



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/34560/2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 20th September 2017**

**Decision & Reasons
Promulgated
On 21st September 2017**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**JAGDISH KAUR
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr P. Nath, Senior Presenting Officer
For the Respondent: Mr Chohan, Counsel instructed by Expert Law Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission, against the decision of the First-tier Tribunal (Judge Amin) who, in a determination promulgated on the 4th January 2017 allowed her appeal against the decision of the Respondent to refuse to vary leave to remain.
2. Whilst the Secretary of State is the Appellant, for the sake of convenience I intend to refer to the parties as they were before the First-tier Tribunal.
3. No anonymity direction was made by the First Tier-Tribunal and no application has been made on behalf of the Appellant or any grounds put forward to support such an application.

4. The Appellant, a citizen of India, entered the United Kingdom on 5 November 2010 as a Tier 4 student and was leave granted until 17 February 2012. On 22 August 2012 she was granted further leave to remain valid until 20 June 2013. She was granted a further period of leave from 5 July 2013 until 17 February 2015.
5. On 13 February 2015 she submitted an application for a further grant of leave to remain outside of the rules. As made plain in the decision letter of 2 September 2015 she submitted an FLR (O) application requesting leave to remain outside the rules. The Secretary of State considered whether the particular circumstances set out in the application constituted compassionate factors which might warrant a grant of leave to remain outside the requirements of the immigration rules. It appears that in support of her claim she stated that she required an extension of 30 days leave in order to obtain a CAS and arranged to continue her studies. The grounds of the application would be considered but it was stated in the decision letter that it was open to her to return to India and pursue her studies or employment there. In the alternative, if she wished to undertake studies, she could make an application for entry clearance under Tier 4. It was noted that she had already had six months in which to organise studies and no further Tier 4 application had been raised. Thus the application was refused under paragraph 322 (one) of the Immigration Rules.
6. The Respondent also refused the application under paragraph 322(5) of the Immigration Rules on the basis that the Appellant had, in an earlier application for leave to remain as a student on the 16th February 2012, submitted an English language test certificate from ETS which was false. The Respondent referred to the Appellant's test scores having been cancelled by ETS. As a result the Respondent refused the application under Paragraph 322(5) on the basis that her conduct made it undesirable to allow her to remain in the UK.
7. The Appellant appealed that decision. The application was made out of time. In a letter dated 30 November 2015 her legal representatives set out her position and her immigration history and submitted that she had an in country right of appeal. The letter also requested an extension of time for the reasons set out in that letter. On 2 March 2016 First-tier Tribunal Judge Doyle issued a decision in which he extended time to appeal. The appeal was lodged on 30 November 2015; the grounds argued that the circumstances of the Appellant were such that discretion should be exercised in the Appellant's favour. It was asserted that she would give evidence at the hearing. However, on or before 6 March 2016, the Appellant indicated that she wished the appeal to be heard on the papers without hearing. However in a later communication made to the Tribunal her solicitors requested an oral hearing (see email sent on 13 April 2016).
8. Directions had been sent by the Tribunal to the parties on 16 March 2016 making reference to documents or submissions to be provided by 13 April

2016. No documents were provided on behalf of the Appellant in response to those directions nor were there any further documents provided by the Respondent.

9. A notice of hearing was subsequently sent on 30 April 2016 with a hearing date of 16 December 2016.
10. On the 16th December 2016 her appeal was heard by the First-tier Tribunal (Judge Amin). The judge recorded at paragraph 8 that the Appellant had not attended and there was no representative in attendance either. In these circumstances the judge applied rule 25 of the Tribunal Procedure (First-tier) Immigration and Asylum Chamber Rules 2014 and decided to proceed in the appeal in the absence of the Appellant.
11. The judge recorded that the presenting officer applied to have a bundle of documents served on the Tribunal at the commencement of the hearing. Those documents related to the evidence in support of the refusal under paragraph 322 (5) and the allegation relating to the submission of the TOEIC certificate. The judge noted that the documents had not been provided to the Appellant and thus it would result in an unfair trial. The judge also stated that the directions the service of documents had been sent to both sides some time ago and the documents should have been served in compliance with those directions. Thus the judge refused to admit those documents.
12. In a determination promulgated on the 31st January 2017 the judge allowed her appeal. The judge set out the immigration history at paragraph 12 under paragraph 13 made reference to the issue of deception and the burden of proof. At paragraph 14 the judge found that “there is no evidence from the Respondent proved that the Appellants TOEIC certificate was fraudulently obtained “and at paragraph 15 stated that “the difficulty with the refusal letter is that the strong assertions of fraudulent certificate are not supported by any admissible evidence.” The judge referred to the burden being on the Respondent and that “the Respondent has failed to do this due to a total lack of evidence. For these reasons the appeal succeeds as a refusal was not in accordance with the law”. Thus the judge set out in the notice of decision that the appeal succeeded on the grounds of the Respondent’s decision was not in accordance with the law therefore a valid decision was outstanding.
13. The Respondent sought permission to appeal that decision on 11 January 2017 and permission was granted by First-tier Tribunal Page on 10 July 2017 for the following reasons:
“The Respondents grounds of appeal are arguable. The Respondent complained that the judge acted unfairly by refusing to admit the bundle of documents which the Home Office presenting Officer attempted to serve at the commencement of the hearing. This evidence, it is argued, was the evidence that would approve the Respondent’s allegation that the TOEIC test had been obtained fraudulently. The Respondent argues that the appeal could not have been justly determined without this crucial

