Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/22971/2012

THE IMMIGRATION ACTS

Heard at Belfast Laganside	**Determination Promulgated**
On 2 July 2013	**On 18 July 2013**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOANA OBISPO

Respondent

Representation:

For the Appellant: Mr A. Mullen, Home Office Presenting Officer
For the Respondent: Ms F. Connolly, Counsel instructed by John P. Hagan Solicitors

DETERMINATION AND REASONS

1. The appellant in these proceedings is the Secretary of State. However, for convenience I refer to the parties as they were before the First-tier Tribunal.

2. Thus, the appellant is a citizen of the Philippines, born on 19 May 1976. She arrived in the UK with leave as a student. She made an application for further leave to remain on 23 June 2012, within the currency of her leave. That application was refused in a decision dated 8 October 2012.

3. Her appeal came before First-tier Tribunal Judge M. Hutchinson on 11 December 2012 whereby she allowed the appeal under the Immigration Rules. Permission to

appeal was granted on the basis of an arguable error of law on the part of the First-tier judge in relation to her appreciation of the requirements of the Rules.

4. The application for further leave to remain was refused on the basis of maintenance. It was decided that the appellant had not demonstrated that she had sufficient funds because the CAS stated that of the course fees of £4,120, none had been paid. On the basis that she had not paid the course fees, she had not demonstrated sufficient funds in her accounts.

5. The First-tier judge allowed the appeal because on the evidence before her it was demonstrated that the appellant had in fact paid her course fees, and that this had been demonstrated at the time of application. That she had paid her course fees was conceded on behalf of the respondent. Thus, the funds she had were sufficient to establish that she was entitled to the claimed 10 points for maintenance.

6. It seems from the determination that the CAS that was used was one that related to the time when she started her course in 2011, but the appellant's case was that this was an extension of stay in relation to the existing course, rather than applying for a new course. It appears that an issue arose as to whether the appellant had used the correct application form, although before the First-tier Tribunal it was not established what application form was more appropriate.

7. The judge considered that she was not able to take into account evidence that had not been submitted with the application, but (under the Rules at least) her conclusions were such that that evidence did not need to be taken into account.

8. As a matter of interest, it is also to be noted that Judge Hutchinson dismissed the appeal under Article 8 of the ECHR, notwithstanding that she had allowed the appeal under the Immigration Rules (raising a question as to whether it could be proportionate to the legitimate aim, to remove someone who has been found to meet the requirements of the Rules). I also note that within the decision to refuse to vary leave to remain there was a decision to remove the appellant under section 47 of the Immigration, Asylum and Nationality Act 2006, which on recent authority is a decision that is unlawful if made at the same time as a decision to refuse to vary leave to remain.

9. The grounds of appeal to the Upper Tribunal on which permission to appeal was granted contended that the Immigration Rules at Appendix C paragraph 13C required, in summary, evidence of the payment of the course fees to be stated on the CAS or on an original paper receipt issued by the Tier 4 sponsor. That requirement of the Rules does not appear to have been drawn to the judge's attention by either party, and not surprisingly therefore, it did not form part of her consideration.

10. At the hearing before me I raised with the parties the issue of whether the relevant immigration rule that was relied on did in fact apply, given that although it was introduced into the Rules on 20 July 2012, by the time the immigration

decision was made, it was not part of the Rules at the date of application. The question arises as to whether there exists transitional arrangements in relation to applications made before that date. A second issue was whether the judge would in fact have been permitted to consider evidence that was not submitted at the time of application in her consideration of Article 8, having regard to the human rights exception in section 85A of the Nationality, Immigration and Asylum Act 2002. A third issue was the lawfulness of the removal decision under section 47, a matter that was not dealt with in the determination of the First-tier Tribunal.

11. At the hearing before me Mr Mullen indicated that he would withdraw the section 47 removal decision. His submissions can be summarised as follows. He accepted that there appeared to be something amiss with the CAS on its face. He suggested that it may be that now the principle of evidential flexibility would have been applied to the application. The appellant probably believes, with some justification, that she had what she needed to comply with the Rules. Although it was the appellant's responsibility to ensure that she put forward the correct evidence, it may be that the appropriate outcome is that the decision of the Secretary of State is not in accordance with the law and that the matter should go back to the Secretary of State.

12. I suggested to Mr Mullen that an alternative course would be for the Secretary of State to withdraw its case before the Upper Tribunal, that case being that the appellant is not entitled to an extension of stay. It was agreed that that was an appropriate course of action and it was understood by both parties that the effect of that would be that the decision of the First-tier Tribunal to allow the appeal under the Immigration Rules would stand.

13. Rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides as follows:

> "17.-(1) Subject to paragraph (2), a party may give notice of the withdrawal of its case, or any part of it –
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> (a) at any time before a hearing to consider the disposal of the proceedings (or, if the Upper Tribunal disposes of the proceedings without a hearing, before that disposal), by sending or delivering to the Upper Tribunal a written notice of withdrawal; or
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> (b) orally at a hearing.
>
> (2) Notice of withdrawal will not take effect unless the Upper Tribunal consents to the withdrawal except in relation to an application for permission to appeal."

14. I gave my consent to the withdrawal of the Secretary of State's case (that the appellant is not entitled to leave to remain). The effect therefore, is that the decision of the First-tier Tribunal to allow the appeal under the Immigration Rules

stands. The case for removal under section 47 was also effectively withdrawn, it being a decision that is in any event unlawful.

15. In the circumstances, the other issues raised at the hearing and identified in [10] above do not need to be resolved.

16. The Secretary of State having withdrawn her case that the appellant is not entitled to leave to remain, the appellant has established that she should be granted further leave to remain. The decision of the First-tier Tribunal to allow the appeal therefore stands. The appellant succeeds in her appeal against the decision to refuse to vary leave to remain.

Upper Tribunal Judge Kopieczek

2/07/13