



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/00086/2017

THE IMMIGRATION ACTS

Heard at Field House
On 2 July 2018

Decision and Reasons Promulgated
On 6 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

DANDY ASUNCION GOTANGOGAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Willocks-Briscoe, Senior Home Office Presenting Officer

For the Respondent: Ms E King (counsel), instructed by Davidson & Co, solicitors

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge

Courtney, promulgated on 6 December 2017 which allowed the Appellant's appeal and directed the respondent to make a fresh decision not sooner than 150 days after promulgation of the First-tier Tribunal's decision. The Judge explained that the purpose of her decision was to enable the appellant to obtain a fresh sponsorship letter & then vary his application to include study at the college which issued the new sponsorship letter.

Background

3. The Appellant was born on 17 April 1979 and is a national of the Philippines. On 10 February 2017 the respondent refused the appellant's application for leave to remain as a student.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Courtney ("the Judge") allowed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 15 March 2018 Judge Holmes gave permission to appeal stating (inter alia)

"The appeal appears to have been allowed on the basis that the procedure adopted by the respondent was unfair - even though the respondent applied her 60 day policy, and then having done so gave the appellant a further 60 day period. Thus, arguably, the respondent went beyond what she was required under her own policy to do; Patel (revocation sponsor licence -fairness) India [2011 UKUT 211, and Kaur (Patel fairness; respondent's policy) India [2013] UKUT 344. Arguably it was not open to the Judge to proceed as she did; Marghia (procedural fairness) [2014] UKUT 366, and Raza [2016] EWCA Civ 36."

The Hearing

5. (a) For the respondent, Ms Willocks-Briscoe moved the grounds of appeal. She told me that the Judge has allowed this appeal are grounds of public law fairness. She took me to [13] of the decision where the Judge records that the appellant was given 60 days from 1 November 2016 to obtain a new CAS and that period was extended to 24 January 2017. She told me that finding clearly indicated that the appellant had been allowed 60 days in accordance with the respondent's policy, yet at [20] of the decision the Judge contradicts the findings at [13] by saying that the appellant has not had an opportunity to enrol at another college.

(b) Ms Willocks-Briscoe told me that the Judge fails to set out adequate reasons, and does not identify the manner in which the decision is not in accordance with the law she reminded me that the appellant does not meet the immigration rules. She relied on Marghia (procedural fairness) (2014) UKUT 366 (IAC), Raza [2016] EWCA Civ 36 and Kaur v SSHD [2018] EWCA Civ 1303.

(c) Ms Willocks- Briscoe asked me to allow the appeal and set the decision aside. She asked me to substitute my own decision. Dismissing the appellant's appeal.

6. (a) Ms King, for the appellant, relied on the rule 24 response dated 28 June 2018. She told me that the decision does not contain an error of law and that the Judge correctly identified the duty to act fairly. She relied on Thakur (PBS decision -common law fairness) Bangladesh [2011] UKUT 00151 and Patel (revocation of sponsor licence-fairness) India [2011] UKUT 00211. She took me through the history of the appellant's application and appeals. She told me that delay is a relevant consideration, which had been taken into account by the Judge.

(b) Ms King argued that the caselaw relied on by the respondent can be distinguished from the facts and circumstances of the appellant's case. She told me that it was the Secretary of State withdrew the college licence, which was the foundation for the appellant's difficulties. Ms King told me that the Judge looked holistically at all of the evidence in this case before reaching sustainable decision which are well within the range of reasonable decisions available to the Judge. She told me that the Judge clearly reaches the conclusion that the only way to return the appellant to the situation he would have been in but for procedural unfairness was to grant a lengthy period of leave to enable him to secure a CAS.

Analysis

7. The appellant's application was submitted on 2 August 2010. His application was originally refused on 25 August 2010. The appellant appealed that decision and in a determination promulgated on 11 November 2010 his appeal was allowed. The respondent appealed against the First-tier Tribunal's determination of 11 November 2010 successfully. The appellant was granted permission to appeal to the Court of Appeal, and by consent this case was remitted to the Upper Tribunal. On 19 October 2012 the Upper Tribunal allowed the appeal to the extent

“... that the appellant should have a period of 60 days, which will start from the date of service on him by the Home Office of a copy of this determination, during which period he may submit to the respondent a further application for leave to remain in order to study Health and Social Care to National Vocational Qualification level 4 at a college which holds a highly trusted sponsor's licence.”

8. Four years later, on 1 November 2016, the respondent served the Upper Tribunal decision of 19 October 2012 on the appellant, and told the appellant that he has until 31 December 2016 to submit documentary evidence confirming that he had been accepted onto a course of study with a licensed tier 4 sponsor. The appellant sought the assistance of an MP, who sent an email to the respondent asking for an extension of the 60 day period. The respondent extended the period to 24 January 2017.

