Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36790/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 8 September 2015	**On 18 September 2015**

Before:

UPPER TRIBUNAL JUDGE GILL
DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

Ashvin Saggoonoo
(ANONYMITY ORDER NOT MADE)

Appellant

And

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr R Parkin, Solicitor Advocate, instructed by Windfall Solicitors.
For the Respondent: Miss A Holmes, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant has been granted permission to appeal against the determination of Judge of the First-tier Tribunal Stanford who, following a hearing on 12 February 2015, dismissed his appeal against a decision of the respondent of 22 August 2013 to

refuse his application of 29 October 2012 for leave as a Tier 4 (General) Student Migrant under the Points Based System.

2. The respondent refused the appellant's application for reasons which may be summarised as follows:

   i) In support of his application, the appellant had submitted a letter from the Mauritius Commercial Bank (MCB) which the respondent contended was a false document. The respondent was therefore satisfied that the appellant had used deception in his application and refused the application under para 322(1A) of the Statement of Changes in the Immigration Rules HC 395 (as amended) (the "IRs").

   ii) The appellant had failed to provide a letter from the University of Bristol which he used in order to obtain an offer of a place of study with Leyton College. It was said that it was necessary for the appellant to submit this letter because Leyton College was not a Highly Trusted Sponsor. Accordingly, the respondent awarded the appellant nil points in respect of Attributes – CAS under Appendix A of the IRs. He therefore failed to score 30 points as was required.

   iii) In respect of Appendix C, the appellant had not shown that he had the required funds of £7,200 for the required 28-day period because:

      a) The appellant was required to produce original bank statements or internet and ad-hoc printouts which contain all personal information and be stamped and signed by the bank. However, the bank statement he had provided did not have an original stamp and it was a photocopy.

      and

      b) He had provided a bank document which was false.

3. The judge's findings may be summarised as follows:

   i) The respondent had not discharged the burden of proof upon her to establish that the letter from MCB was forged or that the appellant had been fraudulent ([29]).

   ii) The appellant was required to produce with his application the letter from the University of Bristol. He therefore did not qualify for 30 points under Appendix A, Attributes – CAS.

   iii) In relation to Appendix C, the appellant could not rely upon the letter from the MCB because this states the balance on one day and does not provide the 28-day perspective. He had provided printouts of a statement of this account with Barclays Bank covering the relevant 28-day period which showed that the balance in his account did not drop below £9,199.99 during that period. These statements were not acceptable because they were photocopies. Under para 245AA of the IRs, which had incorporated the respondent's policy previously known as the "*evidential flexibility policy*", the appellant should have been given, "*on the face of it*", an opportunity to have provided the original bank statements. However, the respondent's obligation to give the appellant such an opportunity

did not arise because para 245AA(c) provided that '*the UK Border Agency will not request documents where a specified document has not been submitted …. or where the UK Border Agency does not anticipate that addressing the omission or error …. will lead to a grant because the application will be refused for other reasons*'. The judge decided that para 245AA(c) applied because the application fell to be refused on the ground that the appellant had not provided the letter from University of Bristol.

4. Permission to appeal was granted on the ground that the judge was arguably wrong in failing to consider that the appellant did not have to produce a document in support of the CAS because Leyton College was a Highly Trusted Sponsor.

The hearing before the Upper Tribunal

5. Mr Parkin submitted that the appellant could not be expected to produce evidence that Leyton College was a Highly Trusted Sponsor at the date of the decision because its licence was revoked on 2 May 2014 and there is no publicly-accessible archive of the information as to whether it had Highly Trusted Sponsor status as at the date of the decision. All that the appellant had been able to produce was a letter dated 22 June 2012 granting Leyton College a licence as a Highly Trusted Sponsor valid until 21 June 2013 unless withdrawn or surrendered before then.

6. We agree with Mr Parkin that the appellant could not be expected to produce evidence that is not publicly accessible and which is only in the hands of the respondent.

7. Miss Holmes kindly obtained evidence which showed that the licence of Leyton College as a Highly Trusted Sponsor was issued on 30 June 2013 and revoked on 2 May 2014. It was therefore clear that Leyton College was a Highly Trusted Sponsor as at the date of the decision (22 August 2013). The respondent was represented at the hearing before the judge. It is not known why this information was not produced to the judge by the Home Office Presenting Officer.

8. Miss Holmes therefore accepted that:

   i) As Leyton College was a Highly Trusted Sponsor as at the date of the decision, it was not necessary for the appellant to have submitted with his application the letter from University of Bristol.

   ii) This meant that the respondent ought to have given him the opportunity to produce the originals of his bank statements. Miss Holmes accepted that this meant that the respondent's decision was not in accordance with the IRs.

