Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/40670/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th September 2015	**On 28th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MR NIMESHKUMAR AMRUTLAL PANCHAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Patel, Hiren Patel Solicitors
For the Claimant: Mr P Duffy, Senior Presenting Officer

DETERMINATION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Ghani dismissing the appeal against the Respondent's decision to refuse leave as a Tier 4 student and removal directions under section 47 of the Immigration, Asylum and Nationality Act 2006. It is important to note from the outset that there are two refusals. The first refusal is dated 30 June 2014 whereas the second is dated 12 August 2014. The first refusal carried a right of appeal, whilst the second did not.

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2. The Appellant appealed against the decision of Judge Ghani and was granted permission to appeal by First-tier Tribunal Judge Kelly. The basis upon which permission was granted may be summarised as follows:

   (i) The judge arguably failed to engage with the fourth ground of appeal, namely that the Appellant had submitted a valid variation of an earlier application for further leave to remain at a time when he had extant leave to remain and that, consequently, the first decision to refuse the application (i.e. the refusal of 30 June 2014) was invalid and the Tribunal ought to have treated his appeal as being against the second refusal (i.e. the refusal of 12 August 2014) of his varied application and the first refusal was void *ab initio*. This argument was arguable in light of *JH (Zimbabwe) v SSHD* [2009] EWCA Civ 78.

3. I was provided with a Rule 24 response from the Respondent wherein she appeared to accept that the Appellant had successfully varied his application to that of a dependent upon a Points Based System migrant and the Respondent was entitled to a decision on his varied application. Thereafter, following the subsequent decision, which was pre-empted to be a refusal, the Appellant would have a right of appeal against the subsequent refusal. It was also accepted that the respondent considered the decision was not in accordance with the law and that the matter should be remitted to the Respondent so that she could issue a lawful decision.

Discussion

4. At the close of submissions, I indicated that although there appeared to be an error of law as stated in the Rule 24 Reply my decision would follow in writing. That decision follows hereafter. I find that there was an error of law in the decision such that it should be set aside. My reasons for so finding are as follows.

5. In relation to the Rule 24 Reply, Mr Duffy confirmed that the concessions made within were maintained and should be taken as read. Mr Duffy accepted that the first refusal of 30 June 2014 demonstrated that the author was unaware of the variation of the application which took place on 6 June 2014 and consequently dealt with the Tier 4 mattes and the variation of the application was consequently dealt with by an erroneous process.

6. Mr Patel for the Appellant indicated that he concurred with Mr Duffy and the Rule 24 Reply. He submitted that the Tier 4 decision was void *ab initio* and irrelevant.

7. Given that both advocates were in agreement, I considered their pragmatic stances and could discern no reason not to follow the course that they jointly proposed and requested me to follow.

Error of Law

8. In light of the above agreement and concession by the Respondent, I find that the decision of Judge Ghani involves the making of an error of law such that it should be set aside.

9. I reach this conclusion given that the Respondent accepts that the decision of 30 June 2014 addresses a Tier 4 application as it was previously made however that application was varied on 6 June 2014 to that of a dependent upon a Tier 4 migrant, which the author of the refusal of 30 June 2014 appears to have been unaware of.

10. Furthermore, the Respondent accepts that the decision of 12 August 2014 was made on an erroneous basis, and I further find this to be so, as the Appellant deserves a lawful decision upon his varied application, and given the Rule 24 Reply, it is clear that one remains to be lawfully made.

11. Consequently, I set aside the decision and the findings made by Judge Ghani and I substitute that decision with my own allowing the appeal pursuant to section 86(3)(a) of the Nationality, Immigration and Asylum Act 2002.

12. As the appeal has succeeded and the Respondent has indicated she will issue a lawful decision shortly, I confirm for the sake of clarity that in the interim the Appellant's section 3C/3D leave shall continue for the time being as the appeal has succeeded. In short, the Appellant's position naturally reverts to that of a person whom has made an "in-time" valid application for further leave, whose previous leave has expired and whose leave has been statutorily extended via section 3C whilst he awaits a lawful decision on his application.

Decision

13. The appeal to the Upper Tribunal is allowed.

14. The decision of the First-tier Tribunal is set aside.

15. The Appellant's appeal is remade and allowed given that the decision is not in accordance with the law.

Anonymity

16. The First-tier Tribunal did not make an anonymity order. I was not invited to make any such order and in any event, I see no reason to make such an order.

Fee Award

17. I make a fee award in the Appellant's favour given my decision allowing the appeal.

Signed Date

Deputy Upper Tribunal Judge Saini