



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

Appeal Number: IA/01083/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 6th November 2015**

**Decision & Reasons
Promulgated
On 7th December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MR ANISH KAMLESHKUMAR SHAH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Swain (Counsel)

For the Respondent: Mr Kandola (Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Ford, promulgated on 19th May 2015. In the determination the judge allowed the appeal of Anish Kamleshkumar Shah. The Respondent subsequently 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 male, a citizen of India, who was born on 12th August 1990. He applied for leave to remain as a Tier 4 (General) Student on 6th June 2014 and his application was refused on 22nd December 2014 on account of the fact that he had not submitted a valid CAS form with his application for further leave.

The Appellant's Claim

3. The Appellant's claim is that he had completed his level 5 diploma in IT with the Cromwell College of IT and Management on 28th May 2014. He still had an English language test to complete but on 21st August 2014 the Secretary of State wrote to the Appellant to say that all testing at Cromwell College had been suspended with immediate effect. The Appellant then was told in September 2014 that his proposed Sponsor, the London School of Advanced Study, had also been closed down. He approached the London School of Business and finance. They told him they had to see his passport or a certified copy of his passport. Without this documentation he could not sit an English language test with them. On 18th September the Respondent wrote to the Appellant confirming receipt of his Tier 4 (General) Student application of 6th June 2014.
4. This letter contains an apology for the delay in dealing with the application. On 3rd December the Respondent wrote to the Appellant requiring him to attend for an interview to help them assess his application. They did not inform the Appellant that he was required to take another English language test from an alternative provider (paragraph 6).
5. The Appellant attended an interview (to which Judge Ford makes a reference at paragraph 7) and the interviewer

"Concluded that the applicant was able to answer the questions in basic English and answered in a fluent manner suggestive of the fact that they had not been coached in providing specific answers by rote. The interviewer stated that there were no points in the interview where the applicant appeared to lack credibility" (see paragraph 7).
6. The Appellant claims that he has, accordingly, been treated in a conspicuously unfair manner. His passport has been withheld. He cannot sit the English language test, after first having been given no indication that he was required to do so. Moreover, there has been consequent delay in the entire process which has disadvantaged him.

The Judge's Findings

7. The judge considered the arguments before her of a breach of a common law duty of fairness by the Respondent Secretary of State. She had regard to the Respondent's policy on the return of visa immigration or citizenship documents sent with applications, which were needed urgently by an applicant, in order to regularise their immigration status (see paragraph 12 of the determination). The judge went on to expressly state that,

“Contrary to what was stated in the letter from the Respondent to the Appellant dated 18th September 2014, it is clear that there is a policy of returning documents to applicants if they are needed urgently within the period of ten days unless the application has already been refused. There is an online form to request the return of the documents which was not used by the applicant. But I am satisfied that the applicant made a clear request for the return of his documents which was acknowledged by the Secretary of State in the letter of 18th September 2014. For the Secretary of State to say that ‘Your regional passport cannot be returned, cannot be issued to take a new English test’ is in breach of the terms of the Secretary of State’s own policy” (see paragraph 13).

8. On this basis, the judge went on to conclude that the decision of the Respondent was conspicuously unfair because the Secretary of State had participated in the unfairness by failing to follow her own established procedures.
9. The judge went on to allow the appeal to a limited extent by stating that it was not in accordance with the law because the Secretary of State was in breach of her duty of common law fairness. The matter was remitted back to the Secretary of State to consider.

Grounds of Application

10. The grounds of application state that the Appellant did not provide a valid CAS with his application and that the Tribunal had failed to explain adequately why the Appellant was the subject of unfairness.
11. On 24th July 2015, permission to appeal was granted.

The Hearing

12. At the hearing before me, Mr Kandola, appearing on behalf of the Respondent drew my attention to paragraph 12 of the determination where the judge referred to the Respondent’s policy with an online link. He submitted that if one looks at the two pages of this document, the first page makes it clear that, “You might have to cancel your application ...” On 6th June 2014 the Appellant had applied for return of his documents. This was on the same date that he had made his application. On 8th September 2014 the Respondent rejected the application. The Secretary of State was not going to return documents to allow the Appellant to make good his application. There was no such responsibility on the Secretary of State.
13. Second, however, even if it is a policy that should have been followed, the position here was that the Appellant was an overstayer because he was applying on the last day of his leave, and whilst he had a Section 3(C) immigration leave that made his residence lawful for the time being, by asking the Secretary for return of the documents he had overstayed by 28 days. There was no unfairness.

