



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/27836/2011

THE IMMIGRATION ACTS

Heard at Field House
On 4 November 2013
Determination given orally at hearing

Determination Promulgated
On 6 December 2013

Before

UPPER TRIBUNAL JUDGE PETER LANE

Between

OZAIR MUHAMMAD AFRIDI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Brown, Counsel instructed by Christian Khan Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION

1. This case has an exceptionally complex and unusual procedural history. It arises from the application made by the appellant, Mr Afridi, for a variation of his leave to remain in the United Kingdom as a student. That application was refused by the respondent on 16 September 2011 and the appellant appealed against it to the First-

tier Tribunal. Without at this stage going into any detail, it is plain from the determination of First-tier Tribunal Judge Webb that he was sympathetic to the predicament in which the appellant found himself. Judge Webb however concluded that the appellant could not meet the relevant requirements of the Immigration Rules and he did not see that it was possible to excuse the appellant from the consequences of that failure by having regard to Article 8 of the European Convention for the Protection of Human Rights.

2. The appellant appealed against the determination of Judge Webb. Permission was granted by a Designated Judge of the First-tier Tribunal and in March 2012 the matter came before Upper Tribunal Judge King. On 12 March Judge King issued directions and preliminary decision in the following terms:

- “2. It is my preliminary decision that the immigration decision is not in accordance with the law on the basis of unfairness Patel (revocation of sponsor licence - fairness) India [2011] UKUT 2011 (IAC) and Patel (consideration of Sapkota - unfairness) India [2011] UKUT 00484 (IAC). I would propose to allow the appeal and send the matter back to the Secretary of State for the Home Department for a lawful decision to be made.

3. The parties have 21 days from the date of these directions to make written submissions to the contrary, failing which the decision as indicated will be made without further hearing.”

3. It is common ground that neither party submitted any representations in response to those directions. Accordingly, on 8 June 2012, Judge King issued a determination in which he allowed the appellant’s appeal to the extent that the matter was “remitted back to the Secretary of State for a proper and lawful decision to be made”. The determination records that Judge King considered there to be considerable merit in the grounds as advanced, particularly in the light of the permission to appeal which was given “although of course the UK Border Agency cannot compel a particular college to issue a CAS, nevertheless the wider ramifications of human rights were something perhaps that should have been borne in mind by the Immigration Judge. I also had in mind the concerns as to fairness as set out in Patel (consideration of Sapkota - unfairness) India [2011] UKUT 00484 (IAC)”.

4. At this stage it is necessary to explain the background to the matter. I do so by reference to the very helpful and lucid submissions that Ms Brown has made to me this morning. Ms Brown states that the organisation known as Kaplan submitted a CAS to the appellant and to the respondent but did so in different terms to each. The CAS issued to the appellant gave, correctly it appears, a termination date of April 2012 for his course, but that given to the Secretary of State indicated that the course in fact was said to end in April 2011. It is common ground that these errors occurred. It is further common ground that the appellant was unaware at all material times of the fact that Kaplan had issued discrepant information to the Secretary of State. Ms Brown further tells me on instruction, and I have no reason to doubt, that although the appellant was left in this state of ignorance, the Secretary of State was sent both of

the CAS documents. As a result the Secretary of State would have been able to see the discrepancy to which I have referred. The fact that the Secretary of State had been informed of an earlier termination date for the appellant's course resulted in the appellant being given leave only until 20 June 2011. The appellant requested a further CAS letter from Kaplan but at this point difficulties ensued as a result of changes in the Rules. The appellant did not realise that the leave he had been given was due to the error committed by Kaplan. Nevertheless, he applied for a variation of that leave but owing to the Rule changes to which I have just made reference his application could not, it is common ground, be successful by reference to the Rules.

5. Having set out that background, which finds expression to a greater or lesser extent in the reasoning and findings of both the First-tier Tribunal and the Upper Tribunal I turn to the procedural issues. Judge King's determination of June 2012 was not appealed by either party. However Ms Everett has shown me today a letter dated 21 June 2012 sent to the Upper Tribunal, which although apparently not on my file must have been received by the Tribunal. In that letter reference is made to Judge King's decision of June 2012. The writer of the letter notes that Judge King relied on the case of Patel [2011] UKUT 00484 but "unfortunately Judge King failed to have regard to the case of Patel & Others v Secretary of State for the Home Department [2012] EWCA Civ 741 which was handed down on 1 June 2012 making the determination flawed". Judge King plainly saw that letter because in September 2012 he purported under rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to set aside his determination of June 2012 as a result of the Court of Appeal judgments to which I have just made reference. Accordingly, as far as Judge King was concerned, the matter was to be listed for re-determination of the appeal to the Upper Tribunal.
6. Judge King did not make his rule 43 decision until September 2013. The reason for this delay is unclear but may have something to do with the fate of the letter of 21 June 2012 to which I have made reference.
7. Ms Brown's submissions this morning are as follows. She says that the rule 43 decision of September 2013 is in legal terms a nullity. She says that because none of the conditions set out in rule 43(2) of the Rules are met. The closest that one might come is rule 43(2)(d) which speaks of "some other procedural irregularity in the proceedings" but, as she points out, the chronology of the case law to which I have made reference is such that there cannot possibly be said to be a procedural error in that regard. At the time that Judge King signed his determination on 8 June the judgments in Patel had not been handed down.
8. It seems plain to me and I believe to both representatives that what Judge King had in mind was in fact rule 45 of the Upper Tribunal Rules. Amongst other things, rule 45 permits the Upper Tribunal to review a decision in accordance with rule 46 if "since the Upper Tribunal's decision a court has made a decision which is binding on the Upper Tribunal and which had it been made before the Upper Tribunal's decision could have had a material effect on that decision". The problem with that, however, as Ms Brown points out, is that rule 45 applies only "on receiving an

application for permission to appeal". Again, it is common ground that the respondent made no such application.

9. Accordingly I find myself in agreement with Ms Brown that the rule 43 decision purported to be made in September 2013 has no legal basis. For the respondent Ms Everett did not seek to persuade me to the contrary. The result of that finding is that the determination signed by Judge King on 8 June 2012 allowing the appellant's appeal to the extent I have just indicated should stand.
10. Before leaving the matter, however, and in the hope that it may inform the Secretary of State's consideration of the application which remains outstanding before her from the appellant, I will make the following remarks. It is entirely evident from the history to which I have just made reference that this appellant, through no fault of his own, has been put in an extremely difficult position. Ms Everett points out that the fault largely lies with Kaplan and not with the Secretary of State herself. I readily acknowledge that; but as the overall guardian of the integrity of the system of Immigration Rules the Upper Tribunal would expect the Secretary of State to have particular regard when considering the issue of fairness to what had happened in the present case and in particular that the information of a discrepant nature from Kaplan was in the Secretary of State's possession for some time whilst not being available to the appellant. That issue, as I have indicated, has had severe consequences for the appellant who has at all times plainly striven to remain within the law. The matter however remains for the Secretary of State to deal with in due course.

Signed

Date

Upper Tribunal Judge Peter Lane