



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/15834/2015

THE IMMIGRATION ACTS

Heard at Field House
On 6 July 2016

Decision & Reasons Promulgated
On 19 July 2016

Before
UPPER TRIBUNAL JUDGE C J HANSON
DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DEEPAK KHAREL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation

For the Appellant: Mr I Jarvis, Home Office Presenting Officer
For the Respondent: Ms S Bassir, Counsel instructed by JKR Solicitors

DECISION AND REASONS

1. The respondent (hereinafter “the claimant”) is a citizen of Nepal born on 1 October 1985.
2. This appeal arises from the decision of the appellant (hereinafter “the Secretary of State”) to refuse the claimant’s application for leave to remain as a Tier 4 (General) Student and to remove him from the UK by way of directions under section 47 of the

Immigration Asylum and Nationality Act 2006. The claimant's ensuing appeal to the First-tier Tribunal ("FtT") was heard by FtT Judge Clarke who, in a decision promulgated on 7 January 2016, allowed the appeal. The Secretary of State now appeals that decision.

3. The factual background is not in dispute and can be summarised as follows:
 - (a) The claimant entered the UK on a student visa in June 2011 with leave to remain until 12 October 2013.
 - (b) On 8 October 2013 the claimant applied, in time, for leave to remain as a Tier 4 (General) Student. He submitted with his application a Confirmation of Acceptance for Studies ("CAS") for an institution whose license was subsequently revoked, on 30 October 2013. The claimant was not responsible in any way for the license being revoked.
 - (c) Towards the end of 2013 the claimant became aware that he was not in possession of a valid CAS and began making efforts to gain admission to an alternative institution.
 - (d) The claimant wrote to the Secretary of State on several occasions (25 January 2014, 23 April 2014 and 9 June 2014) requesting that a letter be sent to him confirming that his application would be suspended for 60 days in order to enable him to locate an alternative educational sponsor ("the 60 day letter").
 - (e) On 9 January 2015 the 60 day letter was sent to the claimant. The letter stated that consideration of the claimant's application would, in accordance with the Secretary of States Rules and Guidance, be suspended for a period of 60 working days. Enclosed with the letter was an information leaflet to be taken to any new sponsor explaining that the claimant had an outstanding application and that his previous sponsor's licence had been revoked.
 - (f) The claimant's passport was in the possession of the Secretary of State. A certified copy of the passport (or the original) was not enclosed with the 60 day letter.
 - (g) On 18 February 2015 the claimant wrote to the Secretary of State requesting that his passport be sent to him.
 - (h) On 6 March 2015 the claimant obtained an offer from a new educational sponsor. The offer was conditional on the provision of his passport (or a certified copy).
 - (i) On the same day (6 March 2015) the claimant, via solicitors, wrote again to the Secretary of State requesting that he be sent a certificated copy of his passport. The letter also asked for an extension of a further 60 days.

- (j) On 9 March 2013 the Secretary of State sent the claimant a certified copy of his passport.
- (k) On 12 March 2015 the Secretary of State granted the claimant a 14 day extension to submit a valid CAS.
- (l) The institution that made the conditional offer on 6 March 2015 withdrew the offer as it no longer had sufficient places available.
- (m) The claimant was unable to find another sponsor within the fourteen day time frame.

Decision of the Secretary of State

- 4. In a decision made on 10 April 2015 the Secretary of State refused the claimant's application on the basis that he had failed to provide a valid CAS as required under paragraph 245ZX(c) of the Rules. In addition, the application was refused with reference to paragraph 245ZX(d) on the basis that the failure to provide a valid CAS meant that the course fee and monthly maintenance requirement could not be assessed.
- 5. The application was also refused under Paragraph 322(9) of the Rules on the ground that the claimant had failed to provide requested information within a reasonable time.

Decision of the First-tier Tribunal

- 6. The judge found that the Secretary of State had failed to apply the common law duty of fairness. He allowed the appeal to the limited extent that the Secretary of State's decision of 10 April 2015 was not in accordance with the law and that a lawful decision remained to be made.
- 7. The judge gave two reasons for finding that the Secretary of State had failed to comply with the common law duty of fairness. The first reason was that there had been "an inordinate and unexplained delay" before the 60 day letter and the certified passport copy was sent to the claimant. The second was that the further extension of 14 days was not a reasonable period for the claimant to obtain a new CAS.

Grounds of appeal and submissions

- 8. The grounds of appeal argue that the judge's findings are inadequately reasoned and irrational. They submit that no reasons have been given as to why the delay in sending the 60 day letter was prejudicial to the claimant. They also state the Secretary of State was not obliged to give the claimant an additional 14 days and that, by granting the 60 day suspension, she acted in accordance with her own guidance.
- 9. The grounds also contend that the claimant had "reasonable time" to produce the necessary documents to support his application and therefore that the FtT failed to have due regard to the wording of Paragraph 322(9) of the Immigration Rules.

10. Mr Jarvis, on behalf of the Secretary of State, elaborated on the arguments made in the grounds of appeal. He acknowledged that there had been a lengthy delay on the part of the Secretary of State in providing the claimant with the documents he required in order to obtain a new sponsor, but argued the delay did not cause any detriment to the claimant who had the benefit, as a consequence of the delay, of additional time in the UK.
11. Mr Jarvis maintained that the Secretary of State had acted properly by sending the sponsor a certified copy of his passport shortly after being advised he had found a new sponsor. It was not the fault of the Secretary of State that the new sponsor withdrew its offer. Citing EK (Ivory Coast) [2014] EWCA Civ 1517, he argued that the unfairness (to the extent there was any) was a result of the new sponsor withdrawing an offer that had been promised to the claimant upon submission of his passport. Conduct by a sponsor which has resulted in an “unfair” outcome for an applicant does not mean the Secretary of State has breached her common law duty to act fairly. Mr Jarvis referred to the comment of Lord Justice Briggs in EK at [54] that:

“a clear distinction must be made between the unfairness in outcome, viewed from the standpoint of the applicant....and the separate question whether the Secretary of State’s participation in those circumstances involved a breach of her common law duty to act fairly.”

