



IAC-AH-KRL-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/01732/2015
IA/01751/2015
IA/01755/2015

THE IMMIGRATION ACTS

**Heard at Centre City Tower, Birmingham
On 19th February 2016**

**Decision & Reasons Promulgated
On 8th March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**PARDEEP KUMAR (FIRST APPELLANT)
ROMA RANI (SECOND APPELLANT)
[HK] (THIRD APPELLANT)
(ANONYMITY ORDER NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Miss S Kansal of Counsel
For the Respondent: Mr I Richards, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellants appeal against the decision of Judge Borsada of the First-tier Tribunal (the FtT) promulgated on 7th May 2015.

2. The Appellants are Indian citizens, born 30th April 1985, 25th April 1982, and [-] respectively. The first and second Appellants are married and the third Appellant is their daughter.
3. The first Appellant was granted leave to enter the United Kingdom as a Tier 4 (General) Student Migrant and the second Appellant granted leave as his dependant.
4. Their leave to remain expired on 28th June 2014, and on 23rd June 2014 the Appellants applied for further leave to remain, the first Appellant's application was for leave to remain as a Tier 4 Student, with the second and third Appellants as his dependants.
5. The applications were refused on 30th December 2014. The first Appellant's application was refused with reference to paragraph 245ZX(c) and (d). He was not awarded any points in relation to Confirmation of Acceptance for Studies (CAS) because he had not submitted a valid CAS with his application. For the same reason, the Appellant was not awarded any points in relation to maintenance. The applications of the second and third Appellants were refused in line.
6. The Appellants appealed to the FtT. In summary it was contended that the Respondent had not acted reasonably in considering the applications. The first Appellant explained that he had not been able to submit a CAS with his application because although he had taken his English language test in June 2014, and he expected the results prior to his leave to remain expiring, his results were not received. Therefore the first Appellant had submitted with his application a conditional offer letter dated 9th July 2014 issued by the college where he intended to study, the Centre for Teaching in Management (CTM).
7. The first Appellant explained that he received the results of his English language test on 4th September 2014, and he had passed. However he explained that "the Sponsor CAS allocation has been finished" so his Sponsor was not able to issue him with a CAS. The first Appellant thereafter contacted other Sponsors, but was unable to be issued with a CAS, as all Sponsor colleges requested the Respondent's written permission, and attested copies of the Appellant's documents, including his passport.
8. The first Appellant wrote to the Respondent on two occasions requesting that these documents be returned to him to enable him to obtain a CAS, and he also contacted the Respondent by telephone. He received no response either to the letters or telephone call.
9. Therefore it was contended that the Respondent had not acted fairly in refusing the first Appellant's application without explaining why his documents were not returned to him. The first Appellant relied upon Thakur (PBS decision - common law fairness) Bangladesh [2011] UKUT 00151 (IAC). The first Appellant therefore submitted that the Respondent's decision was not in accordance with the law.
10. The appeals were heard by the FtT on 23rd April 2015. The FtT did not doubt the first Appellant's evidence in relation to the delay he experienced in obtaining his English language certificate, and the difficulties that he encountered thereafter in obtaining a

new CAS. It was also accepted that the first Appellant had contacted the Respondent on several occasions requesting copy documents to assist in his search for a new Sponsor, and there was a lack of response from the Respondent.

11. However the FtT decided that because the first Appellant had not submitted a valid CAS with his application, then his application could not succeed, and his appeal had to be dismissed.

12. In relation to the question of fairness the FtT noted that the Respondent was under no obligation to request a CAS that was not submitted, but in this case even if such a request had been made, no CAS would have been available. The FtT found that

“Whether the Respondent should have responded to the Appellant’s request for his copy documents is an entirely different matter but even if it had and the Appellant had been able to secure a CAS, this CAS would not have assisted the Appellant in respect of his original application.”

13. The FtT found that the Respondent had a policy whereby 60 days was given to an individual where a Sponsor licence had been revoked, but that did not apply in this case, as the first Appellant had not provided a valid CAS with his application. Therefore the FtT did not accept that the Respondent’s decision was not in accordance with the law.

14. The Appellants applied for permission to appeal to the Upper Tribunal. The grounds are summarised below.

15. The issue before the FtT was whether the Respondent had acted fairly in refusing the application, without giving the first Appellant an opportunity to vary his application, despite requests being made for documents held by the Respondent to be produced. These documents included the first Appellant’s passport without which he could not obtain a new CAS.

