Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00149/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 November 2019	**On 19 November 2019**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

ABID IQBAL
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Pipe, of Counsel, instructed by Connaught Law
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before me following the grant of permission to appeal by Upper Tribunal Judge Sheridan on 3 October 2019 against the determination of First-tier Tribunal Judge Wilding, promulgated on 2 July 2019 following a hearing at Taylor House on 4 June 2019.

2. The appellant is a Pakistani national born on 15 December 1985. He entered the UK on 1 May 2011 as a Tier 4 student with leave until 30 April 2013. During this time, he studied for a level 7 extended diploma in strategic management and leadership at the International School of Business in Harrow. There is no information as to whether he successfully completed this course.

3. An application for further leave to study for a year for another extended Diploma in Information Technology at the14 Stars European College for Higher Education was made on 30 April 2013 but was refused on 5 August 2013 because there were issues with the sponsor's licence and his CAS was withdrawn. He appealed, arguing that he should have been made aware of the problems with his sponsor before a decision was taken to refuse his application. The appeal was allowed to a limited extent by First-tier Tribunal Judge Wiseman on 22 August 2014 on the basis that the decision was not in accordance with the law and a fresh decision was required *"either to allow the sixty day period in question for a further CAS to be obtained or if the application is to be refused again to justify in detail why that should be the appropriate course of action"*. The application was re-refused on 21 August 2015 under paragraph 322(1A) on the basis that the appellant had relied on a fraudulently obtained TOEIC certificate from ETS.

4. A further appeal was lodged and was heard by First-tier Tribunal Judge Wylie on 23 June 2016. The judge found that the appellant had taken the test himself and had not used a proxy test taker. The appeal was allowed on 21 July 2016 again on a limited basis and remitted to the Secretary of State for reconsideration.

5. On 14 June 2017, the respondent provided the appellant with a 60-day letter. A second letter was provided on 25 May 2018 after a judicial review challenge. On 23 July 2018 a further three-month period was given to the appellant. No CAS was, however, obtained and on 25 October 2018 the application was eventually refused. The respondent noted that the 14 stars European College for Higher Education was not on the list of sponsors and that the appellant had already been given two 60-day letters to enable him to obtain a CAS.

6. First-tier Tribunal Judge Wilding then heard the appeal against the October 2018 decision. The appellant's case was that the respondent's decision was not in accordance with the law on the basis that it breached the respondent's duty of common law

fairness. In his witness statement the appellant asked for discretionary leave so that he did not have to satisfy the usual student requirements but that was not an argument pursued by Counsel at the hearing before Judge Wilding. The judge took account of the appellant's evidence, noting that various educational institutions had refused his application for reasons varying from a lack of academic progression to his risky immigration situation but also noting that none had stated that he would have been accepted were it not for his lack of status. He also noted the unexplained and regrettable delays on the part of the respondent and accepted those were not the appellant's fault. However, he found that the respondent's decision was not unlawful because the appellant had been given time to find a sponsor and had not been able to do so. He considered he had no power to direct the respondent to grant a period of leave long enough to enable the appellant to undertake a course of study and that the appellant could not expect to be granted a period of leave outside what he had sought. Given that the appellant had been given two chances to remedy the problem over the lack of a CAS, the judge concluded that there was no breach of common law fairness. Accordingly, he dismissed the appeal.

7. Permission to appeal was granted on the basis that it was arguable that the lack of a CAS was the result of an act or an omission of the respondent (Kaur [2019] EWCA Civ 1101).

8. In her Rule 24 reply, the respondent sought to distinguish Kaur and relied on EK (Ivory Coast) [2014] EWCA Civ 1517 instead, maintaining that the respondent could not be blamed for the actions of institutions outside her control.

The Hearing

9. Mr Pipe relied on and expanded the grounds in his submissions at the hearing on 8 November 2019. He submitted that the decision was not in accordance with the law because of the problems which led to the absence of a CAS and the delays in the issue of the 60-day letters. He then took me through the appellant's immigration history and background and submitted that all the appellant's immigration difficulties lay with the Secretary of State. He pointed to two successful appeals and to the long delays in the issue of the two 60-day letters.

10. Mr Pipe submitted that the judge made irrational findings and those vitiated his determination. He submitted that the appellant had no adverse immigration history when he made his application. All his problems emanated from the respondent. He submitted that the respondent could have issued the

appellant with a letter stating that his immigration history was not his fault or could have granted him a period of leave.

11. For the respondent, Mr Melvin relied upon the Rule 24 response. He submitted that there was nothing irrational with the judge's decision. Many students faced similar problems and lengthy litigation was not an exceptional circumstance. The respondent did not instruct institutions to issue a CAS and so reliance could be placed on EK. Two 60-day letters had been issued. The appellant had therefore had the opportunity to apply to colleges. Alternatively, he could apply from overseas where his immigration history would not be an issue. It was irrational to suggest that he should be granted discretionary leave. The judge's decision was not vitiated by material error.

