Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: IA/00016/2018

THE IMMIGRATION ACT

Heard at Field House **Decision & Reasons Promulgated**

On 8th January 2019 **On 23rd January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

Mr Md Shahin Khondoker

(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Salim of Counsel, instructed by Thamina Solicitors

For the Respondent: Mr Whitwell, Senior Home Officer Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Bartlett promulgated on the 2nd October2018 the judge dismissed the

appellant's appeal against the decision of the respondent to refuse the appellant further leave to remain in the UK as a Tier 4 Student and thereafter leave based on Article 8 of the ECHR rights to family and private life.

2. I have considered whether or not it is appropriate to make an anonymity direction. Having considered all the circumstances I do not consider it necessary to do so.

3. Leave to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Lambert on 22nd October 2018. Thus the case appeared before me to determine whether or not there was a material error of law in the decision.

4. The material part of the grant of leave provides:-

> *3. The grounds take issue with the appeal having been listed for oral hearing after the appellant had requested it to be considered on the papers. The file records that this has been confirmed by the Tribunal on the 17th September. The real issue is whether the judge was in the circumstances entitled, the appeal having been listed, to proceed to hear submissions on behalf of the Respondent (paragraph 2). There is arguable merit in the contention that doing so gave rise to unfairness to the Appellant whether real or perceived and amounted to a procedural error amounting to an error of law.*

Factual background

5. The appellant entered the UK on 15th January 2010 with leave valid as a student until 24th October 2011. On 5th October 2012 the appellant was granted further leave as a student until 13th October 2014.

6. On 26th July 2013 the appellant made a further application for leave to remain as a student on the basis of a CAS issued by London Regal College. On the 20th January 2015 the respondent informed the appellant that the licence of London Regal College had been revoked. The appellant was given 60 days to obtain an alternative sponsor.

7. By the time of the notification the appellant's English test certificate was no longer valid and the appellant required a new English-language test certificate before he could apply for a CAS. The appellant in order to sit the test required his passport which was with the respondent. The respondent provided a certified copy of the passport but the appellant at that stage could only book an English language test outside the 60 days on the 18th April 2016. Ultimately the appellant was not permitted to sit the English Language test as he only had a certified copy of his passport and not the original.

8. By that stage the appellant was outside the 60 day period for submission of a valid CAS to support the existing application. A decision was made to refuse the appellant's application. The appellant appealed. Ultimately by decision of the Upper Tribunal the appellant's appeal was allowed as it was accepted that

the appellant had been prevented from taking an appropriate English language test by reason of the respondent retaining the appellant's passport.

9. In paragraph 8 of the decision by Upper Tribunal Judge Pitt it is suggested that the respondent should allow the appellant a further 60 days *"with the benefit of his original passport"* in order to obtain a new sponsor and CAS. The decision by Judge Pitt is dated 5th December 2016.

10. By decision of 22 December 2017 the respondent again refused the appellant leave to remain in the United Kingdom as a student or otherwise on the basis of Article 8 family and private life and made a decision to remove the appellant by way of directions under section 47 of the Immigration Asylum and Nationality Act 2006.

11. The appellant appealed against the respondent's decision and as indicated the appeal was heard by Judge Bartlett on 18 September 2018. By decision dated 20 September 2018 Judge Bartlett dismissed the appellant's appeal.

12. It is against that appeal that the appellant now seeks to appeal.

Grounds of appeal

13. In challenging the decision of the judge the appellant has raised the following grounds

    (a) The appeal was to be listed as an oral hearing. By request made on 13 September 2018 the appellant requested that the case be heard on the papers. The First-tier Tribunal confirmed in writing on 17 September that the case would be heard on the papers. Despite that the case was heard in an oral hearing on 18 September 2018. In conducting an oral hearing it is submitted that there was unfairness to the appellant and the decision ought to be set aside. Reliance is placed on the case of MM (Unfairness; E & R) Sudan [2014] UKUT 00105. [E & R is a reference to the case of E & R v SSHD [2004] EWCA Civ 49.

    (b) The 2nd issue taken was the fact that the respondent had failed to cooperate and provide the appellant's original passport thereby preventing the appellant from taking the required English-language test or from obtaining a CAS.

    (c) In assessing article 8 it is submitted that the judge has erred in concluding that little weight has to be given to the private life established by the appellant in the UK. Given that the appellant had been in the United Kingdom with lawful residence for 9 years article 8 was clearly engaged and the judge has failed to consider such properly.

    (d) The judge has failed properly to assess the appellant's family life with his Estonian fiancée. The judge states that very little information has been given not even the name of the fiancée and family life is not mentioned in the skeleton argument. Submitted at paragraph 3 of the appellant's

witness statement is a clear reference to the fiancée. No credibility findings are made in respect of the appellant's detailed witness statement.

