



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

Appeal Numbers: IA/18501/2015
IA/18491/2015

THE IMMIGRATION ACTS

Heard at Field House

On 15 March 2018

**Decision &
Promulgated
On 08 May 2018**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**(1) MAMITA BANTAWA
(2) ASHESH KUMAR RAI
(ANONYMITY DIRECTIONS NOT MADE)**

Respondents

Representation:

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer

For the Respondents: Mr R Singer of Counsel, instructed by Paul John & Co Solicitors

DECISION AND REASONS

1. These are linked appeals against the decisions of First-tier Tribunal Judge Abebrese promulgated on 22 June 2017 in which he allowed the appeals of Ms Bantawa and Mr Rai.

2. Although before me the Secretary of State for the Home Department is the Appellant and Ms Bantawa and Mr Rai are the Respondents, for the sake of continuity with the proceedings before the First-tier Tribunal I shall hereafter refer to Ms Bantawa and Mr Rai as the Appellants and the Secretary of State for the Home Department as the Respondent.
3. The Appellants are citizens of Nepal. Ms Bantawa was born on 6 September 1982. She is married to Mr Rai, who was born on 14 August 1979. Mr Rai entered the United Kingdom as a Tier 4 Migrant on 20 October 2009 with leave until 31 March 2011. On 2 June 2010 Ms Banawa entered the UK as a Tier 4 (General) Dependent Partner with leave 'in line' with her husband until 31 March 2011. A subsequent period of leave was granted to each of them on 21 April 2011 until 28 June 2014. However, it appears that such leave was subsequently curtailed, to take effect on 6 May 2014.
4. An application was made in May 2014 for Mr Rai to be granted further leave to remain as a Tier 4 Student Migrant, and for his wife again to be granted leave 'in line' as a dependant. Mr Rai's application was made on the basis of his proposed study at Blake Hall College in Surrey Quays from 19 May 2014 until 30 May 2015 on a BTEC Advanced Professional Diploma in Innovative and Creative Leadership. However, whilst his application was pending the licence for Blake Hall College to issue certificates of approval of study ('CAS') was revoked. The Appellants' joint applications relied upon a CAS issued by Blake Hall College; accordingly on 17 February 2015 the Respondent wrote to Mr Rai advising him of the fact of the revocation of the licence of Blake Hall College and advising him that he had a period of 60 calendar days during which consideration of his application would be suspended. He was informed of this circumstance in what is a letter in 'standard terms', accompanied by documentation that might assist him in obtaining a new CAS, and otherwise explaining his options. The letter said that the 60 day period would end on 18 April 2015.
5. The Respondent filed before the First-tier Tribunal evidence of the posting of the letter of 17 February 2015, and evidence of its receipt by way of a signed 'track and trace' document from the Royal Mail signed for on 19 February 2015 by Ashesh Kumar (the first two names of Mr Rai).
6. Mr Rai struggled to find a course provider willing to offer him a place and to issue him with a new valid CAS. On 15 April 2015 his representatives wrote to the Respondent advising that they were duly instructed by the Appellant, thanking the Respondent for the letter of 17 February 2015, and requesting an extension of time to submit further documents in support of

the Tier 4 application. The relevant passage in the representatives' letter is in these terms:

"We kindly request an extension of time to submit these documents. We request that we are given till 17 May 2015 to file these documents. The extension of time is to ensure our client has ample time to provide the documents to send to you taking into account the delay in receiving your letter."

7. It is to be recalled from the chronology indicated above that there was in fact no particular delay in receiving the letter of 17 February 2015, which was signed for on 19 February 2015.
8. Nothing is specified in the representatives' letter as to the measures that the Appellant had taken by way of obtaining a CAS, nor by way of identifying any particular difficulties that he was experiencing.
9. The Respondent refused both the application of Mr Rai and the application of Mrs Bantawa by separate 'reasons for refusal' letters ('RFRL') dated 11 May 2015. Mr Rai's application was refused on the basis that he did not have a valid CAS and accordingly he was awarded no points in respect of 'attributes', and also in consequence was awarded no points in respect of 'maintenance (funds)'. Mrs Bantawa was essentially refused 'in line' with the decision on her husband's application: the RFRL in her case identified the fact of the refusal of Mr Rai, and also made reference to the consequent failure to demonstrate the requirements in respect of level of funding.
10. Notices of appeal were lodged in respect of both Appellants.
11. I pause at this juncture to deal with a preliminary matter. It is to be noted that the RFRL in respect of Mr Rai stated that he did not have a right of appeal because his application for leave to remain had been made after the expiry of his leave. It was said that his leave was curtailed with effect from 5 May 2014 but that his application was not made until 6 May 2014. In contrast, no such point was taken in respect of his wife her RFRL informed her that she had a right of appeal. This discrepancy in approach was identified in the combined grounds of appeal to the First-tier Tribunal drafted by the Appellants' representatives. Indeed, the grounds of appeal went into some considerable detail by way of preliminary submission as to why it was said that the application had been made 'in time' - in particular that it had been posted on 3 May 2014 and that according to the Home Office Guidance on Specified Application Forms and Procedures the date of posting would be treated as the date of application. To that extent there

is evidence on file of the posting having been made on 3 May 2014 at 12.19 hours. There is also evidence that the application form was completed and the fee paid on 3 May 2014.

