



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/14329/2015

THE IMMIGRATION ACTS

Heard at Field House
On 20 June 2016

Decision & Reasons Promulgated
On 1 July 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS BHUPINDER KAUR
(ANONYMITY DIRECTION NOT MADE)

Claimant

Representation:

For the Appellant: Mr S Whitwell – Home office presenting officer

For the Claimant : Mr A Arayn (legal representative Farani Javid & Taylor)

DECISION AND REASONS

1. This is an appeal by the Secretary of State in respect of a decision and reasons of the First-tier Tribunal (Judge Walker) who in a decision promulgated on 7 December

2015 allowed the appeal against a refusal under the points-based system, to the extent that the matter was remitted to the Secretary of State for reconsideration.

2. In this decision I shall refer to the parties as the “Secretary of State” who is the appellant in these proceedings and to Miss Kaur as “the claimant”.
3. In a decision and reasons the FtT set out the reasons for refusal of the claimant’s application, namely that she did not have a valid CAS assigned. The FtT heard evidence from the claimant which it found to be credible and findings of fact were made accordingly. There is no dispute as to the sequence of events as follows. The claimant prepared for her application in September 2014 and received an offer to study at the London College of Business. She was required to take an English language test following a change in the Rules. The first test available was on 18 October 2015 and her leave expired on 14 October 2015. She submitted her leave application without an English language test or a valid CAS and intended to forward the documents later. Having been notified that she had passed the test she was informed that the London College of Business had been suspended from the sponsor’s list. She did not apply to any other college because she had submitted her original documents with her application.
4. The FtT concluded that the claimant had suffered unfairness and that it would accordingly be necessary for the Secretary of State to provide her with the 60 day period in which to find a fresh sponsor and make a fresh application. Reliance was placed on Patel [2011] UKUT 00211 (IAC).

Grounds of Application for Permission

5. The Secretary of State contended that the FtT’s approach to the issue of common law unfairness was flawed and amounted to an error of law.

Ground 1

6. In relying on Patel the FtT failed to take into account EK (Ivory Coast) v the Secretary of State for the Home Department [2014] EWCA Civ 1517 in which it was made plain that the principle could not extend to cases in which the SSHD bore no direct or knowing responsibility for the alleged unfairness. Further the FtT failed to provide adequate explanation as to how the length of time taken to obtain the English language test was the “fault” of the SSHD and/or how this could have any bearing on common law fairness. It was further contended for the same reasons that the FtT failed to explain how the claimant’s relationship with her former college had any bearing on the Secretary of State’s duty.

Ground 2

7. The claimant never requested documents from the Home Office in order to apply for a college course elsewhere. In reality the claimant very likely did have a 60 day

period in which to find a new college as the Secretary of State made the refusal decision on 10 March 2015 and the claimant became aware of the college's suspension in October 2014.

Permission to Appeal

8. Permission to appeal was granted by First-tier Tribunal Judge Lever on 9 May 2016. Judge Lever concluded

“It was arguably an error of law for the judge to have remitted this case back to the respondent for the reasons given as much of the features do not necessarily reflect blame on the part of the respondent and the Immigration Rules represent a clear structure”.

Error of Law Hearing

Submissions

9. Mr Whitwell expanded on the grounds of appeal and produced the judgments of **EK (Ivory Coast)** and **Marghia (procedural fairness) [2014] UKUT 00366 (IAC)**. There had been no consideration by the FtT of how the Secretary of State could be seen to have been involved in any unfairness. The facts found by the FtT established that the claimant had been affected by matters outside of her control, namely the decision to take the English language test and the fact that she may have been misled by her college.
10. Mr Whitwell cited **Marghia** which referred to procedural unfairness and emphasised that ordinary unfairness had no place in this consideration. There was no procedural unfairness identified by the FtT on the part of the Secretary of State.
11. As to the 60 day period, Mr Whitwell submitted that there was no clear evidence on the dates but subject to any further information on this point it was clear that the claimant had had 60 days and had not taken the opportunity to make any further application.
12. Mr Arayn relied on **Dasgupta (error of law - proportionality - correct approach) [2016] UKUT 0028 (IAC)** and **Miah (interviewer's comments: disclosure: fairness) [2014] UKUT 00515 (IAC)**. He argued that the FtT had properly made findings of fact and given reasons why a common law duty of care arose. The sequence of events was unchallenged and the fact of having to take a further English language test resulted from a change of Rules. It was accepted that there was no procedural unfairness but the claimant relied on the principles in **Thakur** and **Patel** where the Tribunal considered circumstances in which a common law duty of fairness arose. There was no material error of law on the part of the FtT.

13. Mr Whitwell briefly responded that there had been no issue of the Statement of Changes (HC 1025) raised in the decision and reasons. **Dasgupta** was not relevant. There was no perversity challenge, the error of law was a misdirection of law.

Decision

14. I was satisfied that the Secretary of State had made out her case that the First-tier Tribunal erred in law by relying on the principles set out in **Patel** (cited above) without further reference to the Court of Appeal review of the same in **EK (Ivory Coast) v SSHD [2014]** in which consideration was given to **Patel**, **Thakur** and the general principles in **Doody**. Lord Justice Briggs stated

“the necessary starting point is that a clear distinction must be made between the unfairness in outcome, viewed from the standpoint of the applicant, to which a particular set of circumstances may give rise, and the separate question of whether the Secretary of State’s participation in those circumstances involved a breach of her common law duty to act fairly”.

He further stated at [58]

“First, the courts should in my view be slow to rigidify the essential fact-sensitive flexibility of the duty to act fairly, as summarised in the **Doody** case, in the passage quoted by Sales LJ above. The unpredictable variety of factual situations in which the duty may arise is such as to make it dangerous to seek to identify any more rigid principle as applicable to any particular class of situation. Secondly like Sales LJ, I consider that a fairness principle which would lead to success for the applicant in the present case would make too great an inroad into the simplicity, predictability and relative speed of the PBS process, contrary to the thrust of the PBS regime as laid down by the Immigration Rules, particularly in a situation such as the present, where the Secretary of State bears no responsibility at all for the mistake, or the lack of communication of it, which led to the unfair outcome for the applicant.”

15. In my view the FtT erred by focusing on the outcome for the claimant which resulted in unfairness in the general sense, rather than consideration of the role and responsibility of the Secretary of State in respect of any of the alleged fairness. It is clear from the facts found that there was no responsibility or fault on the part of the Secretary of State and that the claimant was in the position that she was because of circumstances with which the Secretary of State had no involvement.
16. Accordingly I set aside the decision and reasons. I then heard further submissions from both representatives which are set out in the Record of Proceedings. I have taken these into account in remaking the decision.
17. The claimant did not submit a valid CAS with her application for which she had an explanation to the extent that she did not have a current English language certificate.

Once she had obtained the same the college to which she had applied was suspended as a sponsor. These factors were to an extent beyond her control although in reality she had a choice as to the timing and location of where she took the English language test and the circumstances were such that she could have sought to apply to a new college notwithstanding that the original documents had been submitted with her application. I find that no procedural unfairness arose as a result of any action or fault on the part of the Secretary of State and that the facts establish that the claimant would in reality have had 60 days in which to make a fresh application from the time she knew that the college had been suspended until the date of refusal in March 2015.

Notice of Decision

18. There is a material error in law by the First -tier Tribunal and the decision is set aside. I remake the decision of the First-tier Tribunal by dismissing the appeal on immigration grounds.

No anonymity direction is made.

Signed

Date 1.7.2016

GA Black
Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

GA Black

Signed

Date 1.7.2016

Deputy Upper Tribunal Judge G A Black