

THE IMMIGRATION ACTS

Heard at Field House
On 7 July 2016

Decision & Reasons Promulgated
On 27 July 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

SAMJHANA ACHARYA KHATRI
RAMESHORA KHATRI
(NO ANONYMITY DIRECTION MADE)

Appellants

And

S ECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellants: Mr S Kumar, instructed by Capital Solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are nationals of Nepal born on 5 December 1987 and 28 December 1976, who entered the UK on 13 November 2009. The first appellant had a Tier 4 student visa. The second appellant is her husband.
2. On 14 October 2014 the first appellant applied for further leave to remain as a Tier 4 (General) student. On 20 January 2015 the application was refused by the respondent on the basis that the appellant did not have a valid Confirmation of Acceptance for Studies ("CAS"). The Reasons for Refusal letter included a paragraph headed "One Stop Warning", requiring the appellants to inform the respondent of any reasons they believe they should be allowed to remain in the UK pursuant to Section 120 of the Nationality, Immigration and Asylum Act 2002 ("the Section 120 Notice").
3. Following the Section 120 Notice, the first appellant made submissions and adduced evidence to support a claim to be granted leave to remain as a Tier 2 (General) Migrant.

4. The appellants appealed to the First-tier Tribunal ("FtT") where their appeal was heard by FtT Judge White. In a decision promulgated on 7 January 2016, Judge White dismissed the appeal. With respect to the first appellant's Tier 4 Application, the judge found that she did not have a CAS at the time she made her application (or at any stage prior to the respondent's decision) as she was waiting to obtain her degree results. The judge noted that Counsel for the first appellant did not dispute that because of this she could not succeed under Tier 4.
5. The judge then considered the first appellant's claim to satisfy the requirements of Tier 2. He found that because this was an application under the Points Based System, pursuant to Section 85A of the 2002 Act, the Tribunal could only consider evidence adduced by the appellant at the time of the application. The evidence submitted by the appellant to support her claim to meet the requirements of Tier 2, however, was submitted only after the respondent's decision in respect of her application under Tier 4 had been made. The judge concluded that he was therefore unable to consider the evidence.
6. The appellants' case, as set out in the grounds of appeal, is that the judge misconstrued section 120 of the 2002 Act. Mr Kumar, elaborating on the grounds, argued that section 120 allows for new evidence to be submitted in respect of a new category of claim even if the new claim is under the Points Based System and Section 85A applies.
7. Mr Tufan argued that it is established by Court of Appeal case law that an applicant in the first appellant's circumstances is unable to rely on evidence that was not submitted at the time of making the application.

Consideration

8. The effect of a Section 120 Notice is that an appeal covers not only any grounds before the Secretary of State when the decision was made but also any grounds raised in response to the Section 120 Notice even if those grounds do not relate to the decision under appeal.
9. However, this is subject to the effect of section 85A of the 2002 Act, which applies in Points Based System appeals. Under Section 85A, in a Points Based System appeal evidence can only be considered by the Secretary of State if it was submitted at the time of making the application to which the immigration decision relates. The effect of this is that Section 85A precludes a section 120 Notice from being used to adduce evidence of compliance with a different requirement of the Points Based System. See Ali [2013] EWCA Civ 1198 at [11]: "*The points based system is strict and requires the necessary qualification to be obtained before the application for leave to remain is made and not after, through the mechanism of appeal.*"
10. In this case, the first appellant applied for leave to remain under Tier 4 of the Points Based System but was unable to satisfy the requirements. In response to a Section 120 Notice she submitted evidence to show she could succeed under Tier 2. This evidence was submitted after the respondent had made her decision in respect of the Tier 4 application. For the reasons set out above, and in accordance with Ali, Section 85A of the 2002 Act precluded the judge from considering the new evidence. Accordingly, I am satisfied that the judge did not make an error of law by refusing to consider the new evidence put forward by the appellant in response to the Section 120 Notice.

Decision

- A. The appeal is dismissed.
- B. The decision of the First-tier Tribunal did not involve the making of a material error of law and shall stand.
- C. No anonymity direction is made.

Signed

Deputy Upper Tribunal Judge Sheridan

Dated: 25 July 2016