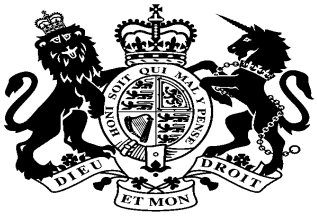


Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00020/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 February 2019	**On 7 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

ZUBAIR DAWOOD
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No appearance
For the Respondent: Mr S Melvin (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Zubair Dawood, a citizen of Bangladesh born 30 March 1994, against the decision of the First-tier Tribunal (Judge Aujla) of 7 December 2018 to dismiss his appeal, itself brought against the Respondent's decision of 8 January 2018 to refuse his application for an extension of leave to remain as a Tier 4 Migrant.

2. The immigration history set out in the decision below records that the Appellant entered the United Kingdom on 25 May 2013 with an entry clearance conferring him leave to enter until 27 December 2014; however that leave was curtailed to expire on 14 June 2014. An application of 13 June 2014 was refused on 6 November 2014, on the basis that a false bank statement had been supplied in its support, and because the supporting Confirmation of Acceptance for Studies (CAS) was not valid. The First-tier Tribunal allowed the subsequent appeal in a decision of 21 July 2015 on the basis that there was now evidence explaining the "false document" allegation, and noting that the "60 day" policy (i.e. to put an application on hold in order to give an opportunity to find a new Sponsor within that period) had not been applied in the Appellant's favour; the Tribunal's decision on this issue should be recognised as final.

3. The application in this case made as long ago as 13 June 2014, though Mr Melvin helpfully explained that this was because the appeal had previously been through the Tribunal system, with the consequence that the underlying original Home Office decision had been identified as not in accordance with the law, with the result that the most recent decision had been issued as a response to the 2014 application.

4. The background to the appeal is that the Appellant applied for an extension of leave, his application being supported by a CAS for a place at London Corporate College.

5. The application was refused in January 2018 because at the date of decision the Sponsor was no longer on the register of Sponsors. The Appellant was well aware of this difficulty by now, not least because on 2 May 2017 the Respondent had written to him, stating that his application was being put on hold with a view to giving him 60 days to find a new Sponsor.

6. The First-tier Tribunal dismissed the ensuing appeal because

   (a) The Appellant had now received the benefit of "60-day" policy and so there was no procedural unfairness in the manner in which his case had been considered;

   (b) The Appellant had made a generic reference to human rights issues in the grounds of appeal but "no evidence whatsoever" had been provided to substantiate that claim.

7. Grounds of appeal argued that the First-tier Tribunal had overlooked a bundle of evidence provided in relation to the Appellant's private and family life in the UK. Furthermore it was said that the First-tier Tribunal erred in law in failing to consider whether the ruling in *Patel* should be followed given that the Appellant had not been given an effective opportunity to find a new Sponsor: the relevant letter having been provided to him at a moment "when it was not reasonably and

realistically open to him to ensure enrolment with a Tier 4 Sponsor" within the 60-day period.

8. The First-tier Tribunal granted permission to appeal on 8 January 2019, on the basis that it appeared that the Appellant's ground of appeal based on his private and family life in the UK had not been determined.

9. A Rule 24 response from the Secretary of State argued that this was a "new matter" that sought to raise issues that had not formed part of the original application and had not subsequently been considered, and no invitation to provide a section 120 statement had been provided; accordingly any issues of private and family life would have required consent from the Secretary of State for the First-tier Tribunal to have jurisdiction to consider the issue, and none had been given.

10. An email from Mr Shamsuzzoha (the advocate instructed by Londonium Solicitors for the hearing before me) stated that he had been taken sick overnight and thus could not attend the hearing. I raised the possibility of an adjournment, but in the light of the discussion that ensued with Mr Melvin for the Home Office, it became apparent that a more expeditious resolution of the appeal was appropriate.

11. Following a discussion with the bench, Mr Melvin agreed that, on analysis, there had been a material failure to consider a relevant ground of appeal and its supporting evidence. The Rule 24 Response had been drafted under the misapprehension that this was an appeal brought under the Immigration Act 2014 amendments to the Nationality Immigration and Asylum Act 2002.

Decision and reasons

12. Although the decision appealed against post-dates 6 April 2015, it is expressly not one to which the new "relevant" provisions of the Nationality Immigration and Asylum Act 2002 have application; because the application was made other than on human rights grounds and prior to 6 April 2015. The Immigration Act 2014 (Commencement No. 4, Transitional and Saving Provisions and Amendment) Order 2015 inserts Article 9(1)(c)(iv) into Commencement Order No. 3 such that the "saved" provisions are preserved in relation to "a decision made on or after 6th April 2015 … to refuse an application made before 6th April 2015 … to vary a person's leave to enter or remain and where the result of that decision is that the person has no leave to enter or remain … unless that decision is also a refusal of an asylum, protection or human rights claim."