9. Miss Holmes therefore accepted that the appellant's case should be remitted to the respondent for her to re-take her decision on the appellant's application after having given him an opportunity to produce original bank statements pursuant to para 245AA(c) of the IRs.

Error of law

10. Given that the respondent was the only party to this appeal who had access to information that was material to the appellant's appeal (i.e. whether Leyton College as a Highly Trusted Sponsor as at the date of the decision), we are satisfied that, through no fault of his own, the determination of the judge proceeds upon a procedural irregularity (namely, the failure of the respondent to adduce relevant information to which only she had access) which has given rise to procedural unfairness, in that, the appellant has been deprived of a fair hearing.

11. We therefore set aside the decision of the judge and re-make the decision on the appellant's appeal. The judge's finding that the respondent had not shown that the appellant had practised deception stands since this was not challenged by the respondent. Given [8.(i)] above, we find that the appellant's application of 29 October 2012 met the requirements of Appendix A, Attributes – CAS.

12. Furthermore, and for the reasons given above, we find that the respondent's failure to give the appellant an opportunity to produce originals of his bank statements in relation to Appendix C meant that her decision was not in accordance with the IRs.

13. We therefore allow the appeal to the extent that the appellant's case is remitted to the respondent for her to take a new decision on the appellant's application of 29 October 2012 after having given him an opportunity to produce originals of his bank statements.

14. However, the respondent will be aware that, by letter dated 26 August 2015 to the respondent, the appellant purported "*to vary his application to include an application for indefinite leave to remain under paragraph 276B of the [IRs] on the basis of long lawful residence*". Accordingly, it will be for the respondent to decide:

    i) whether the letter of 26 August 2015 did vary the application of 29 October 2012, given:

        a) the judgment of the Court of Appeal in JH (Zimbabwe) v SSHD [2009] EWCA Civ 78 that an application cannot be varied under s.3C of the Immigration Act 1971 (the "1971 Act") once a decision has been made on it; and

        b) our decision that the decision of 22 August 2013 is not in accordance with the IRs.

    We offer some observations in this respect at [15] below, although we stress that the decision as to whether the letter of 26 August 2015 did vary the application of 29 October 2012 will be one for the respondent to take in the first instance.

    ii) If the letter of 26 August 2015 did not vary the application of 29 October 2012, the respondent will have to decide the application of 29 October 2012 for leave as a Tier 4 (General) Student Migrant. It will be for the respondent to decide whether the purported variation by letter dated 26 August 2015 meant that the appellant no longer satisfied the requirements for leave as a student.

15. In JH (Zimbabwe), the Court of Appeal held that an applicant can vary his application at any time up until the time when a decision has been made on the application. Once a decision has been made on an application, the application cannot be varied under s.3C because there is nothing left to vary (final sentence of [35] of the judgment). In a statutory appeal, the Upper Tribunal does not have power to quash a decision of the Secretary of State or set it aside. There is an argument for saying that, whether the Upper Tribunal allows or dismisses an appeal, the decision appealed against continues to exist as a decision and that the final sentence of [35] of the judgment of the Court of Appeal in JH (Zimbabwe) applies. However, in R (Bhgat) v SSHD [2014] EWHC 772 (Admin), Miss Clare Moulder, sitting as Deputy High Court Judge, said, at [31]: "*Accordingly, in my view, section 3C and in particular subsection (2)(a) that "leave is extended during any period when the application for variation is neither decided nor withdrawn" must be interpreted to mean a final decision and where the Secretary of State is obliged to act on a direction from the Tribunal it seems to me that during such period of awaiting implementation the application is not finally decided.*"

16. Since the respondent's decision is not in accordance with the Immigration Rules because she failed to give the applicant an opportunity to submit originals of his bank statements and given our decision to remit the case to the respondent, it can be argued that a final decision has not been made on the appellant's application of 29 October 2012 for leave as a Tier 4 (General) Student Migrant. Although we did (at the hearing) use the phrase "re-take" the decision in the context of the respondent having to make a new decision on the appellant's application of 29 October 2012, it is clear that the respondent will in fact be taking a new decision because the Upper Tribunal has no power to set aside the decision of 22 August 2013 or quash it.

Decision

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. We have set it aside. We have re-made the decision. We allow the appeal on he ground that the decision is not in accordance with the Immigration Rules but only because the respondent failed to offer the appellant an opportunity to produce original bank statements. The appellant's case is therefore remitted to the respondent for her to take a new decision on the appellant's application of 29 October 2012.

Signed Date: 16 September 2015
Upper Tribunal Judge Gill