Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/34964/2013**

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On:11th September 2015	**On: 24th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MR HUSSAIN AHMED
(ANONYMITY DIRECTION NOT MADE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Biggs of counsel
For the Respondent: Ms E Savage, a Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. In this appeal, the appellant appeals against a decision of the First-tier Tribunal dismissing the appellant's appeal against a decision taken on 5th September 2013 to refuse to grant further leave to remain in the United Kingdom and a decision to remove him by way of directions issued under section 47 of the Immigration, Asylum and Nationality Act 2006.

Background Facts

2. The appellant is a citizen of Pakistan who was born on 1 January 1989. He entered the United Kingdom on 12 August 2009 with entry clearance valid to 28 February 2012. This leave was subsequently extended to 30 August 2013. He applied for further leave to remain on 4th March 2013 as a Tier 4 (General) Student Migrant under Paragraph 245ZX(c) of the Immigration Rules HC395 (as amended) ('the Immigration Rules'). That application was refused because the Secretary of State did not accept that that the Confirmation of Acceptance for Studies ('CAS') confirmed that the course that the appellant intended to study, which was at a lower level to the course that the appellant was previously granted leave to study, represented academic progress from previous studies.

The Appeal

3. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 17 March 2015, Judge Bennett dismissed the appellant's appeal. The First-tier Tribunal found that the Appellant did not satisfy para 120A of the Immigration Rules. Although there was a discretion to make a decision outside the Immigration Rules the refusal to exercise a discretion was not a matter that could be considered on a statutory appeal pursuant to s86(6) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'). The judge considered the Tier 4 Sponsors' Guidance ('the Sponsors' Guidance') and concluded that the explanation of academic progression in the CAS was not adequate and the application fell to be rejected.

The Appeal to the Upper Tribunal

4. The appellant sought permission to appeal to the Upper Tribunal. The grounds of appeal assert that, i) the appellant's CAS did expressly confirm there had been academic progress and that the judge erred in failing to hold that the Secretary of State was bound to accept the CAS did confirm academic progress, ii) the Rules have changed and paragraph 120A(b) of appendix A now fails to identify courses at a lower level as being capable of amounting to academic progress but even if ii) is correct this is not dispositive, the Tier 4 sponsor guidance is the determinative document, and iii) the Tribunal has jurisdiction pursuant to 84(1)(e) (c) (g) and 86(3) of the 2002 Act to determine whether the respondent ought to have departed from the Immigration Rules, the Judge wrong to consider there was no jurisdiction by virtue of 86(6) of the 2002 Act. On 18 May First-tier Tribunal Judge Shimmin granted the appellant permission to appeal. Thus, the appeal came before me.

Summary of the Submissions

5. Mr Biggs handed up a version of the Tier 4 Sponsors' Guidance issued by the Home Office. The numbering in this document differs from the version considered by the judge. However the wording is either the same or has the same requirements in the relevant paragraphs. To avoid confusion I will refer to both paragraph numberings. Mr Biggs submitted that the analysis of the judge does not conform to the narrow exception identified

in paragraph 47 of the case of Pokhriyal [2013] EWCA Civ 1568 which states that the Secretary of State in the ordinary way cannot go behind an assessment of academic progress. He acknowledged that there was an exception if it was plainly inappropriate. The language of the rule is that the requirement is that the sponsor has confirmed the course represents progress. In this case the CAS did confirm academic progression setting out that these subjects are not covered in the previous course, it helps improve skills and gain knowledge. The Secretary of State was bound by the principles set out in Pokhyrial and confirmed in Kaur [2015] EWCA Civ 13. The judge at paragraph 22 says that it is impossible to interpret the CAS as any form of confirmation – this finding is not sustainable. Confirmation is the assertion of a conclusion. The test is that the CAS confirms that the study is complementary. The test must be the same in the various permutations of the test for progress. The judge doesn't consider what progress is or whether the course is complimentary. It is not right to say that the only benign interpretation is that the words provide some explanation for him taking the course. What the text on the CAS does is show that the course is complimentary. The policy considers 'complimentary' to be the relevant test. The judge's reasoning is irrational as it is possible to construe the text as complimentary and therefore the determination is unsafe.

