



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/07348/2013
IA/07349/2013

THE IMMIGRATION ACTS

Heard at Field House
On 19 December 2013
And 27 January 2014

Determination Promulgated

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR MOHAMMED AKTHER-UL ZAMAN
MRS NAIMA SULTANA

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Sayem, Legal Representative (19 December 2013)
Mr S Karim, Legal Representative (27 January 2014)
For the Respondent: Mr Whitwell, Presenting Officer

DETERMINATION AND REASONS

1. The appellants appeal with permission against the determination of First-tier Tribunal Judge Chohan promulgated on 20 September 2013 in which he dismissed

their appeals against the decisions of the respondent made on 15 February 2013 to refuse their applications for leave to remain and to make removal directions pursuant to section 47 of the Immigration Asylum and Nationality Act 2006.

2. The first appellant was born on 2 February 1984; the second appellant was born on 1 July 1990. They are married and both are citizens of Bangladesh. The first appellant arrived in the United Kingdom on 15 September 2004 with leave to enter as a student until 1 January 2008. He was subsequently granted further leave to remain in that capacity and later as a Tier 4 (General) Student Migrant, the most recent grant being until 29 October 2012.
3. The second appellant entered the United Kingdom on 9 November 2010 with leave to enter as the dependent partner of the first appellant and was also most recently granted leave to remain in that capacity until 29 October 2012.
4. On 29 October 2012 the appellants applied for further leave to remain in the United Kingdom as, in the case of the first appellant, a Tier 4 (General) Student Migrant and, in the case of the second appellant, as his dependant.
5. The first appellant's application was made on the basis that he had been awarded a Confirmation of Acceptance for Studies ("CAS") issued by St Peter's College. On 11 December 2012, whilst the application for further leave to remain was pending, the college withdrew the CAS.
6. On 15 February 2013 the respondent refused the applications on the basis that, as there was no longer a valid CAS in place, he did not fulfil the requirements of paragraph 245ZX with reference to paragraph 115A of Appendix A. She refused the second appellant's application in line.
7. It is the appellants' case that the withdrawal of the CAS by the college was in error; that that error had been admitted and that it was in the circumstances unfair for the Secretary of State to have taken a decision in circumstances where he could not have known what had happened; and, in the alternative, the respondent had erred in law in failing to have regard to the flexibility policy (see **Rodriguez (flexibility policy) [2013] UKUT 00042 (IAC)** and **Naved (student - fairness - notice of points) [2012] UKUT 00014**).
8. The matter came before First-tier Tribunal Judge Chohan sitting at Sheldon Court, Birmingham on 13 August 2013. The judge concluded:-
 - (a) that the error in this case did not emanate from the respondent and that if he had any grievance then it was with the college [16];
 - (b) that the respondent could not have been expected to know that the letter withdrawing the CAS had not been sent to the appellant and that it was open to the respondent to have assumed that the withdrawal had been sent to him; and therefore

- (c) that there is no duty on the respondent to notify the appellant and accordingly the respondent's decision did not fall foul of the principles established in either Naved or Rodriguez [17];
 - (d) that requiring the appellants to return to Bangladesh would not amount to a breach of their right to respect for their family life [20] and that any interference with their right to respect for private life would not have consequences of such gravity as potentially to engage Article 8 [22].
9. The appellants sought permission to appeal on the grounds that:-
- (a) the principles in established case law imposed a duty on the respondent to inform the appellant of the withdrawal of the CAS and that a failure to do so rendered the decision unlawful;
 - (b) that despite being at fault, the judge went on "ruthlessly to dismiss the appellants' appeals unfairly" and the decisions were unlawful;
 - (c) that Judge Chohan failed to declare that the Secretary of State's decision to remove the appellants pursuant to directions given under Section 47 of the Immigration, Asylum and Nationality Act 2006 was wrong in law and to be set aside;
 - (d) that the judge had erred in his approach to Article 8 in giving no weight to the first appellant's established private and family life in the United Kingdom.
10. On 6 November 2013 Upper Tribunal Judge Latta granted permission to appeal on the grounds that the Section 47 removal decision needed to be clarified and there was an arguable issue in relation to fairness in the operation of the flexibility policy in the context of the CAS being withdrawn without the appellant's knowledge. He stated, "However, there is no substance in the earlier grounds relating to the burden of proof, illogicality and failure to consider Article 8. Permission is granted only in respect of the grounds I have identified."
11. When the matter came before me I asked both parties to address me on the question of whether the errors of law pleaded were in any event material given the length of time the appellant appears to have spent with leave to remain as a student in light of the provisions of paragraph 245ZX(h) and (ha).
12. Mr Whitwell produced a note of the hearing taken by a Presenting Officer which indicated that the Section 47 notice had been withdrawn. I have no reason to doubt that this was so and that the judge erred simply by failing to record this fact.
13. It is not in dispute that the judge should have proceeded to allow the appeal against the Section 47 decision on the basis it was not in accordance with the law and on that limited basis I find that the judge did err in law with respect to that decision.

