



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

Appeal Number: IA/00502/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 2 February 2018**

**Decision & Reasons Promulgated
On 28 March 2018**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

IRAM RASHEED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S K Abbas, Legal Representative

For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. On 1 October 2014, the appellant, a citizen of Pakistan, made an application for further leave to remain, as a Tier 4 Student. That application was refused in a decision dated 8 January 2016, with a concomitant decision to remove her pursuant to section 47 of the Immigration and Asylum Nationality Act 2006.
2. The appellant appealed against that decision and her appeal came before a Judge of the First-tier Tribunal (“the FtJ”) at a hearing on 22 February 2017. The FtJ dismissed the appeal.

3. The basis of the respondent's decision to refuse leave to remain was that the appellant had not provided a valid Confirmation of Acceptance for Studies ("CAS") because that which she provided with her application related to a college that was not listed as a Tier 4 sponsor as at the date the sponsor register was checked on 8 January 2016. Accordingly, the appellant was not awarded the requisite number of points for having a valid CAS. Her application was refused with reference to paragraph 245ZX(c) and paragraph 116(a) of Appendix A. Because no valid CAS was provided, no points were awarded for Maintenance (Funds).
4. The appellant's grounds of appeal in relation to the FtJ's decision relate firstly to what is said to have been an erroneous assessment on his part in terms of whether the appellant had varied the application made to the respondent, the purported variation being in terms of Article 8 of the ECHR. Secondly, complaint is made about the FtJ's consideration of documentary evidence provided after the hearing by the respondent's representative. It is argued that the FtJ should not have taken that evidence into account or if he did, should have given the appellant the opportunity to respond to it.

The FtJ's reasons

5. It is necessary to set out in a little more detail the events that took place before the FtJ, and the FtJ's reasons for dismissing the appeal.
6. The FtJ set out the basis of the respondent's decision and summarised the appellant's grounds of appeal. Referring to the appellant's bundle of documents, he noted that that bundle did not include the '60-day' letter sent to the appellant by the respondent (giving her the opportunity to obtain new sponsorship), the application which is said in the grounds to have been made on 22 December 2015 under Article 8 (the 'variation' application), or any correspondence either in relation to the 60-day letter or in relation to the application said to have been made on 22 December 2015. He noted that the respondent's bundle did not contain those documents either.
7. Having heard the appellant's evidence, and referring to what he said was inconsistency in certain respects with her witness statement, the FtJ said that although no curtailment letter had been produced by the respondent, the appellant accepts receiving such a document towards the end of October 2015.
8. In relation to the appellant's contention in her witness statement that she had asked the respondent to provide her with a certified copy of her passport so that she could find another sponsor, the FtJ referred to the fact that that was a matter that was only mentioned in her witness statement for the appeal hearing. On that issue, he found that she had not given credible evidence because there was a "plain contradiction" between what she said in oral evidence and what she said in her witness statement on this issue. To summarise, in her witness statement she said that she had

repeatedly telephoned the Home Office to complain about not being provided with a certified copy of her passport, whereas in her oral evidence she said that it was her solicitor that had contacted the Home Office and she did not make such phone calls. Earlier in his decision the FtJ quoted from her witness statement in this respect.

9. The FtJ also found it incredible that the lack of a certified copy of her passport was a genuine reason for not being able to obtain a CAS given that it was not raised by the appellant's representatives in correspondence with the Home Office, or in the grounds of appeal. That, he concluded, was a matter that would have been at the forefront of an argument that the appellant had been the victim of common law unfairness.
10. At [30] the FtJ said that it was "possible" that the appellant's representatives had made "written representations" to the Home Office on 22 December 2015 to the effect that the appellant should be given more time to obtain a new CAS (that having a bearing on Article 8). At [31] he concluded that if that was what had happened, that did not constitute a variation of the original application as distinct from simply asking the Secretary of State to delay making a decision on the original application which was still pending.
11. The FtJ went on to consider Article 8 of the ECHR, both under the Rules, and under Article 8 proper. In that context, at [37] he said that the appellant had not given an account of what she was doing at the time when she received the curtailment letter, and her account was completely silent on elementary questions such as when she came to the UK as a student, what she came to study, and what qualifications, if any, she had obtained thus far. He found that she had fallen far short of showing that the private life which she has established in the UK has a special and compelling character such as to justify a departure from the general proposition that little weight should be attached to a private life established while a person's status in the UK is precarious.
12. Under a subheading "New Evidence received after the hearing" the FtJ said at [39] as follows:

"After dictating this decision, I received new evidence from [the Presenting Officer]. She produced a copy of the 60 day letter sent to the Appellant. The letter said that a certified copy of her passport was enclosed. [The Presenting Officer] also produced evidence that the application of 22 December 2015 had been rejected as invalid. If so, this torpedoes the claim that the application of 22 December 2015 remains outstanding. But this is academic, as the Appellant failed to raise a prima facie case that it was, and I have already found against her on this issue. In summary, the new evidence does not change the outcome of this appeal, and so I make no further comment on it".