6. Mr Biggs accepted that the appellant could not succeed under Paragraph 120A of the 2002 Act. The best the appellant can hope for is a decision on the basis that the Secretary of State's decision is not in accordance with the law and therefore she acted unlawfully. Mr Biggs relied on the case of Walumba Lumba (previously referred to as WL) (Congo) 1 and 2 (Appellant) and Kadian Mighty (previously referred to as KM) (Jamaica) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 12 submitting that the Secretary of State should apply its published policy, not to do so is unfair and unlawful. The policy has not changed following the introduction of section 120A.

7. The role of the judge was to decide whether the decision letter was in accordance with the law. The judge wrongly concluded that the Tribunal cannot do so. There was no regard to Pokhriyal in the Secretary of State's decision. The judge wrongly said that s86(6) of the 2002 Act deprives the Tribunal of the jurisdiction to consider the point. Section 86(6) does not oblige the Tribunal to allow an appeal but does not deprive the tribunal of the power to consider the Secretary of State's decision whether or not to exercise the discretion. The judge applied the wrong approach. The only issue was whether the grounds were made out, section 84(1)(e) 2002 Act, which were that the Secretary of State had not applied Pokhriyal and Kaur. The judge erred in making his own assessment. The correct remedy is for a re-making of the decision by the Secretary of State.

8. Ms Savage submitted that the grounds of appeal essentially amount to a disagreement with the judge's findings. The judge explicitly considered the guidance set out in Pokhriyal and Kaur and took into account the relevant expectation set out in Kaur that a CAS represents progress. It is clear from

Kaur and Pokhriyal that justification is necessary. That is completely lacking in this case. The statement in the CAS does not represent justification. In Kaur the course was on the same level but the court found that the explanation did not amount to justification. The Tribunal has considered all the matters required.

Discussion

9. I will consider the second and third grounds of appeal first. The appellant argues that the judge was wrong to consider that there was no jurisdiction by virtue of section 86(6) of the 2002 Act to consider the question as to whether the respondent should have departed from the Immigration Rules. Although the judge records (at paragraph 15) that Section 86(6) prevents the Tribunal from reviewing the Secretary of State's decision not to depart from the Immigration Rules the judge considered that the Secretary of State had considered the application under paragraph 415 (430) of the Sponsors' Guidance (i.e. outside of the Immigration Rules). The judge considered that the Secretary of State 'did not refuse the application merely because it fell foul of paragraph 120A'. As the judge proceeded on the basis that the Secretary of State had exercised a discretion (rather than refusing to do so) the ground of appeal in respect of the jurisdiction under section 86(6) is academic and I do not need to decide the point.

10. The appellant asserts that he has a legitimate expectation that the Secretary of State will abide by the guidance issued to Tier 4 Sponsors and that the test for academic progression is that the course complements a previous course of study. It was submitted that section 86(3) of the 2002 Act provides a clear jurisdiction for a Tribunal to determine the issue as to whether the Secretary of State must abide by her policy. Section 86(3)(b) of the 2002 Act (as it applied at the relevant time to this case) provides:

> (3) [The Tribunal] must allow the appeal in so far as [it] thinks that—
>
> …
>
> (b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently.

11. When the judge undertook a consideration of the Sponsors' Guidance and its application to this case what the judge was doing was precisely what the appellant argues for: that is, the judge was considering whether the discretion should have been exercised differently.

12. Undertaking an assessment as to whether the discretion should have been exercised differently will necessarily require an assessment by the judge of all the factors relevant to the exercise of that discretion. This will require an evaluation of the evidence by the judge. As set out above the judge was of the view that the Secretary of State had considered the Tier 4 Guidance. The judge set out in some detail matters that the Secretary of State took into consideration when determining whether the course

represented academic progression. At paragraph 20 the judge noted that the Secretary of State referred to other aspects of the application such as:

> i) the CAS stated that the Appellant intended to study for a diploma in Management and Leadership at NQF level 6, ii) that he was previously granted leave to study for a postgraduate diplomas in management and leadership at NQF level 7, iii) that he had been a student here since 2009, and iv) that, as evidence of his progression, he had submitted his secondary certificate which he obtained in Pakistan in 2007.

