Upper Tribunal
(Immigration and Asylum Chamber)

Marghia (procedural fairness) [2014] UKUT 00366 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 26 June 2014	
Delivered orally	.....

Before

THE HONOURABLE MR JUSTICE HADDON-CAVE
UPPER TRIBUNAL JUDGE COKER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS TAMAR MARGHIA

Respondent

Representation:

For the Appellant: Mr R Hopkin, Home Office Presenting Officer
For the Respondent: Ms M Malhotra, Counsel

The common law duty of fairness is essentially about procedural fairness. There is no absolute duty at common law to make decisions which are substantively "fair". The Court will not interfere with decisions which are objected to as being substantively unfair, except the decision in question falls foul of the Wednesbury test i.e. that no reasonable decision-maker or public body could have arrived at such a decision.

It is a matter for the Secretary of State whether she exercises her residual discretion. The exercise of such residual discretion, which does not appear in the Immigration Rules, is absolutely a matter for the Secretary of State and nobody else, including the Tribunal – Abdi [1996] Imm AR 148.

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal Judge Chamberlain dated and promulgated on 15 April 2014 whereby the judge allowed an appeal by the Claimant Miss Tamar Marghia against a decision of the Secretary of State dated 12 December 2013 refusing the claimant leave to remain as a Tier 4 (General) Student on the grounds that the Secretary of State was not satisfied that the claimant qualified for leave under part 6A of the Immigration Rules. In the same decision letter the claimant was notified that a decision had been made to remove the claimant under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The brief facts were these. The Claimant came to the United Kingdom as a Tier 4 (General) Student Migrant under paragraph 245 of the Immigration Rules. The claimant's visa expired on 4 December 2013. Shortly before the expiry of that visa, the claimant had found another course at the Docklands Academy London which was due to commence on 16 December 2013. As the judge held, the start date of 16 December 2013 was one of the main reasons that the claimant had chosen the course at the Docklands Academy London.

3. The Claimant stated in her evidence that the course was suitable for her "according to conditions such as the beginning date". Unfortunately for the Claimant, subsequently the Docklands Academy London changed the date for the start of the course from 16 December 2013 to 13 January 2014. The Docklands Academy London then issued the CAS letter for the claimant.

4. It is apparent from the judgment at paragraph 11, that the change was made due to Christmas. The Docklands Academy London explained in a further letter that it was their change which had disadvantaged the claimant through no fault of her own.

5. The problem for the claimant was that the change in date meant that she fell outside the relevant requirements of the Rules and in particular paragraph 248ZX(i) which required the course which was the subject of the new CAS letter to begin no more than 28 days after the expiry of her previous visa. The mathematics are such that the new start date meant that the course in question at the Docklands Academy London was scheduled to start more than 28 days after the expiry of the claimant's

previous visa on 4 December 2013, namely about fourteen days later than the 28 day window.

6. In the Determination and Reasons Judge Chamberlain considered these matters and the fact that the claimant had only learnt on 25 February 2013 that the course date had been changed, (*i.e.* only nine days before her visa expired) and clearly had sympathy for the claimant. The judge said this:

> "15. I find that the respondent is under a common law duty to act with fairness. I find that she had not been fair in refusing the claimant's application. I find that the claimant was not at fault…"

7. In the grounds of appeal the Secretary of State argues that the judge had found that the Secretary of State had not acted with "fairness" but had not explained the reasons for that finding.

8. Ms Malhotra for the claimant, doing her level best for her client, submitted that the decision of the Secretary of State dated 12 December 2013 was unfair because (a) if one took away eight days or so for the Christmas period, the gap between the 28 day window allowed by the Rules and the commencement of the course with the new date was 'only a handful of days' and (b) as the judge found it was not the fault of the claimant that she had found herself in this predicament.

9. The problem with that submission (as Ms Malhotra accepted) is that it fails to use the word "fairness" in its correct sense. The "common law duty to act with fairness", which the judge refers to in paragraph 15 of the Determination and Reasons, is the common law duty of a decision-maker or a public body to make decisions in a *manner* which is fair, i.e. the common law duty of fairness is about *procedural* fairness in this context. There is, however, no absolute duty at common law to make decisions which are *substantively* "fair". The Court will only interfere with administrative decisions which are unfair in this second, i.e., substantive, sense where they can be shown to be Wednesbury unreasonable, i.e. that no reasonable decision-maker or public body could have arrived at such a decision.

10. Ms Malhotra and the Judge erroneously use the term "fairness" in the second, substantive sense. It is not suggested, however (nor could it be) that the decision in question was Wednesbury unreasonable. It was a matter for the Secretary of State as to whether or not she exercised any residual discretion to permit the Claimant to have a further Tier 4 visa notwithstanding her clear inability to meet the criteria set out in the Rules. That exercise of such residual discretion, which does not appear in the Rules, is absolutely a matter for the Secretary of State and nobody else, including the court (see Abdi [1996] Imm AR 148). The Court should not have sought to impose its own view. This trespassed upon the proper functions of the executive. Nor could there be any suggestion of any procedural unfairness in this case. The mere fact that the judge in

question may have had sympathy for the claimant or regarded the substantive decision of the Secretary of State as "unfair" is not to point.

11. This was a case in which the Rules were crystal-clear and the failure to meet the breach of the Rules was manifest. It was therefore open to the Secretary of State to make the decision that she did in her decision letter of 12 December 2013, the claimant having failed to meet the requirements of paragraph 245ZX(i) of the Immigration Rules. The judge erred in law and we set aside the decision and re-make it.

12. Mr Hopkin for the Secretary of State has very fairly mentioned the fact that the claimant is subject to a Section 47 removal order and referred to the fact that Article 8 was the subject of some discussion in the judgment. It is, however, apparent that Article 8 was not pleaded in the grounds of appeal against the original decision of the Secretary of State dated 12 December 2013 and therefore is not before us. Even if it had been pleaded in the context of a Tier 4 Student it is difficult in this case to see any grounds for an Article 8 argument in this case in any event. No further submissions were made by Ms Malhotra.

13. For the above reasons, the appeal by the Secretary of State is allowed. The appeal by the claimant against the decision of the Secretary of State dated 12th December 2013 is dismissed.

Conclusion

The First-tier Tribunal judge erred in law and we set aside the determination to be re-made.
The appeal by the Secretary of State is allowed.
The appeal by the claimant against the decision of 12th December 2013 is dismissed.

Signed Date 23rd July 2014

Mr Justice Haddon-Cave