Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10895/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 October 2013	**On 25 October 2013**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MISS PRABINA BHETWAL
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Nabila Mallick, Counsel instructed by Cleveland & Co Solicitors
For the Respondent: Mr N Bramble, Specialist Appeals Team

DETERMINATION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing her appeal against the refusal of further leave to remain as a Tier 4 (General) Student Migrant.

2. The appellant made her application on 19 October 2012. On 26 March 2013 the Secretary of State gave her reasons for refusing her application, and for making a concomitant decision to remove her from the United Kingdom by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. She claimed 30 points under Appendix A of the Immigration Rules. But for applications made on or after 22 February 2010 it became mandatory that applications as a Tier 4 Student Migrant were accompanied by a Confirmation of Acceptance for Studies (CAS). She had provided no evidence to establish that she had been assigned a CAS and no valid CAS had been found.

The Hearing Before, the Decision of, the First-tier Tribunal

3. The appellant's appeal came before Judge Wyman sitting at Hatton Cross on 17 July 2013. Both parties were legally represented. The appellant's case was that she had been a victim of unfairness. The Secretary of State failed to take into account her special circumstances. The college where she was studying, City Banking College, had been involved in litigation with UKBA. In July 2012 the college obtained an interim relief in the High Court allowing them to continue to educate students up to 23 November 2012. The college informed the Treasury Solicitors that of the 150 students who were allowed to continue and finish their studies, nine students (including the appellant) would need to have their leave to remain in the United Kingdom extended in order to complete the BSc programme. The college requested that nine CAS's be issued to support these nine students, including the appellant. The Treasury Solicitors did not accede to this request.

4. In his subsequent findings, Judge Wyman said the appellant had been a very good student throughout the time she had been present in the United Kingdom. She had previously been awarded an advanced diploma in management practice with distinction, and had now been awarded a degree from University of Roehampton with first class honours. The key issue was whether or not the appellant could comply with the Rules. It was not in dispute the appellant had not submitted a valid CAS when applying for further leave to remain on 18 October 2012.

5. The judge went on to refer to the Tier 4 sponsor guidance on what happens if a college becomes a legacy sponsor. The CAS allocation is set to zero. They are not allowed to sponsor any new students but can continue to sponsor students already studying until they finish their course. The guidance goes on say that if any of the existing students need to extend their leave so they can complete the course, they will be able to apply for a CAS to be assigned to them.

6. The judge continued:

> In this case, the appellant does not need to extend her leave so that she can complete her course as this was already granted. What the appellant is asking for is something different – for further leave to remain to start a new course at a different college (the University of Sunderland).

7. The judge therefore concluded that she did not fall within the circumstances set out in the Tier 4 sponsor guidance, and he said he had not option but to dismiss the appeal.

The Application for Permission to Appeal

8. Miss Nabila Mallick of Counsel settled the grounds of appeal to the Upper Tribunal. She argued that the judge had erred in law in failing to consider whether the decision itself was not in accordance with the law. She said the judge had wrongly focused on the circumstances as they existed at the date of the hearing i.e. that the appellant had now completed the course for which she had been seeking further leave to complete.

The Grant of Permission

9. On 6 September 2013 Designated Judge Macdonald granted permission to appeal, holding that while the judge noted the key issue was whether or not the appellant could comply with the Rules, it was arguable the judge had not looked at the issue of fairness to the appellant in line with the factual background presented.

The Hearing in the Upper Tribunal

10. At the hearing in the Upper Tribunal, Mr Bramble conceded that not only had Judge Wyman materially erred in law, but also that the appeal should be remade in the appellant's favour. He accepted that the refusal letter had taken no account of the particular factual background to the application, which the appellant's solicitors had explained in a covering letter sent with the application. So the decision was not in accordance with the law.

Discussion

11. Judge Wyman was wrong to find, as he did, that the Secretary of State had complied with her own policy with regard to legacy sponsors. Following the grant of interim relief by the High Court, the appellant's college was a legacy sponsor. The respondent should have allowed the college to assign a CAS to those existing students of the college who needed to extend their leave in the UK so that they could complete their course. The college asked for permission to assign a CAS to the appellant and other students in her position more than once prior to the appellant making her application, but there was no positive response. So the respondent sabotaged the appellant's ability to comply with Appendix A: therein lies the unfairness.

12. The college obtained further interim relief from the High Court, which meant that students were allowed to continue in their studies well beyond 23 November 2012. The appellant completed her course in March 2013, as permitted by the High Court, and obtained an offer from the University of Sunderland to study an MBA course. Just before UKBA made a decision on the appellant's outstanding application, her solicitors wrote to UKBA on 20 March 2013 notifying them that the appellant would like to pursue an MBA programme at the University of Sunderland commencing in

April 2013 and that she had received a conditional offer. However the University of Sunderland would not accept her given the absence of her passport. The solicitors asked UKBA to either release her passport with the necessary extension, or to issue her with a letter which could be shown to her sponsor, thereby allowing her to obtain a CAS from the University of Sunderland so as to enable her renew her leave to remain in the United Kingdom as a student.

13. By this letter the appellant's solicitors were effectively amending the appellant's pending application. As UKBA well knew, the appellant could not follow a new course at her existing college as it was only a legacy sponsor: it was not registered for the enrolment of new students, or for the enrolment of old students on new courses. Equally, because of her special situation, the appellant could not simply present a new CAS from the University of Sunderland. She required the cooperation from UKBA which her solicitors had requested.

14. The subsequent letter of refusal did not engage with this request. It also plainly failed to take into account the appellant's special situation, as had been previously outlined in the covering letter with the application. Accordingly, the refusal decision was not in accordance with the law and a lawful decision on the appellant's amended application for leave to remain as a student remains outstanding.

15. As a victim of common law unfairness, I consider that the appellant is entitled to the following relief: the issue of a permission letter so as to enable her to obtain a new CAS; and the decision on her amended application should be delayed until at least 60 days have elapsed from the date of the provision of such a permission letter.

Decision

15. The decision of the First-tier Tribunal contained an error of law, and accordingly it is set aside and the following decision is substituted: this appeal is allowed on the ground that the decision appealed against was not in accordance with the law. The Secretary of State is directed to provide the appellant with a permission letter; and to delay making a decision on her amended application until at least 60 days have elapsed from the date such a letter is provided.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Fee Award Note: this is **not** part of the determination.

In the light of my decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make a whole fee award of £140.

Reasons: the First-tier Tribunal should have allowed the appeal.

Signed Date

Deputy Upper Tribunal Judge Monson