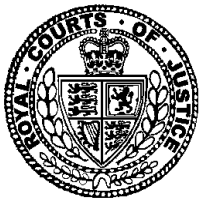

Neutral Citation Number: [2019] EWCA Civ 1101

Case No: CASE NO:C7/2017/3277

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE UPPER TRIBUNAL**
**(IMMIGRATION AND ASYLUM CHAMBER)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/07/2019

**Before :**

**LORD JUSTICE FLOYD**
**LORD JUSTICE LEGGATT**
**and**
**LORD JUSTICE COULSON**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **JADGEEP KAUR**<br>**ASHMEET SINGH** | **Appellant** |
| **- and -** | |
| **SECRETARY OF STATE**<br>**FOR THE HOME DEPARTMENT** | **Respondent** |

**Mr Tony Muman** (instructed by **ATM Law Solicitor**) for the **Appellants**
**Mr Zane Malik** (instructed by **the Government Legal Dept**) for the **Respondent**

Hearing Date: 13 June 2019

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# Judgment Approved by the court for handing down

**Lord Justice Coulson: :**

*Introduction*

1. This is a second appeal arising from a decision taken by the respondent ("SSHD") on 22 October 2015, when she refused the first appellant's claim for leave to remain as a Tier 4 (General) Student Migrant under the points-based system, and for a biometric residence permit. The grounds of appeal raised what were, on analysis, two narrow issues concerning the SSHD's power to retain the appellant's original passport during a period when she was seeking fresh sponsorship. I address them in paragraphs 14 - 33 below. The arguments raised orally by Mr Muman on her behalf went much wider, and I deal with them rather more circumspectly from paragraph 33 onwards.

*The Factual Background*

2. The first appellant is a citizen of India, born on 12 January 1989. Her dependant spouse, Ashmeet Singh, who is also a citizen of India, has no free-standing claim to reside in the United Kingdom. His claim is therefore entirely dependent on hers. I therefore refer below to the first appellant only.

3. The first appellant arrived in the UK on 2 March 2011 with an entry clearance as a Tier 4 (General) Student, valid until 16 January 2013. Her application for further leave to remain was refused on 9 October 2014 on the ground that her educational institution, Centre for Teaching Management, had withdrawn the necessary Confirmation of Acceptance for Studies ("CAS"). The letter said that a decision had been taken to remove the appellant by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006.

4. The appellant appealed. It was agreed that, in reaching her decision, the SSHD had referred to the wrong CAS number and that, certainly at that time, the appellant's CAS had not been withdrawn. The matter was remitted back to the SSHD.

5. On 13 August 2015, the SSHD wrote to the appellant again, noting that the Centre for Teaching Management had now surrendered its sponsorship licence. This meant that the appellant's CAS was no longer valid. Accordingly, the appellant was given a further period of 60 days, during which the SSHD suspended any consideration of her application for further leave to remain as a Tier 4 (General) Student. The appellant was invited either to withdraw her application and submit a fresh application in a different category, or to leave the UK, within that 60-day period. As a further alternative, the SSHD stated that, if the appellant wanted to continue to pursue her application as it stood, she should, within those 60 days, find an alternative educational institution and submit a new CAS. A letter to be shown to other institutions was attached under the heading 'Information Leaflet'.

6. It is not disputed that the appellant was unable to find an alternative sponsor or to submit a new CAS. Accordingly, on 22 October 2015, after the expiry of the 60 days, the SSHD refused her application for further leave to remain as a Tier 4 (General) Student, on the ground that there was no valid CAS or sponsorship ("the decision letter").

7. The relevant parts of the decision letter read as follows:

> "We have considered your application on behalf of the Secretary of State and your application has been refused under the Immigration Rules. This decision has been made in line with the Immigration Rules.
>
> A decision has also been made to remove you from the UK by way of directions under section 47 of the Immigration Asylum Nationality Act 2006...
>
> You were required to submit documentary evidence that you have been accepted onto a course of study with a licensed Tier 4 Sponsor and you were given a period of 60 days to do so. That period of 60 days ended on 12 October 2015.
>
> This process of delaying consideration for 60 days is now the Secretary of State's standard policy for applicants who find that, through no fault of their own, their sponsor has been revoked. This has been arrived at following a high court ruling which stated that it would be fair to allow all applicants to have 60 days in which to address this change of circumstance, whereas previously the application would have been refused.
>
> "Therefore the Secretary of State is not prepared to give any additional time as 60 days has been deemed to be suitable and, in order to be fair and consistent, this is applied to everyone in that situation. As you have not complied with this request within that 60 day period, we are refusing your application under 322(9) of the Immigration Rules. As you have been refused under one of the general grounds we are also refusing your application under 245ZX(i).
>
> The Secretary of State has considered whether the particular circumstances of your case merit the exercise of discretion. Having considered those circumstances the Secretary of State is satisfied that the refusal remains appropriate and is not prepared to exercise discretion in your favour.
>
> We wrote to you on 13 August 2015 giving you 60 days, to 12 October 2015 in which to submit further information but have not received a response to date. Therefore your application has been assessed on the documentation previously submitted and available at the time of consideration."