13. The judge then went on to consider the cases of Pokhriyal and Kaur setting out that those cases make it clear that the Appellant's college was required to confirm in the CAS that the proposed course represented academic progression and that there was an expectation that the CAS should not be assigned unless the new course confirms academic progress. The judge then took paragraph 416 (432) of the Sponsors' Guidance into account, namely that a course at a lower level would only represent progress in rare cases. Additionally the judge considered that the need for an explanation was emphasised by the fact that the appellant did not appear to have achieved any qualifications representing academic progress (as he had only submitted his secondary education certificate to the Sponsor)

14. The judge considered the wording of the CAS and specifically took into consideration the guidance in Kaur. The wording on the CAS was:

> 'These subjects are not covered in previous course. It helps improve skills and gain knowledge in leadership and management industry'.

15. The judge adopted a benign construction of the words and found that it was impossible to construe them as constituting any form of confirmation that the proposed course represents academic progression and therefore that the application fell to be rejected in accordance with paragraph 418 (433) of the Sponsors' Guidance. The appellant asserted that the judge erred in making his own assessment. As I set out above in order to consider whether the discretion should have been exercised differently the judge would also need to consider the application of the Sponsors' Guidance to the evidence. The Secretary of State had set out the evidence that she had taken into consideration in reaching her decision (as set out by the judge). It is difficult to see how a judge could decide that the Secretary of State should have exercised her discretion differently if there is no consideration and evaluation of the evidence that was before the Secretary of State and the relevant guidance (policy) that was to be applied to determine whether the discretion should have been exercised differently. Although the reasons for refusal letter does not refer to the cases of Pokhriyal and Kaur, in this case the judge (having considered the requirements of those cases) concluded that the CAS did not confirm academic progression and that the application fell to be rejected in accordance with paragraph 418 (433) of the guidance. The judge's

conclusion therefore is effectively that the Secretary of State exercised her discretion appropriately.

16. With regard to the first ground of appeal in paragraph 47 of Pokhriyal the court of appeal specifically refers to the potential for exceptions to the general principle that the Secretary of State cannot go behind a college's assessment of academic progress. One of these was suggested to be:

> '… if the college made an assessment which was plainly inappropriate on the face of the documents'.

17. The appellant's argument is that the judge's analysis does not conform to that narrow exception. Further, the test is that the CAS confirms that the proposed course of study is complementary to previous studies. The Sponsors' Guidance sets out three different situations where academic progression must be confirmed. At paragraph 414 (430) the guidance sets out:

> 'However academic progression may involve study at the same level. In these cases, you must confirm that the new course compliments the previous course…'

18. At paragraph 415 (431) which applies in this case the Guidance sets out:

> 'Sometimes the further study may be at a lower level but we would expect these cases to be rare. Again you must justify this on the CAS…'

19. The two requirements are differently worded. There is no suggestion in paragraph 415 (431) that the sponsor must confirm that the new course compliments the previous higher level course. The guidance requires, in these rare cases, that the sponsor must 'justify' why the course represents academic progression. If the requirement to show academic progression was the same for both study at a lower level and at the same level the guidance would have been worded in the same way in both paragraphs. The wording is very different. The test is not whether the course compliments the previous course. There is no reason why the test must be the same in all the various permutations of the test for progress. The starting point is very different. It is fairly obvious that study at a lower level will not, in the vast majority of cases, represent academic progress hence the reference to the cases being rare.

20. The judge applied the expectation arising from the issuing of the CAS and gave the words in the CAS the most benign interpretation. The appellant in this case was proposing to study for the same qualification but at a lower level. Convincing reasoning would be required to justify the lower level of the same course as representing academic progress particularly in this case where the evidence of academic progression submitted to the sponsor was a secondary education certificate from 2008. In this case the wording in the CAS was plainly inappropriate. The judge's conclusion was well reasoned and was a conclusion entirely open to him to reach.

21. It follows from the above that the appellant has not discharged the burden upon him of showing that there is any material error of law in the First-tier Tribunal decision, without which that decision is not susceptible to being set aside or remade.

22. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Decision

23. The appellant's appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed P M Ramshaw Date 22 September 2015

Deputy Upper Tribunal Judge Ramshaw