IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01254/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 February 2016	**On 23 February 2016**

Before

Mr H J E LATTER
(DEPUTY UPPER TRIBUNAL JUDGE)

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

RAJESH KUMAR JANGIR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr P Prashant, solicitor.
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by of the Secretary of State against a decision of the First-tier Tribunal (Judge M J Gillespie) allowing an appeal by the applicant against the decision made on 12 December 2014 refusing him further leave to remain in the UK and to give directions for his removal. In this decision I will refer to the applicant as the appellant and the Secretary of State as the respondent

Background

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2. The background to the appeal can briefly be summarised as follows. The appellant is a citizen of India born in February 1985. He was granted leave to enter the UK in April 2011 as a Tier 4 student, having been granted entry clearance for the period 21 March 2011 to 20 October 2013. On 17 December 2013 his leave was extended to 14 October 2014, when he applied for further leave to remain.

3. His application was accompanied by a letter from his representatives which explained that the appellant was enrolled with Forbes Graduate School to pursue a Diploma in Healthcare Management. However, he had received an e-mail from his college on the 1 July 2014 confirming that their licence was suspended. Since then he had been in regular contact with the college to find out whether the licence would be reinstated or revoked but had received no confirmation to date. If the licence had been revoked he would have written to the respondent asking for a 60 day extension or possibly have got enrolled at another college. He now had no option but to seek further leave so that he could pursue his education.

4. The respondent's decision is set out in the reasons for refusal letter dated 12 December 2014. The respondent set out her policy that grants of leave outside the immigration rules would only be made where particularly compelling circumstances existed. Careful consideration had been given to the appellant’s claim to remain on the basis of the issues with his educational establishment's licence and enrolling with another college. The respondent was not satisfied that circumstances were such that discretion should be exercised outside the rules. Further consideration was given to whether the appellant could meet the requirements of the rules or whether there were exceptional circumstances justifying a grant under article 8 but the respondent was not satisfied that this was the case and his application was refused.

The Findings of the First-tier Tribunal Judge

5. The appellant appealed against this decision. His appeal was considered at an oral hearing on 31 July 2015. The judge noted that the applicant had made the application to preserve his status hoping for the grant of leave for 60 days in order to enable him, if necessary, to make a fresh application [2]. The evidence showed that the appellant had been informed by his college of the suspension of its licence, although no documentation had been produced by the respondent as to its suspension or as to the current status of the college. It had not been shown that the appellant who was affected by the suspension was dealt with or even considered for treatment in accordance with the published policy relating to such situations.

6. The judge commented that the appellant or his legal adviser was considerably to blame for the circumstances as the application was not expressly framed as a request for a 60 day period of grace but appeared to be a non-specific and open-ended request for leave to remain for rather ill stated reasons, namely that he had invested a considerable amount of

funds on his education in the UK and was now in some doubt as to his status. He said that a thoughtful consideration of the application would have shown that it should be treated as a request for a 60 day period of grace but in the event it had been treated as the open-ended request as arguably it appeared to be.

7. The judge found that the appellant had proved that he had been affected by the decision to suspend the sponsor licence of his college and that during the period of suspension his visa expired. He made the application to preserve his position but what ought to have been the primary thrust of the basis of the application was not considered by the respondent. In considering the application the respondent had not had regard to her published policy relating to the grant of the period of grace to students so affected in order to enable them to regularise their positions [6]. For these reasons he allowed the appeal to the extent that the application was remitted to the respondent for consideration of whether the appellant in the light of published policy ought to be granted a period of grace 60 days within which to make a lawful application to regularise his position.

The Grounds of Appeal and Submissions

8. In the grounds of appeal it is argued that the judge erred in law as the appellant had not been disadvantaged by matters of fairness falling within the remit of Patel (Revocation of sponsor licence – fairness) India [2011] UKUT 00211 and was therefore not entitled to60 days leave. It was not a case of an applicant providing details of a valid CAS with the application but where the sponsor's licence was subsequently revoked while the application was pending. The appellant had not submitted a valid CAS and the application made was for leave to remain outside the rules.

