



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

Appeal Number: IA/51728/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 18<sup>th</sup> August 2014**

**Determination  
Promulgated**

**On 8<sup>th</sup> September 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**MRS ROSANI KAYASTHA  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr P V Thoree (Solicitor)

For the Respondent: Mr T Wilding (HOPO)

**DETERMINATION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge M R Oliver promulgated on 9<sup>th</sup> May 2014, following a hearing at Richmond on 3<sup>rd</sup> April 2014. In the determination, the judge allowed the appeal of Rosani Kayastha. The Respondent Secretary of State applied for, and was

granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

### **The Appellant**

2. The Appellant is a citizen of Nepal who was born on 24<sup>th</sup> April 1985. She appealed against the decision of the Respondent dated 19<sup>th</sup> November 2013, refusing her application for further leave to remain under Tier 4 as a student who wished to embark upon a new course at a new institution for which she had no CAS number.

### **The Appellant's Claim**

3. The Appellant's claim is that she joined EThames College in August 2013 when she first arrived with her Tier 4 Student leave on 11<sup>th</sup> July 2010, which was valid until 31<sup>st</sup> August 2013. However, matters quickly deteriorated at college with teachers not turning up to run courses on a regular basis. She complained. Things did not change. One staff threatened to report her to the Home Office and to have her leave curtailed. Finally she wrote to Immigration Services in February 2012 with confirmation of her intention to change to an alternative college. The Home Office did not respond. She wrote again on 19<sup>th</sup> July 2012, but this was after she had already changed colleges. Again the Respondent Home Office did not reply.

### **The Judge's Findings**

4. The judge had evidence before him of the letter written to the Home Office in July 2012. He did not have evidence of the letter written in February 2012. He adjourned during the hearing to have this evidence produced. It was not forthcoming. He heard the Appellant's explanation that she had given certificates of posting both letters to her solicitors, but they could only produce the July certificate of posting. The judge held that the Appellant's "attendance and her results show that she is a serious bona fide student" and that this case is not one where a person "is caught trying to extend his stay in the United Kingdom by any means" (para 9). He concluded that, given the evidence before him of the July certificate of posting, "the Appellant probably did send both letters" and in the circumstances that she should have been permitted to change the Sponsor, especially as there would be no reason why such permission would not have been forthcoming from the Home Office had they replied.
5. The appeal was allowed.

### **Grounds of Application**

6. The grounds of application submit that there was no evidence of any fresh application having been made. There was only the suggestion that two letters had been written, only one of which was proven that the Appellant intended to change her college of study. However, the Appellant could not meet the requirement of the Rules by commencing studies with a different

Sponsor, regardless of any letters that she may have written, because she did not have a valid CAS. When she did write in July 2012 she had already commenced her studies some five months earlier.

7. Second, the Respondent has always maintained that the Appellant could not meet the requirements of the Immigration Rules if she switched Sponsors without a valid CAS, so that even if she could prove that she contacted the Respondent in February as claimed, what she needed was an application backed by a valid CAS.
8. On 18<sup>th</sup> June 2014, permission to appeal was granted on the basis that the Appellant could not change her Sponsor without a valid CAS.

### **Submissions**

9. At the hearing before me on 18<sup>th</sup> August 2014 Mr T Wilding, appearing as Counsel on behalf of the Respondent Secretary of State, submitted that there had clearly been an error of law in this case in the judge's decision. The findings reached, as to whether or not letters were written in February and July 2012, are irrelevant to whether the Appellant is entitled to succeed under the Rules. The fact was that the Appellant did not have a CAS for the new business school that she was now intending to study at. Moreover, this business school was not a highly trusted Sponsor. All she had to do was to make an application. This she did not do. She only wrote to the Home Office. That was to no avail because she did not have a CAS. The judge at the hearing treated this as an application under the old Rules, which were changed in 2007, by giving her credit for being a bona fide student. However, on the basis of the recent High Court decision in **Afzaal [2014] EWHC 2215** the Appellant could not succeed. It was still open to her to make a fresh application from within the UK, provided she did so within 28 days of the decision, or she could apply from overseas.
10. For his part, Mr Thoree submitted that he had taken the opportunity to discuss the appeal with Mr Wilding and it was unfortunate that the Appellant did not have a CAS when she changed colleges but he would ask me to exercise discretion in her favour. He also relied upon Article 8 with respect to the Appellant's private life.
11. In reply, Mr Wilding submitted that the Supreme Court judgment in **Patel** makes it clear that Article 8 does not extend as far as this because in this case the Appellant did not comply with the Immigration Rules as she was expected to and chose wilfully herself to act in a way that went against the Rules. She knew she had to have a CAS. She did not have one and yet she changed colleges. In fact, there was no evidence that she even had the CAS in the summer of 2012 when she should have made the application. There was no issue of fairness involved.

### **Error of Law**

12. I am satisfied that the making of the decision by the judge did involve the making of an error on a point of law (see Section 12(1) of **TCEA [2007]**) such that I should aside the decision. My reasons are as follows. This is a case where the Appellant had to make an application with a new CAS for change of Sponsor. She did not do so. She chose to write to the Respondent Home Office. There was only evidence before the judge of the July letter, which was five months after she had commenced her course with an institution which does not, apparently, have a highly trusted Sponsor status, in any event. The judge erred in law in giving the Appellant credit for being a “serious bona fide student,” as would have been open to him under the old Rules which were amended in 2007, because the current Rules do not provide discretion to a judge. If the Appellant purported to act under the Immigration Rules she had to comply with the Rules. This she did not do. The appeal could not have been allowed.

### **Re-Making the Decision**

13. I have re-made the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am dismissing this appeal for the reasons that I have already given above.
14. The Appellant did not make an application for a change of Sponsor. She did not have a CAS. She could not comply with the Immigration Rules. The case of **Afzaal [2014] EWHC 2215** (see especially paras 40 to 48 which refer to a condition being imposed by the Rules). In this case having a CAS was a condition of a valid application for a change of Sponsor. This the Appellant did not have. I am aware that the Appellant wrote, at least once to the Respondent Secretary of State, and there are cases (see **Obienna** per Mr Justice Simon) to the effect that a failure to respond to reasonable communication by a government department is culpable. Even so, that does not mean that the Appellant was absolved from making a proper application with a CAS number. Accordingly, this appeal is dismissed.

### **Decision**

15. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is dismissed.
16. No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

8<sup>th</sup> September 2014