**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/33619/2015

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
| --- | --- |
| **On 1 December 2017** | **On 23 January 2018** |

**Before**

**UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**MR ROHIT SINGH MEHTA**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr L Lourdes, Counsel
For the Respondent: Mr P Nath, Home Office Presenting Officer

## DECISION AND REASONS

### The Appellant

1. The appellant appeals against a decision of First-tier Tribunal which dismissed his appeal on 15th December 2016. The grounds explain that the appellant is an Indian national and he appealed a decision of the Secretary of State dated 9 October 2015 denying him further leave to remain in the UK as a Tier 4 (General) Student. The application was refused on the basis that the appellant did not submit a valid Confirmation

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of Acceptance of Studies (CAS). The relevant provisions invoked under the Immigration Rules were paragraph 245ZX.

Grounds for Permission to Appeal

2. It was asserted in the grounds for permission to appeal that the appellant had elaborated to the First-tier Tribunal that the respondent's decision was deficient as no discretion was afforded to him despite his compelling circumstances such as the 'rampant revocation of sponsor licences'. In line with the public duty of fairness he should have been granted further limited leave to remain in the United Kingdom. It was submitted that the appellant was unable to file a valid CAS because his college had had its licence revoked and he had not managed to secure an alternative CAS.

3. The proceedings recorded by the judge featured between paragraphs 2 and 3 of the determination and dealt with the submissions only and the judge failed to consider the evidence relied on and the serious consequences of the refusal and the strength of his case. Further, a wider assessment should have been carried out in respect of Article 8 rights.

4. Three specific grounds were advanced in the application for permission to appeal, that is:

(i) Failure to consider a fairness point; the appellant had undergone unfortunate circumstances regarding the sponsor's licence being revoked and this was not the fault of the appellant and this should have been given due weight

(ii) Erroneous finding on a private life, the First-tier Tribunal Judge did not carry out the requisite balancing exercise as required under **Razgar v SSHD** [2004] UKHL 27. His conclusions under Article 8 were incomplete

(iii) Proportionality of removal and public interest: The grounds of appeal submitted that the judge did not conduct an assessment under Section 117A-D and the judge proceeded on very little consideration of the law and a curtailed assessment of facts when determining the appeal. For example the appellant was law abiding and could speak English and the judge failed to give proper consideration to the law and the facts.

5. The appellant also took issue with the judge's statement that there was "no issue of human rights or other procedural unfairness".

6. The application was made late and the circumstances of the delay explained. The appellant was represented at the hearing by Lexpert Solicitors and on 31 October 2016 the Tribunal was served with a letter of authority and a bundle containing documents supporting the appeal. Following the appeal the appellant's representative made queries to chase up the determination but no correspondence from the Tribunal was received. It transpired that the representatives were not on record as acting and thus the copy of the determination was requested but only finally received on 5 September 2017.

7. The First-tier Tribunal Judge granting permission merely stated that

> *"a wider assessment should have been carried out in respect of the appellant's Article 8 rights and proportionality of removal is arguable because of the paucity of reasoning in the judge's decision".*

Conclusions

8. The application for permission to appeal was nine months out of time. That point was not taken by the First-tier Tribunal Judge in granting permission and nonetheless although the delay in filing was egregious, I note the explanation and I have considered the circumstances.

9. Despite Mr Lourdes' assertion at the hearing before me that the First-tier Tribunal had been provided with evidence by way of fax on 31 October 2016 and one day prior to the hearing before Judge Wilsher the fax transmission that he provided me with was dated 13 September 2001. There is no record on file of any documentation being provided to the Tribunal by Lexpert Solicitors and the further documentation and witness statements provided to me in the Upper Tribunal were by way of a covering letter of 30 November 2017 and 22 November 2017. Both of those bundles postdate the hearing before the First-tier Tribunal by nearly a year.

10. I do note that curiously the appellant was nonetheless represented at the First-tier Tribunal hearing and also he confirmed that he was in attendance.

11. The appellant is a national of India, born in 1988 and entered the United Kingdom in May 2010 as a Tier 4 (General) Student Migrant. He applied to extend his leave but this was refused on 7 March 2013 with a right of appeal. His appeal was withdrawn and the matter remitted back to the Secretary of State who allowed him 60 days to find fresh sponsorship. On 16 December 2013 the appellant lodged a fresh application with a CAS issued by Lee Valley College. Their licence was then revoked on 11th August 2014. On 3 August 2015 the appellant was given a further 60 days to find a sponsor and produce a CAS after his solicitors wrote to the respondent; the extension expired on 2 October 2015. The Secretary of State's decision was made on 9 October 2015 after the two extensions had been granted.

12. The only CAS that was before the respondent was that of Lee College. The appellant was given the opportunity to find a fresh sponsorship and a new CAS. As the decision stated, as at the decision of 9 October 2015, no further evidence of a new Tier 4 Sponsor or CAS had been submitted. The application was refused under paragraphs 322(9), 245ZX (a) and 245ZX (c) of the Immigration Rules.

