Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/33757/2015**

IA

/33758/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal	**Decision & Reasons Promulgated**
On 17 August 2017	**On 18 September 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

JAGDEEP KAUR
ASHMEET SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Iqbal instructed by Visa Expert Ltd
For the Respondent: Mr Kotas Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge A.M.S Green promulgated on 9 December 2016 in which the Judge dismissed the appeals of both appellants.
2. The appellants are a married couple who are both citizens of India. The first appellant was born on 12 January 1989 the second appellant on 28 March 1989. The first appellant applied for leave to remain in

the United Kingdom as a Tier 4 (General) Student Migrant. The second appellant's application is dependent upon the first appellant. On 9 October 2014, the applications were refused. The first appellant appealed resulting in the matter being remitted to the Secretary of State. On 22 October 2015, a further decision was made refusing the application.

3. Having considered the evidence the Judge sets out his core findings at [11] of the decision under challenge which I set out as they appear in the determination:

> 11. The essence of the First Appellants claim is that she should be given an extension to take account of the fact that despite her best efforts she was unable to secure an alternative offer from a licensed Sponsor and thus, she could not provide an alternative CAS within the 60–day timeframe. She says that the Respondent acted unfairly by not releasing her original passport to her despite repeated requests to do so. The decision in **Patel (revocation of sponsors licence – fairness) India [2011] 00211 (IAC)** and **Thakur (PBS decision – common law fairness) Bangladesh [2011] UKUT 151 (IAC)** are relevant to this appeal. In **Thakur** the Tribunal held that a decision by the Secretary of State to refuse further leave to remain as a Tier 4 (General) Student Migrant was not in accordance with the law because of a failure to comply with the common law duty to act fairly in the decision-making process when an applicant had not had an adequate opportunity of enrolling at another college following the withdrawal of his sponsors licence or of making further representations before the decision was made. However, the principles of fairness are not to be applied by rote: what fairness demands is dependent on the context of the decision and the particular circumstances of the applicant. On 13 August 2015 the Respondent wrote to the First Appellant telling her that she had 60 days to provide an alternative CAS. This would have taken her to 22 October 2015. The Respondent enclosed an attested copy of her passport and an explanatory leaflet which the First Appellant could have shown to prospective colleges as was standard practice. The First Appellant claims that none of the colleges that she visited would issue a CAS without sight of her original passport. However, she has not provided any supporting evidence of this because she claims that they refused to issue her anything in writing. Frankly, I do not find that credible. 60 day extensions in the circumstances are common and I have heard many similar cases and I know that it is standard practice of the Respondent to retain the original passport and that prospective colleges will accept an attested copy and can be guided by the explanatory leaflet. Whilst the Respondent acted discourteously in failing to answer the First Appellants letters, I do not think that she acted unfairly under the circumstances. The Respondent discharged her common law duty. The First Appellant had an adequate opportunity to enrol at another institution and had the necessary documents to do so.

4. The Judge found the respondent writing to the appellant on 13 August 2015 and enclosing the leaflet which the first appellant refers to in her witness statement meant the respondent had complied with her policy and therefore the decision in relating to the appellant was in accordance with the law.
5. The Judge states at [14] that if the first appellant wishes to study in the United Kingdom she will need to return to India and make an out of country application for leave to enter.
6. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal in the following terms:

The appellants applied in time on identical grounds for permission to appeal against the decision of Judge of the First-tier Tribunal AMS Green (promulgated on 9 December 2016) in which the judge dismissed the appeals in respect of the Immigration Rules. The grounds disclosed arguable errors of law but for which the outcome of the appeal might have been different. The judge arrived at a finding that the respondent had not acted unlawfully or unfairly by not releasing the first appellant's passport so that she could obtain a Confirmation of Acceptance for Studies within the period of 60 days by recourse to the judges personal knowledge if paragraph 11 of the judge's decision was read. The judge was to arrive at findings of fact by reference to the evidence presented. For the judge to have recourse to the judge's personal knowledge was arguably an inadequate reason and arguably amounted to a procedural irregularity which materially affected the outcome of the appeals. The applications for permission are granted.

Error of law

7. Mr Iqbal relied on only one ground of challenge before the Upper Tribunal by reference to the respondent's publication entitled 'Retention of Valuable Documents, Version 7, valid from 30 January 2014' which it was submitted sets out the Secretary of State policy in relation to the retention of valuable documents.
8. Mr Iqbal maintained throughout that this document represented the Secretary of State's policy in relation to such issues. This is an important matter for the document itself is described as Guidance - Retention of valuable documents – version 7.0 and not a policy. There is, arguably, a material difference between the two types of documents. Policy documents represent the Secretary of State's official interpretation or view of specific issues, a breach of which could give rise to a finding a decision is 'not in accordance with the law' on the basis that there is a legitimate expectation that a decision-maker will follow published policy relevant to the decision being made. In *R (on the application of Semeda) (statelessness; Pham [2015] UKSC 19 applied) IJR [2015] UKUT 00658* it was held that the policies of public authorities are not merely material considerations to be taken into account by the decision maker. Rather, they trigger a duty to give effect to their terms, absent good reason for departure.
9. Guidance documents, by contrast, are published to further clarify matters relating to pre-existing provisions and to assist in implementation of those provisions.
10. The first finding I make is that although Mr Iqbal addresses the Upper Tribunal by reference to the doctrine of fairness arising from a breach of the policy, he fails to make out that the Retention of Valuable Documents guidance is a statement of policy. The guidance is published for the reasons stated namely "this guidance explains what to do with valuable documents where a person is liable to removal". The statutory basis necessitating consideration of these matters is set out in section 17 of the Asylum & Immigration (Treatment of Claimants etc.) Act 2004 which gives the power to retain documents, such as a passport, where the Secretary of State or an immigration officer suspects a migrant is liable to removal and the retention of the document may facilitate removal. The 2004 Act does not allow for the indefinite retention of documents and where a person is later granted leave, in whatever capacity, the document must be returned to the

