



IAC-AH-CJ-V1

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

Appeal Number: IA/19202/2014

THE IMMIGRATION ACTS

Heard at Field House

On 29 January and 10 March 2016

**Decision &
Promulgated**

On 4 April 2016

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR MD RANA SHAMIM
(ANONYMITY DIRECTION NOT MADE)**

Respondent/Claimant

Representation:

For the Appellant:

Mr P Nath (29.01.16) and Mr S Kotas
(10.03.16), Specialist Appeals Team

For the Respondent/Claimant: In person (29.01.16) and Mr Z Hussain

(10.03.16), Farringdon Solicitors

DECISION AND REASONS

1. The SSHD appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the claimant's appeal against the decision to refuse to

grant him further leave to remain as a student. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant should be accorded anonymity for these proceedings in the Upper Tribunal.

2. The application was made on 10 February 2014, and it was refused on 9 April 2014. The ground of refusal was that no CAS reference number had been submitted with the application, and therefore the claimant had not shown he had a valid CAS.
3. The claimant was not given a right of appeal as the SSHD contended that he was an overstayer. This was on the basis that his last grant of leave had been curtailed to expire on 30 July 2012, and so his application of 10 February 2014 was well beyond the permitted period of 28 days residence without extant leave.
4. In his grounds of appeal, the claimant accepted that he did not have a valid CAS. His explanation was that he had not obtained his bank statements from Bangladesh at the time of his application. But his leave was due to expire on 31 December 2013, and so he had to make the application without a CAS. He had in fact made an application on 31 July 2012, which was returned as invalid due to non-payment of fees. But he had not received notice of the invalidity until March 2013, as he had changed his address.

The Hearing Before, and the Decision of, the First-tier Tribunal

5. The appeal came before Judge Abebrese sitting at Taylor House on 24 July 2015. Both parties were legally represented. The judge received oral evidence from the appellant, who was cross-examined.
6. The claimant's evidence was that he had first submitted his application on 30 July (not 31 July) 2012. He had then re-submitted it on 31 December 2013, after receiving notification of the rejection on invalidity grounds in March 2013. The re-submitted application was returned as invalid for non-payment of the fee, and so he submitted the application for a third time on 8 February 2014.
7. The judge accepted the claimant's evidence that each application had been accompanied with authorisation for the funds to be taken from his account, and that, applying **Basnet**, the burden of proof had shifted to the SSHD to prove that the in-time application had been validly rejected. As the SSHD had not discharged this burden either in relation to the in-time application or the second application in December 2013, the judge held that the third application of February 2014 was a continuation of the in-time application made on 30 July 2012, and allowed the claimant's appeal on this ground.

The Reasons for Granting Permission to Appeal

8. On 17 December 2015 Judge Astle granted the SSHD permission to appeal, as the judge did not appear to have dealt with the issue of the CAS and it was arguable that there was no right of appeal in any event bearing in mind **Mitchell (Basnet revisited) [2015] UKUT 00562 (IAC)**.

The Error of Law Hearing in the Upper Tribunal

9. At the outset of the hearing, the claimant renewed an adjournment request which had previously been made in writing to the Upper Tribunal by his solicitors, and which had been refused. As canvassed in a lengthy letter dated 28 February 2016 from Farrington Solicitors which reached me in the course of the hearing, the reason for seeking an adjournment was that their client had not been able to pass on to them the papers which were still in possession of his previous legal representatives, and that their preparation for the hearing had thus been compromised. At the end of the letter they said their client would be in attendance at the hearing and that he was aware that, "the matter may have to proceed in any event".
10. Having regard to the reasons for granting permission to appeal, I was satisfied that it was in accordance with the overriding objective to give a ruling on the question of whether the decision was vitiated by a material error of law such that it should be set aside and remade, but not to proceed immediately to remake the decision. After explaining why an error of law was clearly made out, I made directions for a resumed hearing before me to remake the decision.

Reasons for Finding an Error of Law

11. The first point raised by Judge Astle when granting permission to appeal is unanswerable. The claimant could not succeed in an appeal under the rules as, by his own admission (which he repeated to me), he was not in possession of a valid CAS. It appears that the legal representatives and the judge became fixated on the question of whether the application for leave to remain should be treated as being made in time, so as to give the claimant a right of appeal, and ignored the equally important question of whether the appeal had any intrinsic merit.
12. As to whether the judge misdirected himself in law in finding that the application was made in time, so as to give the claimant a right of appeal, I find that an error of law is made out on the grounds of inadequate reasoning. The judge has not, for example, engaged with the fact that the claimant delayed making a second application for a period of nine months after he says he received notice of the rejection of the first application; and he has not engaged with the fact that service at an applicant's last known address is prima facie good service.