Submissions

13. Mr Abbas relied on the grounds. It was submitted that the appellant had varied the application that was before the respondent and the

respondent's decision was therefore not in accordance with the law. It was submitted that the grounds of appeal to the First-tier Tribunal made it clear that there was an application to the respondent which was a variation application, and not simply written representations as the FtJ had suggested. S.3C of the Immigration Act 1971 ("the 1971 Act") does not preclude such an application.

14. I did enquire of the parties as to whether the appellant would have been entitled to vary her application, having regard to s.3C(4) and (5) of the 1971 Act, and whether that would have been a permissible variation of the application for leave to remain whilst her leave was extended by virtue of s.3C. Mr Jarvis accepted the contention on behalf of the appellant that that would have been a permissible application to vary leave. Having considered the decision in *JH (Zimbabwe) v Secretary of State for the Home Department* [2009] EWCA Civ 78, to which Mr Jarvis referred, I accept that this is so.
15. It was conceded on behalf of the appellant that the appellant had not produced before the FtJ a copy of that application, but it was submitted that nevertheless the FtJ needed to have regard to the express words of the grounds of appeal before him.
16. In relation to the evidence provided after the hearing, it was submitted that it was not possible to judge the extent to which the FtJ's decision was affected by anything in those documents. The appellant in that regard had been deprived of the right to a fair hearing.
17. On behalf of the respondent, Mr Jarvis said that the Home Office file which he had, did not contain a copy of the documents submitted to the FtJ in terms of what was actually sent, although there is a note as to what was in fact sent. No copies of the documents sent were kept by the Presenting Officer. Mr Jarvis did however, say that there were documents on the file which indicated that the 60-day letter had been sent, and that the appellant had been notified that her application of 22 December 2015 was invalid. He referred to a letter dated 22 March 2016 from the appellant's solicitors requesting a refund of the application and the immigration health surcharge fee. It appears from what I was told by Mr Jarvis that the appellant's representatives (or the appellant) had been asked to rectify the application otherwise it would be finally invalidated.
18. Mr Jarvis indicated that he had not seen any letter showing that a copy of the appellant's passport had been sent to her and there was no indication of such on the Home Office 'system'.
19. I was referred to two decisions of the Court of Appeal, *SH (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 1284 in relation to procedural fairness and the need to establish materiality, and *EK (Ivory Coast) v Secretary of State for the Home Department* [2014] EWCA Civ 1517 in relation to the need to establish that any unfairness arose as a result of the Secretary of State's actions.

20. It was accepted on behalf of the respondent that in principle it was good practice for a judge to indicate to the other party that evidence or information had been received after the hearing. However, it was submitted that the 60-day letter was not a matter that was in contention, and the appellant knew that her application had been rejected as invalid. The appellant's grounds do not take issue with that and do not say that the appellant's solicitors were unaware that those documents were sent to them.
21. Therefore, it was submitted that even if there was an error of law in the decision of the FtJ, it was not material.
22. In any event, the FtJ considered the issue of common law fairness and Article 8 of the ECHR. Even if there was a variation of the application, there was no material consequence in the FtJ having determined the appeal as it was before him. The appellant had the opportunity to argue Article 8 and that was done. The Article 8 conclusions have not been challenged.
23. In relation to the purported absence of a certified copy of the appellant's passport, the FtJ had rejected the inconsistent evidence of the appellant on this issue. Furthermore, the lack of a passport was not material to the appellant not having been able to find another sponsor because her evidence was that no college would allow her to start half way through a term. Therefore, the lack of a copy of her passport would have made no difference.
24. In reply, Mr Abbas contended that the errors of law made by the FtJ were material. The FtJ had made an assessment of the appellant's credibility and it was not possible to say the extent to which his perspective of the appellant's credibility was affected by the documents provided after the hearing.
25. In relation to the lack of provision of a copy of her passport, she needed to have been provided with every opportunity to obtain admission to another college.

Assessment and Conclusions

26. It is contended on behalf of the appellant that whereas the respondent's decision dated 8 January 2016 was on the basis of an application for further leave to remain as a Tier 4 Migrant, she had in fact varied that application to a human rights application with reference to Article 8. Thus, reliance is placed on the grounds of appeal before the First-tier Tribunal which states that an application for further leave under Article 8 was made on 22 December 2015. It is argued that the FtJ wrongly characterised what was an 'application' as written representations.
27. The difficulty for the appellant in relation to this contention is that the FtJ noted at [15] that the appellant's bundle did not include documents in

relation to what was said to have been the application made on 22 December 2015. The Ftj referred to the appellant's evidence in relation to that application and her oral evidence as set out at [19]-[20].

