



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01467/2016

IMMIGRATION ACTS

Heard at Field House
On 5th March 2018

Decision & Reasons Promulgated
On 15th May 2018

Before

DEPUTY JUDGE FARRELLY OF THE UPPER TRIBUNAL

Between

Mrs U. K. BHOJAK
(NO ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms. S Iqbal, Counsel instructed by Hiren Patel Solicitors
For the respondent: Mr Avery, Home Office Presenting Officer.

DETERMINATION AND REASONS

Introduction

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge Robertson promulgated on 21 June 2017. That decision dismissed her appeal against the respondent's refusal to vary her leave to remain. Her husband had a linked appeal as her dependent

2. Mrs Bhojak came to the United Kingdom as a student in February 2009 with leave until 30 April 2010. On 17 May 2010, she was granted further leave as a student until 30 August 2013. However, on 1 June 2012 that leave was curtailed, effective from 31 July 2012. The judge recorded that the curtailment was because she had not been attending the course. She told the judge that at the time she was pregnant and then had taken a six-month holiday. She states that she informed the college. At paragraph 12 the judge records that she said she had appealed that decision successfully but a copy had not been provided.
3. She was then granted further leave to remain as a student on 28th February 2013, valid until 15th June 2014.
4. She made a further application for leave to remain as a student on the 12th June 2014. The respondent had concerns as to whether she was a genuine student and invited her for interview on 8 December 2015. She did not attend and gave no explanation.
5. To qualify for leave to remain as a Tier 4 (General) Student under paragraph 245ZX of the Immigration Rules, an applicant has to meet the requirements of the points-based scheme ("PBS"), including having a minimum of 30 points under paragraphs 113-120 of Appendix A to the Rules relating to attributes. To obtain those points, under paragraph 114 of that appendix, the Applicant is required to have a valid CAS. The CAS provided related to 360 GSP College.
6. When the respondent checked the register of approved sponsors on 2 March 2016 this college was not listed.
7. On the 2 March 2016 her application was refused. As she did not have a valid CAS she was not awarded the necessary 30 points in respect of attributes. Because there was no educational provider it was not possible to assess the course fees and so she also did not achieve the necessary 10 points for maintenance.
8. Her failure to attend without providing a reasonable explanation caused her application to be refused under para 322(10) of the rules. Because she had not been granted leave then her husband's application as her dependent did not meet the rules.

The First tier Tribunal

9. The refusal of 2nd March 2016 was the decision under appeal before First-tier Tribunal Judge Robertson. The decision records the appellant's evidence was she went to the college in February 2015 and was advised

they had lost their licence and had unsuccessfully disputed this with the Home Office. She confirmed she had received letters dated 16 November 2015 and 27 November 2015 inviting her to attend for interview. She acknowledged she did not respond, saying she was waiting for her 60-day letter and there was no point in her attending for the interview as at that stage she could not advise of her studies.

10. On behalf of the appellant it was argued that the appellant should have been given a 60 day letter in accordance with the decision of Kaur (Patel fairness: respondent's policy) [2013] UKUT 00344(IAC). The original Patel decision (Patel (revocation of sponsor licence - fairness) India) [2011] UKUT 211 (IAC) held that where the applicant is innocent and ignorant of the loss of status, common law fairness and the principle of treating applicants equally mean that they should have an equal opportunity to vary their application by affording them a reasonable time with which to find a substitute college. Such potential refusals should be treated in the same way as curtailment cases where the Home Office policy is to allow sixty days to find a substitute college.
11. Kaur (Patel fairness: respondent's policy) [2013] UKUT 00344 (IAC) referred to the respondent's policy introduced to give effect to Patel. The policy provides that, in cases of potential discretionary refusal under paragraph 322 caseworkers should follow the 'Patel' process otherwise the resulting decision will not be in accordance with the law. In that case there was a change made to the policy between the date of application and the decision in 2013.
12. The presenting officer had submitted that the 60-day letter was only relevant if that was the only reason for refusal. If there were other reasons, for instance, the applicant had not established they were a bone fide student then it fell for refusal. Here, the refusal related to the appellant's failure to attend for interview and paragraph 322(10) of the rules. The argument put forward on behalf of the appellant was that it was premature to interview her as she did not have a new course to attend.
13. First-tier Tribunal Judge Robertson asked the appellant's representative if the original policy had been replaced by the guidance of November 2015. Her representative could not answer but submitted that the new policy still provided for a 60-day letter.
14. At paragraph 22 the judge concluded that the respondent had good reason for wanting to interview the appellant and she had not demonstrated a good reason for her failure to attend or make contact. The judge concluded that the 25th November 2015 policy had replaced the earlier one. The 60-day notice was only an issue if that where the only reason for refusal. The judge concluded that the given the appellant's failure to contact the