8. The appellant appealed against that decision. The basis of her appeal was that she had been hampered in finding alternative sponsorship or another CAS because, although she had been given an attested copy of her passport, the SSHD had retained the original.

9. Her appeal was rejected by the FtT on 9 December 2016. Judge Green's reasons for dismissing the appeal were principally based on the facts. He said:

> "11… The First Appellant claims that none of the colleges that she visited would issue a CAS without sight of her original passport.

> However, she has not provided any supporting evidence of this because she claims that they refused to issue anything in writing. Frankly, I do not find that credible. 60 day extensions in these circumstances are common, and I have heard many similar cases and I know that it is standard practice of the respondent to retain the original passport and that prospective colleges will accept an attested copy and can be guided by the explanatory leaflet. Whilst the Respondent acted discourteously in failing to answer the First Appellant's letters, I do not think that she acted unfairly under the circumstances. The Respondent discharged her common law duty. The First Appellant had an adequate opportunity to enrol at another institution and had the necessary documentation to do so."

10. There is and can be no appeal against those findings of fact. That was a point made by the Upper Tribunal when, on 15 September 2017, UTJ Hanson rejected the appellant's appeal against the decision of the FtT as being without merit. He pointed out that the FtT's findings of fact meant that the appeal could not succeed. In addition, he rejected the submission that the SSHD had not acted in accordance with her own guidance, 'Retention of valuable documents, version 7'.

11. His overall conclusions were at paragraphs 16 and 17, in the following terms:

> "16 The appellant did not make out before the Judge that the actions of the Secretary of State were in anyway procedurally unfair in providing an attested copy of the passport and an explanatory leaflet. The Secretary of State was arguably entitled to retain the passport in the circumstances of this case where, without lawful leave to remain in the United Kingdom, the appellants were removable. Their application was refused as the first appellant did not have a valid CAS and their leave had been curtailed.
>
> "17 The appellants failed to produce sufficient evidence before the First-Tier Tribunal to show that sufficient inquiries had been made of the colleges in question. The Judge expresses surprise at the claim the colleges were not willing to set out their position in writing and during his submissions Mr Kotas referred to difficulties that may have been experienced by the appellant in doing no more than speaking to a receptionist who, understandably, may have advised the prospective applicant who is not a British national that a copy of their passport was required."

It is common ground that the last sentence of paragraph 16 was wrong: leave had not been curtailed at the time that the original passport was retained. However, as explained below, that error does not affect the outcome of the appeal.

*The Second Appeal*

12. Permission to bring this second appeal was granted on two grounds only. The first was based on the submission that the decisions of the FtT and/or the UT were not in accordance with another UT judgment, *Nanette Marcellana v SSHD* UT 1A/01888/2013 (a case never previously referred to). The second ground was that the SSHD should have exercised her discretion to return the appellant's passport because these were "exceptional circumstances".

13. A threshold issue arose at the appeal hearing, concerned with jurisdiction. I deal with that first, because it leads conveniently into a consideration of the effect of the factual findings by the FtT on this appeal. Thereafter, I deal with the two stated grounds, before going on to consider Mr Muman's wider submissions.

*Threshold Point*

14. In his skeleton argument, Mr Malik argued that neither the FtT, nor the UT, had any jurisdiction to deal with the challenge to the decision letter. The argument was that the appellant's complaint was not about the decision letter (which refused leave to remain), but about the earlier decision by the SSHD (dated 13 August 2015) to retain the appellant's original passport. Mr Malik submits that that was not an 'immigration decision' as defined by statute, and was therefore outwith the jurisdiction of the tribunal judges who considered the appellant's challenge.

