Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09421/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 December 2014	**On 8 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MR RATAN KUMAR BARMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Rahman
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS FOR FINDING A MATERIAL ERROR OF LAW

Introduction

1. This is an appeal by the respondent against the decision of the First-tier Tribunal to allow the appellant's appeal against the respondent's decision to refuse an application by the appellant for leave to remain as a Tier 4 (General) Student Migrant.

2. The judge granting permission, Judge of the First-tier Tribunal Frankish, considered there were arguable errors made by the First-tier Tribunal. In particular, the decision to allow the appeal on the basis that there should have been a postponement of the respondent's decision until the appellant was able to provide an English language certificate (a CAS) that the matter being remitted to the respondent. It was at least arguable, according to Judge Frankish, that the First-tier Tribunal Judge was wrong to refer to the case of **Forrester [2008] EWHC 2307 (Admin)**. That case was arguably inconsistent with later cases. Accordingly permission was given.

Background

3. The appellant is a citizen of Bangladesh born on 20 February 1986. It appears that on 16 January 2008 the appellant was granted leave to enter the UK as a student until 30 April 2011. On 11 July 2011 he was granted further leave to remain as a Tier 4 (General) Student until 22 December 2013. Such points-based migrants were required to satisfy various requirements, including achieving 30 points under Appendix A (attributes). However, the appellant was awarded no points for "attributes – Confirmation of Studies (CAS)" and none for maintenance (funds). In short the respondent was not satisfied that the appellant met the necessary criteria for attributes and funds.

The Appeal Proceedings

4. The Immigration Judge N M K Lawrence (the Immigration Judge) having considered the appellant's application for leave to remain as a Tier 4 (General) Migrant and for a biometric residence card had regard to the letter written by the appellant to the respondent requesting that the respondent did not make a decision until he has "passed the English language test". In the absence of any response to that request the respondent was found to have acted unfairly in the way that he treated the appellant. The Immigration Judge found that the appellant had acted properly and expeditiously so as to satisfy the conditions in place by the Sanjari International College well before the date of the decision on 6 February 2014. The appellant was making good progress on his course and the failure to exercise his discretion in favour of the appellant constituted to an error of law. The Immigration Judge referred to the case of **Forrester** where the respondent had a discretion but had not exercised it in favour of the claimant, in circumstances that were described by the High Court as "perverse". The court said that it ought to exercise this discretion with intelligence, common sense and humanity. The respondent is alleged to have adopted a "tick box approach having regard to the weight of the issues. The matter was remitted to her for a lawful decision. The grounds of appeal state that the appellant had obtained his proficiency in English language certificate on 24 January 2014 whereas the application for further leave to remain had been on 21 December 2013. The application had been refused on 6 February 2014. The grounds state

that the Immigration Judge had characterised the failure of the appellant to be in possession of an English language qualification as not being her fault but that of the Sanjari International College. However, this was a material misdirection of law because the relevant Immigration Rules confirm that acceptance on the course of studies would only be considered valid if it was issued no more than six months before the application is made Appendix A and paragraph 116 of the Immigration Rules. As the application was made on 21 December 2013, as defined by Immigration Rule 34G(i), the material date for the appellant to have a valid CAS would have been the six month period ending with that date. Accordingly, the application could not succeed. The approach of the judge was contrary as authority from the Upper Tribunal in the case of **Marghia [2014] UKUT 366 (IAC)** where the UT had to characterise the issue of fairness as essentially about procedural fairness. There is no absolute duty at common law to make decisions which are substantively fair the respondent was entitled to make decisions which were within her discretion as long as they were not unreasonable in the **Wednesbury** sense. The respondent sought an oral hearing of the appeal.

5. As indicated above, Judge of First-tier Tribunal Frankish thought there were arguable merits in the grounds. It was at least arguable that the case of **Forrester** was inconsistent with the case of **Marghia**.

6. At the hearing I heard representations by both parties' Counsel/legal representatives. Mr Whitwell made two essential points:

   (1) The Confirmation of Studies document (CAS) had to be supplied with the application. The application was made on 21 December 2013. It was lacking. Therefore, the application had to fail.

   (2) He relied on **Marghia**. The college had changed the start date of the course. He specifically relied on paragraph 9 in **Marghia** and pointed out that the procedural unfairness had to be such as to bring the case within the **Wednesbury** unreasonableness principle if it was to succeed on an unfairness challenge. This case fell well short of that. The Rules in that case as in this were "crystal-clear". Therefore, the failure to meet them with a manifest failure such as to justify refusal.

