IAC-UT

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/44311/2014

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

MANJINDER SINGH KANDOLA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P. Richardson, instructed by Louis Kennedy, solicitors.
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal (Judge Malone) dismissing his appeal against the respondent's decision made on 6 November 2014 refusing to vary his leave to remain as a Tier 4 student and to remove him by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006.

Background

2. The background to this appeal can briefly be summarised as follows. The appellant is a citizen of India born on 1 July 1990. In October 2009 he was granted entry clearance as a student valid until 31 May 2013. He arrived in the UK on 23 January 2010. On 30 April 2013 he applied for further leave to remain as a Tier 4 (General) Migrant and submitted a CAS for studies at Grenville College London. However, on 14 April 2014 UK Visas and Immigration decided to revoke the college's licence.

3. On 8 August 2014 the respondent wrote to the appellant notifying him of the revocation and indicating that the CAS he had submitted was no longer valid and that his application would fall to be refused but in line with the rules and guidance consideration of the application would be suspended for the period of 60 calendar days. On 6 November 2014 the appellant made a further application for leave to remain to pursue studies at Edwards College. This application was treated by the respondent as void. She went on to consider the original application which was refused for the reasons set out in the decision letter dated 6 November 2014, that the appellant had failed to provide a valid CAS in support of this application.

The Findings of the First-tier Tribunal Judge

4. The appellant appealed against that decision arguing that his first application was made in time and supported by a valid CAS. His college licence was revoked during the currency of his section 3C leave and he had submitted a variation of application which was not accepted by the respondent but which was open to him under the rules. He asked for his appeal to be determined on the papers without an oral hearing.

5. The judge noted that the appeal before him related to the application of 30 April 2013. The CAS submitted in support was no longer valid. He noted that the application in relation to Edwards College was "voided" by the respondent for reasons of which he was unaware. As there was no CAS in relation to the decision under appeal, the judge found that the respondent's decision was in accordance with the law and the rules and that the appeal must be dismissed.

The Grounds of Appeal and Submissions

6. In his grounds of appeal to the Upper Tribunal the appellant argued that there was no suggestion that the college licence was revoked due to any fault of his or that he had been given a fair opportunity in accordance with the respondent's policy to find another college. The grounds refer to the decision in Naved (student-fairness-notice of points) Pakistan [2012] UKUT 14 and also seek to rely on the issue of procedural fairness set out in Patel (revocation of sponsor licence-fairness) India [2011] UKUT 211 and Thakur (PBS decision-common law fairness) Bangladesh [2011] UKUT 151.

7. Permission to appeal was refused by the First-tier Tribunal but granted by the Upper Tribunal (UTJ Finch) for the following reasons:

> "... in his grounds of appeal he also explained that he had submitted a variation of his application and there is a copy of this application in the home office bundle. In his original grounds of appeal the appellant had said that this application had been voided because he already had an outstanding application.
>
> The appellant now argues that the First-tier Tribunal judge erred in law as he failed to take into account the respondent's "Patel guidance". The First-tier Tribunal judge found that the guidance had been complied with as the appellant had been able to apply for further leave to study at another college. However, as the application was voided, this is not the case and the respondent did not comply with her own policy.
>
> Therefore the respondent has not acted in accordance with the law and the appellant's appeal should have been allowed on this basis in order for the respondent to provide the appellant with the opportunity to apply to vary his application for a Tier 4 leave. (This ground of appeal was still available as he had applied to vary his leave prior to 20 October 2014.)
>
> Therefore, I am satisfied that the First-tier Tribunal judge made an arguable error of law in his decision and reasons and find that permission to appeal should be granted."

8. In her response to the grounds the respondent makes the point that the appellant chose to opt for a hearing on the papers and the information before the judge was therefore limited. The author of the response did not have access to the original appeal but said that it would be surprising if it contained an assertion that he had not been given the 60 day period to find another college because records showed that by letter dated 8 August 2014, he has been given that opportunity. The response enclosed a copy of the letter.

