IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/17112/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 17th July 2015	**On 23rd July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MISS AMJAD ALIYA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss A White (Counsel)
For the Respondent: Mr D Mills (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge V A Cox, promulgated on 21st August 2014, following a hearing at Stoke-on-Trent, Bennett House, on 12th August 2014. In the determination, the judge allowed the appeal of Amjad Aliya. The Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female citizen of Pakistan born on 28th July 1989. She made an application for leave to remain in the United Kingdom as a Tier 4 (General) Student under the points-based system (PBS). The Respondent refused the application on 3rd April 2014. It is the Appellant's case that she made her application in time by completing and submitting an online application before the expiration of her leave and then sending supporting documents within the fifteen days which, as she maintains, was required by the Rules.

The Judge's Findings

3. The judge concluded both

   (i) that the application had been made online as contended, and that

   (ii) supporting documents were submitted by the Appellant within fifteen days (see paragraph 5).

4. In the discussions by the respective legal representatives before the judge, it was explained that in the event that the Appellant was found by the judge to have valid leave when she made her application, the maintenance (funds) requirements of the Rules was the lower amount applicable to an applicant with "an established presence studying in the United Kingdom", (see paragraph 14, Appendix C).

5. The judge also observed that, "helpfully, Miss Aboni, conceded that the Respondent accepted that the Appellant was able to meet the lower level and did not pursue the refusal in respect of maintenance funds" (see paragraph 12).

6. The other issue before the judge was in relation to the Appellant having submitted the proper English language test certificate. Here, as the judge explained, "the remaining issue before me was the Appellant's acknowledged error in failing to grant access to the Pearson test results relating to her English language test certificate" (paragraph 14). Here, as the judge went on to explain,

> "Her application made it clear she relied upon the same and as set out at Appendix O to the Rules, the tests are accepted but as no certificates are printed the responsibility is on any applicant to provide a downloaded copy and to grant access to the website to the Respondent in order for the test certificate to be verified" (paragraph 14).

7. The judge went on to explain that the Appellant was "clearly required to provide evidence of her ability to meet the English language requirements under the PBS" but that she was "in fact able to meet the same and under Appendix O provided evidence from a pre-approved provider but did not, as is agreed before me, grant access for the Respondent to verify the certificate that she had provided" (see paragraph 19).

8. That being so, the judge went on to conclude that it was not the case that there was no "evidential flexibility" in relation to the determination of this claim of the Appellant. As the judge explained,

> "The Appellant had the relevant qualification and did provide the document as evidence of the same. I find that common law fairness in this matter does require the Respondent to contact the Appellant and allow her the opportunity to grant that access. There was evidence before the Respondent that the required information existed ...." (paragraph 21).

9. This was a case where

> "The Respondent had correctly identified that this application was made in time, and therefore correctly identified that this Appellant was able to meet the maintenance requirements under the PBS, and that the only issue related to access to the relevant website as a matter of common law fairness ...".

The judge concluded that this was a case where "the Respondent should have allowed an opportunity for that step to be taken" (paragraph 22).

10. The appeal was allowed.

Grounds of Application

11. The grounds of application state that the judge has failed to take cognisance of the recent case of **Marghia (procedural fairness) [2014] UKUT 366**, where the Tribunal made it clear that

> "The common law duty of fairness is essentially about procedural fairness. There is no absolute duty at common law to make decisions which are substantively 'fair'. The court will not interfere with decisions which are objected to as being substantively unfair, except the decision in question falls foul of the **Wednesbury** test i.e., that no reasonable decision maker or public body could have arrived at such a decision".

12. On 2nd October 2014, permission to appeal was granted on the basis that the judge had misconstrued the application of common law fairness principles in a case such as the present.

13. On 24th October 2014, a Rule 24 response was entered by the Appellant's legal representatives, which appears at section A of the Appellant's bundle.

Submissions

14. At the hearing before me on 17th July 2015, the Respondent was represented by Mr D Mills and the Appellant was represented by Miss A White of Counsel. Mr D Mills submitted that it was not challenged that the Appellant had made a timeous online application. What was challenged was that for the Pearson test certificate to be properly acknowledged there had to be three requirements met, as is clear from the "Immigration Rules, Appendix O". These are first, a printout of online score report. Second, scores must also be sent to the Home Office online. Third, the Pearson test certificate does not issue paper certificates. Given that Pearson did not issue a paper certificate, it was incumbent upon the Appellant to ensure that a certificate was sent in the appropriate manner.