28. Furthermore, although the grounds before me assert that there such an application, no evidence of it has been provided such as may demonstrate that the Ftj made a mistake of fact leading to an error of law in terms of facts which were in existence but about which he was unaware, (see *E v Secretary of State for Home Department* [2004] EWCA Civ 49).
29. On the basis that the appellant was asserting that the existing application was varied, it was for her to produce evidence of that fact. No such evidence has been forthcoming. The Ftj was entitled to conclude on the evidence before him that the application for further leave to remain as a Tier 4 student was not varied, and that that was the decision which was the subject matter of the appeal.
30. It is also worth pointing out that if the appellant genuinely did have any Article 8 claim to advance, the basis of it was manifestly not apparent from the information or evidence put before the Ftj. There was nothing whatsoever advanced on behalf of the appellant which could conceivably have created a viable Article 8 claim. That undermines the contention that there was in fact any application to vary the existing application, on Article 8 grounds.
31. Thus, the Ftj dealt with the appeal entirely properly on the basis of a decision to refuse to vary leave to remain as a Tier 4 Migrant. The appellant failed to produce to the respondent a valid CAS, and thus her appeal under the Rules could not succeed (the appeal having been dealt with under the appeals regime prior to the recent amendments).
32. The appellant was found by the Ftj not to have been a credible witness, given the inconsistency in her account in terms of what was said to have been a request of the Home Office to provide her with a certified copy of her passport to enable her to gain admission to another college. The Ftj was entitled to conclude that there was no unfairness in the respondent's decision. In any event, as Mr Jarvis persuasively suggested, the appellant's case was that she was not able to gain admission to a new college because they would not issue a CAS to her in the middle of a term. Even it could be said that the respondent had wrongly failed to provide her with a certified copy of her passport, any omission in that respect was not material. As is clear however, neither the Ftj's decision, nor mine, is dependent on that alternative consideration.
33. As regards the Ftj's consideration of documents provided to him after the hearing, I have set out in full what he said about those documents at [39] of his decision. In this respect I do consider that both the Presenting Officer's action in sending documents to the Ftj after the hearing, and the way that the Ftj dealt with that issue, were unfortunate, to say the least.

34. In the first place, the Presenting Officer ought not to have provided documents to the FtJ after the hearing without having been invited to do so, or without first having sought permission to do so either at the hearing or in advance of having sent them post-hearing. There is no indication that permission had been sought in advance or that the FtJ had invited the submission of documents post-hearing. Furthermore, the Presenting Officer apparently did not leave on the respondent's file a copy of any correspondence sent to the Tribunal after the hearing, listing in a comprehensive form the documents that were sent to the FtJ, which she ought to have done.
35. More importantly for the purposes of the appeal before me, I consider that the FtJ should either have declined to consider the documents, and have said as much, because they were not the subject of any application or invitation by him, or he ought to have ensured that they were served on the appellant's representatives to allow for any submissions to be made on them, before any consideration of them, if such consideration was to feature in his reasons. To do otherwise plainly creates a risk of unfairness.
36. However, it is apparent from the FtJ's decision that even without the post-hearing documents, he had concluded that the appellant was not a credible witness, for the reasons he gave independently of those documents, and that the appeal could not succeed, either under the Tier 4 Rules, under Article 8, or in relation to any common law unfairness. The letter said to be from the respondent to the appellant or her representatives stating that a certified copy of her passport was enclosed was not material in the sense that the FtJ had already concluded that the appellant was not credible about this, for the reasons he gave. In relation to the document suggesting that the 'application' of 22 December 2015 had been rejected as invalid, the appellant signally failed to produce to the FtJ any evidence in support of the contention that there had been a variation of the application. The 60-day letter was not a matter in contention, and therefore that could not have made any difference either. The FtJ said at [39] that he had already found against the appellant on the issue of the variation application. He expressly stated that the "new evidence" did not change the outcome of the appeal, and there is nothing to indicate otherwise.
37. There is no reason at all to think that the FtJ had allowed the post-hearing documents to influence his decision in circumstances where he gave clear and sustainable reasons for concluding that the appeal could not succeed, and those reasons being manifest from the evidence before him.
38. Accordingly, whilst I do consider that the circumstances in which documents were sent post-hearing to the FtJ, and the FtJ's consideration of those documents, were wrong, I am not satisfied that this amounted to an error of law, or if it did, that it was an error of law that was material to the outcome of the appeal.
39. In the circumstances, this appeal is dismissed.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to dismiss the appeal therefore stands.

Upper Tribunal Judge Kopieczek

26/03/18