Neutral Citation Number: [2019] EWCA Civ 129

Case No: C7/2016/3301

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
DEPUTY JUDGE ALIS
IA/21853/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/02/2019

Before :

LORD JUSTICE HAMBLEN
LADY JUSTICE ASPLIN
and
MR JUSTICE NUGEE

- -

Between :

BHANDARI & ANOTHER	**Appellants**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Tom Tabori (instructed by **Greenwich solicitors**) for the **Appellants**
Zane Malik (instructed by **Government Legal Department**) for the **Respondent**

Hearing date : 31 January 2019

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Approved Judgment

Lord Justice Hamblen :

Introduction

1. This is an appeal from the decision of the Upper Tribunal ("UT") promulgated on 25 May 2016. The UT, in that decision, dismissed the Appellant's appeal from the decision of the First Tier Tribunal ("FTT"), which, in turn, had dismissed her appeal from the decision of the Respondent Secretary of State ("SSHD") to refuse her application for further leave to remain as a Tier 4 (General) Migrant.

Factual and procedural background

2. The Appellant is a citizen of Nepal and was born on 11 January 1986. Her dependent, her husband, Prakashchandra Sodari, is also a citizen of Nepal and was born on 18 July 1980.

3. On 22 October 2009, the Appellant was granted leave to enter the UK as a Tier 4 (General) student until 21 May 2011 in order to study for an MBA course with Tasmac London College (which awarded MBAs on behalf of the University of Wales).

4. In February 2011, the Appellant obtained a Confirmation of Acceptance for Studies ("CAS") to study for an ACCA course at the London School of Theology.

5. On 15 March 2011, the Appellant was granted further leave to remain until 28 June 2014.

6. In September 2011, the London School of Theology's licence was revoked when the Appellant was halfway through the ACCA course.

7. On 26 October 2012, the Appellant made a further application for leave to remain accompanied by a CAS, purportedly issued by King's College London ("KCL"), and for which she paid £9,500.

8. The CAS provided was false. The Appellant reported the fraud to the police and subsequently helped the authorities with their investigations.

9. On 18 November 2013, the Appellant submitted another CAS, issued by Grenville College, and applied to vary her application to study at KCL, which was still pending.

10. In April 2014, the SSHD revoked the sponsorship licence of Grenville College. The Appellant was not informed of this until 13 March 2015 when the SSHD wrote to her, inviting her to obtain and submit a new CAS within 60 days.

11. On 12 May 2015, the Appellant's solicitors wrote to the SSHD stating that she had been a victim of fraud and that the Secretary of State should "re-issue 60 days letter with explanation letter of special circumstances". The reason given for this was:

> "Our Client tried a lot with various colleges and universities to take admission but could not succeed because the sessions has already started. Furthermore, the colleges and universities are asking for explanation of delay in deciding her previous Tier-4 student application.
>
> It is a fact that Our Client previously a victim of fraud and actively helped the Home Office officials with the investigation

> and for the same reason the decision on her application was delayed. The Home Office should have sent a letter along with the letter dated 13th March 2015 explaining the special circumstances of Our Client.
>
> A statement from Our Client is attached herewith. It shall be just and fair in the present matter to make exception and re-issue 60 days letter with explanation letter of special circumstances."

12. The statement attached explained that:

> "4. All the University & Colleges have either Easter or September session for the courses. I have tried a lot to take admission in good university or college but failed to secure any position for the above mention reason. I cannot risk further money by choosing 'A' rated sponsor as I already lost a lot of money due to revocation of sponsor licence.
>
> 5. Inadvertently, I have become victim of bad timing. No reasonable Secretary of State would issue 60 days letter to find new sponsor, when it is well known that the sessions only start either in Easter or September.
>
> 6. Furthermore, every college & university ask us to provide letter from the Home Office for delay in deciding our application i.e. fraud investigation by the Home Office officials. Along with 60 days letter, the Home Office should have issued us letter explaining the circumstances."

13. On 26 May 2015, the SSHD refused the Appellant's application on the basis that there was no valid CAS and, consequently, she was not entitled to any points under Appendix A or Appendix B to the Immigration Rules. The SSHD also stated that if the Appellant wanted to rely on her private or family life, she should make a formal application on that basis. The SSHD's decision attracted a right of appeal to the FTT under section 82 of the Nationality, Immigration and Asylum Act 2002 and the Appellant duly exercised that right.