9. At the start of the hearing I asked whether there is been a change in circumstances since the decision promulgated on 6 December 2017 has been received. I was told that the appellant has not applied to any educational institutions because the respondent has appealed the decision of 6 December 2017, and the appellant does not want to pay a significant deposit to a college while his future is uncertain.

10. At [13] of the decision the Judge finds that on 1 November 2016 the appellant was given 60 days to obtain a new CAS for a course of study. At [15] the Judge finds that the appellant was granted an extension of time until 24 January 2017. At [16] the Judge finds the what the appellant pleads in the grounds of appeal does not amount to an impediment to using the time allowed to find a college course and a tier 4 educational sponsor.

11. Despite those findings, at [20] the Judge finds that the appellant has not had an opportunity to enrol at another college. That finding is inadequately reasoned and contradicts clear findings that the Judge makes between [13] and [16].

12. In Kaur (Patel fairness: respondent's policy) [2013] UKUT 344 (IAC) it was held that (i) The respondent has produced a policy, which is intended to give effect to the principles of common law fairness identified in Patel (relocation of sponsor licence – fairness) [2011] UKUT 211 (IAC) and is designed to deal fairly with applicants whose college of choice loses a sponsor licence whilst the application for leave to remain is outstanding; (ii) In essence, the policy provides that, in cases of potential discretionary refusal under paragraph 322 of the immigration rules, caseworkers should follow the 'Patel' process. Where this is not done, the resulting decision will not be in accordance with the law.

13. Marghia (procedural fairness) (2014) UKUT 366 (IAC) deals with the issue of the common law duty of fairness. There is no absolute duty in law to make decisions which are substantively 'fair'. The court will not interfere with decisions which are objected to as being substantively unfair, except where no reasonable decision maker could have arrived at the decision in question. It is only for the Secretary of State to exercise discretion. This does not appear in the Immigration rules, which is a matter purely for the Secretary of State and no-one else, including the Court.

14. In Marghia the Upper Tribunal found that the common law duty of a decision maker is to make decisions in a manner that is fair, the duty of fairness is about procedural fairness – but that there is no duty at common law to make decisions which are substantively 'fair'. The court found it would only interfere with administrative decisions which are 'unreasonable' ie that no reasonable decision maker could have arrived at such a decision. The Upper Tribunal found that the decision in this sense could not be unreasonable. It found that it is a matter for the Secretary of State as to whether or not to exercise discretion which does not appear in the Immigration rules, notwithstanding the claimant's inability to meet the requirements of the Immigration rules. The exercise of discretion was for the Secretary of State alone, no one else, including the Court. The fact that the Immigration Judge may have had sympathy for the claimant or regarded the decision as 'unfair' was not to the point.

15. Paragraph 32 of Patel (revocation of sponsor licence – fairness) [2011] UKUT 211 (IAC) discusses the respondent's policy of allowing 60 days for variation of an application where college is no longer on the approved list of sponsors (as in this case). The last sentence of paragraph 32 says

“If the applicant fails to respond to the invitation there has been no breach of the duty of fairness.”

16. The Judge’s conclusions at [20] and [21] are contradicted by the Judge’s findings of fact between [13] and [16]. There are no findings of fact to support the Judge’s conclusions at [20] & [21]. There are no findings of fact to support the Judge’s decision at [23]. The direction that the Judge makes at [24] cannot competently be made.

17. These are all material errors of law. I set the decision aside.

18. There is sufficient material before me to enable me to substitute my own decision. The procedural history is beyond dispute. The appellant submitted his application in August 2010. The appellant was given 84 days (between 1 November 2016 and 24 January 2017) to secure a CAS and vary his application - but did not do so. The appellant has not secured a college place since the First-tier Tribunal heard his appeal on 22 November 2017.

19. Patel (relocation of sponsor licence – fairness) [2011] UKUT 211 (IAC), Kaur (Patel fairness: respondent’s policy) [2013] UKUT 344 (IAC), Marghia (procedural fairness) (2014) UKUT 366 (IAC) and Patel v SSHD [2018] EWCA Civ 229 all tell me that, on the facts and circumstances of this appellant’s case, there has been no breach of the duty of fairness. The decision that the respondent made on 10 February 2017 is in accordance with the law. No other ground of appeal is pursued.

20. The appellant’s appeal against the respondent’s decision of 10 February 2017 is dismissed.

CONCLUSION

The decision of the First-tier Tribunal promulgated on 6 December 2017 is tainted by a material error of law. I set it aside.

I substitute my own decision.

The appeal against the respondent’s decision dated 10 February 2017 is dismissed.



Signed
Deputy Upper Tribunal Judge Doyle

Date 5 July 2018