15. I do not accept that submission as a matter of principle. It is quite possible to imagine circumstances where a decision by the SSHD to retain the original passport prevented an applicant from obtaining the necessary secondary documentation (like a CAS), which led directly to a decision to refuse further leave to remain. Indeed, as we shall see, *Marcellana* was one such case. In such circumstances, there can be no doubt that the FtT/UT would have the jurisdiction to consider the merits and effect of the decision to retain the passport, because an answer to that question may well decide the underlying question of whether or not leave to remain was wrongly refused.

16. Another way of putting the same point is by reference to Rule 322(9) of the Immigration Rules, which identities as a ground (on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused) as:

> "Failure by an applicant to produce within a reasonable time information, documents or other evidence required by the Secretary of State to establish his claim to remain under these Rules..."

It is not necessary, for the purposes of this appeal, to address Mr Muman's argument that in some way this should be read by adding in words to say that any failure had to be a failure by the applicant and not a third party, although I should say that, for my own part, it is never attractive to interpret rules or regulations by adding in words which are not there. But I accept the narrower formulation that, even if the failure to produce the necessary documents was that of the applicant, if that failure was itself the result of an act or omission on the part of the SSHD, then refusal of leave to remain on the basis of that failure would *prima facie* be unlawful.

17. In this way, Mr Malik's erroneous submission as to jurisdiction has had the effect of throwing into sharp relief the need, in a case of this sort, to demonstrate a causal connection between the SSHD's decision to retain the original passport, and her subsequent refusal of the application for leave to remain under Rule 322(9). Did the retention of the original passport cause or materially contribute to the refusal of leave to remain? If no such causal connection can be made out (in other words, if the FtT or UT was satisfied that the retention of the passport did not have the adverse consequences suggested by the applicant in the subsequent challenge) then the appeal will fail, not on jurisdictional grounds, but because a critical building block of any such claim on the facts is demonstrably absent.

18. In the present case, as set out above, the FtT judge made the following findings of fact:

    (a) The SSHD had provided the appellant with an attested copy of her passport and what was called an explanatory leaflet which the appellant could have shown to prospective educational institutions.

    (b) The appellant provided no evidence to support her bare assertions that such educational institutions as she approached would not agree to take her without sight of her original passport.

    (c) The appellant's account to that effect was "not credible".

    (d) It was the standard practice of the SSHD to retain a passport. In such circumstances, educational institutions accepted attested copies of a passport and would be guided by the explanatory leaflet.

    (e) The Secretary of State's failure to respond to the appellant's letters during the relevant period was discourteous but did not give rise to illegality.

    (f) The appellant was given an adequate opportunity to enrol at another institution and had the necessary documentation to do so.

19. On the basis of these findings, which are not and cannot be challenged in this court, there was no causal connection between the SSHD's retention of the passport, on the one hand, and the appellant's failure to obtain a CAS or sponsorship, on the other. On that basis, although the FtT/UT did have the necessary jurisdiction, once it had been decided that the absence of the original passport was an irrelevance to the decision to refuse leave to remain, the appellant's claim for appeal was doomed to fail.

20. Although that conclusion is sufficient to dispose of this appeal, it is appropriate to go on and consider the two specific grounds of appeal on which permission was granted.

*Ground 1: Marcellana*

21. The first ground of appeal seeks to rely upon the decision of the Upper Tribunal in *Marcellana*. That was also a case involving the SSHD's retention of the passport.

22. Mr Malik argued that *Marcellana* was not citable to this court, and relied on *Practice Direction: Citation Authorities* [2012] 1 WLR 780. However, I think Mr Muman was right to argue that there was not a complete bar on the citation of such authorities to this court, either by way of that Practice Direction, or the similar PD issued by the Senior President of Tribunals on 10 February 2010, as amended 13 November 2014.

23. However, whilst citation may be permitted, that is only where "there is a relevant statement of legal principle not found in reported authority". This is not simply a dry argument about precedent. Immigration and asylum work at all levels is bedevilled by the promiscuous citation of authorities from all kinds of judges, regardless of the factual background of the case in question, in the hope that there might be something, whether law, or fact or even comment, which might look roughly similar to the case in question and therefore might assist the argument being advanced. It is not unfair to dub it a 'kitchen-sink' approach to citation. It is wholly illegitimate and merely adds to the workload of already-stretched FtT and UT judges. Proper limits on the citation of authorities in judicial review cases are required if this blizzard of references to irrelevant, fact-dependant cases is ever going to be stopped.

24. During the course of argument, I pressed Mr Muman as to where in *Marcellana* one found a statement of legal principle that was not otherwise found in reported authority. He was unable to identify any such passage; the best he could do was a reference to a particular finding of fact by UTJ Reeds at paragraph 38 of her judgment, to the effect that, on the facts, the SSHD had 'frustrated' the applicant's attempts to obtain a CAS. For that reason alone, *Marcellana* takes the matter no further. It does not give rise to any sort of arguable ground of appeal in this case.