14. The FTT heard the Appellant's appeal on 23 September 2015 and dismissed it in a determination promulgated on 8 October 2015. The FTT concluded that the SSHD's decision was in accordance with the Immigration Rules and rejected the argument that there was any unfairness. The FTT also concluded that the Appellant's removal from the United Kingdom would not be incompatible with Article 8.

15. The FTT granted the Appellant permission to appeal to the UT on 12 April 2016. The UT heard the appeal on 23 May 2016 and dismissed it in a determination promulgated on 25 May 2016. The UT concluded that the FTT made no material error of law in dismissing the Appellant's appeal. The UT refused the Appellant permission to appeal to this Court on 19 July 2016.

16. The Appellant filed the Appellant's Notice with this Court on 18 August 2016. Gross LJ, on 20 February 2017, refused permission to appeal on the papers.

17. At the subsequent oral renewal hearing on 30 November 2017, Longmore LJ granted permission to appeal.

The Tribunal decisions

18. So far as relevant to the appeal, the relevant arguments put to the FTT and the determination made by the FTT Judge are as set out at [18]-[20] as follows:

> "18. The Appellant submitted that the 60 day letter issued by the Respondent was unfair. In *Thakur (PBS decision-common law fairness) Bangladesh* [2011] UKUT 151 (IAC) the Upper Tribunal set out the policy guidance in respect of what would happen when a Sponsor's Tier 4 licence was withdrawn. "We will limit the student's permission to stay: to 60 days if the student was not involved in the reasons why the Tier 4 Sponsor had their licence withdrawn (we will not limit the student's permission to stay if he/she has less than six months left). In the case of *Thakur,* it was found that, although he was not entitled to 60 days under the policy, the Respondent's decision was not in accordance with the law because there was a failure to comply with the common law duty of acting fairly in the decision making process. In *Patel* the Upper Tribunal accepted that there was no policy in respect of refusal, as opposed to curtailment cases, "Where the applicant is both innocent of any practice that led to the loss of the sponsorship status and ignorant of the fact of such loss of status, it seems to us that common law fairness and the principle of treating applicants equally mean that each should have an equal opportunity to vary the application by affording them a reasonable time with which to find a substitute college on which to base their application for an extension of stay to obtain the relevant qualification. In the curtailment cases, express Home Office policy is to afford sixty days for such application to be made." I find that the Respondent in this case acted fairly and reasonably in accordance with the above policy guidance. The practice of offering an extra 60 days to obtain a CAS is related to the situation where the applicant's college has lost its licence.
>
> 19. The Appellant has made little progress in her education in this country. She started studying for an MBA but had not completed it as the college went bankrupt. She then switched courses and started studying an ACCA course at the London College of Theology. That licence was revoked and she then went to the Educational Consultant and he gave her a CAS letter to study law at Kings College London. This was the CAS, which was fake. The CAS she presented for this present application is for a Diploma in Health Care Management at Grenville College and the college had its licence revoked. She said in evidence that she had registered with the ACCA and had

> exemptions from some papers. I do not find that she has satisfactorily explained why she did not continue with the ACCA course using her exemptions at another college rather than change course twice not just to law and then to Health Care Management. She has not indicated that during the 60 day period she sought to study again on an ACCA course on which she has some exemptions.
>
> 20. As the Appellant did not have a valid CAS, when her application was considered and then failed to obtain one during the 60 days period, the Respondent having acted appropriately in issuing the 60 day letter, she has not satisfied me that she meets the requirements to be awarded 30 points under Appendix A. Her application therefore falls to be refused under Paragraph 245ZX (c). "

19. On the appeal to the UT the Appellant's case was as summarised at [13] of the UT decision:

> "13. Mr Uppal adopted the grounds of appeal and submitted the letter dated May 12, 2015 had been supported by a statement that was found on pages 24 and 25 of the appellant's bundle. He submitted that in the circumstances the standard sixty-day extension was not sufficient bearing in mind it took 2 ½ years for the respondent to make a decision on the application. The appellant was entitled to an explanation for the delay and the respondent had not done this in her refusal letter."

