



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/00152/2018

THE IMMIGRATION ACTS

Heard at Field House
On 19 August 2019

Decision & Reasons Promulgated
On 04 September 2019

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

MELINA [D]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms P. Solanki, Counsel instructed by Sky Solicitors Ltd
For the Respondent: Ms S. Jones, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Devittie ('the Judge') issued on 13 March 2019 by which the appellant's appeal against the decision of the respondent to refuse to grant her leave to remain as a Tier 4 (General) Student was dismissed.

2. Upper Tribunal Judge Grubb granted permission to appeal on all grounds.

Anonymity

3. The Judge did not issue an anonymity order and the appellant did not seek one before this Tribunal.

Background

4. The appellant is a national of Nepal and is currently aged 34. She entered the United Kingdom as a Tier 4 (General) Student Migrant in 2009 with her leave originally expiring in May 2011. Her leave was subsequently varied to 25 May 2013. On 26 March 2012 her leave to remain was curtailed so as to expire on 25 May 2012, such curtailment being consequent to the sponsor licence of her college having been revoked. On 23 May 2012 she applied for further leave to remain as a Tier 4 (General) Student Migrant and this application was refused by the respondent on 4 October 2012. She was awarded no points for Confirmation of Acceptance for Studies (CAS) as she had provided no evidence to establish that she had been assigned a CAS and no valid CAS had been identified as having been issued to her. She was awarded no points as to maintenance because she had provided printed bank statements which had been established to be false.
5. The appellant asserts that she was not served with the reasons for this decision until it was provided to her by the respondent under cover of a letter dated 19 September 2018. She appealed this decision to the First-tier Tribunal and in her grounds of appeal dated 19 November 2018, she observed that she had *"no clue that the immigration advisers she was using were fraudsters and that they submitted a fake document on her behalf"*. It is appropriate to observe that having made her May 2012 application the appellant submitted another application for leave to remain as a Tier 4 (General) Student Migrant on 3 December 2012. She did so, according to her witness statement, because her immigration advisers informed her that the May 2012 application would be refused. This is unsurprising as no CAS had accompanied the application. The December 2012 application was eventually refused by way of a decision dated 14 May 2018. Importantly the respondent awarded points to the appellant for the attribute of possessing a valid CAS and also for meeting the maintenance requirement. The application was refused because it was made over 28 days after her original leave had expired and further under paragraph 322(2) of the Immigration Rules because false documents had been used with a previous application. The May 2018 decision enjoyed no right of appeal. The appeal before the Judge in this matter was concerned with the October 2012 decision which was served in September 2018.

Hearing Before the First-tier Tribunal

6. The appeal came before the Judge on 11 February 2019. By way of her witness statement the appellant explained,

"I can confirm that in April to May 2012 I met Mr S and M who were referred by a friend from the Mile End area of London and who told me that they were immigration advisers and education consultants. I needed help with my extension application as a student and therefore gave them my papers and they promised to arrange a loan from the bank in Nepal to meet the bank statement requirements and for this purpose to charge £1,500. I paid the £1,500 in cash for arranging a loan and making my application to the Home Office.

I can confirm that either they met me in their car or in a college in Mile End but through the back entrance. They were communicating through mobile phones. They provided the bank statements for the application as agreed however it was later in 2018 confirmed by the Home Office that the bank statements they provided were fake.

I can confirm that I am the victim of this fraud which I only became aware of following (the) reconsideration decision of my application in 2018. The decision under appeal was never served on me. I can confirm that since I came to know of it, I tried to locate both fraudsters. It was very hard, however with the help of my mother-in-law and our wider community I have obtained details which I have given to the police and the County Court. The firm which received my refusal notice on 21 September 2018 was dissolved in 2016 (sic) ... and both fraudsters are not listed as directors of the company. I can confirm that I was not aware that my application was being made through the above law firm. I only became aware of this following the refusal of the notice I received in September 2018. I can confirm that since I came to know I have reported the fraud to the police, OSIC (sic) and to the court. I enclose evidence. In the circumstances I request the Tribunal to find that I am not liable for deception ..."

7. Ms Solanki represented the appellant at the hearing before the First-tier Tribunal and sought an adjournment on her behalf in order to enable further information to be provided to the Tribunal in relation to the formal complaint that the appellant had lodged with the OISC as to the fraud conducted by her previous representatives. The judge refused the application at paragraph 6 of his decision observing:

"I declined the application. In my view whether or not false documents had been submitted by her previous representatives, was a separate issue, to the question whether the appellant herself, was a willing participant to the fraudulent activity. I did not consider that any evidence could be forthcoming, in which her previous representatives would take sole responsibility and seek to absolve the appellant. And even if such evidence was adduced, the Tribunal would still be seized with the question of whether the appellant was a willing participant to the presentation of forged documents in her application. I considered that the question as to whether the appellant was aware of the

falsity of the documents submitted, is one that this Tribunal can determine, on the basis of the evidence of the appellant and responses to questions put to her in these proceedings. I did not consider that the refusal of an adjournment would prevent the just disposal of this appeal."