12. The issue of Mr Rai's right of appeal does not appear to have been determined at the listing stage, as is sometimes - indeed not infrequently - the case. The Duty Judge indicated that the 'right of appeal' issue could be taken as a preliminary point at the hearing; both appeals were listed accordingly. It may be that because the cases were listed that the parties - and perhaps the Judge - assumed that jurisdiction had been accepted. I say this because it is absolutely clear that there was no discussion or exploration of this issue before Judge Abebrese.
13. Mr Singer, who appeared both before me and before Judge Abebrese, acknowledged that there was no such discussion at the hearing before the First-tier Tribunal. Moreover I note that in Judge Abebrese's rehearsal of the facts he gives the application date as 6 May 2014 (paragraph 2), which would have been an out-of-time date, and thereby does not appear to have engaged with this issue.
14. In such circumstances it seems to me right and proper that I formally acknowledge at this preliminary stage of my deliberation that in my judgment the application of Mr Rai for variation of leave to remain was made prior to the expiry of his leave, and to that extent he was entitled to appeal to the First-tier Tribunal, as indeed was Mrs Bantawa (in respect of whom no such issue has ever been raised).
15. I turn then to the consideration of Judge Abebrese's approach to the appeals.
16. It is apparent from the Decision of Judge Abebrese that during preliminary discussions it was agreed by the representatives that the issues in the appeal were narrow and that the matter could be dealt with by way of submissions only: see paragraph 7. The focus was on the 60 day period which Mr Rai had been permitted in order to find another college / course provider. The argument on behalf of the Appellants was, in short, that the Respondent had failed to deal with the application for an extension of this period made by way of the representatives' letter of 15 April 2015.
17. Judge Abebrese concluded in the Appellants' favour in this regard: see paragraph 14. In particular, Judge Abebrese concluded that there had been procedural unfairness:

“Once the letter had been sent to the Respondent they had a duty to provide an answer to the Appellant in relation to the request which had been made. It is the case in this instance that there has been no such engagement and that the Respondent has therefore made a decision which is flawed in law.”

On that basis the appeal was allowed.

18. It is to be observed that these were ‘old-style’ appeals where it was permissible to allow an appeal on the basis that the decision was not in accordance with the law. As such the appeal was not restricted to human rights grounds. That said, it is not abundantly clear that Judge Abebrese had it in mind that the application therefore essentially required to be considered further by the Secretary of State.
19. I also pause to note that it was not argued in the alternative that the removal of the Appellants in consequence of the Respondent’s decisions would be in breach of their Article 8 rights.
20. Mr Singer suggested that this was because the issue of the alleged procedural unfairness in the Respondent not dealing with the Mr Rai’s application for an extension of time to obtain a CAS, was dealt with as a preliminary issue. I am not sure that I can detect from the available materials that that was the case. It is to be acknowledged that Judge Abebrese records *“The representatives also as a preliminary issue identified the matter to be determined by the Tribunal as concerning the 60-day period ...”* (paragraph 8). It seems to me that that means no more than that during the preliminary discussions the key issue was identified. I do not understand it inevitably to mean that the issue of the 60-day period was considered to be a preliminary issue – with the implication that, contingent upon the outcome of the issue, there might be some other argument to be pursued. If there were to be some further ground of appeal developed – such as human rights grounds – that would have required the calling of evidence, even if only to offer the Appellants for cross-examination.
21. Further, it was confirmed by Mr Singer, and from the access that Mr Wilding was able to have to the Respondent’s representative’s record of the hearing, that Judge Abebrese reserved his Decision. If the issue of the extension of the 60 day period was being advanced only as a preliminary issue, and was not ruled upon at the hearing, then it seems obvious enough that any other grounds of appeal, such as Article 8, would have to have been argued in the alternative at the hearing (and likely supported by the calling of evidence). The circumstances suggests that an Article 8 case was not put before Judge Abebrese.

22. Be that as it may, as I say, the Judge allowed the appeals on the basis that he considered that there had been procedural unfairness because the Respondent had not dealt with the request for an extension of time to obtain a CAS. The Respondent's appeal to the Upper Tribunal is essentially based on the premise that the Judge proceeded on a fundamental misconception of fact. Evidence has now been produced that the Respondent did consider the application for extension of time, and communicated this to the Appellants' representatives by way of a letter that accompanied the decisions.
23. I have been provided with a copy of a letter dated 11 May 2015 addressed to the representatives which states:

"Your clients' applications have been refused for the reasons set out in the enclosed notices. Please ensure that these are passed to your clients immediately. The notices inform your clients of whether or not there is a right of appeal or of administrative review and, if so, how this may be exercised, and sets out any time limit for an appeal or application for administrative review to be made. In our letter dated 15 April 2015 you requested an extension of time due to a delay in receiving our letter dated 17 February 2015. Royal Mail has a record of your client signing for our letter dated 17 February 2015 on 19 February 2015 and do not consider this as a delay requiring an extension."

