IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00005/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House by Skype Remote Hearing	**Decision & Reasons Promulgated**
On 15th October 2020	**On 26 October 2020**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MD MOYNUL ISLAM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Jarvis, Home Office Presenting Officer
For the Respondent: Mr Syed-Ali, Direct Access

DECISION AND REASONS

The application for permission to appeal was made by the Secretary of State but nonetheless I refer to the parties hereinafter as they were described before the First-tier Tribunal.

The respondent appeals against the decision of First-tier Tribunal Judge Lawrence, who in a decision promulgated on 28th January 2020 allowed the appellant's appeal against the refusal of his student leave, allowing the appeal on human rights grounds.

The Secretary of State submitted that in allowing the appeal on that basis that the respondent's decision was unlawful as the First-tier Tribunal Judge had failed to give adequate reasons for his conclusion.

A short immigration history is, according to the Home Office file, that the appellant's spouse first entered the United Kingdom on 29th October 2010 with leave to 28th October 2011 and on 10th August 2011 was granted leave to remain as a student until 26th May 2014. Quite when the applicant entered the United Kingdom is not clear. That said, he made an application to remain as a Tier 4 (General) Student on 14th May 2014. The respondent, not being satisfied he was qualified to leave under Part 6A of the Immigration Rules, made a decision on 17th June 2015 to remove him from the UK by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. He had no Confirmation of Acceptance for Studies because the CAS submitted was assigned by the London School of Technology. This had been checked on 30th April 2015 and the college was not listed as a Tier 4 sponsor as at that date. Judge Herbert, however, allowed the appeal on the basis that the appellant's inability to provide a CAS letter was due to matters outside his control as the respondent was required to return his original documentation so he could supply his CAS to a different college.

In a letter dated 5th July 2017 (some time after the appeal) the Secretary of State referenced the application dated 14th May 2014 and confirmed that it would suspend consideration of his application for a period of 60 calendar days. It was stated to be open to him to obtain a new CAS for a course of study at a fully licensed Tier 4 educational sponsor and to submit an application to vary the grounds of his original application. The letter stated:

> *"In order to assist you in obtaining a new CAS we have enclosed with this letter an information leaflet which you can take to any potential new sponsors. This leaflet explains to them that you have an application outstanding and that your previous Tier 4 educational sponsor's licence has been revoked."*

The Secretary of State also enclosed the appellant's passport, stating: "If you decide to obtain a new CAS then your sponsor will need to see your passport."

Subsequently on 7th January 2019 the Secretary of State refused the application on the basis that the Secretary of State was not satisfied he had produced a valid CAS because the CAS had been cancelled by the UK Visas & Immigration. Seemingly, the applicant provided no new CAS and the application was decided on the basis of the CAS assigned by the London School of Technology.

The matter was appealed and in the determination of First-tier Tribunal Judge Lawrence, which is under challenge, the First-tier Tribunal Judge acknowledged the two Home Office letters dated 5th July 2017 stating that the appellant's leave was to be extended by 60 days in order for him to

find a Tier 4 licensed sponsor and instructions referred to that the appellant was requested to follow in order to book a Secure English Language Test and it was stated that he would be able to do so despite his passport having expired.

Judge Lawrence correctly considered that the appeal was covered by provisions saving the rights to appeal that were available under the version of Part 5A of the Nationality, Immigration and Asylum Act 2002 as in force immediately prior to 20th October 2014 ("the saved provisions"). As such, the grounds of appeal were the "old grounds of appeal" and not merely confined to human rights grounds.

However, the judge added at paragraph 23 of his decision: "Some three years after Judge Herbert OBE heard the appellant's appeal, the appellant's situation appears not to have improved in terms of his stated wish to progress his education in the United Kingdom". At paragraph 24 the judge stated:

> *"The appellant does not suggest he is now eligible for a grant of leave to remain under the Immigration Rules and I do not consider that there is any obvious eligibility within the various categories of the Rules. The appellant has not, for example, suggested that there are matters that would constitute very significant obstacles to his reintegration in Bangladesh if he was required to return to that country. I do not find therefore that the decision was not in accordance with the Immigration Rules."*

The judge added at paragraph 25: "*There is a lack of detail or independent evidence as to the extent of the efforts the appellant has made to obtain a CAS*." The judge, however, found that the appellant was unable to provide a CAS for reasons outside his control despite being given additional time and that there was an "*absence of any suggested or obvious way forward"* and concluded that "*I consider that the respondent has yet to correct the illegality that was identified by Judge Herbert OBE*".

The judge on that basis proceeded to allow the appeal because he accepted the appellant's claim to be unable to provide a CAS for reasons outside of his control and the respondent had yet to correct the illegality identified by Judge Herbert OBE.

The Secretary of State appealed on the basis that the judge had failed to give adequate reasons when finding on a material matter:

> *"However, I consider that the respondent has yet to correct the illegality that was identified by Judge Herbert OBE, in that the appellant has yet to be provided with any real opportunity to obtain a new sponsor to continue his studies in the United Kingdom, as he wishes to do, and I therefore consider that the decision under appeal was not in accordance with the law",*

Nor did the judge give adequate reasoning for finding the removal of the appellant from the United Kingdom was contrary to Section 6 of the Human Rights Act. It was pointed out in the grounds of appeal that the respondent's bundle included two Home Office letters dated 5th July 2017 giving the appellant leave extended by 60 days for him to find a new Tier 4 licensed sponsor with instructions as to how to an English language test.