Error of law

14. At the outset of the hearing before me the appellant's representative withdrew the 2nd ground of appeal. The respondent's representative had disclosed correspondence between the appellant and his solicitor on one side and the respondent on the other, in which it was clear that the original passport had in fact been provided to the appellant. The respondent had clearly been in touch with the appellant and his representative as required by the Upper Tribunal direction. It was accepted in the circumstances that the 2nd ground of appeal was not made out.

15. The appellant's representative in dealing with the 1st ground of appeal placed great reliance upon paragraph 10 of the decision of Judge Bartlett. In paragraph 10 the judge had referred to the respondent's representative having submitted a written skeleton argument. There is no copy of that skeleton argument on the court file. The representative for the respondent was also unable to find a copy of any such written skeleton argument on the Home Office file. There was no record of any such skeleton argument having been submitted beforehand. There is no reference to a skeleton argument in the decision itself other than in paragraph 10.

16. The appellant's representative accepted that if no skeleton argument had been submitted then the mere fact that the respondent's representative at the hearing had relied upon the refusal letter would make no difference to the proceedings as no matter not already before the First-tier Tribunal and the appellant was being relied upon by the respondent.

17. The respondent's representative was arguing that paragraph 10 of the decision was clearly a typographical error and that the judge should have referred to skeleton argument that had been submitted by the appellant. There is a reference to a skeleton argument by the appellant's representative in the decision at paragraph 13. There is no reference anywhere in the decision otherwise to a skeleton argument submitted by the respondent's representative.

18. I asked the appellant's representative why I should not deal with the appeal on the basis of the documentation lodged if I found that there was an error by listing the matter as an oral hearing and by reason of permitting the appellant's representative to submit skeleton argument. The appellant's representative could give no good reason why I should not deal with the appeal on the basis of the documentation lodged.

19. In that respect the skeleton argument submitted by the appellant was seeking to argue that

(a) on 2 June 2017, 6 months after the decision of the Upper Tribunal, the respondent had written to the appellant issuing another 60 day letter, requiring the appellant to obtain a valid CAS within 60 days.

(b) by letter the appellant had written on 22 June 2017 requesting further assistance as he was finding it difficult to find college that would provide him with a valid CAS.

(c) on the 26 June 2017 the respondent refused to provide an extension to the appellant. In the skeleton argument it is alleged that that was despite the direction by the Upper Tribunal Judge that the respondent should liaise with the appellant's legal representatives, the respondent had not liaised as required. (Clearly given the correspondence that could not be maintained).

(d) on the 29th July 2017 asserting that the documentation provided by the respondent was generic in nature, the solicitors were seeking to argue that the appellant an innocent student had been prevented from studying as he could not find a college to providing with a valid CAS.

(e) It is sought to be argued that this is unfair and ultimately that the refusal of 20 December without replying to the letter of the 29th July and without taking account of the direction by the Upper Tribunal was unfair to the appellant.

20. The appellant had entered on a temporary basis as a student and required a valid CAS to be able to extend his leave. The respondent had provided the passport. It was then a matter for the appellant to obtain any necessary English-language test certificate and to obtain a valid CAS. The appellant had had ample opportunity to do so. It is clear from the fact that there was correspondence that the respondent had done all within his power to facilitate the appellant taking the English-language test and applying to colleges for a valid CAS.

21. From the original date of the application 2013 the appellant had had over 4 years in which to obtain the necessary qualifications and CAS. Even if one discounts the initial period, the appellant had had from the decision of the Upper Tribunal in December 2016 until the date of the respondent's letter of 2 June 2017 but even by that stage the appellant still had not obtained a CAS. Thereafter from that date through to the date of decision by the respondent in December 2017 the appellant had not obtained a valid CAS.

22. By the hearing before Judge Bartlett on the 18th September 2018 the appellant still had not obtained a valid CAS. The appellant had had more than enough time to obtain a valid CAS and had not done so. The appellant seeks to argue that it is unfair and that he should have been given more time. As found by Judge Bartlett the appellant had been given more than sufficient time and did not have a CAS. Judge Bartlett has carefully examined the facts and given valid

reasons for finding that the appellant had had more than sufficient time to obtain a valid CAS.

23. Even if there were procedural unfairness and the decision for the reasons set out was set aside, I would have found that the appellant had had more than sufficient time to obtain a new CAS but had not done so and he could not meet the requirements of the rules as a student.

24. Judge Bartlett was under the impression that the appellant had not been furnished with his passport as is evident from paragraph 16 but that was clearly not the case given the correspondence that has now been produced by the respondent's representative.

25. Dealing with the issues the case law cited requires that there be that not only a procedural error but that there be resultant unfairness. In the circumstances presented I do not find that there has been any unfairness.