Directions for The Resumed Hearing

13. I directed that the issues which were to be resolved at the resumed hearing were (a) whether the claimant had a right of appeal; and, if so (b) whether the appeal should succeed outside the rules.
14. As to the first issue, none of the judge's findings of fact should be preserved. As to the second issue, the claimant informed me that the case which he wished to present was that the SSHD should have given him, and/or should give him now, a 60 day permission letter so as to enable him to obtain a valid CAS.
15. I gave permission to both the SSHD and the claimant to adduce further evidence on issues (a) and (b) provided that such evidence was served on the Upper Tribunal and on each other not less than seven days before the resumed hearing

Discussion and Findings on Remaking

16. In remaking the decision, I have taken into account the documentary evidence which was placed before the First-tier Tribunal by the claimant's previous representative, Immigration 4 U. The bundle contained a witness statement for the claimant that was unsigned, and so I asked the claimant to sign it in my presence. He was briefly cross-examined by Mr Kotas, and he also answered questions for clarification purposes from me. _
17. On the question of whether the claimant had Section 3C leave at the date of the refusal decision (9 April 2014), Mr Hussain relied on the proposition that the claimant had enjoyed Section 3C leave from the date when his previous leave to remain expired, and had never lost Section 3C leave, because the in time application made on 30 July 2012 had not been validly rejected. Accordingly, he submitted, a lawful decision on the in time application remained outstanding.
18. Mr Kotas submitted that the proposition did not stand up to scrutiny, even if the underlying facts relied upon by the claimant were accepted. He submitted that the claimant could not assert that he enjoyed Section 3C leave in circumstances where he had, on his own case, delayed until December 2013 before making a fresh application for leave to remain, having received (on his case) notice of the rejection of his in time application in March 2013.
19. Although not cited to me, I had regard to **Mitchell (Basnet revisited) [2015] UKUT 562** which was published on 25 August 2015. This is decision of a panel chaired by Vice President Mark Ockelton. Judge Abebrese did not have the benefit of this decision. But the law always speaks, and I am not constrained by Judge Abebrese's findings, which are based on the earlier decision of **Basnet [2012] UKUT 00113**.
20. In **Mitchell**, the Tribunal distinguished the earlier case of **Basnet** on two grounds. The first was that, in **Basnet** the asserted ground of invalidity was solely within the knowledge of the Secretary of State, because the

crucial events had happened after the submission of a form which was good on its face; and it was therefore for the Secretary of State to show that the difficulty in collecting the fee arose from a default by the appellant. It did not appear to the Tribunal that similar reasoning applied where the alleged defect was apparent on the face of the form itself, and so was in the knowledge of the applicant.

21. The second ground for distinguishing the case before them from **Basnet** was that there had been a lengthy delay before the appellant had asserted that the application in question had been wrongly rejected on invalidity grounds. The Tribunal found that the appellant's failure to raise the matter at the time impacted on the question of where the burden of proof lay. At paragraph [12] the Tribunal said:

"Further, the position is that at all relevant times the applicant knew that the Secretary of State's position was that her leave had expired on 31 January 2010. We have great sympathy with Mr Matthews's submissions that if she wanted to assert the Secretary of State's view was wrong, she should have done so at the time: this view is if anything reinforced by the evidence to which we refer below. One reason why any difficulty needs to be taken up promptly is that nobody is entitled to require anybody else to keep documents indefinitely."

22. Paragraph 2 of the headnote to **Mitchell** reads as follows:

"The evidence shows that the payment pages are retained for eighteen months. Thus, within that period, any question of the reason for failure to obtain payment can be investigated, although the reasons for declining a payment are available only to the bank account holder, not the Secretary of State. In the light of this, a more nuanced approach to the burden of proof may be needed."

23. By letter dated 20 August 2012, which was sent to the appellant's last known address, the appellant was informed that his attempted application which he had made by post on 30 July 2012 had been rejected because although credit/debit card details had been provided, the issuing bank had rejected the payment. There might have been insufficient funds in the account or the details provided did not match the information held by the bank. For security reasons the cardholder's name, address, expiry date and issue number supplied on the payment form had to correspond with the information held by the issuing bank. If the details failed to match, the bank would reject the payment.
24. The letter indicates that enclosed with the letter was the claimant's passport and other supporting documents provided with the application.
25. The claimant did not dispute the validity of this rejection until some two years later. In the circumstances, applying the reasoning of the Tribunal in **Mitchell**, I consider that the burden of proof rested with him to show that the application had been wrongly rejected. I do not consider that he discharges this burden by giving oral evidence that he had provided all the necessary details, and so the fault must lie with the Secretary of State.