8. The Judge proceeded to find that the appellant had knowingly practised deception in relation to her application in 2012. In reaching this decision the Judge noted the appellant's evidence that she did not know the amount of the bank loan that she was to receive from the bank observing, "I find it difficult to accept that a person in her position, who was studying a degree in management, would not have taken the trouble to establish the extent of her liability". The Judge also found it incredible that the appellant would not have checked documents attached to her application to ascertain the amount of the loan. He observed that in her evidence before him the appellant had not been able to put a figure to the loan that had been applied for on her behalf. She did not know what, if any, were the payment terms. She did not know what rates of interest was to be levied. She simply stated that all she was advised was that she had to pay £1,500 interest to her representatives and that this amount represented interest on the loan. The Judge determined that the appellant's evidence on this point was entirely incoherent and made no sense whatsoever. He further noted that the appellant was unable to explain why if he were to believe that the loan had been granted, she had made no efforts to repay the loan between the date of the application and the time that she stated that she first became aware that false bank statements had been presented on her behalf to the respondent.

Grounds of Appeal

9. The grounds of appeal raise two complaints. The first is that the Judge materially erred in law by refusing to adjourn the hearing so as to await the outcome of the complaint before the OISC. Reliance is placed upon the decision of *Nwaigwe (adjournment; fairness)* [2014] UKUT 418 IAC. The second complaint is that the Judge's conclusion that the appellant was engaged in deception was not one that was open to him on the facts and evidence before the Tribunal.
10. For the purpose of this appeal it is appropriate to observe Upper Tribunal Grubb's reasoning when granting permission to appeal:

"1. The First-tier Tribunal (Judge Devittie) dismissed the appellant's appeal against a decision to refuse her leave as a Tier 4 Student. The judge found that the appellant had knowingly submitted false bank documents with an earlier application. He rejected the appellant's "innocent explanation" that this had been done without her knowledge by her previous representatives

...

3. The appellant had made a complaint to OISC against her previous representatives whom she claimed had (without her knowledge) submitted the fraudulent documents. The judge refused an adjournment in order to await the OISC determination. The judge took the view that any decision

would not assist in determining whether the appellant was dishonest, i.e. complicit. The reasoning was arguably wrong and the OISC decision might well be relevant to the issue which was central to the appeal. Permission is granted."

11. A Rule 24 response was filed by the respondent observing that notwithstanding the grant of permission, it could not be disputed that at the time of the application the appellant could not meet the requirements of the Rules. She candidly accepted before the Judge that she had required the loan to be arranged so as to meet the financial elements of the relevant Immigration Rule.

Decision

12. Consequent to Ms Solanki providing a copy of her skeleton argument, which had been placed before the Judge at the hearing in February 2019, Ms. Jones appropriately conceded that the Judge's decision in refusing to grant an adjournment lacked the requisite fairness and so was erroneous in law.
13. Under the title 'adjournment request', the skeleton argument details at paragraph 7:

"The appellant seeks an adjournment of this appeal. The appellant's case is based upon her being a victim of fraud. She has reported this to the police, the OISC and issued a claim in the County Court against her immigration advisers. It seems the outcome of these matters will be core to the issue in the appeal (whether she has practised deception). It is in the interests of justice this appeal be adjourned for three months to allow these matters to be determined. The appellant will otherwise be at risk of an extremely damaging finding of deception against her."
14. In Nwaigwe the Tribunal reminded itself of the Court of Appeal's judgment in SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284 and confirmed that when considering whether the First-tier Tribunal ought to have granted an adjournment, the test is not whether the decision is one which had been open to the Tribunal or was Wednesbury unreasonable or perverse. The sole test is whether it was unfair. In practice, in most cases the question will be whether the refusal to adjourn deprived the affected party of her right to a fair hearing.
15. I observe that awaiting a decision from the OISC is not by itself a matter that requires an appeal to be adjourned. However, the overriding objective of the First-tier Tribunal is to deal with cases fairly and justly and this requires consideration as to the positions of both parties as to delay. Therefore, it can be reasonably open to a Judge to refuse to grant an adjournment request if satisfied that the appeal would be extensively delayed, or that there had been a delay in making a complaint to the OISC. However, upon carefully considering the Judge's reasoning in this matter, I find that it was speculative in nature. It was based upon an assumption that the previous immigration advisers would not make adverse admissions and therefore the OISC would be unable to progress the appellant's complaint. Such an approach fails to engage with the investigatory powers possessed by the OISC and its ability to

consider both the appellant's file and other files in possession of the immigration advisers. The decision was predicated on a presumption that the OISC could not make any decision as whether or not the applicant was engaged in the deceit, or an innocent party. This is not so. Whilst it may eventually prove impossible upon considering the relevant files for such an assessment to be made, the Judge was wrong to simply assume that in these circumstances such a decision could not be made by the OISC. Such a speculative approach as to the likely inadequacy of the OISC investigation can only be considered to be erroneous and, in the circumstances of the adjournment request, to be unfair because there was a failure to adequately consider the benefit that could arise not only to the appellant but also to the Tribunal, as the ultimate decision maker, for time to be given for the OISC to complete its investigation.

