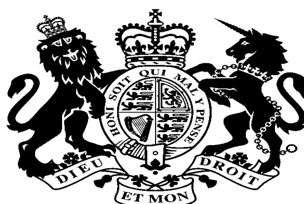

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/38961/2014**

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke	**Determination Promulgated**
On 14 October 2015	**On 16 October 2015**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD IQBAL

Respondent

Representation:

For the appellant: Ms Johnstone, Senior Home Office Presenting Officer
For the respondent: Mr Wainwright, Counsel

DECISION AND REASONS

1. The appellant ('the SSHD') appeals against a decision of First-tier Tribunal Judge Barcello dated 6 February 2015 in which the respondent's ('the claimant') appeal was allowed. The SSHD was granted permission in relation to two grounds of appeal: first, the judge was wrong to find that the claimant had an 'established presence'; second, the judge incorrectly found that the outstanding balance on the CAS was nil when it was £500.

2. The issue before the First-tier Tribunal was whether or not the claimant met the maintenance requirements of the Immigration Rules in order for his leave to be varied as a Tier 4 (General) Student. Judge Barcello determined this issue on the papers and without a hearing on 4

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February 2015, as requested by the claimant. The papers available to the judge were limited to the IATFT-1 form, the letter of refusal and a bundle of documents received by the Tribunal on 10 December 2014. The SSHD did not provide any documentation in response to directions dated 6 November 2014. The SSHD was again directed to serve a bundle of documents on 10 December 2014 but did not comply with these directions.

3. At the hearing before me, after some preliminary discussions, the representatives were able to agree the issues that remained in dispute in relation to the two grounds of appeal.

4. Mr Wainwright accepted that the appellant did not have an 'established presence' for the purposes of the Immigration Rules and the judge therefore erred in law in basing the first calculation on that footing (para 14). Mr Wainwright submitted that this could not be said to be a material error because the judge went on to consider the position in the second alternative calculation i.e. on the basis that the claimant did not have an 'established presence' and needed to establish that he could meet the relevant living expenses of £7380 in addition to any outstanding fees.

5. Both representatives accepted that there was evidence available to the Judge that for the appropriate 28 day period the appellant's balance did not fall below £7,669. The only factual dispute between the parties was this: Mr Wainwright submitted that the judge was entitled to find that there was no fee balance outstanding on the CAS dated 7 August 2014 before the judge. That meant that the appellant met the Rules – he needed to show a balance of £7380 for the relevant 28 day period and the judge was entitled to find that he did. On the other hand, Ms Johnstone submitted that the CAS (also dated 7 August 2014) that was attached to the application form indicated a £500 outstanding balance. She submitted that it followed that the claimant could not establish that he had £7380+£500=£7880 as he only had £7669.

6. Both representatives accepted that in these circumstances, the sole issue before me was whether or not the judge made an error of law in finding the outstanding balance on the CAS to be nil.

7. Ms Johnstone submitted that the judge made a mistake of fact in finding that £500 was not outstanding and this caused the SSHD unfairness. The nine- page bundle provided to the judge by the claimant included an original CAS dated 7 August 2014 (the day before the application was made). I have considered that document. It clearly shows the outstanding balance as nil. The judge was entitled to conclude that the outstanding balance on the CAS is nil, on the basis of this document and in the absence of any documentation from the SSHD at all (in breach of two directions).

8. Ms Johnstone sought to demonstrate that the CAS relied upon by the judge and the appellant was the wrong CAS, and not the one that was attached to his application. She sought to do this by providing fresh evidence to this Tribunal: an alternate version of the CAS, which she said was attached to the application.

9. In MM (unfairness; E & R) Sudan [2014] UKUT 105 (IAC), the Tribunal discussed the applicable principles in play when an argument is made that an error of law was brought about by a mistake of fact. MM reviews the relevant authorities, which make it clear that one of the necessary ingredients is normally that the party alleging the mistake "*could not fairly be held responsible for the error*". In addition, the appellate court could not identify a mistake unless it was willing to admit new evidence in order to identify it, and this should be done by a flexible interpretation of Ladd v Marshall principles. The reference to the Ladd v Marshall principles is a reference to that part of the judgment of Denning LJ in [1954] 1 WLR 1489 when he said (at p 1491) that where there had been a trial or hearing on the merits, the decision of the judge could only be overturned by resort to further evidence if it could be shown that: (1) the new evidence could not with reasonable diligence have been obtained for use at the trial (or hearing); (2) the new evidence must be such that, if given, it would probably have had an important influence on the result of the case (though it need not be decisive); (3) the new evidence was apparently credible although it need not be incontrovertible.

10. I have no doubt that the copy of the CAS that Ms Johnstone sought to admit in order to demonstrate a mistake could have been provided with reasonable diligence to the First-tier Tribunal, had directions been complied with. Ms Johnstone argued that the SSHD did not receive a copy of the claimant's bundle and therefore did not realise that it was necessary to provide the 'correct' CAS. I do not accept this submission. The SSHD was put on notice on two occasions that documentation was required. The SSHD failed, without any explanation whatsoever, to provide any documentation. The application form and the CAS were very basic documents that could have and should have been provided. Prior to the paper hearing the SSHD twice failed to comply with directions. In these circumstances the judge was fully entitled to make findings on the information provided by the appellant, there being no information forthcoming from the SSHD. This information could and should have been forthcoming.

11. In any event, Ms Johnstone submitted a copy of a CAS and *asserted* it was attached to the claimant's application form. There was no *evidence* that this was in fact the version of the CAS that was attached. There was no evidence available to me that this CAS accompanied the form and no explanation for there being two CAS of the same date. The appellant's witness statement before the judge states: "*I have NIL fees as stated in my CAS. This CAS was the same CAS that was used in my*

application". The SSHD has not provided any evidence whatsoever to contradict that evidence, plainly accepted by Judge Barcello, beyond the production of a copy of an alternate CAS.

12. Furthermore, Ms Johnstone provided the appellant's Counsel with a copy of the fresh evidence on the day of the hearing before me. This was not mentioned in the grounds of appeal and there has been a failure to comply with rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. In all the circumstances, it is not in the interests of justice for the documentation belatedly sought to be relied upon by the SSHD to be admitted, and I decline to admit it.

13. In the absence of this evidence the SSHD is unable to establish there was any mistake of fact or a material error of law in the decision.

14. The decision of the First-tier Tribunal did not involve the making of a material error of law.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
15 October 2015