It was asserted in the grounds that to find that the Secretary of State had failed to correct the illegality indicated by Judge Herbert was a misdirection which infected the ultimate conclusion, rendering it unsound. The appellant failed to attend the hearing to elaborate his contention that he had been unable to obtain a substitute CAS and the judge had found at paragraph 25 that: "*There is a lack of detail or independent evidence as to the extent of the efforts the appellant has made to obtain a CAS*."

The judge also found that there was a breach to the appellant's right to a private life under Article 8 and that the judge recorded in his assessment, paragraph 24 that the appellant had not advanced any argument in his grounds of appeal that would suggest he would face any obstacles to reintegration in Bangladesh and further: "*There is little detail in the evidence as to the life that the appellant is enjoying in the United Kingdom presently*", adding that little weight should be attached to a private life that was established when in the United Kingdom precariously.

It was therefore asserted that it was unclear on what basis the judge found the appellant's private life would be breached by return to his home country.

Having listened to the submissions from both Mr Syed-Ali and Mr Jarvis, who helpfully provided a skeleton argument, I do find an error of law. As is clear in the First-tier Tribunal Judge's decision, the appellant did not attend the First-tier Tribunal hearing and provided no reasonable explanation for not doing so. Nonetheless, the judge placed material weight on his written assertion that despite having been granted additional time by the Home Office he could not obtain another CAS because he could not find another college to take him. As set out in the Secretary of State's decision dated 7th January 2019, *'his sponsor's licence had been revoked'*. The appellant had, however been given the opportunity to obtain another CAS and had failed to do so. The Secretary of State's decision cannot be undermined on the basis of illegality or procedural unfairness by the actions of third parties, in this case the *new* colleges who refused to give the appellant a further CAS. **Dharmeshkumar Bhupendrabhai Patel & Anor, R (on the application of) v The Secretary of State for the Home Department [2018] EWCA Civ 229**, set out in paragraph 28:

> *"There is an exception to the general rule, when public law fairness requires a period of grace for an individual to identify a new sponsor; but the authorities make clear that that is confined to cases in which the problem that has arisen was of the Secretary of State's own making, e.g. if the Secretary of State revokes a sponsor's licence or a student's CAS."*

As Mr Jarvis pointed out, the refusal by third party colleges to give the appellant a new CAS was not the decision of the Secretary of State, who had provided further leave for the appellant to secure a CAS.

Further, the decision of Judge Lawrence to rely on the decision of Judge Herbert was flawed because (a) the material reasons for Judge Herbert reaching his decision in 2016 no longer persisted. The appellant had been given an opportunity to obtain a new CAS and further, the reasoning behind Judge Herbert's decision has been undermined by **Kaur & Anor v Secretary of State for the Home Department [2019] EWCA Civ 1101** whereby the court clarified the legal impact of the Secretary of State's retention of passports. In essence, Section 17 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 specifically provides for the retention of passports by the Secretary of State and secondly, as stated at paragraph 31:

> *"Whilst..., in theory, a viable challenge to the exercise of the discretionary power might lie in the existence of exceptional circumstances which made the retention unfair or otherwise unlawful, the appellant has come nowhere close to demonstrating such circumstances in this case."*

First, I note that the letter of 5th July 2017 specifically enclosed the passport of the appellant and secondly, the appellant provided no further evidence to Judge Lawrence as to his efforts made to secure another CAS. There was no causal nexus between the appellant's failure to get a CAS and the retention of documentation. Further, the judge materially erred by failing to have regard to the decision of the Supreme Court in **Patel & Ors v Secretary of State for the Home Department [2013] UKSC 72** in finding without any evidence that the appellant had established a private life under Article 8(1) in the United Kingdom. Indeed the appellant did not even attend the hearing.

I note that in particular Mr Syed-Ali did not pursue any grounds in relation to Article 8 and pursued quite clearly the matter only in relation to the Immigration Rules. Under the Immigration Rules as set out in the decision letter of 7th January 2019 the appellant did not satisfy the requirements of the Immigration Rules, paragraph 245ZX(c) with reference to paragraph 117(b) of Appendix A and 245XZ(d). The appellant had failed to provide specified documents, in particular Confirmation of Acceptance for Studies, CAS.

As such, I set aside the decision of First-tier Tribunal Judge Lawrence and refuse the appeal in relation to the Immigration Rules and secondly, bearing in mind that Mr Syed-Ali specifically stated he did not pursue the matter on Article 8 grounds and that there was a complete absence of evidence in relation to the appellant's private life, I find no Article 8 protected life, specifically with reference to paragraph 57 of **Patel v Secretary of State for the Home Department [2013] UKSC 72** and refuse the appeal on human rights grounds.

Notice of Decision

The decision of First-tier Tribunal Judge Lawrence is set aside. I remake the appeal and dismiss the appeal of Mr Md Moynul Islam under the Immigration Rules and on human rights grounds.

No anonymity direction is made.

Signed Helen Rimington Date 22nd October 2020

Upper Tribunal Judge Rimington

I have dismissed the appeal and therefore there can be no fee award.

Signed Helen Rimington Date 22nd October 2020

Upper Tribunal Judge Rimington