Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/00169/2016**

THE IMMIGRATION ACTS

Heard at Field House
On 13 February 2018

Decision & Reasons Promulgated
On 20 March 2018

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ZAHIRUL ISLAM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Mr M Hossain, Counsel

DECISION AND REASONS

1. The respondent (hereafter the claimant) is a citizen of Bangladesh. He was granted leave to enter the UK as a Tier 4 (General) Student Migrant on 10 April and received extensions in the same capacity until 15 March 2014. On 25 February 2013 his further leave to remain as a Tier 4 (General) Student was curtailed due to revocation of the Tier 4 sponsor licence. On 27 April 2013 he had applied for leave to remain as a Tier 4 Student. On 7 August 2015 the appellant (hereafter the Secretary of State or SSHD) refused this under paragraphs 322(1A), 322(2) and 320(7B) of the Immigration Rules on the basis of alleged deception in the use of an English test certificate from the TOEIC.

2. The claimant's grounds of appeal to the First-tier Tribunal (FtT) disputed that he had ever used deception and also claimed that the SSHD should have granted him 60

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days when she curtailed his licence, pursuant to the Upper Tribunal guidance in **Patel (revocation of sponsor licence – fairness) India [2011] UKUT 00211** and similar cases.

3. His appeal came before Judge Freer of the FtT. He found that the SSHD had not proven deception and in consequence

   (1) the SSHD could not rely on any of the general grounds of refusal; and

   (2) the claimant should succeed under the substantive Immigration Rules set out in Appendices A and C:

   > "For that [the general grounds which relied on deception] was the only reason he failed in points under the appendices."

   The judge went on to state that as the claimant was entitled to succeed under the Immigration Rules he did not need to decide the human rights grounds 'but it appears highly unlikely that he would succeed under Article 8'" (paragraph 33).

4. The SSHD's grounds of appeal challenged the judge's decision. The principal contention was that the judge had failed to address correctly the burden of proof in respect of the deception issue. The grounds also contended that the judge had failed to make a finding that the maintenance requirement was met and that it was not open to the judge to allow the appeal under the Immigration Rules without finding that the claimant met the maintenance requirements.

5. In granting permission UTJ Plimmer stated that the principal challenge raised by the SSHD was "not arguable".

6. Ms Isherwood stated that she did not seek to go behind that conclusion and said she felt the SSHD was in difficulty in pursuing the other grounds because although incorrect to allow the appeal under the Immigration Rules, the judge should have allowed the appeal on fairness grounds applying the Upper Tribunal guidance in **Patel**, especially since the judge found the claimant credible and the SSHD has raised no challenge to the facts as set out by the claimant before the judge (except in relation to the deception issue).

7. I am grateful to the submissions I heard from Ms Isherwood and Mr Hossain.

8. As already noted the SSHD does not maintain her challenge to the judge's finding that the SSHD had not made out any of her general grounds of refusal.

9. This is an "old style" appeal under s.82(1) of the NIAA and hence it was open to the judge to allow it on the basis that the claimant met the requirements of the Immigration Rules.

10. However, it is clear that the judge was not entitled to allow it under the Immigration Rules because the evidence before him did not establish that the claimant met the maintenance requirements of the Rules. The SSHD did not say in her refusal letter that the only relevant matter as regards meeting the maintenance requirement concerned being able to score points by providing a valid CAS. She stated that because he had been unable to provide a valid CAS "we are unable to assess your remaining course fees or monthly maintenance (funds) requirement". That accurately reflects the requirements set out at paragraph 11 of Appendix C. Since by the time of decision the claimant no longer had a valid CAS there was no concrete reference point for deciding whether the specified documents demonstrated that he had funds amounting to the course fees. The FtT Judge was wrong to consider that the claimant met the maintenance requirements.

11. Since the judge himself stated that it was "highly unlikely" that the claimant could succeed on Article 8 grounds if he did not meet the Immigration Rules, the judge's error regarding the maintenance requirement was clearly material. Whilst there was a further ground on which the judge might have allowed the appeal – the fairness ground – this was not relied on by the claimant's Counsel at the hearing before Judge Freer and it was not automatically the case that the claimant stood to succeed on that ground even if it had been raised. Accordingly I set aside the judge's decision for material error of law.

12. I am in a position to re-make the decision without further ado.

13. The SSHD's reliance on general grounds of refusal has fallen away.

14. It remains the case that the claimant cannot succeed under the Immigration Rules since he did not show that he met the maintenance requirements. There remains no way of knowing if the specified document he produced would suffice to cover the course fees.

15. Both representatives agree, however, that there is another possible ground on which the claimant is entitled to succeed in his appeal, namely, if he can establish that the SSHD failed to act fairly in not granting the claimant 60 days' leave in which to obtain a valid CAS. Ms Isherwood for the SSHD states, that the claimant's position seemed to fall under the SSHD's own policy governing 60 days' leave to obtain a valid CAS. In addition, I see from my own inspection that the claimant's CAS was valid at the date of his application, and only became invalid in the period in between date of application and date of decision. The claimant still had more than 60 days' leave to remain based on the original grant to him of an extension until 15 March 2014. Whilst the SSHD had curtailed the claimant's leave to remain prior to his application for further leave to remain, this (so far as I can tell) was not a matter on which the SSHD thereafter placed any reliance. In such circumstances (with particular reference to Ms Isherwood's stated position on the issue), I consider that the decision of 7 August 2015 was not in accordance with the law by virtue of unfairness on the part of the SSHD in not applying to the claimant her policy to grant 60 days' leave to obtain a valid CAS.

16. The situation created by my decision is uncomfortably artificial because nearly five years have elapsed since the SSHD should have considered applying the 60 days' policy. Nevertheless the rock on which the immigration appeal system is built is that a person who succeeds in his appeal should be put back in the position he should have enjoyed but for the wrongful decision.

17. At the same time, in order to act on my decision, the SSHD would certainly need to be satisfied that the claimant still wished to pursue studies as a Tier 4 (General) Migrant and can currently meet all relevant requirements currently.

18. To summarise:

    The decision of the FtT Judge is set aside for material error of law.

    The decision I re-make is to dismiss the claimant's appeal under the Immigration Rules but to allow it as "not in accordance with the law" on fairness grounds.

No anonymity direction is made.

Signed   Date: 16 March 2018

Dr H H Storey
Judge of the Upper Tribunal