16. The first Appellant relied upon Kaur [2013] UKUT 00344 (IAC), and Patel India [2011] UKUT 00211, in addition to Thakur which had been relied upon in the grounds submitted to the FtT.

17. Permission to appeal was initially refused by Judge Kelly of the FtT, but the application was renewed to the Upper Tribunal and permission to appeal was granted by Upper Tribunal Judge Gill in the following terms;

“It is arguable that Judge Borsada may have erred in law in failing to engage at all or adequately with the Appellants’ argument that the Respondent had acted unfairly by:

- (a) failing to respond to the first Appellant’s requests for copies of his documents so as to enable him to obtain a CAS and thus submit an application to vary his application for leave dated 23rd June 2014; and
- (b) proceeding instead to refuse his application of 23rd June 2014 on the basis that he had not provided a CAS letter.

It would seem that the Respondent’s suggestion that the Appellant can make another application from abroad is not an answer, as this would appear to ignore the issue of

unfairness, if there has in fact been unfairness such as to render the decision not in accordance with the law. This ground was available to the Appellant at the date of the decision and it was raised in the original Grounds of Appeal to the First-tier Tribunal. One would have thought that the first Appellant would have kept copies of his documents. He should be ready to address the Tribunal on this issue.”

18. Following the grant of permission the Respondent lodged a response dated 14th September 2015 pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008. In summary it was contended that the FtT had not erred in law, and the grounds submitted amounted to a disagreement, rather than disclosing an error of law. It was contended that the FtT provided adequate and sustainable findings and had properly considered the issue of fairness.
19. Directions were subsequently issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision must be set aside.

The Appellants' Submissions

20. Miss Kansal had not appeared before the FtT and had not prepared the grounds contained within the application for permission to appeal. Miss Kansal confirmed that there was no skeleton argument submitted on behalf of the Appellants.
21. In addition to relying upon the grant of permission Miss Kansal submitted that the Respondent's decisions to refuse the applications for leave to remain were not in accordance with the law, because there was no reference in those decisions to the residual discretion to grant leave to remain outside the Immigration Rules.
22. The FtT had erred in law by failing to consider whether discretion should have been exercised. Miss Kansal relied upon case law, Shaikh v SSHD [2014] EWHC 2586 (Admin), and in particular paragraph 21 of that decision. Reliance was also placed upon Ukus (discretion: when reviewable) [2012] UKUT 00307 (IAC). Unfortunately Miss Kansal did not have copies of the case law to supply to the Tribunal or the Respondent.
23. Miss Kansal confirmed that the first Appellant did not contend that he should have the benefit of the Respondent's 60 day policy which would apply if a college which had issued a CAS subsequently had its Sponsor licence revoked. The case made on behalf of the Appellants was that the Respondent had acted unfairly in not acknowledging the first Appellant's requests for documents which would have enabled him to apply for a new CAS and vary his application, and the Respondent's decisions were not in accordance with the law, because there was no reference to the Respondent considering the exercise of discretion to grant leave to remain outside the Immigration Rules.

The Respondent's Submissions

24. Mr Richards relied upon the rule 24 response and pointed out that Miss Kansal was raising the issue of discretion for the first time, and this was not before the FtT. I was asked to find that the FtT decision disclosed no material error of law and should stand.
25. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

26. I deal firstly with the submission that the Respondent's decisions were not in accordance with the law because discretion outside the Immigration Rules had not been exercised. It is unfortunate that no skeleton argument was submitted and that copies of cases relied upon were not provided. I do not find that there is any merit in this ground for the following reasons.
27. I find that the issue of failure to consider discretion was not raised as a Ground of Appeal to the FtT, and in my view it was certainly not a 'Robinson obvious' point. Neither was the issue of discretion raised within the application for permission to appeal to the Upper Tribunal, and permission to appeal was not granted on this point.
28. In my view the Appellants had no right of appeal to the FtT on this issue. There was a right of appeal to the FtT (now abolished by the Immigration Act 2014) under section 84(1)(f) of the Nationality, Immigration and Asylum Act 2002 which I set out below for ease of reference;
 - (f) that the person taking the decision should have exercised differently a discretion conferred by Immigration Rules;

The Respondent did not have a discretion under the Immigration Rules in relation to the applications made by the Appellants. The point made by Miss Kansal is that the Respondent did not consider a residual discretion outside the Immigration Rules. There is no appeal to the FtT on that basis. The case law referred to does not assist the Appellants, as Shaikh is a High Court judicial review case, and Ukus relates to a discretion within the Immigration Rules.