26. For the sake of completeness I have to say that there being no copy of any written submissions or skeleton argument on behalf of the respondent on file or on the Home Office file that there being a skeleton argument on behalf of the appellant and willing to accept that there was a typographical error and the judge was seeking to refer to skeleton argument submitted by the appellant not the respondent in paragraph 10 of the decision.

27. Even if I were to find that there was a procedural error I would therefore not have found that there was any unfairness. Even if there had been unfairness and I had to reconsider the case, I would find that the appellant had been given every opportunity to obtain a valid CAS but had not done so. The appellant therefore could not meet the requirements of the rules in any event as a student. In those circumstances even if I had found that there was a procedural error constituting an error of law I would have gone on to remake decision and find that the appellant could not succeed under the immigration rules as a student.

28. Turning to the other grounds of appeal, grounds 3, the appellant's representative seeks to argue the judge has erred into assessing the article 8 rights of the appellant. In the bundle of documents submitted by the appellant is a statement from page 1 onwards. In the main that statement deals with the problems that the appellant has experienced in seeking to obtain a CAS. The only reference to any other aspects of private life within that relate to his relationship to his alleged girlfriend, [KM], an Estonian national.

29. With regard to his relationship the appellant indicates that he is living with the lady and suggest that they have been together nearly 2 years. He does not give any details for the start of the relationship; he claims that the lady is working at Ivy Collection; and that she is supporting him. He claims that they intend to marry. There is no statement from [KM]. There is no documentation to confirm that she is working or supporting the appellant. There is no evidence apart

from the appellant's assertions that he is in the relationship with an Estonian national and being supported.

30. Apart from the relationship no aspect of family or private life has been evidenced in any way. The appellant has relied primarily upon his problems with regard to obtaining CAS. It may be difficult to obtain a CAS, but an individual requires such a document in order to be able to continue studying in the United Kingdom.

31. The respondent's representative has relied upon the case of Patel 2013 UKSC 72 specifically paragraph 57 wherein Lord Carnwarth states

> *"It is important to remember that article 8 is not a general dispensing. It is to be distinguished from the Secretary of States discretion to allow leave to remain outside the rules, which may be unrelated to any protected human rights. The merits of the decision not to depart from the rules are not reviewable on appeal: section 86 (6). One may sympathise with Sedley LJ's call in Pankina for 'common sense' in the application of the rules to graduate to have been studying the United Kingdom some years (see paragraph 47 above). However, such considerations do not by themselves provide grounds for appeal under article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8.*

32. In the present circumstances the appellant has been given every opportunity to seek to obtain a valid CAS and comply with the rules. Unfortunate though it is he cannot comply with the rules as a student and in the circumstances whilst it may be a factor to be taken into consideration it is not of itself such as to give a right under Article 8.

33. The 4th ground relates to the judge's assessment of the appellant's relationship with his Estonian fiancée. The suggestion being that the judge has failed to consider the relationship. As pointed out there is no evidence to support the appellant's claims as to the relationship and the fact that the lady is working and supporting the appellant. There is no statement from the fiancée. There are no payslips, rental agreements, bills or other evidence to support the claims of a relationship. The judge in paragraph 23 in assessing whether or not family life existed found that the information provided was insufficient to establish that the relationship was such as to engage family life. In the light of the evidence produced that was a conclusion that the judge was entitled to make on the facts. Further whilst the appellant has been in the UK for 9 years he has not otherwise given any evidence as to any significant aspect of private life other than his desire to finish his studies. There was a means by which he could complete his studies under the rules. Ample time has been given for him to find a sponsor. Accordingly the judge was entitled to conclude that there would be no breach of anyone's private life rights.

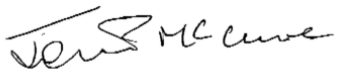
34. Thus having assessed all of the circumstances and taking account of the careful examination of the facts of the present case I find that the judge has in paragraph 10 made a typographical error and that there was no skeleton argument submitted on behalf of the respondent. In the light of that a submission that the respondent relied upon the refusal letter and no other submissions being made I find is not such as to give rise to any procedural error and is not such to give rise to any unfairness.

35. Even if there was procedural unfairness giving rise to an error in law, for the reasons set out I would in remaking the decision for the reasons set out above have found that the appellant did not meet the requirements of the rules. Further having considered the issues with regard to article 8 rights otherwise I find that the decisions taken do not breach anyone's rights under article 8 of the ECHR

36. I therefore dismiss the appeal against the decision of Judge Bartlett on all grounds.

Notice of Decision

37. I dismiss the appeal on all grounds.

Signed 

Deputy Upper Tribunal Judge McClure Date 11th January 2019