IAC-HW-MP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25211/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th November 2015	**On 23rd November 2015**

Before

MR JUSTICE PHILLIPS
UPPER TRIBUNAL JUDGE REEDS

Between

MS MST TARANEA JUNNAT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Malik, instructed by Malik Law Chambers Solicitors
For the Respondent: Mr Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, with permission, seeks to appeal the decision of the First-tier Tribunal (Judge Stokes) which in a determination promulgated on 1st April 2015 dismissed her appeal against the decision of the Secretary of State to refuse leave to remain as a Tier 4 (General) Student Migrant under the points-based system.

2. No application has been made for any anonymity direction on behalf of the Appellant.

3. The Appellant's immigration history can be summarised as follows. The Appellant is a citizen of Bangladesh born on 16th November 1982. She first arrived in the United Kingdom to study for a Diploma in Business Management (Level 7) at the London School of Business Studies which was completed after eighteen months in July 2011. She had subsequently been granted leave to remain as a Tier 4 (General) Student Migrant expiring on 20th April 2014 to study on a Health and Social Care course (Level 5) at Helios College which she had completed in or about July 2013. According to the Appellant's evidence before the First-tier Tribunal the licence of that college was subsequently suspended.

4. From the material before the First-tier Tribunal, it was noted that she had applied in January 2014 for further leave to remain to enable her to study at the London School of Technology (LST) on a course in Health and Social Care.

5. The Secretary of State refused that application in a decision made on 27th February 2014.

6. The Appellant made a further application for leave to remain as a Tier 4 (General) Student Migrant on 17th April 2014. In a decision made on 4th June 2014, the Secretary of State refused her application on the grounds that she had not met the requirements of paragraph 245ZX(c), (d). Those paragraphs state as follows:

> "(c) The applicant must have a minimum of 30 points under paragraphs 113 to 120 of Appendix A.
>
> (d) The applicant must have a minimum of 10 points under paragraphs 10 to 14 of Appendix C."

7. The relevant paragraphs of Appendix A of the Immigration Rules headed "Attributes for Tier 4 (General) Students" states as follows:-

> "113. An applicant applying for entry clearance or leave to remain as a Tier 4 (General) Student must score 30 points for attributes.
>
> 114. Available points are shown in Table 16 below.
>
> 115. Notes to accompany Table 16 appear below that table.
>
> Table 16
>
> | Criterion | Points Awarded |
> |---|---|
> | Confirmation of Acceptance for Studies (CAS) | 30 |
>
> Notes:
>
> 115A In order to obtain points for a CAS, the applicant must provide a valid CAS reference number.
>
> 116. A CAS will only be considered to be valid if:

(a) - (d) …

(ea) the migrant must not previously have applied for entry clearance, leave to enter or leave to remain using the same CAS reference number where that application was either approved or refused (not rejected as an invalid application, declared void or withdrawn)."

8. In the decision letter the Secretary of State noted that the Appellant had claimed 30 points for her CAS number which had been submitted with her application but that it had been used in a previous application and therefore this was not a valid CAS and thus she was not awarded the 30 points necessary. The Appellant had also claimed 10 points for maintenance (funds) under Appendix C but as she had failed to submit a valid CAS, the Respondent was unable to assess the level of funds she was required to show in support of her application. Consequently the application was refused under paragraph 245ZX(c) and (d) of the Immigration Rules.

9. The Appellant appealed that decision and the appeal came before the First-tier Tribunal (Judge Stokes) on 13th February 2015. The First-tier Tribunal at paragraphs 12 to 21 set out the evidence advanced on behalf of the Appellant. At paragraphs 12-21 of the determination the First-tier Tribunal set out the evidence of the Appellant. It is plain from the conclusions reached at [23] there has been no challenge to the Appellant's credibility and her claim was accepted that she had been told by the college that a CAS was valid for six months and that the college submitted the CAS directly to the Home Office, the first that she knew of the difficulties with her application was from the refusal decision and that the Home Office had not contacted either her or the college concerning the validity of the CAS (See [23]).

10. It was argued on behalf of the Appellant that there was a public law duty of fairness upon the Secretary of State to have made a further enquiry of either the college or the Appellant or to have notified the Appellant of the problems with the CAS. Reliance was placed on the decision of **Pokhriyal v SSHD [2013] EWCA Civ 1568** and its reference to the decision of the Upper Tribunal in **Naved v SSHD [2012] UKUT 14 (IAC)**. The judge found that whilst neither the college nor the Appellant had been notified that the CAS had been used in a previous application, there was no procedural unfairness in the manner in which the Respondent considered her application and had reached the decision. The judge found that the CAS was not valid and therefore she did not qualify for the requisite 30 points under Appendix A of the Immigration Rules thus she dismissed the appeal under the Immigration Rules. (The judge also dealt with Article 8 at paragraphs 31 to 40).