12. In response, Mr Pipe submitted that the appellant's situation could not be fairly compared to that of other students. There had been long unexplained delays. The conduct of the respondent had not been engaged with. It was unfair to describe this just as protracted litigation. The respondent had the option to grant discretionary leave or to issue a letter confirming that the delays were not the appellant's fault. EK did not apply as that concerned a mistake by a university where a CAS was withdrawn. The appellant sought a decision from the Tribunal that the decision of the respondent was not in accordance with the law. It would then be up to the parties to decide on the remedy.

13. That completed submissions. At the conclusion of the hearing, I reserved my decision which I now give with reasons.

Discussion and Conclusions

14. I have considered all the evidence and the submissions made.

15. The grounds maintain that the appellant seeks a letter from the respondent to Tier 4 sponsors to whom he applies which confirms that his immigration history should not be taken into account. Mr Pipe, in his submissions, maintained that or a period of discretionary leave was sought but that the nature of the remedy was a matter for the parties to agree. What the appellant sought from the Tribunal was a decision that the respondent had not acted in accordance with the law.

16. The appellant argues that he could not obtain a CAS because sponsors were unwilling to take him on due to his poor immigration history. He has adduced evidence of refusals from

several educational institutions. The University of Bedfordshire letter of 5 July 2017 gives no reason for the rejection of his application but the appellant claims in his witness statement that it was because his last college was not in the list of sponsors. The University of Roehampton turned down his application on 13 July 2017 because he had no guarantee of a student visa. An email from the University of West London dated 4 August 2017 (after the first 60-day letter was issued) states that *"Our admissions policy is that we are unable to consider any applicants who have had their leave curtailed in their UK immigration history"*. A letter from London Metropolitan University dated 11 August 2017 states that the appellant was not offered a place because *"there is no academic progress from your previous study"*. That was also a reason given by the University of Hertfordshire in 2017 along with the fact that the appellant's last sponsor had lost its Tier 4 licence. On 7 June 2018, the University of the West of Scotland refused his application because he had been in the UK for over ten years. On 20 July 2018 Ulster University turned down the appellant because there was no time for them to carry out checks given the imminent expiry of his visa.

17. The judge had full regard to all the matters Mr Pipe raised in his submissions. He acknowledged the delays in the issuing of the two 60-day letters but noted that they had been issued and that they did give the appellant the opportunity to find a new sponsor. He also considered the request for discretionary leave but noted that the appellant could not be granted something he had not applied for. That was a valid conclusion.

18. The appellant complains that he was not given a letter that shows that the delays in resolving his leave application were not his fault. The two letters issued by the respondent, dated 14 June 2017 and 25 May 2018, make it very clear, however, that the appellant put in his application in 2013 and that it has since been under consideration by the respondent. Any sponsor can, therefore, see from these letters that the appellant's leave was not curtailed and that he did not delay in the making of his applications. Indeed, he has two determinations which would further support that. In those circumstances, the respondent cannot be held accountable for the policies of individual educational institutions or how they interpreted his position. As observed in Alam [2012] EWCA Civ 960 (at 35 and 45) and cited in EK (Ivory Coast) (at 29), it is an inherent feature of the points- based system that it *"puts a premium on predictability and certainty at the expense of discretion"* and this *"may well result in hard decisions"*. However, as the court held in EK, *"application of the duty of fairness should not result in the public benefits associated with having such a clear and*

predictable scheme operating according to objective criteria being placed in serious jeopardy" (at 31).

19. I have also considered Kaur [2019] EWCA Civ 1101 where the court held that if an applicant's failure to produce a required document on application was *"the result of an act or omission on the part of the Secretary of State for the Home Department, then refusal of leave to remain on the basis of that failure would prima facie be unlawful"* (at 16) but that it was necessary for such a case to succeed to show *"a causal connection"* between the Secretary of State's act or omission and the applicant's failure to meet the rules (at 17 and 19). In the case of Kaur it was the Secretary of State's retention of the applicant's passport which, it was argued, led to her inability to obtain a CAS. In fact, the court found no causal connection had been shown. In the present case, the judgment was not relied on by Mr Pipe in his oral submissions and indeed it would not be clear what act or omission could be attributed to the respondent in circumstances where she acted in accordance with her policy and accepted procedure and issued the appellant not one but two 60-day letters. If the argument is that it was the delay in issuing the letters that led to his difficulty in obtaining a CAS, then I find that a causal connection has not been shown. This is because although some of the university rejections cite a poor immigration history as a reason for rejection, two refer to the lack of academic progress demonstrated by the proposed course and not a single institution confirmed that it would accept him were it not for his immigration history.

20. The appellant's problems in fact commenced in 2013 with his choice of college. Had he perhaps shown more care in his selection at that stage he may not have ended up in the predicament he later found himself. In any event, the respondent gave the appellant two letters in line with her practice and policy and then further delayed consideration of the application for a further two months until it was eventually refused in October 2018 for want of a CAS. The appellant appears, therefore, to have been treated more favourably than other students in getting further time, possibly because of the delays that had been previously incurred. However, as he was still unable to obtain a CAS after the additional time allotted to him, the respondent was entitled to refuse his application and the judge was entitled to dismiss the appeal.

Decision

21. The determination of the First-tier Tribunal does not contain any material errors of law. The appeal is dismissed.

Anonymity

22. No request for an anonymity order was made.

Signed

Upper Tribunal Judge
Date: 14 November 2019