



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA028852015;  
IA028882015; IA028912015

THE IMMIGRATION ACTS

Heard at Field House  
On 14 March 2016

Determination Promulgated  
On 24 May 2016

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

MR SUMIT KATYAL+2

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Claire Litchfield, Counsel, instructed by Haque and Hausman  
For the Respondent: Mr Seb Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order

pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.

2. The appellant appeals against the decision of the First-tier Tribunal (Judge Powell) dismissing the appellant's appeal against a decision taken on 24 December 2014 to refuse to grant further leave to remain as a Tier 4 (General) Student Migrant.

### **Introduction**

3. The appellant is a citizen of India born in 1982. He was variously granted leave to enter and remain as a student from 6 January 2009 to 27 April 2013. He submitted an application on 24 April 2013 for a visa following his enrolment at Grenville College, London. The college lost its licence and on 18 September 2014 the respondent wrote to the appellant giving him 60 calendar days to find an alternative college. He then obtained a conditional offer of a place at Unipro College but needed to take an additional English test. He did not have his original passport and so was not allowed to sit the test booked on 14 February 2015. He paid £2000 to Unipro College which was not refunded. The appellant claims that his representatives, ACM, wrote to the respondent on 20 November 2014 enclosing the conditional offer from Unipro College and advising that the college would issue a CAS once he had obtained his IELTS test certificate. His test was cancelled and ACM wrote again to the respondent requesting the return of his original passport.
4. The Secretary of State did not accept that the requirements of paragraph 245ZX(c) were met because the CAS submitted was assigned by Grenville College and that college was not listed as a Tier 4 sponsor as of 19 December 2014. No valid CAS had been submitted with the application.

### **The Appeal**

5. The appellant appealed to the First-tier Tribunal and attended an oral hearing at Newport on 15 September 2015. He was represented by Ms Vatish, Counsel. The First-tier Tribunal found that the letter dated 20 November 2014 did not request the return of the original passport or complain about any delay in doing so. Nor did it state that Unipro or any other body were not prepared to accept the certified copy which had been provided. No further letter from ACM could be found on the respondent's file. The letter of 20 November 2014 had not been responded to but that was not the normal approach taken by the respondent. Nor was it the cause of the appellant's difficulty because there was no request for the passport to be returned. There was no direct evidence that the absence of the original passport caused the appellant to be unable to take the language test.

### **The Appeal to the Upper Tribunal**

6. The appellant sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law by failing to make clear credibility findings and findings in respect of the documents submitted by the appellant. The judge

failed to apply the common law principle of fairness. The appellant had found himself to be in a predicament and the remedy lay with the respondent but they failed even to respond. The judge had failed to appreciate that tighter measures might be in place as a result of the ETS/TOEIC scandal and original passports were required.

7. Permission to appeal was granted by First-tier Judge Cruthers on 2 February 2016. The crux of the appellant's case was that he was not able to take an English language test because all test providers now require the candidate's original passport and the respondent would not release it to him. It was arguable that the judge had not adequately dealt with the argument that in those circumstances the refusal breached principles of fairness.
8. In a rule 24 response dated 5 February 2016 the respondent submitted that the judge had not materially erred in law. At paragraph 15(K) it was accepted by the appellant that the e-mails refusing him entry were after the refusal. At paragraphs 20 and 28, the judge did not accept that the letter from ACM requested the passport to be returned to the appellant. At paragraph 33 of the decision, the judge did not accept the appellant's enquiries with universities about taking the language test without his original passport were genuine because he was already out of time by that stage.
9. Thus, the appeal came before me

### **Discussion**

10. Ms Litchfield submitted that the appellant needed time to sit an English test and the letter of 20 November 2014 requested that the decision should be held until he had sat the test. The appeal is based on the fact that the respondent should have returned the passport. The judge found that there was no request for the passport but the respondent knew that the appellant could not take the test without the original passport. There was no response from the respondent to the letter of 20 November 2014 and the respondent then unfairly refused the application on 24 December 2014. The exam was not too far in the future and the application was refused unfairly. The unfairness issue was not adequately dealt with at paragraph 38 of the decision because the lack of response from the respondent did cause the appellant difficulty. The judge did not adequately deal with that issue – just saying that was not the normal approach. The appellant has still not been able to take the English language test because the exam centres will not accept a certified copy of the passport and the respondent has the appellant's passport.
11. Mr Kandola submitted that there was no material error of law. The fairness issue was dealt with at paragraphs 11-12 of the decision. There had already been numerous 60 day extensions. The appellant should have got back to the respondent with a CAS by November 2014. The test was not booked until February 2015. The appellant was asking for a fourth 60 day extension. The judge dealt with the chronology and the fairness of the application. At paragraph 20 of the decision the judge found that there

was no request for the passport. This was a comprehensive decision for a simple student matter.

12. Mr Kandola confirmed that it was not apparent from the file whether the caseworker was aware of the letter of 20 November 2014. The decision was put on hold in September 2014 and then reviewed on 24 November 2014. There was a further hold until 8 December 2014 when documents were linked to the file, documents were awaited on 9 December 2014 which were linked on 15 December 2014 and then the application was refused on 24 December 2014.
13. Ms Litchfield submitted in reply that the test was booked before 20 February 2015 but that was the earliest date that the appellant could sit the language test. The issue was not whether Unipro College would accept certified copies but whether the exam centre would accept certified copies. The IELTS application form says that candidates must have a current passport to prove identity. Other e-mails say that only the original passport would be accepted. The appellant says that he telephoned the respondent to ask for the original passport but there is no documentary evidence to support that claim.
14. I am satisfied that the findings at paragraphs 29-37 of the decision were properly open to the judge. However, the key issue in this appeal is the letter from ACM dated 20 November 2014. The judge correctly identified at paragraph 38 of the decision that the letter contained no request for the original passport to be returned. However, the letter did confirm that the language test was booked for 14 February 2015 and requested that the decision should be held until the English language certificate and new CAS had been submitted to the respondent. It is common ground that the respondent failed to respond to the letter and there is no mention of the letter in the refusal decision. There is no evidence on the respondent's file that the letter was ever considered.
15. I have considered Patel (consideration of Sapkota - unfairness) India [2011] UKUT 00484 (IAC) and Thakur (PBS decision - common law fairness) Bangladesh [2011] UKUT 00151 (IAC). I find that the failure to consider and respond to the letter of 20 November 2014 amounted to a breach of the common law duty of fairness, in the particular circumstances of this case. There was no obligation on the respondent to accede to the request for the decision to be held but there was an obligation to consider the request to hold the decision until after 14 February 2015 and to evidence the reasons for rejecting the request and refusing the application without further evidence. The judgement is generally thorough and carefully considered but I accept the submission that the common law duty of fairness was not adequately considered at paragraph 38. That is a material error of law.
16. Thus, the First-tier Tribunal's decision to dismiss the appellant's appeal under the Immigration Rules involved the making of an error of law and its decision cannot stand.

**Decision**

17. Consequently, I set aside the decision of the First-tier Tribunal. I remake the decision by allowing the appeal to the extent that no valid decision has yet been made in respect of the appellant's application. The respondent must now make a fresh decision in due course. The respondent should give proper consideration to the possibility of returning the original passport to the appellant to enable him to take the English language test and submit a new CAS before the fresh decision is made.

Signed



Date 19 May 2016

Judge Archer

Deputy Judge of the Upper Tribunal