11. The Appellant sought permission to appeal that decision and permission was granted on 17th June 2015.

12. Thus the appeal came before the Upper Tribunal. Mr Malik appeared on behalf of the Appellant and Mr Whitwell on behalf of the Secretary of State.

13. The Grounds of Appeal upon which permission was granted related to what was described as the "conspicuous conflict of authority" between the Court of Appeal decisions in **Pokhriyal v SSHD [2013] EWCA Civ 1568** and that of **EK (Ivory Coast) v SSHD [2014] EWCA Civ 1517**. It was therefore submitted that **EK (Ivory Coast)** was decided per incuriam and should not be followed (see paragraph 11 of the grounds). However as Mr Malik conceded before us, after the grounds were settled (but before the grant of permission) the Court of Appeal considered this issue in the decision of **Kaur v SSHD [2015] EWCA Civ 13**. The decision in **Kaur** (as cited) concerned an Appellant who had been refused leave to remain in the UK as a Tier 4 (General) Student who was required to have a minimum of 30 points under paragraphs 113-120 of Appendix A to the Rules. The Secretary of State declined to take into account a Confirmation of Acceptance for Studies ("CAS") assigned to the Appellant by the Sponsor because the CAS had not been provided in the application. Before the First-tier Tribunal and the Upper Tribunal, the CAS and the documentary evidence was taken into account, but it was considered that the evidence did not provide the confirmation required by the Rules. As the decision sets out, two principal submissions were made on behalf of the Appellant (at [2]). For the purposes of this appeal, the second of those submissions is of relevance where it was argued that even if the Secretary of State did not have to accept the CAS as confirming academic progress, she was obliged to make further enquiries of the academic institution before refusing the application (applying the decision of the Upper Tribunal in **Naved v SSHD [2012] UKUT 14 (IAC)** which had been applied by analogy in the decision of **Pokhriyal**.

14. On the second question, the Court of Appeal observed that the decision of **Naved** had been considered twice since the decision of **Pokhriyal** concerning Tier 4 Students and deficiencies in the CAS (**Rahman v SSHD** and **EK (Ivory Coast)**). In both cases the decision of **Naved** was distinguished and thus concluded that where a Tier 4 Sponsor fails to provide evidence via a CAS which is required to enable the student to secure the necessary points, there is no obligation founded in fairness which obliges the Secretary of State to further investigate with the Sponsor or to inform the student (see the decision at [58]). The Court of Appeal went on to consider the decision of **Naved** and **Rahman** at paragraphs [39] and [40] of that decision and reached the conclusion at [42]:-

> "It follows, in my judgment, that both **Rahman** and **EK (Ivory Coast)** are binding authority on the question whether the Secretary of State should, as a matter of fairness, give notice to an applicant for leave to remain or the Tier 4 Sponsor that she considers there to be a deficiency in the CAS before making an adverse decision on that basis. There is no such obligation."

15. Thus Mr Malik conceded that the basis upon which the grounds were advanced when seeking permission were no longer arguable.

16. However in his oral submissions he raised an alternative argument; that whilst the there is no general obligation on the Secretary of State to either contact the Appellant or the Sponsor before deciding the application, each case was "fact sensitive" and that on the particular facts of this appeal the Appellant could demonstrate there was a duty of fairness upon the Secretary of State to contact either her or the Tier 4 Sponsor before refusing the application for leave to remain and therefore her appeal before the First-tier Tribunal should have succeeded.

17. In this respect he advanced the following argument. The Appellant had set out in her application form at page 5 the circumstances in which she had been refused leave to remain following a previous application made in January 2014. The form recorded the following:-

> "I applied for leave to remain on 20th January 2014 and got refused despite being awarded the 40 points, on the grounds that I was not allowed to change Sponsor without notifying UKVI. I mentioned in a cover letter with my previous application that I did not change my Sponsor but studied a programme alongside my main study. I finished the supplementary programme but could not complete the main programme as London College of Care Education faced difficulties with UKBA and subsequently lost sponsorship. When the college informed me that they were revoked I applied to study under sponsorship of a different institute recently. Therefore my previous study of HND in Business was a supplementary study with my main programme of Diploma in Health and Social Care at College of Care Education. I could not complete the certificate because my Sponsor, College of Care Education lost their licence and was terminated. Therefore the grounds of refusal were incorrect according to my understanding."

18. Mr Malik submitted that in the circumstances where the Appellant had said that she had made an earlier application and the decision was unjustified and thus unlawful and the CAS on its face was valid until 21st July 2014, the Secretary of State was obliged to give notice to her on the basis that the Appellant could not have been expected to understand that the CAS could not be used again. Consequently the submission he made was that this particular case could be distinguished on its facts.