On the face of it, the application for an extension was considered, and was refused because the Respondent did not consider any basis for an extension had been shown. It may be recalled that the application asserted delay in receiving the letter of 17 February 2015, but advanced no other basis for an extension, and did not offer any indication as to the steps pursued by Mr Rai in the meantime.

24. It seems to me that had Mr Singer been aware of this letter he would not have been able to pursue the submission that succeeded before Judge Abebrese. It is clearly apparent that Mr Singer was unaware of this letter, notwithstanding that his instructing solicitors must have been aware of it. Indeed, it seems to me significant that the Appellants' solicitors did not raise any complaint against the refusal of extensions in the grounds of appeal accompanying the Notices of Appeal to the First-tier Tribunal - where they had otherwise set out in some competent detail their disquiet as to the denial of a right of appeal to Mr Rai. Had the representatives been troubled by, or thought that some challenge was available in respect of, the refusal of an extension (or had thought the application had not been dealt with), it is reasonable to expect that it would have found its way into the grounds of appeal alongside the carefully articulated complaint against

the denial of a right of appeal. This powerfully suggests that the representatives were fully cognisant of the fact that the application had been adequately dealt with, even if Mr Singer in due course when he came to be instructed to appear at the hearing was not.

25. The circumstances of Mr Singer being 'wrong-footed' in this regard is not helped by the fact that the Respondent's representative before the First-tier Tribunal does not appear to have had knowledge of the covering letter to the RFRLs - or if he did was not astute enough to draw it to the attention of Judge Abebrese. Be that as it may, the letter was clearly in existence and it is clearly the case that the Respondent did consider this aspect of the Appellants' representations. On that basis I am satisfied that the decision of Judge Abebrese is founded on a fundamental misconception of fact which, in my judgment, amounts to an error of law. In reaching this conclusion, necessarily I neither criticise Mr Singer in pursuing what he considered to be an available argument, or Judge Abebrese in considering and finding in favour of that argument where incomplete materials were before him. However, the nature of the error is so fundamental that it vitiates the lawfulness of the decision of the First-tier Tribunal such that it is to be set aside.
26. As discussed above, there seems to have been no consideration of Article 8 in the alternative. Mr Wilding very helpfully acknowledges that there were issues in respect of private life raised in the witness statements that were before the First-tier Tribunal, most notably that of Ms Bantawa. No such matters have been addressed or considered. In the circumstances it is common ground that the appeal should be remitted to the First-tier Tribunal to give proper consideration to all the issues at large, again bearing in mind that this an old-style appeal and not limited to human rights grounds.
27. In this latter regard I pause to observe that Mr Singer suggested that had he been alert to the Respondent's response to the application for extension of time to obtain a CAS he might nonetheless have sought to present some further arguments on the merits of the decision to refuse an extension. Without deciding the matter, on the basis of the available evidence it is difficult to see what further might be said with regard to the merits of the refusal. The application was simply made on the basis of supposed delay in receiving the letter of 17 February 2015 (when the evidence suggests that there was no delay), and did not provide any other detail, or offer any other reason as to why more time was needed; the Respondent's rejection of the application is clear in addressing the single point raised. It may also be noted that it is reiterated in the Respondent's grounds of appeal to the Upper Tribunal that the letter of 17 February 2015 itself emphasised that no further extensions beyond the 60 calendar day period would be allowed. Yet further it is to be observed that even

though there was no formal extension it was not until a further 20 days after the 60 day period had expired that a decision was actually made on Mr Rai's application for leave to remain - and there is no evidence filed as to what steps, if any, were ever taken by Mr Rai between 19 February 2015 and 11 May 2015 by way of obtaining a CAS.

28. Even if it were the case that something more might be said on the merits of the application for an extension of time, or against the merits of the Respondent's refusal to extend time - I struggle to see how that could found an available ground of appeal against the substantive decisions of 11 May 2015. The refusal to extend time is not itself an appealable decision, and can only impact upon the appealable decisions if it was dealt with in a manner that rendered the substantive decisions procedurally unfair or otherwise not in accordance with the law. It is not remotely apparent that the facts give rise to any such argument. Any argument simply that an extension of time on its merits should have been granted does not amount to a ground of appeal that could impugn the substantive decision on the applications: it does not render the substantive decisions not in accordance with the law or not in accordance with the Immigration Rules. I do not wish to be unduly prescriptive as to the way in which the First-tier Tribunal may look at this case in due course, or to anticipate what might not yet have been fully formulated by Mr Singer; nonetheless I offer the above brief observations as seemingly pertinent.

Notice of Decision

29. The decisions of the First-tier Tribunal are vitiated for material error of law and are set aside.
30. The decisions in the appeals will be remade before the First-tier Tribunal in front of any Judge other than First-tier Judge Abebrese.
31. No anonymity directions are sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed:

Date: 3 May 2018

Deputy Upper Tribunal Judge I A Lewis