Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00210/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 November 2018	**On 08 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

LAKHBIR KAUR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Awan of MT UK Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Gribble promulgated on 10 July 2018 in which the Appellant's appeal against a decision of the Respondent dated 6 June 2017 refusing leave to remain in the UK and making a decision to remove the Appellant pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006, was dismissed.

2. The Appellant entered the UK on 4 November 2011 pursuant to entry clearance as a Tier 4 student. She was granted further leave to remain on 23 April 2013. On 9 June 2014 she applied for further leave to remain including her husband and son as her dependants. This application was refused on 23 March 2015.

3. The Appellant appealed to the IAC. The appeal was allowed on the basis that the Respondent's decision had not been in accordance with the law: see decision of First-tier Tribunal Judge Fox promulgated on 6 November 2015 (ref. IA/12581/2015). The Respondent was thereafter required to consider exercising discretion to allow the Appellant 60 days to find a fresh educational institution to act as her sponsor and to sit a further English language test.

4. The Appellant was duly given a period of 60 days to expire on 21 October 2016. Thereafter she was given a further period of 60 days to make arrangements to undertake an English language test – this further period of 60 days to run from 11 January 2017 to 13 March 2017. However, during these periods the Appellant was unable either to pass an English language test or to obtain a CAS – the latter necessarily so in consequence of her failure to obtain the appropriate English language qualification.

5. Before the expiry of the latter 60 day period the Appellant's representative wrote to the Respondent by way of letter dated 9 March 2017 (Respondent's bundle Annex U). The letter sought a further period of time in order for the Appellant to seek to pass an English test and to obtain a CAS. The letter states in part:

> *"After going through a huge hardship finally she was accepted to take English Test at one of the recommended test centre at Croydon, however, she was unable to pass it in the first attempt.*
>
> *We have instructions from our client that she was not satisfied with the test centre. She believes that she had done enough to satisfy her English proficiency. She also confirms that she has been in the United Kingdom as a student for almost 6 years and this much of time is sufficient for a student to comply with English speaking and understanding this language. Our client wants Home Office to provide her further time to prove her English through a different venue or centre.*
>
> *Now, while our client has been through all these odds to seek further leave to remain, it is requested to kindly allow her further time to appear again to complete the English Language Test and or consider her application for further leave by taking into account her previously submitted English Language tests."*

6. The Respondent refused the Appellant's application for reasons set out in a combined Notice of Immigration Decision and 'reasons for refusal' letter dated 6 June 2017. The substantive application was refused with reference in particular to paragraph 245ZXA of the Immigration Rules. The decision letter also gives consideration to the request contained in the letter dated 9 March 2017. In this regard the following appears,

> *"This process of delaying consideration for 60 days is now the Secretary of State's standard policy for applicants who find that through no fault of their own, their sponsor has been revoked. This has been arrived at following a High Court ruling which stated that it would be fair to allow all applicants to have 60 days in which to address this change of circumstance, whereas previously the application would have been refused.*
>
> *Therefore the Secretary of State is not prepared to give any additional time as 60 days has been deemed to be suitable and, in order to be fair and consistent, this is applied to everyone in that situation. As you have not complied with this request within the 60 day period we are refusing your application ...*
>
> *The Secretary of State has considered whether the particular circumstances of your case merit the exercise of discretion. Having considered those circumstances the Secretary of State is satisfied that the refusal remains appropriate and is not prepared to exercise discretion in your favour."*

The letter also states:

> *"In a letter dated 09 March 2016 your representatives ... stated that you had taken an English language test at "one of the recommended test centres in Croydon". The letter did not specify which test centre you attended and did not enclose any evidence of your test result. The letter went on to state "...however she was unable to pass it in the first attempt. We have instructions from our client that she was not satisfied with the test centre."*
>
> *While it is noted that your representatives have requested further time for you to re-sit your English language test, it is considered that having been provided with an extension to your initial 60 day deadline (09 December 2016 - 14 day extension to arrange a test), together with a further 60 day extension from 11 January 2017 to 13 March 2017, you have been given a sufficient opportunity to sit an approved English language test."*

7. The Respondent's decision advised the Appellant of her rights of appeal - which were pursuant to section 82(1) of the Nationality, Immigration and Asylum Act 2002 as amended by the Immigration, Asylum and Nationality Act 2006. It was indicated to the Appellant that she had available to her the grounds of appeal as they pertained prior to the amendments of the Immigration Act 2014.