16. I remind myself that Tribunals, like courts, have to set aside a determination reached by the adoption of an unfair procedure unless satisfied that it would be pointless to do so because the results would be the same: *John v Rees* [1970] CH 345. I initially expressed my concern to Ms Solanki that neither the grounds of appeal nor the submissions recorded by the Judge in his decision address the impact of the alleged deceit exercised by the former immigration advisers upon the article 8 appeal. However, Ms Solanki kindly drew my attention to paragraph 24 of her skeleton argument that was before the Judge, which states,

*"The Tribunal will note that in the reconsideration decision dated 14 May 2018, the appellant was awarded full points for her Confirmation of Acceptance of Studies and full points for maintenance. Her application was refused simply on the grounds that the appellant had failed to disclose material facts, namely that deception had been used in the previous application (paragraphs 322(1A), (2) and 320(7B) of the Rules). Of course the evidence establishes that the appellant was unaware of the allegations of deception and indeed that she herself had not been dishonest. This demonstrated that (if) she had not been a victim of fraud this application would have been granted. The appellant refers to the decision in *Mumu* and submits that hers is a case where 'despite the public policy issues inherent in paragraph 320(7A), it would nevertheless be disproportionate to refuse leave'. As per *Mansur* had it not been for the poor and fraudulent immigration advice received the appellant's most recent application would have been granted demonstrating that her appeal should be allowed under Article 8 ECHR."*

17. In *Mansur v Secretary of State for the Home Department* [2018] UKUT 274 (IAC); (2018) Imm AR 1436, the President (Lane J) confirmed that the failings of an immigration adviser could constitute a reason to qualify the public interest in firm and effective immigration control. However, that would be the position only rarely. The President observed that poor legal advice in the immigration field would have no correlation with the relevant public interest. The weight that would otherwise need to be given to the maintenance of effective immigration controls was not to be reduced just because there happened to be immigration advisers who offered poor advice and other services. Consequently, a person who took advice to do one thing when doing another might have produced a more favourable outcome would normally have to live with the consequences.

18. The appellant relies upon the respondent's subsequent decision whereby points were awarded for CAS and also for maintenance as establishing that save for the act by the former immigration advisers to serve a false document with the May 2012 application, the appellant would have secured status as a Tier 4 (General) Student Migrant by this point in time. Any consideration of this argument will require a finding of fact as to whether or not the appellant was aware of the October 2012 decision, because the refusal of the 2012 application in May 2018 relies upon the latter application being made over 28 days after the October 2012 refusal. I cannot say that an adverse finding of fact would definitely be made and so, as I am considering the issue of fairness, I accept that it is arguable that the appellant can seek to rely upon the approach confirmed in *Mansur* and that this appeal does not admit of only decision, namely the refusal of the appeal. It may well be that the appellant has significant hurdles to climb though I say no more as I have not considered the evidence in detail but this is a matter whereby the unfair procedure adopted by the Judge requires a new hearing so that a fair consideration can be undertaken. I set aside the decision and do not preserve any of the findings.

Remittal

19. As to remaking the decision, given the nature of the errors, I accept the submissions by both Ms Solanki and Ms Jones that evidence has to be presented and clear findings have to be made. Both advocates submit that the appeal should be remitted to the First-tier Tribunal. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. That reads as follows at paragraph 7.2,

"7.2 The Upper tribunal is likely on each such occasion to proceed to remake the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:

- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put and considered by the First-tier Tribunal; or*
- (b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be remade is such that, having regard to the overruling objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal."*

20. I have reached the conclusion that it is appropriate to remit this matter to the First-tier Tribunal for a fresh decision on all matters. The appellant has had no adequate consideration of her appeal to date and has not yet enjoyed a fair hearing.

Notice of Decision

21. The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the Judge's decision promulgated on 13 March 2019 pursuant to Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.
22. It is remitted to the First-tier Tribunal for a fresh hearing before any Judge other than Judge of the First-tier Tribunal Devittie at Taylor House. No findings of fact are preserved.
23. No anonymity direction is made.

Signed: D O'Callaghan

Upper Tribunal Judge O'Callaghan

Date: 19 August 2019