25. Moreover, for completeness, I should say that the facts in *Marcellana* were entirely different to the present case. They were also much stronger. There, unlike the present case, the applicant needed her original passport for a specific purpose, namely to take an English test, and made an express request for its return. In the meantime, she had also been accepted to study on a post graduate diploma and had a new CAS, although she still needed the original passport to undertake the exam.

26. After a long delay, for which the SSHD accepted responsibility, the passport was returned, and an extension granted until 9th October 2012. The problem was that by the time the passport was received, it was the 12th October, so the deadline had expired. It was therefore unsurprising that, on the facts, UTJ Reeds found that the appellant's opportunity to obtain the English language qualification had been frustrated by the SSHD (see paragraphs 38-39 of her judgment). As the UTJ correctly noted, the applicant could not comply with a deadline of which she was unaware.

27. All of those admissions and other findings of fact in *Marcellana* give rise to an unexceptionable decision. They are far removed from the facts of the present case. Accordingly, not only is the attempt to cite *Marcellana* illegitimate (because there is no statement of principle that cannot be found in hundreds of authorities going back centuries concerned with estoppel, the prevention principle and the prohibition on taking advantage of your own wrong), but its citation also serves to demonstrate the absence of any plausible arguments available to the appellant in the present case.

28. For those reasons, ground 1 of this appeal fails.

*Ground 2: The Discretion to Retain*

29. The grounds of appeal accepted that the SSHD had retained the appellant's passport pursuant to s.17 of the Asylum and Immigration Act (Treatment of Claims) 2004. That provides:

> "17 Retention of documents
>
> Where a document comes into the possession of the Secretary of State or an immigration officer in the course of the exercise of an immigration function, the Secretary of State or an immigration officer may retain the document while he suspects that -
>
> (a) a person to whom the document relates may be liable to removal from the United Kingdom in accordance with a provision of the Immigration Acts and
>
> (b) retention of the document may facilitate the removal."

30. The grounds expressly assumed that s.17 gave the SSHD the discretionary power to retain the appellant's passport. The argument that was advanced there was that, because these were 'exceptional circumstances', the original passport should have been returned.

31. Whilst I accept that, in theory, a viable challenge to the exercise of the discretionary power might lie in the existence of exceptional circumstances which made the retention unfair or otherwise unlawful, the appellant has come nowhere close to demonstrating such circumstances in this case. On analysis, the facts of this case could not be more ordinary. Like thousands of others, the appellant found herself in the position of having no sponsorship or CAS. She had a specific period to find an alternative and she was not able to do so.

32. Critically, as I have already noted, it is not open to the appellant to argue that in some way her failure to obtain a CAS or alternative sponsorship was in any way connected to the SSHD's retention of her original passport and the provision of an attested copy instead. Thus, there is no arguable basis on which it could be said that these were exceptional circumstances. The SSHD was therefore entitled to exercise her discretion against returning the passport.

33. That means that ground 2 must also fail.

34. I go on to address, with some caution, Mr Muman's wider submissions. I do so only in deference to the arguments we heard; they cannot arise on the facts of this case and are outside the stated grounds of appeal.

35. In his skeleton argument and then in his oral submissions, Mr Muman submitted that any retention of the original passport *at all* was unlawful under s.17. This was on the basis that the appellant was *not* a person who the SSHD reasonably suspected "may be liable to removal from the United Kingdom in accordance with the provision of the Immigration Acts". The argument was advanced on the basis that, at the time of the decision to retain the original passport, the appellant had leave to remain and that such leave had not been curtailed.

36. Although it is unnecessary to reach a concluded view on this argument (because it was not in the grounds of appeal and does not get round the causation difficulties in any event), my initial impression is that it is wrong. There are a number of reasons for that.

37. The first reason arises without any reference to authority and is simply based on the width of the words used. In order to retain the document, the SSHD need only *suspect* that the person in question *may* be liable to removal. Clearly, such suspicion must be reasonable, and any liability to removal must have arisen or at least be imminent. But it seems to me that this would cover the appellant, who had already been the subject of one refusal, had been given a 60 day suspension period to try and find the documentation that she had so far failed to find, and who would be liable to removal if she failed so to do. Contrary to Mr Muman's submissions, the wide words do not suggest that the passport can only be retained once leave to remain had been curtailed.

