Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/22566/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th November 2015	**On 22nd December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR MUHAMMAD ZESHAN QAMAR
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A. Syed-Ali of Counsel
For the Respondent: Ms A. Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Pakistan born on 6th November 1988. He appeals against a decision of Judge of the First-tier Tribunal Cassel in Chambers dated 12th March 2015 in which the Judge dismissed the Appellant's appeal against the decision of the Respondent dated 12th May 2014. That decision was to refuse the Appellant's application for leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant under the points-based system and for a biometric residence permit and remove

the Appellant by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. On 7th March 2014 the Appellant made a combined application for leave as a Tier 4 (General) Student and for a biometric residence permit. The Respondent refused the application on the grounds that the Appellant could not meet the requirements of paragraph 245ZX(C) of the Immigration Rules as he had not been awarded 30 points for a Confirmation of Acceptance for Studies (CAS). The CAS checking service was checked by the Respondent on 12th May 2014 but no CAS had been assigned to the Appellant. As such he failed to meet the requirements of paragraph 117 of Appendix A. He was also awarded no points for maintenance arising therefrom.

3. The Appellant appealed against that decision arguing that he had submitted his Tier 4 leave to remain application on 7th March 2014 with an offer letter from Radcliffe College. That was as much as he could send as he did not have his full English language score at that time. Radcliffe College had explained the situation in their letter making the conditional offer to the Appellant and had requested the Respondent to consider the matter. The Appellant was under the impression that Radcliffe College would send him a CAS as soon as he received his English language test score. Unfortunately the result of the test took an unusually long time to be published and in the meantime the Appellant received a refusal letter from the Respondent on the grounds of no CAS supplied. The Appellant was now in a position to send both a CAS and an English language certificate but his application remained refused. The Appellant argued there was procedural unfairness and relied on the case of **Thakur [2011] UKUT 00151**. The failure to meet the requirements at the time of making his application was beyond his control as he had not received his result in the expected time. The Respondent could have asked for an explanation of what was happening instead of refusing the application outright. The Appellant should be shown discretion and allowed leave under the Tier 4 Rules and in line with the principles of **CDS (Brazil) [2010] UKUT 305**.

The Decision at First Instance

4. The Judge found the Respondent's decision to refuse under the Rules to be a well reasoned one with careful consideration of the documentary evidence submitted. The decision was not one based on rote, it was a fair assessment and the outcome was neither surprising nor unreasonable. The appeal was dismissed under the Rules. In relation to Article 8 the Judge directed himself in accordance with **Nagre [2013] EWHC 720**. There was no suggestion the Appellant could satisfy the requirements of Appendix FM in relation to any claim for family life or paragraph 276ADE for any claim to private life. It was proportionate to the legitimate aim being pursued that the Appellant should not remain in the United Kingdom. The Appellant appeared able to speak English and in the Judge's view might well be able to manage financially but little weight could be given to his private life under Section 117B of the Nationality, Immigration

and Asylum Act 2002. There was no evidence he had built up a wide network of friends and appeared to have no health problems. The appeal was dismissed under both the Rules and Article 8.

The Onward Appeal

5. The Appellant appealed against this decision repeating his argument that there had been a delay in obtaining his language certificate. His application was only supported by an offer letter from Radcliffe College as the college was reluctant to assign him with a CAS due to the absence of an English language test certificate. The Appellant added that at the time Radcliffe College were not on the Sponsor's register. No other college would assign a CAS whilst the Appellant's application was pending. The Respondent had failed to exercise evidential flexibility. The Appellant had come to the United Kingdom for higher education and made progress for which he had obtained an extension of leave as a student. His ongoing studies in which he had made this progress would be unnecessarily interrupted by his removal from the United Kingdom.

6. The application for permission to appeal came on the papers before First-tier Tribunal Judge Cruthers on 28th May 2015. Refusing permission to appeal he wrote that the grounds amounted to no more than an attempt to re-run the Appellant's case that was rejected by the Judge. The simple fact was that the Appellant had no CAS with which to support the application that was refused by the Respondent on 12th May 2014. There was no basis on which the Judge could properly have allowed this appeal.

7. The Appellant renewed his application for permission to appeal to the Upper Tribunal on the same grounds as before. His renewed application came before Deputy Upper Tribunal Judge McGinty on 30th July 2015. In granting permission to appeal he wrote it was arguable that the First-tier Tribunal Judge had materially erred in law in failing to adequately explain his reasons why he rejected the Appellant's case that the Respondent had failed to act fairly. The Respondent replied to this grant of permission on 13th August 2015 submitting that the First-tier Tribunal's decision was adequately reasoned. The Appellant had not submitted a valid CAS and thus fell to be refused under the Rules. The Respondent relied on the Court of Appeal decision of **EK (Ivory Coast) [2014] EWCA Civ 1517**. The Respondent was not responsible for any erroneous actions of a college. Further the Court of Appeal decision in **Kaur [2015] EWCA Civ 13** where the court had considered deficiencies in the CAS was also against the Appellant.