26. But even if I am wrong about that, I do not consider that the claimant has made out his case on the merits. The claimant has not shown that his inability to rely on a CAS for the purposes of his valid application of February 2014 flowed from the rejection of his in time application for leave to remain nearly two years earlier. On his own case, the claimant was able to make two further applications for leave to remain, one in December 2013 and the other at the beginning of February 2014.
27. The letter explaining why the December 2013 application has been rejected on invalidity grounds is not included in the bundle of documents compiled by Immigration 4 U, although they have included the Home Office's letter acknowledging receipt of the application dated 6 January 2014. As surrounding documents were available for disclosure to the First-tier Tribunal, there is no satisfactory explanation as to why the second rejection letter has not been disclosed. So it is not satisfactorily demonstrated that the reason for the second rejection was an inability to collect the fee, as distinct from a failure by the appellant to ensure that the application was "accompanied by the fee".
28. But at all events, when the claimant finally did make an application which was accepted as valid by the Home Office, in his evidence to the First-tier Tribunal he said that the reason why his sponsor institution did not issue him with a CAS was because they had not received his bank statements relating to his bank account in Bangladesh. This is not a failure which can be laid at the door of the Home Office.
29. Before me, Mr Hussain submitted that the claimant could not obtain a CAS without a 60 day letter: as the claimant did not have a 60 day letter to show potential sponsors in December 2013, January 2014 or February 2014, it was impossible for him to obtain a CAS.
30. But the case advanced by Mr Hussain is contradicted by the evidence. It is not the claimant's evidence that he was hampered by the absence of a letter from the Home Office confirming that he could look for a new sponsor.
31. Furthermore, the plain implication of the offer letter from the College of Advanced Studies dated 31 December 2013 was that the claimant's immigration status was not seen by the college as an obstacle to him being issued with a CAS. The only condition which they imposed for the issue of a CAS letter was that he needed to provide original documentary evidence to show that he had passed a qualification greater than or equivalent to NQF/QCF level 6; and that he should provide them with original appropriate evidence showing that he had access to the appropriate funds for 28 consecutive days ending no earlier than one month before the date that he was going to submit his visa application. He had to fulfil these conditions by 3pm on 9 January 2014.
32. On his own case, the claimant failed to secure a CAS from the college because he did not provide by the prescribed deadline the requisite

evidence to show that he met the maintenance requirement. The claimant did not ask the Home Office to delay making a decision on his valid application of February 2014 on the ground that he needed a further 60 days to obtain a valid CAS or that he needed a 60 day letter to show to potential sponsors. The claimant simply applied for leave to remain without a CAS.

33. As was held by Upper Tribunal Judge Grubb in **R (On the application of Akudike) v Secretary of State for the Home Department IJR [2015] UKUT 00213 (IAC)** at paragraph [30], the case law plainly recognises that, as a matter of fairness, the Secretary of State is not required to give an applicant notice that she considers that there is a deficiency in a CAS before making an adverse decision on that basis: see **Kaur v SSHD [2015] EWCA Civ 13**. *A fortiori*, the Secretary of State in this case was not required to give the claimant notice that she was going to refuse his application for leave to remain due to the complete absence of a CAS.
34. The claimant does not have a viable private life claim under the Rules. Turning to an Article 8 claim outside the Rules, I accept that questions one and two of the **Razgar** test should be answered in the claimant's favour, as the threshold for the engagement of private life rights is relatively low. Questions three and four of the **Razgar** test must be answered in favour of the respondent. On the crucial question of proportionality, I have taken into account the Article 8 jurisprudence relating to students and also Section 117B of the 2002 Act. I do not consider there are compelling circumstances which justify the claimant being granted Article 8 relief outside the Rules. The claimant entered the United Kingdom for a temporary purpose, and that purpose has been fulfilled in that he has completed the course of study for which he was granted entry clearance. The claimant had no legitimate expectation of being able to remain in the United Kingdom to follow a further course of study unless he could bring himself within the Rules. His ability to speak English and his apparent financial independence do not significantly tip the scales in his favour. Little weight can be given to a private life which is built while a person's status here is precarious. I conclude that the decision appealed against strikes a fair balance between, on the one hand, the claimant's rights and interests, and, on the other hand, the wider interests of society. It is proportionate to the legitimate public end sought to be achieved, namely the maintenance of firm and effective immigration controls.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant's appeal is dismissed on all grounds raised.

I make no anonymity direction.

Signed

Date

Deputy Upper Tribunal Judge Monson