



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

Appeal Number: IA/29428/2013

THE IMMIGRATION ACTS

Heard at Field House

On 26 August 2014

Determination

Promulgated

On 2 September 2014

Before

DESIGNATED JUDGE OF THE FIRST TIER TRIBUNAL J M LEWIS

Between

MR DIGVIJAYSINH GHANSHYAMSINH GOHIL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Syed-Ali of Immigration Chambers
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

The History of Events

1. The Appellant, Mr Digvijaysinh Ghanshyamsinh Gohil, is a citizen of India. He was in the UK with leave as a Tier 4 (General) Student Migrant under the points-based system. His leave expired on 31 May 2012.
2. On a date which I cannot immediately identify, the Appellant applied through his previous solicitors to extend his leave. The Respondent wrote to his solicitors on 31 October 2012. The letter stated that the Appellant had been informed by letters of 27 June, 8 August, 7 September and 5 October 2012 that he was required to make an appointment to provide his biometric information as part of his application for leave to remain in the

UK, and that he had not done so. His application was therefore being returned as invalid and arrangements had been made to return the fee which had accompanied it.

3. At the error of law hearing before me Mr Syed-Ali, who said that he had only very recently been instructed, said that the Appellant stated that he did not receive any of the four letters requesting him to make an appointment to provide his biometric information and that he only became aware of this from the Respondent's letter of 31 October 2012. The Appellant's witness statement, which was submitted by his former solicitors on 1 November 2013 and which contains his narrative of events, makes no reference to this.
4. On 31 December 2012 the Appellant submitted a further application for leave to remain in the UK as a Tier 4 (General) Student Migrant under the points-based system and for a biometric residence permit.
5. This application was refused by the Respondent in a letter to the Appellant of 29 June 2013. The letter stated that his leave to enter had expired on 31 May 2012 but he had not submitted a valid application for leave to remain until 31 December 2012, which was more than 28 days after the expiry of his previous leave. The Confirmation of Acceptance for Studies (CAS) which he had submitted was from a college which was not listed as a Tier 4 sponsor. So no points could be awarded for a CAS nor, therefore, for maintenance (funds). As the Appellant's leave to enter had expired on 31 May 2012, he did not have leave to enter at the time of his application. Nor, therefore, did he have a right of appeal against the decision.
6. The Appellant gave notice of appeal on 11 July 2013, seeking a determination on the papers. This was done by Judge Hunter sitting at Stoke. In a determination of 27 May 2014, promulgated the following day, the appeal was allowed.
7. Judge Hunter considered whether the Appellant had a valid right of appeal. He considered a direction previously made by the Tribunal that, in the light of **Basnet (validity of application - Respondent) [2012] UKUT 00113 (IAC)**, the onus of proof was on the Respondent to show that the correct fee was not paid, and that the Respondent should therefore do so. Finding that the Respondent had not demonstrated this, the judge considered the application substantively and allowed it. He did not consider the issue raised in the refusal letter of 29 June 2013 that, because the Appellant's leave to enter had expired more than 28 days before he made his application, he had no right of appeal.
8. On 4 June 2014 the Respondent sought permission to appeal. This was granted on 24 June 2014 by Judge Colyer and supplemented by subsequent procedural directions.

9. The Appellant attended the error of law hearing before me, which took the form of submissions. I have taken these into account, together with the Respondent's application for permission. I reserved my determination.

Determination

10. Both parties recognise - the Respondent in the permission application and the Appellant in Mr Syed-Ali's submissions to me - that the reason for the rejection of the application was not related to non-payment of a fee. The papers which were before the judge included from the Appellant's solicitors the Appellant's statement and grounds of appeal. The grounds of appeal misled him by discussing the irrelevant issue of the fee and not addressing the contention that the Appellant had no right of appeal. The judge understandably fell into error in allowing the appeal based upon a chain of reasoning premised on a false factual basis and in not considering the contention of the Respondent in the refusal letter that the Appellant had no right of appeal. Had he done so, he would inevitably have concluded that the Appellant had no right of appeal and that the judge therefore had no jurisdiction to entertain an appeal.
11. I find that the judge misunderstood the position. His discussion of the issue was based upon a mistake of fact which led to a material error of law. I accordingly set the decision aside and consider the appeal afresh.
12. Mr Syed-Ali did not meet the contention that because the application had been submitted more than 28 days after the expiry of the Appellant's leave he did not have a right of appeal. Nor could he have done so. It is plain that the Appellant had no right of appeal.
13. Mr Syed-Ali submitted that the Respondent had been under an obligation to consider the appeal, submitted out of time, in the same way as she had to consider appeals submitted within time; that she should have followed the policy discussed in **Patel (revocation of sponsor licence - fairness) India [2011] UKUT 00211 (IAC)** of allowing the Appellant a 60 day period to find a new college which would issue him with a CAS; and that a failure to do so render the decision unlawful and required it to be remitted to her. These submissions are not legally correct. The Respondent had no obligation to consider an out of time application.
14. The beginning and the end of the matter is that the Appellant had no right of appeal. Having set the determination aside, I resolve the issue simply by recording this to be the case.

Decision

15. The original determination contained an error of law and is set aside.
16. The Appellant has no right of appeal.

Signed
September 2014

Dated: 1

Designated Judge of the First-tier Tribunal J M Lewis