12. Mr Jarvis also submitted that the additional 14 days granted to the claimant, which went beyond the 60 day period in the Secretary of State’s policy, was entirely reasonable in the circumstances.
13. Ms Bassir, on behalf of the claimant, argued that the Secretary of State had acted unfairly. She maintained that the claimant was, until March 2015, unrepresented. He did not know, and could not reasonably have been expected to know, what he would need in order to obtain a new CAS and in particular the implications of not being sent his passport or a certified copy of the passport.

Consideration

14. It is well established that if, whilst a Tier 4 application for variation of leave is pending, a sponsor’s licence is revoked (and the student was not a party to any reason why the licence was revoked) common law fairness requires that the Secretary of State should afford the student a reasonable opportunity to vary the application by identifying a new sponsor before the application is decided. See EK (Ivory Coast) at para. [38]; Alam [2012] EWCA Civ 960 at para. [44]; Patel (revocation of sponsor licence – fairness) India [2011] UKUT 00211 (IAC); and Thakur (PBS Decision – Common Law Fairness) Bangladesh [2011] UKUT 00151 (IAC).
15. The Secretary of State has a policy whereby she will give foreign students in these circumstances 60 days in order to find a new institution to sponsor the application and obtain a new CAS. In Kaur (Patel fairness: respondent’s policy) [2013] UKUT 00344 (IAC) the Upper Tribunal made clear that this policy is intended to give effect to the principles of common law fairness.

16. As a practical matter, in order to obtain a new CAS an applicant will need, inter alia:
 - (a) a letter from the Secretary of State confirming he has been granted a 60 day period to find a new sponsor (the 60 day letter); and
 - (b) his passport (or a certified copy) as the new sponsor will need details of, and to retain a copy of, an applicant's passport.
17. Given that the only way the claimant could obtain his passport (or a copy) was by the Secretary of State sending it to him and that without this document he was unable to obtain a new CAS, fairness required both that the Secretary of State send the claimant his passport (or a certified copy) and that she gave him reasonable time, after receiving it, to obtain a new CAS.
18. The case law and Secretary of State's own policy identify 60 days as a reasonable period to obtain a new CAS. However, the claimant only had 17 days after being sent a copy of his passport (the 14 day extension started three days after the passport copy was sent to him). In these circumstances, where the Secretary of State's policy is to give students 60 days but the claimant was afforded only 17 days after having received the documentation necessary to secure a new sponsor, we are satisfied that the judge was entitled to conclude that a 14 day extension was not sufficient to afford the claimant a reasonable opportunity to obtain a new CAS.
19. Mr Jarvis argued that any unfairness was a result of the conduct of the sponsor, who withdrew its conditional offer. He argued that, following EK, even if there were unfair consequences for the claimant, the Secretary of State did not breach her duty of fairness. We do not find this argument persuasive. The unfairness in this case arose from the amount of time the Secretary of State afforded to the claimant to obtain a new CAS once he had been sent a certified copy of his passport. That was a matter for the Secretary of State, not the sponsor. As such, the circumstances of this case are not analogous to those in EK.
20. The grounds of appeal contend that the judge failed to have due regard to Paragraph 322(9) of the Immigration Rules. Rule 322(9) provides that leave to remain should normally be refused in circumstances where there has been:

"Failure by an applicant to produce within a reasonable time information, documents or other evidence required by the Secretary of State to establish his claim to remain under these Rules"
21. The judge did not explicitly address whether the claimant failed to produce a new CAS within a reasonable time. He did, however, consider whether the Secretary of State gave the claimant reasonable time to obtain a new CAS. It is implicit in, and follows from, the judge's finding as to the claimant not being given reasonable time that he was satisfied that the claimant did not fail to produce the CAS within a reasonable time period. We find, therefore, that the judge has substantively addressed the issue raised in Rule 322(9).

22. A further argument made in the grounds of appeal is that the judge failed to explain why he found that the delay in providing the 60 day letter gave rise to there being a failure by the Secretary of State to comply with the common law duty of fairness. There is merit to this argument. There was no evidence before the FtT to support a finding that, and the judge has not given any reasoning to show why, the delay was prejudicial to the claimant. However, although we accept that the absence of reasoning on this point amounts to an error of law, we are satisfied that the error was not material.
23. For the reasons we have explained, the judge was entitled to conclude that: (a) common law fairness required the Secretary of State to give the claimant a reasonable opportunity to obtain a new CAS after having been sent a certified copy of his passport; and that (b) the 14 day extension granted on 12 March 2015 was not sufficient to afford the claimant a reasonable opportunity to obtain a new CAS.
24. At the error of law hearing, we raised with parties that, were we to find there to be a material error of law, in remaking the decision we would want to explore, in addition to the issue of common law fairness, the question of whether the Secretary of State had complied with her own policy by not sending the claimant a certified copy of his passport at the same time as the 60 day letter. However, having found that the judge did not make a material error of law it will not be necessary to remake the decision.

Decision

25. The appeal is dismissed.
26. The decision of the First-tier Tribunal does not contain a material error of law and shall stand.
27. No anonymity direction is made.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 19 July 2016