19. As we have set out above whilst Mr Malik realistically accepted what was set out in the decision of **Kaur** at [42], he sought to distinguish this particular case on its own facts. We accept as a statement of general principle that the Immigration Rules do not exclude the general public law duty to act fairly which rests on the Secretary of State in exercising her functions and that the context of the duty to act fairly varies according to the particular decision making context in which it falls to be applied (see **EK (Ivory Coast)** at [27]) and as Mr Malik submits, each case is "facts sensitive". However, on the particular facts of this case and the context in which the decision was reached, we do not find that they demonstrate that there was any breach of the Secretary of State's duty to act fairly in

considering the application for leave to remain. We have reached that conclusion for the following reasons.

20. The context and background in which the public law duty of fairness operates in the points-based system is conveniently summarised in the decision of **EK (Ivory Coast)** at [28-31] as follows:-

> "28. The PBS is intended to simplify the procedure for applying for leave to enter or remain in the United Kingdom in certain classes of case, such as economic migrants and students. This is to enable the Secretary of State to process high volumes of applications in a fair and reasonably expeditious manner, according to clear objective criteria. This is in the interests of all applicants. It also assists applicants to know what evidence they have to submit in support of an application.
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> 29. As Sullivan LJ observed in Alam, it is an inherent feature of the PBS that it 'puts a premium on predictability and certainty at the expense of discretion' (para. [35]). Later, at para. [45], he said:
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> > '… I endorse the view expressed by the Upper Tribunal in Shahzad [Shahzad (s 85A: commencement) [2012] UKUT 81 (IAC)] (paragraph 49) that there is no unfairness in the requirement in the PBS that an applicant must submit with his application all of the evidence necessary to demonstrate compliance with the rule under which he seeks leave. The Immigration Rules, the Policy Guidance and the prescribed application form all make it clear that the prescribed documents must be submitted with the application, and if they are not the application will be rejected. The price of securing consistency and predictability is a lack of flexibility that may well result in "hard" decisions in individual cases, but that is not a justification for imposing an obligation on the Secretary of State to conduct a preliminary check of all applications to see whether they are accompanied by all of the specified documents, to contact applicants where this is not the case, and to give them an opportunity to supply the missing documents. Imposing such an obligation would not only have significant resource implications, it would also extend the time taken by the decision making process, contrary to the policy underlying the introduction of the PBS.'
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> 30. These comments were echoed by Davis LJ in giving the lead judgment in Rodriguez, at para. [100].
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> 31. This context informs the way in which the general public law duty of fairness operates in relation to the PBS. The duty supplements the PBS regime, but ought not to be applied in such a manner as to undermine its intended mode of operation in a substantial way. Application of the duty of fairness should not result in the public benefits associated with having such a clear and predictable scheme operating according to objective criteria being placed in serious jeopardy."

21. On the facts of this case it could not be said that the grounds upon which the application was refused could not have been known to the applicant or the Tier 4 Sponsor. We have set out earlier in this determination the Rules which governed the application and in particular the notes to accompany Table 16 in which it was stated at:-

116. A CAS will only be considered to be valid if:

(a) - (d) …

(ea) the migrant must not previously have applied for entry clearance, leave to enter or leave to remain using the same CAS reference number where that application was either approved or refused (not rejected as an invalid application, declared void or withdrawn)."

22. Notwithstanding that, on its face, the CAS was valid until 21st July 2014, it is plain from 116 (ea) that, where an applicant has previously applied for entry clearance and that application had been refused (as it was in this Appellant's case) the applicant must not use the same CAS in a subsequent application. It could not arguably be said that the Secretary of State bore any responsibility for any error which resulted in leave being refused (as on the particular facts of the case of **Naved**). Nor could it arguably be said that the CAS was deficient in its contents. It was a document that the Rules stated would not be valid for the purposes of the application if it had been used in an earlier application which had been refused.

23. Whilst Mr Malik sought to distinguish the facts on the basis that the earlier decision had not been a lawful or a justified decision, that has not been demonstrated to be the case. Whilst the applicant made reference to her previous application and that "the grounds of refusal were incorrect" we observe that no challenge was subsequently made at the time to that decision on the grounds that it was unlawful either by way of any application for judicial review, or by way of any application of reconsideration to the Secretary of State. Similarly, it had not even been argued before the First-tier Tribunal (see paragraph 24 of the decision). Thus on the particular factual circumstances of this case, we do not consider that it could properly be said that there was any public law duty of fairness upon the Secretary of State to require her to contact either the Appellant or the Tier 4 Sponsor before making a decision on the application for further leave to remain as it was plain that this was not a valid CAS.

24. Whilst the First-tier Tribunal did not have the benefit of **EK (Ivory Coast)** or the decision in **Kaur**, we are satisfied it was open to the judge to reach the conclusion on the facts of this case that there was no procedural or any unfairness on the part of the Secretary of State and that the appeal was properly dismissed. The Appellant therefore has not demonstrated any error of law in the decision of the First-tier Tribunal and the decision shall stand.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law in its decision and the decision shall stand.

No anonymity direction is made.

Signed Date 19/11/2015

Upper Tribunal Judge Reeds

We have dismissed the appeal and therefore there can be no fee award.

Signed Date 19/11/2015

Upper Tribunal Judge Reeds