29. In my view it is clear that the FtT did not err in law on this point.
30. I then turn to the question of fairness, which is why Judge Gill granted permission to appeal. The cases referred to by the Appellants are not exactly on point. Thakur confirms that there is a common law duty upon the Secretary of State to act fairly in the decision making process when an applicant had not had an adequate opportunity of enrolling at another college following the withdrawal of the Sponsor licence or of making further representations before the decision was made. I set out below the second paragraph to the head note;

2. The principles of fairness are not to be applied by rote: what fairness demands is dependent on the context of the decision and the particular circumstances of the applicant.

31. Patel dealt with revocation of a Sponsor licence and I set out below for ease of reference the first paragraph to the head note;

- (1) Immigration Judges have jurisdiction to determine whether decisions on variation of leave applications are in accordance with the law, where issues of fairness arise.

In Patel it was held to be unfair to refuse an application for leave to remain as a Tier 4 Student, when a Sponsor's licence had been revoked without giving the applicant a reasonable opportunity to identify a new Sponsor before his application was decided. The Upper Tribunal decided that it would be unfair to refuse an application without opportunity being given to vary it under section 3C(5), Immigration Act 1971.

32. Kaur confirms that the Respondent produced a policy to give effect to the principles of common law fairness identified in Patel, and the policy provides that in cases of potential discretionary refusal under paragraph 322 of the Immigration Rules, caseworkers should follow the 'Patel' process. That is not directly relevant to these appeals.

33. Case law does make it clear that the FtT should decide whether decisions on variation of leave are in accordance with the law where issues of fairness arise, and what fairness demands is dependent on the context of the decision, and the circumstances of the applicant.

34. In my view the FtT did not properly engage with the fairness issues raised by the first Appellant.

35. It was accepted that the first Appellant had written to the Respondent on two occasions, and copies of his letters dated 14th September 2014 and 20th October 2014 were produced, requesting that documents be returned to him to enable him to apply for a new CAS, and there had been no response to those requests.

36. The FtT referred in paragraph 9 to the Respondent being under no obligation to request a CAS, but that was not the issue to be considered. The FtT noted that the CAS did not exist, but again that is not the issue the FtT was being asked to consider, as it was accepted that there was no CAS, and an explanation had been given as to why that was the case.

37. It was accepted that the first Appellant had been given a conditional letter from a college, but could not be issued with a CAS because he was still waiting for the result of his English language test. When that result was received, the college was not able to offer him a CAS. If the Respondent had answered the first Appellant's request by providing documents, he would have had an opportunity to vary his application.

The Respondent gave no reason whatsoever for not answering the first Appellant's requests. The FtT erred in law by not considering this issue, and not considering whether the Respondent had complied with the common law duty to act fairly.

38. I therefore conclude that the decision of the FtT must be set aside.
39. Because the Respondent's decision was made prior to the amendment to appeal rights introduced by the Immigration Act 2014, there is still a power to find that the Respondent's decision was not in accordance with the law.
40. Based upon the findings made by the FtT, which have not been challenged by the Respondent, I conclude that the Respondent did not act fairly in failing to acknowledge or respond to the requests made by the first Appellant for the return to him of documents, including his passport, that would enable him to make another application for a CAS, and vary his application for leave to remain.
41. I therefore conclude that the appropriate course of action is to find that the Respondent's decisions in relation to all the Appellants, are not in accordance with the law, as the Respondent has failed to comply with the common law duty to act fairly, and therefore the decisions remain outstanding before the Respondent for fresh decisions to be made.
42. When considering these applications again, the Respondent will need to consider the requests made by the first Appellant for the return of documents or certified copies, and either provide the documents, or provide a reason why it is not appropriate for those documents to be returned to enable the first Appellant to make an application for a new CAS.

Notice of Decision

The decision of the FtT involved the making of an error of law such that it is set aside. The appeals are allowed to the extent that the Respondent's decisions are not in accordance with the law and the applications by the Appellants remain outstanding before the Respondent for fresh decisions to be made.

Anonymity

The FtT made no anonymity direction. There has been no request for anonymity and I see no need to make an anonymity order.

Signed

Date 25th February 2016

Deputy Upper Tribunal Judge M A Hall

FEE AWARD

The appeals have been allowed to the extent that the decisions need to be considered again by the Respondent. In the circumstances I do not find it is appropriate to make any fee award.

Signed

Date 25th February 2016

Deputy Upper Tribunal Judge M A Hall