



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/27952/2013

THE IMMIGRATION ACTS

Heard at Field House

On 31 March 2014

**Determination given orally on 31 March
2014**

Determination

Promulgated

On 14 April 2014

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Before

UPPER TRIBUNAL JUDGE CRAIG

Between

TANVI ARORA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Nasim

For the Respondent: Mr G Jack, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Scott who in a determination promulgated on 5 February

2014 following a hearing at Taylor House on 18 December 2013, allowed an appeal by Ms Arora against a decision of the Secretary of State on the basis that this decision was not in accordance with the law. For ease of reference I shall throughout this determination refer to Ms Arora, who was the original appellant, as “the claimant” and to the Secretary of State, who was the original the respondent, as “the Secretary of State”.

2. The background to this appeal can be summarised quite briefly. The claimant, who was born on 15 August 1989, is a citizen of India who came to the United Kingdom on 28 June 2008 as a student and she was granted further leave under the points-based system valid until 25 October 2012. On 18 October 2012 she applied for further leave to remain as a student.
3. I should state at the outset that it is not suggested on behalf of the Secretary of State, and indeed it is quite clear from the papers before me that this would not have been the case in any event, that the claimant was anything other than a genuine student. It is also not now suggested that in real terms she did not have adequate funds with which she could be maintained. Her family is apparently sufficiently wealthy that sufficient funds would always have been available for her and indeed in the circumstances which transpired such funds were available. However, and this is also common ground between the parties, because she misunderstood the Rules, the claimant did not maintain a sufficient balance in her bank account throughout the relevant 28 day period prior to her application and for this reason alone did not satisfy the maintenance requirement under the Rules.
4. Her application was refused by the Secretary of State on 6 February 2013 for two reasons. First, she was not awarded the necessary points claimed under Appendix C Maintenance (Funds) because she had not shown possession of the requisite funds through the relevant 28 day period prior to her application. As I have already noted, it is accepted that although she could have shown possession of these funds, because she misunderstood the Rules she did not in fact do so. Secondly, the application was rejected because it was believed that she was not entitled to the points claimed under Appendix A (Attributes) for her Confirmation of Acceptance for Studies (CAS) in respect of the English language requirement.
5. The claimant appealed against this decision; the appeal hearing was set down for 13 June 2013 and on that date the Presenting Officer took instructions and the decision was withdrawn. There is some debate as to what exactly happened on that occasion, but it is common ground that it was accepted that the objection founded on the basis that the English language requirement was not satisfied was not maintained on behalf of the Secretary of State. It is the claimant’s case that the Presenting Officer had agreed to withdraw opposition to the appeal in general although the Secretary of State does not accept either that this was the case or that a Presenting Officer would have been able to do so in any event.

6. It seems to be the case that the representatives of the claimant understood that it was the Secretary of State's intention, certainly the indication given on behalf of the Secretary of State by the Presenting Officer, that the application would be allowed. In any event, five days later the Secretary of State issued a further decision in respect of the application and that decision remained the same. Although the claimant was awarded the points claimed under Appendix A in respect of the English language requirement, the application was again refused under Appendix C for the same reasons, namely that the maintenance requirements under the Rules had not been satisfied.
7. The claimant appealed again against this decision and her appeal was then heard before First-tier Tribunal Judge Scott sitting at Taylor House on 18 December 2013 and, as previously noted above, in a determination promulgated on 5 February 2014, Judge Scott allowed the claimant's appeal to the extent that he found that the decision had not been in accordance with the law. It is perhaps relevant to note that at paragraph 8 of his determination Judge Scott records the claimant's position as being that:

“in relation to the financial requirements which the appellant had to met under Appendix C, her position was that she simply misunderstood the Rules. She thought that she had to submit 28 days' worth of bank statements and that a certain balance had to be shown within, rather than throughout, that period.”
8. It is accordingly accepted on behalf of the claimant, and this has not been challenged before me, that in technical terms the requirements under the Rules had not in fact been satisfied. It follows that an appeal under the Rules could not have succeeded and indeed had the issue been argued at the hearing before the First-tier Tribunal on 13 June 2013 that appeal could not have then succeeded under the Rules.
9. The challenge now made by the Secretary of State to Judge Scott's decision is set out in the grounds of appeal as follows. That decision, it is said, contained a material error of law because the Presenting Officer did not make any express concessions or representations concerning the withdrawal. The judge should not have relied on the negative inference from information contained within Counsel's note which was before him in the absence of any positive representations by the Secretary of State “to support the notion that the whole appeal was being conceded” (at paragraph 5 of the grounds). Further, at paragraph 6 it is stated correctly that “the respondent is permitted to withdraw an appeal without giving reasons under 17(2) of the Asylum and Immigration Tribunal (Procedure) Rules 2005” and “It is respectfully submitted that there is no such authority that a withdrawal by the respondent amounts to a concession”.
10. In judicial review proceedings which had been issued before the hearing of this appeal in which the claimant had sought the return of her passport,

the Secretary of State had said this in response to the claimant's challenge to the decision, at paragraph 9 of her response to the application:

"9. Furthermore, in respect of the claimant's challenge the defendant submits that her decision of 18 June 2013 is entirely lawful for the following reasons:

(i) the claimant's application of 18 October 2012 for further leave to remain in accordance with Tier 4 (General) Student category was refused on 6 February 2013 for two reasons, namely:

(a) the claimant had failed to meet the English language requirement in accordance with paragraph 245ZX (a) of the Immigration Rules; and,

(b) the claimant had failed to demonstrate that she has the requisite funds in compliance with maintenance requirement at paragraph 245ZX(d) of the Immigration Rules.

(ii) At the claimant's First-tier Tribunal on 13 June 2013, the defendant agreed to reconsider the claimant's application of 18 October 2012 as the claimant had provided an email from Pearson.com that they had omitted to inform the defendant that the claimant had passed her English language

(iii) The claimant's decision was reconsidered and correctly refused as the claimant had refused to satisfy the maintenance requirement. The defendant rightly provided the claimant with an in-country right of appeal which the claimant has exercised and is currently waiting for the matter to be listed in the First-tier Tribunal."

11. This is relevant because it has been argued before me by Mr Nasim on behalf of the claimant that because the Secretary of State was not represented before Judge Scott there had been no challenge to Counsel's recollection. This does not in fact appear to be the case because the claimant's representatives were obviously aware of the Secretary of State's position with regard to this appeal as this had been set out in the response to the application for judicial review.

12. On behalf of the claimant Mr Nasim sought to persuade me that the decision of Judge Scott should be upheld because the Secretary of State's representative having given an indication that the appeal would be allowed, the exercise of the Secretary of State's discretion outside the Rules, or rather the failure to exercise her discretion to allow the application under the Rules, could not have been made in accordance with the law because it was unfair. It is in effect said that the Secretary of

State in fairness ought not to go behind a concession which has been made once that concession has been made.

Discussion

13. The issue I have to determine is a very narrow one because the facts are in general agreed save as to what occurred at the hearing on 13 June 2013. The facts which are not contested can be briefly summarised as follows. The claimant did not satisfy the maintenance requirements under the Rules because having misunderstood what the Rules said, she had not ensured that she had sufficient sums in her bank account for the requisite 28 day period prior to the application. However it is not challenged either that had she understood the requirements under the Rules she would have been in a position to ensure that she did have these funds because at all times, although the technical requirements under the Rules were not satisfied, she did have available to her the requisite funds necessary for her maintenance. Unfortunately as has been accepted on her behalf, there is an abundance of authority now to the effect that an appeal cannot now be allowed merely because the failure to meet a requirement under the Rules is a technical one and is a “near miss”.
14. The fact is that this appeal had it been proceeded with on 13 June 2013 would have been bound to fail under the Rules. It is right that I record that had the appeal proceeded on that day it is at least arguable that there might have been a case that the appeal should then have been allowed under Article 8 under what might be called *CDS* principles, although in light of recent authority in particular *Shahzad (Article 8 : legitimate aim)* [2014] UKUT 00085, it is perhaps unlikely that the appeal could have succeeded on this basis either.
15. However, the fact is that there was no consideration by the First-tier Tribunal at the hearing on 13 June 2013 as to the merits of the appeal. What happened quite simply is that the decision was withdrawn. Had the Tribunal on that occasion proceeded on the basis that the opposition to the appeal was withdrawn, rather than the decision itself, which in substance is what is now said to have happened, it would not have been open to the Tribunal at that hearing to accept this without some examination of the issues. It is well established in this jurisdiction that a Tribunal cannot merely allow an appeal because there has been no challenge to it; it is not the case that because a representative chooses not to contest a point, that point has to be accepted without more.
16. This is particularly relevant in this case where it is, as I have noted, common ground that the claimant's case simply could not have succeeded under the Rules. In my judgement what seems to have happened is that the Presenting Officer accepted at the hearing on 13 June 2013 that in order to exercise her discretion properly outside the Rules, the Secretary of State ought to take into account that one of the reasons which had been given for the rejection of the application, namely the failure to satisfy the

English language requirement, was not fairly taken because in fact the English language requirement was satisfied.