38. Secondly, the appellant's leave had been extended pursuant to section 3C(2)(a) of the Immigration Act 1971. Section 3C provides as follows:

> "(1) This section applies if -
>
> (a) the person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,
>
> (b) the application for variation is made before the leave expires and,
>
> (c) the leave expires without the application for variation having been decided.
>
> (2) The leave is extended by virtue of this section during any period when -
>
> (a) the application for variation is neither decided nor withdrawn,
>
> (b) an appeal under section 82(1) of the Nationality, Asylum Immigration Act 2002 could be brought, while the

> appellant is in the United Kingdom, against the decision on the application for variation... or
>
> (c) an appeal under that section against that decision, brought while the appellant is in the United Kingdom, is pending (within the meaning of section 104 of that Act)."

39. Accordingly, a migrant's position under these provisions is considerably less secure than, say, that of a migrant who had an unfettered leave to remain. In these circumstances, such migrants may well fall into the category of those who may reasonably be suspected of being liable for removal.

40. Thirdly, I agree with Mr Malik that, on the face of it, the discretionary power to retain the passport of those suspected of being potentially liable for removal is a similar power to the SSHD's power to detain those migrants whose leave may be curtailed under s.10 of the Immigration and Asylum Act 1999. Those provisions were recently the subject of decision in *R (on the application of SW) v SSHD* [2018] EWHC 2684 (Admin) where at paragraphs 42-58 the judge rejected the submission that the power to detain could only apply once the relevant person's leave had been curtailed. The judge also rejected the submission that reasonable grounds for suspicion could not exist until the curtailment decision had been notified. He found that the migrant could be detained before notice of curtailment had been served. It seems to me that the same reasoning would apply here to defeat Mr Muman's restrictive interpretation of s.17.

41. Finally, I should refer to the guidance document noted in paragraph 9 above. The relevant section states:

> "Where a valid passport is retained and removal could take place on that passport, it is not necessary to retain original copies of other valuable documents although you must retain photocopies of them. It is necessary to retain original documents however where they may be needed to effect the removal of the spouse or child of the migrant.
>
> This applies if:
>
> - The migrant is unlawfully present in the UK, for example, an overstayer or illegal entrant
> - The migrant has been refused asylum or humanitarian protection and has no other basis of stay in the UK
> - The migrant has been refused leave to remain whether or not they had a right of appeal in the UK (unless they have an existing period of leave, other than under 3C or 3D of the Immigration Act 1971)
> - A decision under section 47 of the Immigration, Asylum and Nationality Act 2006 has been made

- Leave to enter or remain has been curtailed with the result that the migrant has no outstanding leave, if you curtail leave to 60 days you must return the valuable documents because the migrant still has valid leave to remain."

42. Reliance was placed by the appellant on the last part of the last bullet point of the guidance noted above; the submission being that her leave had effectively been curtailed to 60 days and that therefore her passport should have been returned to her.

43. I do not find this guidance easy to decipher. However, I think it is unnecessary for me to do so in this case. On any view, the applicant does not fall within this rubric. Her leave was not curtailed to 60 days; the 60 days was a period of suspension before a decision was taken as to whether or not to curtail her leave.

44. For all the reasons that I have given, I consider that s.17 applied to the retention of the appellant's original passport. Its retention was a matter of discretion for the SSHD and there were clear grounds to justify its retention. On that basis, I consider that Mr Muman's wider arguments, had they been relevant on the facts or raised in the grounds of appeal, would have failed in any event.

*Conclusion*

45. For the reasons that I have given, if My Lords agree, this second appeal will be dismissed.

**Lord Justice Leggatt:**

46. I agree.

**Lord Justice Floyd:**

47. I also agree with the judgment of Coulson LJ.

48. I would only add a few words on the inappropriate citation of the Upper Tribunal's decision in *Marcellana*, which is dealt with by Coulson LJ at [21] to [27] above. The excessive citation of authorities because they bear similarities on the facts to the case under consideration is not a new problem, or one limited to the field of immigration and asylum law. In the century before last Lopes LJ (with whom Lindley and Kay LJJ agreed) sounded this warning in a patent case, *Savage v Harris* (1896) 13 RPC 364 at 370:

> "Cases, so far as regards the law, are most useful, but when they are applied to particular facts, they, as a rule, are of little service. Each case depends on its own particular facts, and the facts of almost every case differ"

49. Citing previous decisions on questions of fact simply serves to increase costs and is wasteful of court time and scarce resources.