respondent about the interview the refusal was justified under paragraph 322 (10).

The Upper Tribunal

15. Permission to appeal was granted on the basis that it was arguable the judge applied the incorrect policy given the date of the applications. As a consequence it was arguable this breached the common law duty of fairness in not granting 60 days to find an alternative sponsor.
16. Ms Iqbal, for the appellant referred me to the date of application, namely 12 June 2014. She submitted the relevant applicable policy therefore was the one of January 2014. This was on the basis that the points-based system requires applicants to satisfy the rules as at the date of application. What became known as the Patel guidance were revised on a number of occasions. The grounds contend that the relevant updated guidance was the one dated 11 November 2013 even though the appellant's representative had relied on the guidance of 25th November 2015 in the appeal bundle.
17. The presenting officer argued that the 60-day notice was not the issue because the appellant had twice been asked to attend for interview and failed without good reason to do so. On this basis there was no unfairness.

Consideration

18. There have been numerous updates to the guidance on the tier 4. As a general principle in all that where the college has lost its licence through no fault of the student then the student is entitled to a 60-day notice. The rationale is fairness.
19. It was not an easy matter for the judge to determine which the relevant guidance was when the appellant's representative could not say and the appeal bundle referred to the 2015 guidance. Ms. S Iqbal has not made it clear to me why the earlier policy was applicable. More significantly, she is now explaining to me what difference it would make.
20. Unless the guidance specified to the contrary, for instance that it was not retrospective, then I would have expected the decision maker to apply the operative guidance in place immediately before the decision was taken. The extracts provided do not make for clarity as to the relevant guidance. I agree with First-tier Tribunal Judge Robertson that there cannot be two policies operative affecting the same issue. A would favour, as the judge did, the later policy. In any event it has not been demonstrated what the material difference was.

21. The 60-day notice is based upon the principle of fairness. The appellant's leave as a student was curtailed in 2012 for non-attendance. She succeeded on appeal and was granted leave for a further period. She then applied for further leave. The respondent had concerns about whether she was a genuine student. The respondent wrote to her on 16 November 2015 and 27 November 2015 inviting her to attend for interview on 8 December 2015. She did not attend and did not contact the respondent offering any explanation. The appellant's evidence was she went to the college in February 2015 and was advised they had lost their licence and had unsuccessfully disputed this with the Home Office. She indicated she did not see any point in going to the interview as she did not have a study plan to follow. Her application was refused under paragraph 322 (10).
22. This is quite separate from the issue of having a CAS and this was a point argued before First-tier Tribunal Judge Robertson. At paragraph 23 the judge concluded that she had made absolutely no attempt to contact the respondent. The judge concluded there was no reason why the respondent should have exercise discretion in her favour.
23. This was a carefully prepared decision in which the judge engaged with the issues arising. The judge did ask representatives as to the relevant policy, but met with limited success. The appeal did not only concerned the fact the educational provider was not registered but concerned whether there was any explanation for her failure to attend for interview about her studies. I can find no fault with this reasoning and find no material error of law established.

Decision.

The decision of First-tier Tribunal Judge Robertson dismissing the appellant's appeal shall stand. No material error of law has been established.

Francis J Farrelly
Deputy Upper Tribunal Judge