20. The essential reasons given by the UT for dismissing the appeal were as follows:

> "16. In this case the respondent initially gave the appellant a sixty-day extension to submit a fresh CAS certificate because her current sponsor's licence had been revoked.
>
> 17. The first-named appellant had experienced a number of problems with her education in the United Kingdom a fact recognised by the Judge in her decision. She noted the appellant arrived in October 2009 to undertake an MBA course. The college she attended at went bankrupt so switched course and commenced an ACCA course at the London College of Theology. Their licence was revoked and she then went to a consultant who gave her the fake CAS enabling her to study law at Kings College, London. She then obtained a CAS for Grenville College to study a diploma in health care management but as became clear that college's licence was also revoked. The Judge concluded she had done very little, education wise, since being here and had hopped from one course to another without explaining why.
>
> 18. At the hearing I clarified with Mr Uppal whether the appellant had submitted any rejection letters or requests for

> further information from any college or university and he indicated that no college had set out their position in writing. There was therefore no evidence before the Judge other than the appellant's own evidence.
>
> 19. Mr Uppal's argument today is that the respondent should have given reasons for the delay in dealing with the appellant's application and that by failing to do so the respondent treated the appellant unfairly. Mr Uppal did not provide me with anything that supported his argument that reasons for delay had to be spelt out in the refusal letter.
>
> ....
>
> 23. The delay in dealing with this appeal would not have altered the fact there was no CAS certificate. Putting a paragraph in the letter may have told the appellant that the respondent was aware of the delay but ultimately this application was refused because the appellants failed to provide the CAS within the extended period allowed. Nothing was adduced to the Judge nor myself suggesting the respondent's decision is unlawful because delay was not explained.
>
> 24. Although I sympathise with the appellant's predicament I am not persuaded the Judge approached their appeal incorrectly.
>
> 25. If no extension had been given, then the position would have been different. However, the fact the appellant was unable to provide a CAS within the sixty-day period and failed to put forward any evidence that the delay prejudiced her obtaining a CAS draws me to the conclusion that the Judge did not err in this appeal."

The grounds of appeal

21. As set out in the grounds of appeal, the only ground now pursued is that "the decision of the UTJ to dismiss the appeal was wrong in law as it was perverse in that no reasonable tribunal could have reached such a decision" because "it was always the Appellant's case that she could not obtain the CAS certificate because of the fault of the Respondent" and "it was challenged that the 60 days letter dated 13 March 2015 was itself defective".

22. As explained by the Appellant's counsel, Mr Tabori, the essence of the ground advanced is that the SSHD created circumstances that prevented the Appellant obtaining a CAS (by delay in dealing with her application) and then unfairly failed to ameliorate those circumstances (by explaining the delay as requested) before refusing the Appellant's application.

23. In his written and oral submissions Mr Tabori developed this ground as follows:

(1) It is established policy that where a sponsor's licence is revoked while a student's application for leave to remain is still under consideration their CAS will become invalid, but the refusal of their application will be delayed to give them 60 days to provide a new CAS – "the 60 day letter policy".

(2) The 60 day letter policy reflects "common law fairness" as stated in the decision in *Patel (Revocation of Sponsor Licence: Fairness: India), Re* [2011] UKUT 211 (IAC) (Blake J). As stated at [22]:

> "Where the applicant is both innocent of any practice that led to loss of the sponsorship status and ignorant of the fact of such loss of status, it seems to us that common law fairness and the principle of treating applicants equally mean that each should have an equal opportunity to vary their application by affording them a reasonable time with which to find a substitute college on which to base their application for an extension of stay to obtain the relevant qualification".

As stated in the headnote, the SSHD should afford the applicant "a reasonable opportunity to vary the application by identifying a new sponsor before the application is determined".

(3) What the duty of fairness requires and what amounts to a "reasonable opportunity" depends on the applicant's circumstances and the particular decision-making context – see, for example, *Thakur (PBS Decision: Common Law Fairness: Bangladesh), Re* [2011] UKUT 151 (IAC).

(4) In the present case it was the SSHD's delay in dealing with the Appellant's application that led to the refusal of her requests for a new CAS. Having created that obstacle the duty of fairness required the SSHD to remove it by providing an explanation of the delay and thereby preventing it from being an obstacle.

24. As to the legal basis of this argument, regard must be had to the reservations as to the correctness of the reasoning in *Patel* expressed by this Court in the recent decision of *Pathan and Islam v Secretary of State for the Home Department* [2018] EWCA Civ 2103 in which an unsuccessful attempt was made to extend *Patel* to Tier 2 cases – see, in particular, [58] and [78].

25. As Singh LJ explained in *Pathan*, it is important to distinguish between procedural fairness and substantive fairness – [54]-[55]. "Common law fairness" as referred to in *Patel* is to be taken as being a reference to procedural fairness [58].