13. The instant appeal is in fact one brought under the saved provisions of the Nationality Immigration and Asylum Act 2002 against the June 2014 decision, because the application that was long put on hold was made before April 2015 and was on non-human rights grounds. Accordingly there are more grounds of

appeal and potential arguments available to the Appellant that would have been the case on a new-style appeal under the "relevant provisions" of that statute.

14. There were two bundles of evidence provided in support of the Appellant's appeal. It is possible that both were overlooked by the First-tier Tribunal. In any event, there is no doubt that the bundle containing the Appellant's witness statement, and that of his partner, escaped the Tribunal's attention below. The Appellant had stated that his family had invested their entire fortune in his studies, and all that would be lost if he was unable to complete his studies in the UK. Furthermore he was now in a relationship with his fiancée Rasheeda Begum, having met her in July 2017, and wished to rely on this as part of his private and family life ground of appeal. The Appellant was entitled to rely on this material given that the grounds of appeal had included a reference, albeit a vague and generic one, to the Human Rights Convention.

15. As stated by Lord Carnwath in *Patel* [2013] UKSC 72 §37], citing Moore-Bick LJ (with whom Sullivan LJ agreed) in *AS (Afghanistan)* [2009] EWCA Civ 1076:

> "Having decided that the "decisions" referred to sections 85(1) and (2) were "immigration decisions" of the kind identified in section 82(1), he said at para 79:
>
> > '... the natural meaning of these provisions is to impose on the tribunal a duty to consider matters raised by the appellant insofar as they provide grounds for challenging a substantive decision of a kind identified in section 82 that affects his immigration status. On the face of it they do not restrict that duty to considering grounds that relate to the reasons for that decision or to the original grounds of appeal.'"

16. Accordingly, as a human rights ground of appeal had been raised, it behoved the First-tier Tribunal to determine it. Its failure so to do is a fundamental error of law that undermines its decision overall.

17. That leaves the question of the ground of appeal predicated on whether the Home Office decision was "*not in accordance with the law*", which is of course available in a pre-Immigration Act 2014 appeal. I consider this argument to be hopeless and it should not be allowed to proceed any further. The First-tier Tribunal's findings, to the effect that there was no material unfairness given the policy had been followed, were ones to which it was well entitled to come. There is no explanation in the papers that adequately evidences the unsuccessful attempts that were made to find a Sponsor. Only the very clearest evidence could possibly support the submission that it was *impossible* to find a Sponsor in the Appellant's circumstances.

18. The First-tier Tribunal was entitled to find that the Appellant appears to have had every opportunity to have found a Sponsor. A person who cannot find a Sponsor within the relevant 60 day period is perfectly entitled to depart from the United

Kingdom in order to make an entry clearance application in the future once they find a Sponsor. There is no requirement to remain in the UK if they do not consider that they will be able to take advantage of the period in question.

19. As held by the Court of Appeal in *Talpada* [2018] EWCA Civ 841, there is very little foundation in our public law for notions of *substantive* rather than *procedural* unfairness. The original failure to give the Appellant the benefit of the 60 day policy may well have been procedurally unfair, given it meant that the potential benefit of a published policy intended to benefit migrants in his situation was denied him. However the complaint in the grounds of appeal to the Upper Tribunal, which appears to argue that it was not *possible* to obtain a Sponsor, is a complaint that the Home Office policy (or its means of operation in this particular case) is unlawful. It is difficult to see any legal basis for that submission, which as I have already noted, is in any event not made out on the evidence.

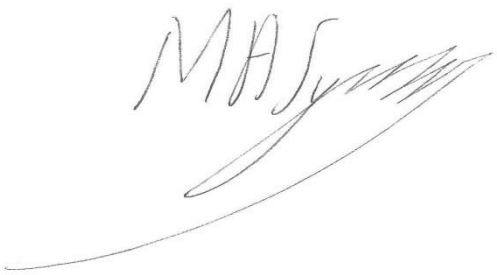
20. So I do not consider that there was any material error of law in the First-tier Tribunal's treatment of the unfairness ground of appeal.

21. Nevertheless, the appeal must be remitted for the human rights ground of appeal to be determined.

Decision:

The decision of the First-tier Tribunal contains a material error of law.
The appeal must be re-heard.

Signed: Date: 27 February 2019



Deputy Upper Tribunal Judge Symes