7. Here, the Immigration Judge appears to have accepted that there was a failure to comply with the Rules (see paragraph 5of the determination). The Immigration Judge plainly accepted that there was a failure to comply with the Rules but considered there was some general fairness duty. It was not unfair to require the appellant to comply with the formalities of a proper application and **Forrester** was clearly distinguished from the present case. The Tribunal was entitled to be more critical if the Secretary of State had failed to apply her own Rules in a procedurally fair manner but that was not the case here.

8. The appellant on the other hand submitted that fairness was a "core value" and he relied on cases like **Thakur (PBS) [2011] UKUT 00151** as well as **Forrester**. The appellant fulfilled the English language test and fact but the test result came in after the decision of 6 February 2014. I was advised to apply the general fairness criteria after judging the case. **Thakur** was a case in which a Bangladeshi national applied for further leave to remain as a Tier 4 (General) Student Migrant. The Immigration Judge proceeded to deal with the appeal on the basis there were no factual matters in issue and having referred to the guidance decided that a consistent policy existed. The failure to follow that policy was sufficient to place the respondent in breach of her legal obligations. Therefore, the decision was not in accordance with the law as such and could not therefore be lawful. However, it was pointed out later in the hearing, **Thakur** and **Forrester** were different types of cases. In **Forrester** the appellant had come to the UK with lawful entry clearance. Having been in this country for many years she made an application for leave to remain but due to a failure of her bank to honour a cheque became an illegal overstayer. The court pointed to the interference with the protected private or family life in that case and the pointlessness of requiring the claimant to seek entry clearance in Jamaica when she had been lawfully in the UK for a number of years. There was an obvious lack of fairness in the Secretary of State's approach.

9. **Thakur** was a case in which the guidance was referred to and the rules. The Upper Tribunal did not regard it as straightforward. The appellant appeared to have been deprived of an opportunity to find another college due to a decision which appeared contrary to the Secretary of State's own guidance. This brought into play the common law duty of fairness. The underlying principles were discussed in that case. Again, there was a procedural problem in that the appellant had not been given an opportunity of making proper representations following the closure of his college. Therefore, he had not had a reasonable period to find an alternative course. The respondent's decision had not been in accordance with the law because of a failure to comply with common law requirements of fairness, as far as the appellant was concerned.

10. On the other hand **Marghia** emphasised that unfairness grounds was limited by the **Wednesbury** test. Provided the Rules are clear and provided they are followed there would be no attack upon the legality of the decision.

Analysis and Conclusions

11. Mr Whitwell is plainly right to draw a distinction between a case where the respondent acts capriciously or arbitrarily in his treatment of an application and the case where the respondent complies fully with the letter of the Immigration Rules but the Immigration Rules nevertheless work in a way which appears unfair towards an appellant. **Thakur** and **Forrester** are persuasive authorities before this Tribunal but in relation to

Thakur in particular I am not sure that the Upper Tribunal went fully into the nature of the "common law unfairness" relied upon. This is not to say that the decision was wrong. However, when the respondent acts in a manner which does not allow an appellant sufficient opportunity to act in a particular way so as to bring him within the Immigration Rules that may be said to be unlawful.

12. In my judgment that is not the situation here. The appellant simply submitted his application at a time before he satisfied the requirements of the Rules. In particular he failed to fulfil the requirement of having a CAS. Had he waited until he obtained that document he would have had no difficulty in qualifying. The respondent did not act arbitrarily or unlawfully. The respondent acted in accordance with the Immigration Rules. In the circumstances, it was indeed a material misdirection in law for the Immigration Judge to state that the Secretary of State should have awaited the obtaining of an English language document (a CAS) before reaching a decision. The Secretary of State decided the case on the evidence presented to her and her decision was correct based on that evidence.

13. For these reasons the respondent has identified a clear error of law in the decision of the First-tier Tribunal such that it is required to be set aside.

Notice of Decision

14. The respondent's appeal against the decision of the First-tier Tribunal is allowed. I find that there was a material error of law in the decision of the First-tier Tribunal. As such that decision requires to be set aside. The decision of this Tribunal is substituted, which is that the appeal against the refusal of the application for further leave to remain is dismissed.

15. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

I set aside the fee award.

Signed Date

Deputy Upper Tribunal Judge Hanbury