26. In light, moreover, of the decision of the Supreme Court decision in *R (Gallaher Group Ltd) v Competition and Markets Authority* [2018] UKSC 25, [2018] 2 WLR 1583 it is "very doubtful" that there is any free-standing doctrine of substantive fairness [67]. As stated by Lord Carnwath JSC in *Gallaher* at [41]:

> "...Such language adds nothing to the ordinary principles of judicial review, notably in the present context irrationality and legitimate expectation".

27. The "principle of treating applicants equally" as referred to in *Patel* is equally not a free-standing doctrine. As Singh LJ explained at [69]:

> "I would also observe that, in *Gallaher*, the Supreme Court held that, while the principle of equal treatment could be regarded as an aspect of rational behaviour, it does not in itself constitute a freestanding ground for judicial review: see paras 24–30 (Lord Carnwath) and para 50 (Lord Sumption). That therefore undermines to a significant extent the reasoning of the UT in *Patel*, which (as I have mentioned earlier) relied on the principle of equal treatment in the same breath as the principles of procedural fairness."

28. In so far as Mr Tabori's argument depends on apparent statements of principle made in *Patel* it accordingly rests on shaky legal foundations. The more fundamental difficulties facing his argument are, however, factual and, in particular, the lack of findings to support it and the adverse findings undermining it.

29. Fundamental to the argument advanced is the assertion that the SSHD's delay was the reason for the refusal of a new CAS. As to that:

(1) As the FTT found at [19]:

> "I do not find that she has satisfactorily explained why she did not continue with the ACCA course using her exemptions at another college rather than change course twice not just to law and then to Health Care Management. She has not indicated that during the 60 day period she sought to study again on an ACCA course on which she has some exemptions."

(2) As the UT found at [19] and [25], there was no evidence from any college or university to support the Appellant's case as to the reasons for the rejection of her applications, and this lack of evidence supported the conclusion reached by the FTT.

(3) As to her own evidence, in her statement she said that she was not able to enrol at a "good" educational institution and that she was not willing "to risk further money by choosing 'A' rated sponsor". This recognises that this was an option but one which was not taken up by the Appellant as a matter of choice.

(4) Further, the Appellant's chequered educational history would in itself be a reason for refusing a CAS, as set out by the FTT at paragraph 19 of its determination. As the UT stated at [17]:

> "The Judge concluded she had done very little, education wise, since being here and had hopped from one course to another without explaining why."

30. In summary, the FTT concluded that it had not been established on the evidence that SSHD's delay was the cause of the Appellant's inability to obtain a CAS and the UT upheld that conclusion and found that it involved no error of law.

31. Mr Tabori sought to contend otherwise by developing an argument based on the need to demonstrate academic progression to sponsors, the terms of the Tier 4 Guidance 5.20 and the fact that none of the exemptions set out in 5.21 applied to the Appellant. This was, not, however, evidence which had previously been relied upon and, even if it was open to the Appellant to place reliance upon it, there are no findings to support the argument now advanced.

32. For all these reasons, I agree with the conclusion of Gross LJ who observed as follows when refusing permission on the papers:

> "The FTT and UT were entitled to reach the decisions to which they came. There is no real prospect of [the Appellant] succeeding on the argument that the Respondent's delay (most regrettable though it was) caused [the Appellant's] failure to produce a substitute CAS. Not least, [the Appellant's] very halting progress with her studies is unexplained. See, in particular, FTT Decision, at [19]; UT Decision, at [18] and [23]."

33. If the Appellant is unable to establish that the SSHD created circumstances that prevented her obtaining a CAS then the foundation of her argument that the SSHD unfairly failed to ameliorate those circumstances by explaining the delay falls away. There are in any event considerable difficulties at the second stage of the argument, not least establishing a duty to do more than provide a 60 day letter, identifying what the SSHD allegedly should have done or said, and showing that this would have made a material difference.

34. Like the UT judge and Gross LJ, I have sympathy for the Appellant, particularly in the light of her being defrauded of £9,500 and the assistance she has provided to the authorities. In my judgment, there are, however, no grounds upon which this appeal can be allowed.

Conclusion

35. For the reasons outlined above I would dismiss the appeal.

Lady Justice Asplin:

36. I too have sympathy for the Appellant. However, I agree with Hamblen LJ that the appeal must be dismissed for the reasons he has given.

Mr Justice Nugee:

37. I agree.