evidence. The judge is arguably erred by not considering whether to adjourn the hearing for the Appellant to be served with this evidence and respond to it. At paragraph 7 - nine the judges said that the Appellant did not attend the hearing and there was no representative in attendance and the judge decided to proceed with the appeal in the absence of the Appellant. Paragraph 9 the judge records that he said to the Respondent's representatives that proceed without the Appellant having had sight of the Respondent's bundle of documents prior to the hearing would result in an unfair trial. This reason, the judge ruled against admitting the Respondent's bundle of documents and they were handed back to the Respondent's representative. Paragraph 14 the judge said that there was no evidence from the Respondent to prove that the Appellants TOEIC certificate was fraudulently obtained. The Respondent's argument is that there was such evidence and that the judge erred in law by refusing to admit it."

14. At the hearing before their Upper Tribunal MrNath appeared on behalf of the Secretary of State and Mr Chohan appeared on behalf of the Appellant. There had been no rule 24 response to the Respondents grounds and no further evidence provided. The Appellant's solicitors had written to the Presenting Officer's Unit for a copy of the documents after permission had been granted.
15. Both advocates had the opportunity to discuss the issues and inform the Tribunal that it was conceded that the decision of Judge Amin involved the making of an error of law and that the outcome should be that the decision should be set aside and remitted to the First-tier Tribunal for a hearing.
16. Given that concession, it is necessary to set out why the decision of the judge did involve the making of an error on a point of law which results in the decision being set aside.
17. The first error relates to the consideration of the evidence that the Respondent sought to provide to the Tribunal. Whilst the judge made reference at paragraph 9 that service of the documents without the Appellant having had sight of them would result in an unfair trial, there was no consideration of the nature of that documentation and whether there would have been any unfairness if the appeal had been adjourned so that service could take place and for the Appellant to respond. There was no reference in the determination to any analysis of the Tribunal's powers under the Procedure Rules or any reference to the overriding objective and to justly determining the appeal.
18. The 2014 Procedure Rules Rule 4(3) (h) empowers the Tribunal to adjourn a hearing. Rule 2 sets out the overriding objectives under the Rules which the Tribunal "must seek to give effect to" when exercising any power under the Rules. It follows that they are the issues to be considered on an adjournment application as well. The overriding objective is deal with cases fairly and justly. This is defined as including "(a) dealing with the

case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal; (b) avoiding unnecessary formality and seeking flexibility in the proceedings; (c) ensuring, so far as is practicable, that the parties are able to participate fully in the proceedings; (d) using any special expertise of the Tribunal effectively; (e) avoiding delay so far as compatible with proper consideration of the issues".

19. It is plain from the decision that the Appellant had not provided any documentation before the Tribunal. Furthermore she had not appeared before the court despite asking for an oral hearing and there had been no further correspondence from those representing her as to either her non-attendance or their non-attendance. It is also the position that the documents that were sought to be admitted were ones which were dealing with an important issue of substance. Had the judge considered the overriding objective when considering whether to admit the documentation, the judge could have ordered that the documentation be served in a short space of time with the appeal returning to the Tribunal with little delay. That would have provided for a fair hearing for both parties. This is particularly so when the judge went on to find that there was no admissible evidence to support the decision letter.
20. The judge made reference to the assertion of the fraudulent certificate in the decision letter that went on to state "the burden is initially on the Respondent to show that fraud has been at play in the application. Respondent has failed to do this due to a total lack of evidence in this case." However there was evidence available as the history demonstrates.
21. The second error of law is that the judge found that the Appellant's appeal succeeded because the "refusal was not in accordance with the law." (See paragraph 15 and decision). However the decision letter set out the nature of the application made to the Secretary of State by the Appellant. This was an application made outside of the immigration rules for a period of leave on compassionate grounds which was refused under paragraph 322(1) for the reasons set out within the refusal letter. As it stated, the Appellant's application was for an extension of 30 days leave in order to obtain a CAS and to arrange to continue studies however the Secretary of State considered that the Appellant could return to India and pursue her studies or employment or alternatively, if she wished to undertake studies, she could make an application for entry clearance under Tier 4. It was noted that she had already had six months in which to organise a studies and no further Tier 4 application had been raised. Thus the application was refused under paragraph 322 (1) because the Secretary of State was not satisfied that variation of leave to enter or remain was being sought for a purpose not covered by the rules.
22. The judge made no reference to that application and the refusal under paragraph 322 (1) and made no findings in relation to the appeal against that decision and only dealt with paragraph 322 (5). In those circumstances it was not open to the judge to allow the appeal on the basis that the decision was "not in accordance with the law" and that "a

valid decision was outstanding” because there was a decision which was valid and was the subject of the appeal.

23. Consequently both advocates agree that the decision cannot stand and must be set aside. Both advocates further agreed that the correct course to adopt is for the appeal to be remitted to the First-tier Tribunal for a further hearing. I am satisfied that that is the correct approach therefore I remit the appeal to the First-tier Tribunal for a further hearing.

Decision:

The decision of the First-tier Tribunal did involve the making of an error on a point of law; the appeal by the Secretary of State is allowed. The appeal is remitted to the First-tier Tribunal.

Signed

Date: 20/9/2017

Upper Tribunal Judge Reeds