9. Ms Isherwood adopted her grounds. She emphasised that an application had not been made under Tier 4. The application had to be considered within the rules. In any event the appellant could not bring him within the terms of the policy as there would be no 60 day extension if there was less than six months leave outstanding. In any event the appellant had been aware of the position affecting his college from June 2014.

10. Mr Prashant submitted that the appellant had had no option in his circumstances but to make the application he did. The college licence been suspended and the appellant was seeking to protect his position. He should not be faulted for taking such a course in circumstances where it was the respondent's policy to grant an applicant 60 days to find another college.

Assessment of Whether there is an Error of Law

11. The issue for me at this stage of the hearing is whether the judge erred in law such that his decision should be set aside. The starting point must be the application actually made by the appellant which was for the exercise of discretion outside the rules. The respondent dealt with this application

accordingly. She made the point in the decision letter that it was her policy to consider granting leave outside the rules only where particularly compelling circumstances existed. The application considered whether the appellant was able to meet the requirements relating to private life within the rules but found that he could not and indeed there is no challenge this finding. The respondent went on to consider whether there were exceptional circumstances including article 8 and human rights. In that context the respondent considered the issue raised by the appellant that he wanted to complete his studies in the UK. The respondent recorded that this had been carefully considered but it was open to him to return to India to pursue his studies there or alternatively, if he wished to undertake studies in the UK it was open to him to make an application for entry clearance under Tier 4 from India. It is therefore clear that within the context of exceptional circumstances the respondent took into account the particular situation of the appellant. I am satisfied that the respondent reached a decision lawfully open to her on his application.

12. The issue at the heart of the appeal before the First-tier Tribunal was whether the respondent had complied with her published policy of granting period of 60 days grace to make a further application to enable the appellant to regularise his position. An extract from the policy (pages 76-80 of Tier 4 Policy Guidance version 11/2015) was produced before me but this does not satisfy me that the appellant could bring himself within the terms of the policy, which is predicated on the sponsorship licence being revoked or surrendered. In the present case the licence has only been suspended. At the hearing before me Mr Prashant accepted that he did not know when the licence was revoked and Ms Isherwood had no information on this issue. Therefore, there was no adequate evidence before the judge to show that the terms of the policy relied on could be met (page 78). A further difficulty arises in respect of the policy in that the appellant made his application very shortly before his leave to remain expired and this was not a case of a valid CAS being submitted which then became invalid during the currency of his application (also page 78).

13. For the sake of completeness I will deal with the issue of whether there has been any procedural unfairness on the part of the respondent to bring into play the principles set out in Patel v Secretary of State for the Home Department. This decision was recently considered and upheld by the Court of Appeal in R (Raza) v Secretary of State for the Home Department [2016] EWCA Civ 36. The court emphasised at [31] that what fairness required was necessarily fact and context specific and at [37] that the fact that there was in general no duty on the respondent to give notice of what was believed to be a deficiency in the CAS before making an adverse decision did not mean that there may not be some cases where fairness demanded that the Secretary of State should not refuse the application without further enquiry. In the present case, there was no evidence before the respondent and there is still none before me to confirm whether or when the licence was revoked and in any event, on his own account the appellant was aware of the fact that his college's licence had been suspended and that his leave to remain would expire on 14 October 2014.

He had been aware of the problem with his college since the beginning of July 2014 and had had the opportunity of finding another college and of putting himself in a position where he could make an application supported with a valid CAS before his leave expired. I am not satisfied that there is any basis for an argument that the respondent failed to comply with the requirements of procedural fairness.

Re-making the decision

14. I am therefore satisfied that the judge erred in law by remitting the application to the respondent. The appellant has failed to show that he could come within the terms of the respondent's policy. There was no evidence to show whether or when the licence was revoked and the appellant had had an opportunity of resolving the issues arising from the suspension of his college’s licence. The respondent's decision on the application made outside the rules was a decision properly open to her and the appellant had no prospect of succeeding in a claim on article 8 grounds. For these reasons I substitute a decision dismissing the appeal against the respondent's decision

Decision

15. The First-tier Tribunal erred in law and the decision is set aside. I re-make the decision by dismissing the appellant's appeal.

Signed H J E Latter

H J E Latter
Deputy Upper Tribunal Judge

Date: 15 February 2016