The Hearing before Me

8. Counsel for the Appellant argued that he wished to modify the Appellant's grounds of onward appeal in order to distinguish the Appellant's case from the facts of **EK (Ivory Coast)**. On 7th March 2014 the Appellant had made his application with an offer letter and a covering letter. He had clearly drawn the attention of the Respondent to the fact that Radcliffe College

had lost its licence. Following the Supreme Court decision in **Mandalia [2015] UKSC 59** the process instruction obliged the Respondent first to have invited the applicant in that case to repair the deficit in his evidence. There was a deficit of evidence in this Appellant's case with a clear explanation why a CAS was not produced at the time of the application. The Appellant obtained his English language certificate on 19th April 2014 but the refusal was on 12th May one month after the Appellant was able to make a proper application if there had been a request. The Appellant should have been given 60 days to make another application and would then have been able to meet all the conditions.

9. In response the Respondent relied on the Rule 24 response. A CAS had not been provided. In the decision of **EK (Ivory Coast)** (where an applicant's CAS had been withdrawn in error by the college) it was held by the Court of Appeal that the requirement on the Respondent to postpone making a decision on an application in order to raise with the applicant the cancellation of a CAS letter would undermine the benefits associated with the points-based system in a significant and inappropriate way. There was no common law duty owed to the Appellant in this case and the correct decision had been made. Under the Respondent's 60 day policy where a CAS is cancelled because the sponsoring college loses its licence the applicant has 60 days to find another Sponsor. This did not apply in this case because the reason for refusal was that a CAS had not been provided as the Appellant had not passed his English language test. It was not refused because Radcliffe College had lost its sponsorship licence. Reliance was placed by the Respondent on the case of **Kaur** in which it was held that when a Tier 4 Sponsor failed to provide the evidence via a CAS to enable a student to secure the necessary points, there was no obligation founded in fairness which obliged the Respondent further to investigate with the Sponsor or to inform a student (paragraph 38 of **Kaur**).

10. In conclusion Counsel accepted that Article 8 was not being pursued in this appeal but submitted that the 60 day point arose because the refusal was because the college did not have a licence. It did not arise out of a failure to give a CAS due to the absence of an English language test. The failings were beyond the Appellant's control at a time before the Respondent's decision was made. The Respondent was put on notice that a piece of evidence was missing and the Respondent had the option (which was not exercised) of allowing a consideration of the application to take place when the evidence could be produced. The evidence could have been produced within one month before the decision and that was why the Respondent's decision was not in accordance with the law.

Findings

11. The argument in this case is whether the Respondent's decision to refuse the Appellant's application for an extension of leave to remain was or was not in accordance with the law. At the time he made his further application the Appellant was not in possession of an English language test

certificate. The Rules require that such a document must be submitted with the application and if it is not the application falls to be refused. The Appellant's argument that he should have been given more time to produce a test certificate because the production of one was outside his control has in my view no merit. It is difficult to see how in the context of this case the common law duty of fairness arose.

12. The Respondent was correctly applying the Immigration Rules. Those Rules required the Appellant to submit a CAS with his application but he could not do that. There was an added complication in this case that Radcliffe College had lost its licence. That was not the reason why the application was refused and it is something of a red herring. The point was put simply and briefly by both the Judge at first instance and by Judge Cruthers in refusing permission to appeal. It was a simple straightforward point and did not require elaboration.

13. I do not consider there was a material error of law because I do not find that the Judge failed to adequately explain the reasons why the Appellant's case on fairness was rejected. The issue of fairness did not arise. It was not incumbent upon the Judge at First-tier to address irrelevant issues. The case law relied upon by the Respondent including **EK (Ivory Coast)** and **Kaur** makes it clear that there is no general common law duty of fairness on the Respondent in such circumstances. The case of **Mandalia** relied upon by the Appellant similarly does not take matters any further since that was concerned with the evidential flexibility policy. **Mandalia** was decided on a relatively narrow point of what constituted documents in a series. That was a very different factual situation to the one before the Judge at first instance in this case.

14. As the Court of Appeal decided in **Rodriguez 2014] EWCA Civ 2** there is no general duty on the Respondent to assist an Appellant to perfect their application. The Court of Appeal in **EK (Ivory Coast)** made it quite clear why that should be so. There is a public interest in having a clear and predictable scheme operating according to objective criteria. Where the Rules require an applicant to have a CAS before their application can succeed and the applicant does not provide a CAS because he has not obtained an English language test certificate the provisions of the points-based system adequately cater for such an eventuality. In this case it meant that the application was refused. When considering the weight of authority in this case no common law duty of fairness arose such as to require the Respondent to delay making a decision on the application whilst the Appellant put his application in order. Accordingly I find that the decision of the First-tier Tribunal did not disclose any error of law and I uphold the decision to dismiss the Appellant's appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I dismiss the Appellant's appeal. I make no anonymity order as there is no public policy reason for so doing.

Appeal dismissed.

Signed this 11th day of December 2015
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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As the appeal has been dismissed there can be no fee award.

Signed this 11th day of December 2015

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Deputy Upper Tribunal Judge Woodcraft