Upper Tribunal
(Immigration and Asylum Chamber) Appeal No: IA/12315/2015, IA/12316/2015

IA/12320/2015,

IA/12325/2015

At North Shields
on 11th July 2016

Decision & Reasons Promulgated
on 19th July 2016

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

MRS NAYANA SUDARSHANI WEWALAGE + 3
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs. M.Clechorn, Counsel, instructed by VMD Solicitors.
For the Respondent: Mr Diwacz, Home Office Presenting Officer.

CONSENT ORDER FURTHER TO RULE 39 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008.

1. The appellant is a national of Sri Lanka. She was granted leave to enter as a Tier 4 student from 22 January 2011 to 31 December 2014. She arrived in February 2011 accompanied by her husband and their two children, now aged 17 and 12, as her dependents.

2. She enrolled at the London Institute of Management and Technology. There was a preliminary course on English from 22

February 2011 to 11 August 2011.This led into a full-time degree course in business studies. This was to start in September 2011 and run until August 2014.

3. The appellant did not complete her studies as the college closed the facility in July/August 2014.

4. The policy of the respondent is that where a student, through no fault of their own, cannot complete a course a 60-day notice is issued. This is to give them an opportunity to enrol in an alternative course. The principle behind this was set out in the decision of Alam –v- SSHD [2012] EWCA Civ 960.

5. On 19 December 2014 the appellant applied for leave to remain outside the rules. This was refused on 16 March 2015. The refusal letter makes no reference to the 60-day policy. It notes that the appellant was asking that the respondent exercise discretion outside the rules .This was on the basis of compelling circumstances: namely, that she had not been able to complete her studies as the college's licence had been suspended and she had not been able to obtain a new CAS.

6. The refusal did not find compelling circumstances existed. Appendix FM of the rules did not assist as her husband was not a British national nor was he settled. The eligibility criteria in respect of her children did not apply. With regard to paragraph 276 ADE, no significant obstacles to her return were identified. No basis for a freestanding article 8 assessment was identified.

7. The appellant's appeal against that decision was heard by First-tier Immigration Judge Bircher on the 10th July 2015. The 60 day provision was referred to at paragraph 16 of the decision :

> There is no indication in the papers before me to demonstrate that the first appellant was offered a period of 60 days within which she was required to find an alternative educational institution…

The judge referred to case law on this issue. Paragraph 24 states:

> There is no documentation before me from either party to demonstrate that the first appellant was afforded a period of 60 days to secure a student placement …

8. Having noted the issue the judge did not go on to deal with it beyond the comment at paragraph 24 that it may be the case the 60 day period had already been offered to the appellant. The judge then dealt with the appeal in the context of appendix FM and EX 1

and paragraph 276 ADE. The judge concluded that grounds did not exist for a freestanding article 8 assessment.

9. The application for permission was on the basis that there was no finding as to whether the respondent's policy had been applied. A failure by the respondent to follow her policy meant the decision was wrong in law.

10. At today's hearing Mrs. Clechorn referred to paragraphs 16 and 24. Mr Diwacz accepted that the respondent could not demonstrate a 60-day notice had been issued. Mrs. Clechorn argued that as the respondent could not demonstrate the policy had been applied the proper course should have been for the judge to refer the matter back to the respondent. The judge's failure to recognise this tainted the consideration of article 8. Mr Diwacz accepts the merit of Mrs. Clechorn's argument

Consent order

11. Both parties are in agreement that there is a material error of law in Judge Bircher's decision and cannot stand. The matter should be referred back to the respondent for the issue of a 60-day notice. Any subsequent decision will carry attendant appeal rights.

Deputy Upper Tribunal Judge Farrelly
11th July 2016