise not in accordance with the law" provisions. The only remain ground, and one not considered by Judge Graham, relates to Mr Ajaegbo's private life rights. It is accepted that he cannot succeed under paragraph 276ADE of the immigration rules but that in light of R (Oludoyi and others) v SSHD (Article 8 – MM(Lebanon) and Nagre) IJR [2014] UKUT 539 (IAC) it will be necessary to consider the proportionality of the immigration decision in any event.

22. I mention that I am considering article 8 of my own initiative, Ms Bhachu conceding that the issue had not been raised as a ground of appeal before the First-tier Tribunal. However, she did not concede that there was no article 8 issue arising from the facts of this case.

23. Mr Mills reminded me, contrary to the submissions of Ms Bhachu, that it remained open to Mr Ajaegbo to make a fresh application to the Secretary of State which if supported with the correct evidence would be a valid application and would be properly considered. He pointed out that Mr Ajaegbo had continuing leave under s.3C of the Immigration Act 1971 and that as long as he applied within 28 days of the appeal process ending (which would bring such leave to an end), then he would meet the requirements of paragraphs 245HD(b) and (p). This meant there would not be a need for him to apply from overseas, although that of course remained a possibility which would not be unfair in any legal sense.

24. Ms Bhachu had sought to rely on the House of Lords judgment in Chikwamba v SSHD [2008] UKHL 40 to argue that it would be disproportionate to expect Mr Ajaegbo to go abroad merely for the formalities of immigration control. Not only is her argument undermined by Mr Mills's submission but it is not clear whether the principle she drew from Chikwamba is reliable. Not only was Chikwamba decided on its own particular facts, including the difficulties of a family being separated even temporarily and the hardships they were likely to face in Zimbabwe, the duty of migrants to comply with a country's immigration law has been confirmed by the European Court of Human Rights in Jeunesse v Netherlands (appl no 12738/10) [2014] ECHR 1036 including an

expectation they will leave to make a further application from overseas when they do not meet those requirements.

25. Mr Ajaegbo has not provided evidence to show that his moral or physical integrity would be undermined by the immigration decision. Bearing in mind what I have already considered, it follows from Nasim and others (Article 8) Pakistan [2014] UKUT 25 (IAC) that his appeal on human rights grounds cannot succeed.

26. In light of all these points I am satisfied that the immigration decision is proportionate. Although it may cause Mr Ajaegbo some inconvenience, such inconvenience is not sufficient to outweigh the public interest in maintaining immigration control.

27. Having considered all possible grounds, I conclude that the original appeal had to be dismissed and that is the decision I make.

Decision

The Secretary of State's appeal to the Upper Tribunal is allowed because the determination of Judge Graham contains errors on points of law that require it to be set aside.

I remake the decision to dismiss the original appeal against the immigration decision of 29 January 2014.

Signed Date

Deputy Judge of the Upper Tribunal