17. Accordingly the decision had to be remade but without giving any weight to that failure which as the Secretary of State acknowledged, had not been the fault of this claimant.
18. It seems to me that that is what the Secretary of State then did. She, or rather a caseworker acting on her behalf, decided whether or not to exercise discretion outside the Rules in order to allow the application. It may be that a different caseworker would have come to a different decision because as I have already noted also, it is not disputed that this claimant is and has at all times been a genuine student. However, it has long been established that this Tribunal does not have a discretion to interfere with the refusal of the Secretary of State to exercise a discretion outside the Rules (where that discretion has been exercised properly) and so I cannot do so.
19. The decision of the Secretary of State was in my judgement a decision which was open to her. The effect of the Procedure Rules is that the decision to withdraw is one which is open to the Secretary of State and is also one which is not open to challenge before the First-tier Tribunal. The effect of the withdrawal of the decision is that the Secretary of State must make a fresh decision, which is what she has done. Whatever impression the claimant's representatives might have had as to what the likely outcome of a fresh decision would be, they had no right or legitimate expectation to assume that that decision would be favourable to her. The fact is that any discretion would have had to been exercised outside the Rules because the strict requirements of the Rules were not met and there can be no legitimate grievance against a decision by the Secretary of State not to exercise discretion outside the Rules because that is a matter entirely for the Secretary of State.
20. It follows that Judge Scott's determination does contain a material error of law in that there was no basis upon which he could properly find that the Secretary of State's subsequent decision was not in accordance with the law. I therefore have to remake his decision both under the Rules and under Article 8.
21. I can deal with the decision under the Rules briefly. As noted many times already there is no challenge to the finding made or any rate acknowledged within Judge Scott's determination that the application was not in accordance with the Rules. As Judge Scott noted at paragraph 8, the claimant misunderstood the Rules and that is why the requirements were not met.
22. With regard to Article 8, it is the claimant's position now that she wants to regularise her position because she has now finished her studies and wants her passport back so she can go home. I am told by Mr Jack on behalf of the Secretary of State that there should be no difficulty in this

claimant now making arrangements with the Secretary of State to have her passport returned to her at port once she tells them when she wants to go home and from which port she will be departing. I trust that this is the position.

23. It is regrettable that, as I was told by Mr Nasim on behalf of the claimant, the Secretary of State does not appear to have complied with directions concerning this appeal which had previously been given and it would perhaps have assisted in this appeal had the Secretary of State been represented before Judge Scott. However that may be, I trust that the Secretary of State, having been told in terms now that this claimant wishes to go home and would like to be given her passport back in order that she may do so, and in light of Mr Jack's understanding, as this Tribunal was told, that she should be able to have her passport returned to her at port, will now arrange that the claimant's passport will indeed be returned to her to enable her to leave this country without further delay.
24. I was told by Mr Nasim on behalf of the claimant and I have no reason to doubt that this was the case, that the claimant has previously attempted to obtain her passport in order to return home but this has not been possible. It may be that there was some misunderstanding between the parties with regard to how the passport should be returned, but in any event if she now informs the Secretary of State of her travel plans, her passport should be returned to her at port so that she can leave this country.
25. I make one further observation. Although the claimant's appeal ultimately has to be dismissed, it should be noted with regard to any future applications that she may make that the reason that this appeal has to be dismissed is entirely technical. It has not been suggested that she has at any time overstayed and indeed her presence in this country has always been in accordance with the law and under Section 3C of the Immigration Act 1971 she was entitled to remain in this country pending the outcome of this appeal. The only reason that her appeal had to fail ultimately is, as I have noted, technical, and given that the jurisprudence on this area of the law has been developing, it was entirely reasonable for her to maintain this appeal before this Tribunal. The arguments that were put before me on her behalf while ultimately unsuccessful were by no means frivolous and the claimant cannot be faulted in any way for maintaining her position.
26. Although on any future application she may wish to make for entry clearance, she would have to say that she had previously made an application which had not been granted, it should be borne in mind in respect of such a future application that this was not because of any wrong doing on her part in any way. However, for the reasons I have given, her appeal must be dismissed.

Decision

I set aside the determination of First-tier Tribunal Judge Scott as containing a material error of law and substitute the following decision:

The claimant's appeal is dismissed on all grounds.

Signed:

Date: 9 April 2014

Upper Tribunal Judge Craig