Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/00187/2016
IA/00190/2016

THE IMMIGRATION ACTS

Heard at Bradford
On 16th January 2018

Decision & Reasons Promulgated
On 7th February 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

JIMISHA PINAKINBHAI PATEL
TEYASHKUMAR GHELABHAI PATEL
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr R Parkin (Counsel) instructed by Eagles Solicitors
For the Respondent: Mrs R Pettersen, HOPO

DECISION AND REASONS

1. These are the appellants' appeals against the decision of Judge Fox made following a hearing at North Shields on 19 December 2016.

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Background

2. The appellants are citizens of India born on 15th June 1987 and 25th May 1983 respectively.

3. On 14th May 2014 the first appellant made a combined application for leave to remain in the UK as a Tier 4 (General) Student Migrant under the points-based system which was refused with a right of appeal. The appeal was allowed to the extent that it be remitted back to the Secretary of State on the basis that the decision was not in accordance with the law and for a new decision to be made, and for the appellant to be allowed 60 days to pass an English language test and to obtain a CAS.

4. On 6th November 2015 the first appellant made a fresh application, within the specified period, which was refused on the basis that she had used a document which had been found to be false or forged in accordance with paragraph 322(1)(a) of the Immigration Rules and paragraph 245ZX(a) of the Immigration Rules.

5. She had applied for a course offered by St Leonard's College and paid course fees in excess of £7,000. It subsequently transpired that the course offer did not exist and nor did the college. The appellant reported the matter to the police and her solicitors referred it to the National Fraud Intelligence Bureau.

6. The judge found that the appellant had submitted her application in good faith and was not complicit in any dishonesty or fraud. Nevertheless he dismissed the appeal under paragraph 322(1)(a) and was not satisfied that there was an arguable case to be made for leave to be granted outside the Immigration Rules or in respect of the Human Rights Act 1998.

The Grounds of Application

7. The appellants sought permission to appeal, which was initially refused by First-tier Judge O'Garro but subsequently granted by Upper Tribunal Judge McWilliam. The Grounds of Appeal set out the history of the claim and argue both that Judge Fox's analysis of the appellant"s case under Article 8 was inadequate and that the judge had not considered the respondent's public law duty to act fairly.

Submissions

8. At the hearing Mr Parkin produced both the case of Patel (revocation of sponsor licence – fairness) India [2011] UKUT 00211 and the respondent's guidance in relation to cases where a Tier 4 Sponsor Licence has been revoked so that the CAS issued by the sponsor will become invalid. He accepted that the appellant could not meet the requirements of the Immigration Rules but submitted that, in line with the guidance, the respondent ought to have granted 60 days so that the appellant could find another college.

9. Mrs Pettersen submitted that the appellant could not meet the requirements of paragraph 322(1)(a), which required a refusal where false documents had been

submitted whether or not to the applicant's knowledge and reminded me that the appellant had already had a period of 60 days in order to submit a further application.

Findings and Conclusions

10. It does not appear as though the fairness point pursued by Mr Parkin at the hearing was made before the Immigration Judge. Ordinarily, a determination should not be set aside on the basis of arguments which were not put. However in this case it is a Robinson obvious point which ought to have been pursued by the appellant's representative.

11. Accordingly, the determination is set aside because relevant matters were not considered.

Findings and Conclusions

12. The appellant was found by the judge to be a credible witness in that he accepted unreservedly that she had been the innocent victim of fraud.

13. In Patel it was held that

> "Where the applicant is both innocent of any practice that led to loss of the sponsorship status and ignorant of the fact of such loss of status, it seems to us that common law fairness and the principle of treating applicants equally mean that each should have an equal opportunity to vary their application by affording them a reasonable time with which to find a substitute college on which to base their application for an extension of stay to obtain the relevant qualification. In the curtailment cases express Home Office policy is to afford 60 days for such application to be made."

14. Paragraph 11 of the Tier 4 policy guidance current at present, and it was not argued by Mrs Pettersen that it did not apply at the relevant date, states

> "If you have applied for leave to remain and the only ground for refusing your application is that your CAS has become invalid following the revocation of your Tier 4 Sponsor's Licence, where your revoked sponsor is an overseas HEI, embedded college offering pathway courses or an independent school, you will be given 60 days to regularise your stay or leave the UK".

15. The respondent does not contend that there was any material difference between the position of this appellant and those colleges which have been removed from the register following the revocation of the sponsor's licence. This college was on the register at the time that the appellant applied. The fact that it would appear that she applied to an institution which was in fact passing itself off as another institution is not material in this context. She relied on information supplied by the respondent in making the application and acted in good faith. After consideration, Mrs Pettersen did not oppose the submission that the appellant ought to be granted an opportunity to make another application within a 60 day period.

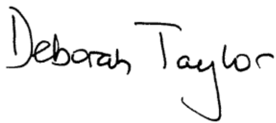
16. There is no error in the judge's consideration of Article 8. He reached a decision plainly open to him. Neither is there any error in his conclusion that the appellant could not meet the requirements of the Immigration Rules.

17. However the respondent did not apply the guidance which she set out on her website and the judge's decision is inconsistent with the Upper Tribunal decision in Patel.

Decision

The original judge erred in law and his decision is set aside. It is remade as follows. The appellant's appeal is allowed insofar as the respondent's decision is not in accordance with the law and remains outstanding, for a fresh decision to be made in line with the guidance set out in the respondent's website.

No anonymity direction is made.



Signed Date 5 February 2018

Deputy Upper Tribunal Judge Taylor