13. Judge Wisher set out the appellant's circumstances and the nature of the appeal. The First-tier Tribunal Judge correctly stated in his decision that the relevant law was at paragraph 245ZX and the appellant was required to file a Confirmation of Acceptance for Studies. The appellant accepted that no such valid CAS was lodged because Lee Valley College had its licence revoked and he had not managed to secure an alternative. The refusal was therefore correct in terms of the law.

14. As the judge reasoned, the fact that the respondent had given the appellant a further 120 days to secure a CAS did not engage unfairness. The judge referred to the relevant guidance which suggested that a single instance in which a college is suspended could be overlooked but this appellant had already had one college suspended prior to the Lee Valley suspension.

15. The fact is that this appellant did not produce a CAS and **EK (Ivory Coast) v SSHD EWCA [2015] Civ 1517** has made clear that the Rules in this respect are firm and even where there is cancellation of a CAS without notification to the appellant, and through no fault of the appellant, the application can be refused without further notice, because of the importance of maintaining clarity and predictability in the points based scheme. The Secretary of State had afforded the appellant in this case further opportunity to secure a valid CAS and he had not done so. As **EK (Ivory Coast)** makes clear it is the responsibility of the appellant to find a *bona fide* institution and he had not done so. As explained at paragraph 34

> *'The fact that there is scope for applicants to seek protection against administrative errors by choosing a college with a good reputation and checking the contractual position before enrolling is of some relevance to the fair balance to be struck between the public interest in the due operation of the PBS regime and the interest of an individual who is detrimentally affected by it'.*

16. The judge in this case cannot be criticised for applying the relevant law. The failure to comply with the Immigration Rules is a relevant fact in the Article 8 assessment.

17. I am not persuaded that there were wider issues that should be raised or analysed by the judge in respect of Article 8 or the approach to private life was legally flawed. The judge clearly addressed the issue of any procedural unfairness and set out the facts, referring to the time extensions to obtain a further CAS, and found that there was none. The appellant acknowledged that the Home Office had indeed returned his passport and granted him an extension of time until 2 October 2015 and there was no unfairness in this respect. The judge gave full reasons in accordance with **MK (duty to give reasons) Pakistan [2013] UKUT 00641**.

18. In relation to the findings on Article 8 it was suggested that the judge had not taken into account the appellant's witness statement. I find there is no evidence that any witness statement was before the judge and even if it were the witness statement that I was referred to was dated 31 October 2016 does no more than explain that the appellant came to the UK as a student and had spent considerable funds in pursuing his academic career.

19. His father financed his higher education and he had always been very focused on academic life and that his current position was unjustified. This witness statement, which I do not accept was before the judge, adds absolutely nothing more to the appellant's case. Indeed the judge noted that the appellant's private life was arguably engaged but was <u>not</u> "*in these circumstances a sufficiently weighty matter to outweigh the proportionate interests of maintaining immigration control".* The judge did take into account the relevant facts and circumstances and was entitled to make that finding.

20. On the facts of this case the judge was unarguably correct in his approach to private life having accepted that it may have been engaged. Article 8, however, is not a general dispensing power and that approach has been underlined by <u>**Patel & Others v Secretary of State for the Home Department**</u> **[2013] UKSC 72** and <u>**Nasim and others (Article 8) [2014] UKUT 00025 (IAC)**</u> .

21. Nor was there any arguable unfairness in the determination and indeed, as the Secretary of State in her Rule 24 response stated, <u>**Marghia**</u> **(procedural fairness) [2014] UKUT 366** stated, "the common law duty of fairness is essentially about procedural fairness". There is no absolute duty of common law to make decisions which are substantially fair. The court will not interfere with the decisions which are objected to as being substantively unfair, except where the decision in question falls foul of the <u>**Wednesbury**</u> test i.e. that no reasonable decision maker or public body could have arrived at such a decision.

22. It may indeed have been an error on the judge's part to have failed to address Section 117 but that cannot be said in any way to be material. Speaking English and not being financially dependent on the public purse are considered neutral factors, see <u>**AM**</u> **(S 117B) Malawi [2015] UKUT 0260 (IAC)** and contrary to the grounds the appellant did indeed have a precarious immigration status from the moment of entry into the UK.

23. The failure to consider Section 117 was therefore to the appellant's advantage. Nonetheless the judge gave adequate reasoning which was succinct and cogent and in line with <u>**Shizad (sufficiency of reasons: set aside**</u>**)** [2013] UKUT 00085 (IAC). Reasoning on the central aspects to the claim was made. There is no error of law in his decision with regards to proportionality or otherwise.

24. In my view I am surprised permission was granted in this matter particularly as the issue of the application being made out of time was not addressed. Nonetheless I have implicitly granted permission and considered the circumstances of the case and the decision of the First-tier Tribunal Judge contains no material error of law.

**<u>Notice of Decision</u>**

The First-tier Tribunal made no error of law and the decision shall stand.

No anonymity direction is made.

Signed Helen Rimington 9th January 2018

Upper Tribunal Judge Rimington