14. Despite Mr Sayem's submissions to the contrary, I am not satisfied that the factual matrix in this case where a CAS was issued by the college but was later withdrawn is a situation which falls within the terms of the flexibility policy which was in force at the relevant time. Mr Whitwell provided a copy of that and I consider that nowhere does it relate to the omission of a CAS. In any event, a CAS would not be submitted with the application; it is an electronic document to which the respondent has access.
15. That said, it was evident from the application form that a CAS had been issued. It would have been evident from the system that the CAS had been issued to the appellant and had been later withdrawn by the college. The issue of fairness does not have anything to do with fault. The judge erred in concentrating on that issue when in reality what occurred here was that the respondent took a decision adverse to the appellant when it was possible that the appellants did not know what had happened. The difficulty is that in the circumstances, given the effect of Section 85A of the 2002 Act, errors of this nature cannot be corrected on appeal.
16. It is established law that the right to be heard includes the duty to give relevant persons, in this case the applicant, an opportunity to make representations as stated in **R v SSHD ex parte Doody (1994) 1 AC 531** 560D-G Lord Mustill, "Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result or after it is taken with a view to procuring its modification; or both."
17. On that basis, I am satisfied that the Secretary of State did err in law in acting unfairly when faced with the fact that the appellant's CAS had been withdrawn, without knowing the reasons behind that and in a situation where the appellant would be unable to make any correction given the nature of Rule 85A.
18. It does not, however follow that this issue is capable of materially affecting the outcome of the decision, given that it may well be that the application fell to be refused in any event by operation of paragraph 245ZX (h), (ha) or (hb). As that was not an issue previously raised, I considered that it was appropriate to adjourn the appeal to hear further submissions on that issue.
19. When the matter reconvened, Mr Whitwell explained that for the reasons set out in the skeleton argument produced by the respondent, there is no intention to take the point as to whether the first appellant meets the requirements of paragraph 245ZX of the Immigration Rules. Accordingly on that basis I am satisfied that the error referred to above is material and thus it is necessary to remake the decisions in respect of both appellants as that of the second appellant is dependant on the first.
20. Given my finding that the Secretary of State had erred in law in acting unfairly, it follows that the decision was not in accordance with the law and accordingly the matter has to be considered again by the Secretary of State. The appeal is therefore remade by allowing it on the basis that the decision was not in accordance with the law.

Summary of Conclusions

1. The decision of the First-tier Tribunal did involve the making of an error of law, and I set it aside.
2. There is no longer any valid appeal against the section 47 decisions
3. I remake the decisions in respect of the refusals to vary the appellants' leave to remain. I do so by maintaining the decision of the First-tier Tribunal to dismiss the appeals on the basis that the decisions were in accordance with the law but I allow the appeals on the basis that the decisions not to vary the appellants' leave to remain were not in accordance with the law. The applications are thus still outstanding before the respondent and await a fresh lawful decision.
4. Given that the appellants have been successful in their appeals, I consider that it is appropriate to make a full fee order in their favour.

Signed

Date

Upper Tribunal Judge Rintoul