8. The Appellant appealed to the IAC.

9. The appeal was dismissed for the reasons set out in the decision of First-tier Tribunal Judge Gribble.

10. The Appellant then made an application for permission to appeal which was granted by First-tier Tribunal Judge Lambert on 8 October 2018. Permission to appeal was granted on the basis that it was arguable that First-tier Tribunal Judge Gribble had misunderstood the scope of the appeal, and had thereby wrongly limited it to human rights grounds because he had failed to identify that the Appellant's appeal fell for consideration under the pre-Immigration Act 2014 regime. This pre-amendment regime applied because the Appellant's original application was made on 9 June 2014 notwithstanding that the decision under appeal was made on 6 June 2017.

11. There does indeed appear to be a misapprehension on the part of the First-tier Tribunal Judge as to the scope of appeal. This is evident at paragraph 11 of the decision which opens in these terms, *"Only one ground of appeal is available: is the decision contrary to Section 6 of the Human Rights Act 1998?"*

12. The grounds of challenge upon which permission to appeal was granted plead in aid the following,

> *"Most crucially, the available grounds of appeal included (inter alia) whether the decision-maker could have exercised discretion differently properly reviewable by the Tribunal under Section 85 of the NIAA 2002. That in turn also begs the question whether discretion was exercised at all for the impugned decision to be in accordance with the law…"*

13. It may be observed at this stage - as indeed Mr Awan acknowledged during the course of submissions - that the first section of this passage, which purports to reference section 84(1)(f) of the 2002 Act, is misconceived: the discretion referred to under the legislation was required

to be a discretion available under the Immigration Rules rather than a discretion at large. It was clearly the case that the Appellant could not satisfy the requirements of the Immigration Rules, and no issue of discretion under the Immigration Rules arose. Accordingly, it is the latter part of the quotation above - which references section 84(1)(e) - that is pertinent to the substance of the challenge: i.e. that but for the Judge's error the Tribunal could have considered whether the Appellant could avail herself of an argument that the Respondent's decision was 'not in accordance with the law'.

14. However, the grounds of appeal do not further articulate in what way it might be contended that the Respondent's decision was impugnable on such a ground.

15. In context the only possibility would be in respect of the rejection of the representations in the letter of March 2017 requesting a further period of grace in order to pass an English test. However, from the passages I have quoted above from the decision letter, it is manifestly the case that the Respondent gave consideration to the request; further, in so doing, as well as having regard to the general policy, gave consideration to whether to make use of his wider discretion to favour the Appellant. In such circumstances Mr Awan realistically acknowledged that he recognised that the challenge was in difficulties in substance if not in form – i.e. that although there was technical merit in the 'jurisdiction' challenge, the Appellant did not have a subsequent case of merit to advance within the wider jurisdiction the First-tier Tribunal should have adopted.

16. The Appellant's difficulty in is regard is reinforced by the limited way in which her case was put before the First-tier Tribunal.

17. It is apparent from paragraph 7 of the decision that reliance was placed only on Article 8 of the ECHR. It was not expressly articulated before the First-tier Tribunal that the appeal should be allowed on the basis that the Respondent's decision was not in accordance with the law.

18. Nonetheless I note that as an aspect of the Article 8 case the issue of exercise of discretion was raised albeit in a very limited sense: "*[The Appellant's representative] had instructions to submit that the failure to exercise discretion is a breach of her private life*" (paragraph 9). However, as I have already noted, this point has no merit: the Respondent considered the discretion and elected not to exercise it in the Appellant's favour.

19. Moreover, and in any event the First-tier Tribunal Judge expressly found that there was no unfairness in the procedures:

> *"She was granted a number of further periods to find a college and sit an English test further to a successful appeal. She failed that test and there is no satisfactory evidence of unfairness in either the process or the test to allow me to conclude the Home Office behaved unfairly in not allowing further time"* (paragraph 14).

See also:

> *"There has been no unfairness in her treatment"* (paragraph 22).

20. In the circumstances it seems manifestly clear that even if the First-tier Tribunal Judge had been alert to the wider jurisdiction the only basis of appeal that the Appellant could possibly have advanced in respect of the decision being not in accordance with the law had absolutely no merit whatsoever. Indeed, Mr Awan does not press the point with any vigour, but frankly recognises the difficulty for the Appellant.

21. In the circumstances, whilst I accept that there was a misdirection such that the Judge failed to identify and recognise the extent of the jurisdiction to be exercised in considering the Appellant's appeal, I decline to set aside the decision of the First-tier Tribunal in exercise of my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. The decision of the First-tier Tribunal accordingly stands.

Notice of Decision

22. The decision of the First-tier Tribunal contained an error of law. However, in exercise of the discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 the decision is not set aside and accordingly stands.

23. The Appellant's appeal remains dismissed.

24. No anonymity direction is sought or made.

Signed: Date: **4 January 2018**

Deputy Upper Tribunal Judge I A Lewis