14. For his part, Mr Swain drew my attention to the reason why the judge had allowed the appeal at paragraph 14 of the determination. The policy, he submitted, tells only half the story. The application was made on 6th June 2014. It was accepted by all that there was no CAS to accompany the application. However, the reason for this was, not the lack of a Sponsor college, but because the Appellant had sat an English language test and failed it the first time, and was now applying to re-sit it the second time, and 11th July 2014 was the earliest time that he could re-sit. He was to re-sit an exam set by Cambridge Education but it was to be sat at Cromwell College, the first time before June, and the second time on 11th July 2014.
15. However, there then resulted a long delay, because when he contacted the college in August he was told that there was an issue between Cambridge Education and Cromwell College and there are emails from 21st August 2014 from Edward Hodges, confirming this. Cambridge Education then told the Appellant that he could take a different test in the form of the IELTS test, given the delay that was resulting in the issuing of his marks. So matters got more and more complicated. However, then the London School of Advanced Study, where he was due to take his exams, also had their licence withdrawn. At this stage he approached the London School of Business and Finance (as is documented at paragraph 4 of the judge's determination), but they stated that they were required to issue a CAS, and in order to do that he would have to sit another English test, before they were able to issue him with a CAS, and for that they needed sight of his passport (see page 47), which the Home Office would not release.
16. It is in these circumstances, that the importance of the policy becomes enhanced. The way that the policy bites can only be assessed on the basis of these background facts. If the policy were not to bite the Appellant would be left entirely bereft of any assistance or help with an inevitable rejection of his application because, quite simply, his application could not move on. It was wrong for Mr Kandola to suggest that this was not an urgent application because the Appellant had to finish his course and embark on a consideration of his future prospects.
17. In reply, Mr Kandola submitted that the appeal was allowed on the basis that it was a decision by the Respondent that was "not in accordance with the law" but there is nothing requiring the Secretary of State to view it with the request for return of documents.

No Error of Law

18. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. In what is a meticulously well compiled and thoughtful determination, the judge has recited all the relevant evidence that Mr Swain has today put before me (see paragraphs 2 to 7 of the determination). In her assessment of the evidence she observes that,

“The interviewer concluded that the Appellant was credible and stated that, ‘applicant has taken another ESOL Cambridge exam. He is waiting for his results for one re-sit’. Ten days later the Secretary of State refused the Appellant’s application without any reference to the interview conducted on 12th December” (paragraph 7).

19. It is unsurprising in these circumstances that the judge went on to conclude that there was conspicuous unfairness in the way that the decision had been made in relation to the Appellant.
20. Second, this is all the more so given that there was a policy in existence that the Respondent Home Office applied in cases of this kind where documents were to be returned in appropriate cases. If one looks at the first page of the policy headed “Request for Return of Documents”, there is nothing there to suggest that documents would be withheld. In fact, there is a statement to the effect that, “The return of the documents may take more than ten working days if ...” It is only in this context, that the statement at the outset, “You might have to cancel your application – you will be told if you have to do this when you ask for your documents back” can be properly interpreted to mean what it does mean, which is, that only the documents, which ought to be returned cannot be returned, that the authorities will inform a prospective applicant for leave to remain, in which event he or she may have to cancel their application. The policy does not stand as authority for the proposition the documents are not to be returned, and in particular those documents which are necessary for an applicant to make a viable application for immigration status.
21. The judge had gone on to make two particular observations. First, that,

“This Appellant was placed in a situation where due to the denial of the return of his passport or a certified copy of that passport accompanied by a Home Office letter following an invitation by the Home Office to take a new English test, the Appellant was denied the opportunity to meet the requirements of the Immigration Rules” (paragraph 14).
22. Third, the judge had heard how the Appellant had failed only one module of his English language test and the letter of 18th September 2014 did not make it clear whether or not he was required to re-take the English language test. In fact, he was expressly told that he would be informed if that was the case. He was not so informed. On the contrary, the Secretary of State waited until 3rd December 2014 before indicating, that rather than inviting him to take an English language test, the Appellant would be invited to interview. Whilst that interview took place (see paragraph 7) the Appellant was just to have been a credible applicant who had not been coached and who had adequate English language capabilities.
23. It is entirely in these circumstances that the judge then makes the observation that,

“No reference is made in that letter [letter of 3rd December 2014] to the interview conducted, or to the request made by the Appellant for the return of his passport or a certified copy of the same ... the Secretary of State was effectively barring the Appellant from compliance” (see paragraph 14).

At the end of the enquiry into the facts and the law, the judge only concluded that the matter would be remitted back to the Secretary of State, so that the appeal is allowed only to that limited extent, in order to make the Secretary of State to actually deal with the application in a bona fide and proper manner. The decision cannot remotely be judged to amount to an error of law.

Decision

There is no material error of law in the original judge’s decision. The determination shall stand.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

3rd December 2015