9. At the hearing before me in response to the question why the second application had been treated as void, Ms Isherwood produced a letter addressed to the appellant dated 6 November 2014 informing him that his application was voided due to the application from 30 April 2013 still being open.

10. Mr Richardson, who had been unaware of the letters of 8 August 2014 and 6 November 2014 until the date of hearing, submitted that there had been an error of law in that the First-tier Tribunal judge had been unaware of the basis on which the second application was treated as void or of the fact that the second application had followed from the grant of the 60 day period enabling the appellant to obtain a new CAS. There may have been some confusion arising from the fact that the appellant had answered “no” to the question on the application form "do you currently have any other applications with UK visas and immigration on which you are awaiting a decision?" However, it was now clear that the appellant had submitted what was in substance an application to vary in accordance with the letter of 8 August 2014 and that would have been obvious on even the most cursory look at the respondent’s records.

11. Ms Isherwood submitted that the respondent had been entitled to treat the second application as void. The obligation was on the appellant to make an application to vary his grounds and to make it clear what application was being made. He had submitted a fresh application and the respondent was entitled to refuse it on the basis that the appellant had failed to declare that there was a pending application. In response Mr Richardson argued that this clearly raised issues of procedural fairness as the appellant had simply responded to the opportunity of obtaining another CAS.

Assessment of Whether there is an Error of Law

12. The first issue I have to consider is whether the First-tier Tribunal erred in law such that the decision should be set aside. The appellant opted for an appeal without an oral hearing and the judge had to deal with the appeal on the basis of the evidence before him. It can only be in exceptional circumstances that further evidence not before the judge can be relied on to establish an error of law. However, in the present case, I am satisfied that the judge through no fault of his own proceeded on a fundamental misapprehension of the facts of this case. Both Judge Malone and Judge Finch were clearly unaware that the 60 day period under the policy had been granted to the appellant and that he had submitted an application, having obtained a valid CAS during that period. Further, the assertion that the second application was intended to be an application to vary the first application was made in the grounds to the First-tier Tribunal but the judge failed to identify and deal with that issue. These errors of law are such that the decision should be set aside.

Re-making the decision

13. The judge took the view that appeal before him related to the application dated 13 April 2013 whereas in fact the issue was whether the subsequent application was a variation of that application. The respondent treated later application as void because of the failure to declare that there was an outstanding application. Ms Isherwood submitted that the onus was on the appellant to make it clear that the later application was an application to vary that outstanding application. Mr Richardson's submission was that even if the appellant could be faulted for not making it clear that the late application was a variation, the fact remained that the respondent knew about the previous application and a 60 day letter had been sent to the appellant. If there was a failure to tick the right box or to identify the application as a variation, this was not a case where the respondent could say that there was any prejudice and when the situation was looked at as a whole it was, so he argued, a clear case where fairness required the respondent to make a decision on the application as amended.

14. In R (Raza) v Secretary of State for the Home Department [2016] EWCA Civ 36, the Court of Appeal confirmed that what fairness required was necessarily fact and context specific and that while there was in general no duty to give notice of what was believed to be a deficiency in a 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 [31]. In that appeal the court was dealing a situation with there was a failure to provide a valid CAS whereas in the present case there was a failure to appreciate that the later application was in fact a variation. It must also be emphasised that fairness in this context relates specifically to procedural fairness. On the particular facts of this appeal, now that the factual position has been confirmed, I am satisfied that this is a case where procedural fairness required clarification of whether the appellant's intention was to submit a fresh application or to vary the previous application. If that enquiry had been made it would have been clear that the intention was to make a variation application within the time limits set out in the guidance given in the 60 day letter.

15. I am therefore satisfied that the proper course is to allow the appeal but only to the extent that the application as varied remains to be decided by the respondent. There has been no decision on that application and the Tribunal is not in a position to make that decision without it first being considered by the respondent.

Decision

16. I find that the First-tier Tribunal erred in law such that its decision should be set aside. The appeal is allowed to the extent that the application as varied is remitted to the respondent for decision.

Signed H J E Latter

H J E Latter
Deputy Upper Tribunal Judge

Date: 15 February 2016