IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11795/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st January 2016	**On 18th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RENTON

Between

KRINABEN ATULKUMAR PATEL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Sharma, Counsel instructed by Imperium Group Immigration Specialists
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant is a female citizen of India born on 13th January 1987. She first arrived in the UK on 22nd October 2009 when she was given leave to enter as a Tier 4 (Student) Migrant until 10th June 2012. That leave was subsequently extended until 6th March 2014. On 11th March 2014 the Appellant applied for further leave to remain in the same capacity. That application was not decided until 12th March 2015 when it was refused for the reasons given in the Respondent's letter of that date. The Appellant

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appealed, and her appeal was decided without a hearing by First-tier Tribunal Judge Boylan-Kemp (the Judge) on 26th June 2015. She decided to allow the appeal for the reasons given in her Decision dated 16th July 2015. The Respondent sought leave to appeal that decision, and on 10th November 2015 such permission was granted.

Error of Law

2. I must first decide if the decision of the Judge contained an error on a point of law so that it should be set aside.

3. The application for leave to remain was refused because the Appellant failed to score sufficient points under paragraphs 245ZX(c) and (d) of the Statement of Changes in Immigration Rules HC 395. This was because the Confirmation of Acceptance for Studies (CAS) provided by the Appellant was not valid as the Tier 4 Sponsor no longer held a Tier 4 Sponsor Licence by the time the Appellant's application was decided. In December 2014 the Appellant had been allowed 60 days to obtain a new Sponsor but had not provided a new CAS.

4. The Judge allowed the appeal solely because she decided that in all the circumstances the Respondent had failed to exercise properly her discretion under paragraph 322(9) of HC 395.

5. At the hearing, Mr Whitwell argued that the Judge had erred in law. The provisions of paragraph 322(9) of HC 395 had no application to the decision under appeal, and had not been applied by the Secretary of State in refusing the application.

6. In response, Mr Sharma acknowledged that paragraph 322(9) of HC 395 should not have been applied by the Judge, but I should decide to refer the original application of the Appellant to the Secretary of State again for the reasons set out by the Judge in paragraphs 28 and 29 of her Decision. The Judge had been misled by a reference to paragraph 322(9) of HC 395 in a letter from the Respondent to the Appellant dated 31st July 2014 appearing at page 36 of the Appellant's Bundle.

7. I find an error of law in the decision of the Judge so that it should be set aside. It has never been in dispute in this appeal that the Appellant failed to satisfy the requirements of paragraph 245ZX(c) and (d) of HC 395. The Judge allowed the appeal only on the basis that in her conclusion, the Secretary of State wrongly exercised the discretion given to her by paragraph 322(9) of HC 395. However, that paragraph has no application to an appeal of this nature, and was not a reason given by the Respondent for refusing the original application for leave to remain.

8. I then proceeded to remake the decision of the First-tier Tribunal. In this respect I heard further submissions from the representatives. Mr Whitwell asked me to dismiss the appeal which in his submission could not succeed as the Appellant had failed to submit a valid CAS at the relevant time.

9. In response, Mr Sharma again accepted that the appeal could not succeed under the Immigration Rules owing to the absence of a valid CAS.

However, he referred to the history of the original application as set out in the Judge's Decision and the Respondent's failure to respond to correspondence from the Appellant. The Appellant had been prejudiced by the various delays. The Secretary of State should therefore be asked to reconsider the original application as the principle of unfairness applied.

Decision and Reasons

10. I remake the decision in the appeal by dismissing it. It has never been in dispute in this appeal that when the original application for leave to remain was decided, the Appellant had not submitted a valid CAS in that by then the Sponsor did not hold a Tier 4 Sponsor Licence. Therefore the Appellant failed to score sufficient points under paragraph 245ZX(c) and (d) of HC 395. The issue of unfairness is not relevant because there is no decision to remove the Appellant, but in any event notwithstanding the history of delays by the Respondent, the Appellant was notified that her Sponsor no longer held the requisite Licence and she was given the usual period of 60 days to rectify that situation. This the Appellant failed to do. She therefore cannot complain of any unfairness.

Decision

11. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

    I set aside that decision.

    I remake the decision in the appeal by dismissing it.

Anonymity

12. The First-tier Tribunal did not make an order for anonymity. I was not asked to do so, and indeed I find no reason to do so.

Signed Date

Deputy Upper Tribunal Judge Renton

TO THE RESPONDENT
FEE AWARD

In the light of my decision to remake the decision in the appeal by dismissing it, there can be no fee award in favour of the Appellant, and the decision of the Judge in this respect is remade accordingly.

Signed Date

Deputy Upper Tribunal Judge Renton