15. Second, the judge was for this reason wrong to say that "common law fairness" required her to allow the appeal on the basis that she did. The case of **Marghia [2014] UKUT 366** makes it clear that such a Rule only applies in relation to "procedural unfairness".

16. Third, and perhaps most importantly, there was no obligation upon the Respondent Secretary of State to make any enquiries of the Appellant on the basis of "evidential flexibility" because this was not a case that was going to ever succeed. The reason for this is that if one looks at the notes on Rule 245AA which are headed "Documents not submitted with applications", these Rules make it clear at subparagraph (c) that, "documents will not be requested where a specific document has not been submitted ... or ... (b) will lead to a grant because the application will be refused for other reasons". This was a case where the application would have been refused for other reasons. The reason here was the absence of an English language test certificate.

17. That only left Article 8. The judge did not consider Article 8 because she had allowed the appeal under the Rules. The Appellant could not succeed now under Article 8. If I found there to be an error of law, I should adopt the arguments put forward by Mr Mills, and dismiss the appeal substantively.

18. For her part, Miss White drew my attention to a recently reported case of **Sultana (rules: waiver/further enquiry; discretion) [2014] UKUT 540**, where the president, Mr Justice McCloskey had given guidance to the effect that the mandatory nature of these Rules has the effect of causing harsh results which need in appropriate cases to be ameliorated. In particular, she drew my attention to paragraphs 23 to 25 of the determination. There was, she submitted, an express reference to the fact that, "discretionary powers of further enquiry and waiver promote the values of fairness and common sense, whilst simultaneously minimising unnecessary dominance of an emphasis on bureaucratic formality" (see paragraph 25).

19. Miss White submitted that the judge, in allowing the appeal that she did, was precisely having regard to the fact that the failure to make a further enquiry was "**Wednesbury** unreasonable" because the Appellant had made a timeous online application, and had subsequently submitted by post her documentation, and it was the fact that the caseworker had erroneously then concluded that the Appellant attracted a high level of maintenance which was not the case, that led to further complications. However, if one looks at paragraph 245AA(d) it is clear that an online score report can be submitted. The Appellant had not submitted a copy. She had complied as best as she could.

20. In reply, Mr Mills submitted that the Pearson test does not allow for the provision of a copy but requires an actual test certificate.

21. I have given careful consideration to all the documents before me and to the oral submissions. I am satisfied that the making of the decision by the

judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.

22. First, this is not a case which falls within the scope of **Marghia [2014] UKUT 366**. This is because the Appellant actually met the requirements under Part 6 of the Immigration Rules. She could remain in the UK as a Tier 4 (General) Student. The Respondent Secretary of State had clear evidence before her of the Appellant's English language test certificate confirming that the Appellant had met the English language criteria under the Immigration Rules.

23. This was because the Appellant had submitted a copy of the same at the time of making an application to extend her stay within the United Kingdom as a Tier 4 (General) Student. This was clearly a case where paragraph 245AA(b)(iv) and (d)(iii) of Part 6A applied. This makes it clear that

> "(b) If the applicant has submitted specified documents in which;
>
> (iv) a document does not contain all of the specified information"
>
> then the officer in question "may contact the applicant or his representative in writing, and request the correct document".

24. Accordingly, it is not correct, as Mr Mills maintains, that this application never stood any chance of succeeding. It did stand a chance of succeeding because of two very clear reasons.

25. First, the caseworker had erroneously ascribed to the Appellant the wrong and higher financial requirement test. The judge recognised that this was legally incorrect. The Appellant could comply with the lower standard.

26. Second, the Appellant was refused because of questions about the English language test certificate. However, the Appellant had submitted a copy of this at the time of her application. Paragraph 245AA clearly applied. All the Respondent Secretary of State had to do was to make the necessary enquiry and the information would have been made available.

27. It is perhaps unfortunate that this entire methodology has been described by the judge as "common law fairness" but the fact remains that the appeal could have properly been allowed by the judge, as indeed it was, and it is not for this Tribunal, as a supervising Tribunal, to intervene to upset that determination, unless there is a clear error of law. There is none.

Notice of Decision

28. There is no material error of law in the original judge's decision. The determination shall stand.

29. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 23rd July 2015