holder unless it is a forgery, in which case it must be sent to the National Document Fraud Unit at Status Park.

11. The guidance defines what is a Valuable Document both in the version referred to by Mr Iqbal and the current version published by the Home Office on 24 August 2017.

12. The guidance provides:

> Where a valid passport is retained and removal could take place on that passport it is not necessary to retain original copies of other valuable documents, although you must retain photocopies of them. It is necessary to retain original documents however, where they may be needed to effect the removal of a spouse or child of the migrant.
>
> This applies if:
>
> the migrant is unlawfully present in the UK, for example, an overstayer or illegal entrant
>
> the migrant has been refused asylum or humanitarian protection and has no other basis of stay in the UK
>
> the migrant has been refused leave to remain whether or not they have a right of appeal in the UK (unless they have an existing period of leave, other than under 3C or 3D of the Immigration Act 1971)
>
> a decision under section 47 of the Immigration, Asylum and Nationality Act 2006 has been made
>
> leave to enter or remain has been curtailed with the result that the migrant has no outstanding leave, if you curtail leave to 60 days you must return the valuable documents because the migrant still has valid leave to remain.

13. Mr Iqbal placed great emphasis upon the final criteria asserting that as leave to remain had been curtailment the valuable document should be returned because the migrant still has valid leave to remain. It is important to read this provision as a whole. It is, as Mr Kotas referred, a provision that relates to a situation in which a passport is to be retained and removal could take place when it is not necessary to retain original copies of other valuable documents. The wording "this applies if" sets out the circumstances in which the passport is retained but other valuable documents need not necessarily be retained. The wording is important as it is not creating and mandatory requirement for the documents to be returned but outlines circumstances where there is no need to retain other valuable documents. As the circumstances outlined come into being if a passport is being retained for the purposes of effecting removal the reference to valuable documents cannot include that passport.

14. It was accepted by Mr Iqbal that the submissions he made were not raised before Judge Green and nor was the guidance on retention of valuable documents brought to the Judges attention either. The document was not pleaded by the appellant although, if it was established that the document amounted to policy, such failure may not be fatal to Mr Iqbal's submissions – see *R v SSHD ex parte Ahmed*

and Patel 1998 INLR 570 in which held that the principle of legitimate expectation in public law, as opposed to the doctrine of estoppel in private law, was a principle of fairness in the decision making process. It was a wholly objective concept, not based upon any actual state of knowledge of the individual. Although the appellant in the instant case did not know of the policy, he was entitled to assume - indeed, he had a legitimate expectation - that whatever applicable policy was in existence at the time would be applied to him. That view was supported by the Court of Appeal in reference [2005] EWCA Civ 744. It was also the view of Mr Justice Calvert in *R (on the application of Timothy Mugisha) [2005] EWHC 2720*.

15. The Judge in decision refers to his knowledge of it being standard practice for the respondent to enclose an attested copy of the passport and explanatory leaflet for a person whose leave has been curtailment in the circumstances of the first appellant in this appeal. The assertion of legal error on this basis has no arguable merit. In *Secretary of State for the Home Department v Abdi [1994] Imm AR 402*, Steyn LJ at page 420 accepted that an adjudicator was entitled to rely on matters within his own knowledge, provided such matters were disclosed to the parties so as to afford them a fair opportunity to deal with them. In the more recent case of *AM (fair hearing) Sudan [2015] UKUT 00656 (IAC)* it was held that if the judge is cognisant of something conceivably material which does not form part of either party's case, this must be brought to the attention of the parties at the earliest possible stage, which duty could in principle extend beyond the hearing date. The statement by Judge Green in relation to standard practice is not something that would not have been known to the parties to this action. Indeed, that is not the basis of the submission made to the Tribunal which is solely the assertion that the standard practice employed by the Secretary of State is unlawful as being contrary to published policy. The difficulty with this argument, as identified above, is that the appellant seeks to rely upon guidance rather than policy to support the argument.
16. The appellant did not make out before the Judge that the actions of the Secretary of State were in any way procedurally unfair in providing an attested copy of the passport and an explanatory leaflet. The Secretary of State was arguably entitled to retain the passport in the circumstances of this case where, without lawful leave to remain in the United Kingdom, the appellants were removable. Their application was refused as the first appellant did not have a valid CAS and their leave had been curtailed.
17. The appellants failed to produce sufficient evidence before the First-tier Tribunal to show that sufficient enquiries had been made of the colleges in question. The Judge expresses surprise at the claim the colleges were not willing to set out their position in writing and during his submissions Mr Kotas referred to difficulties that may have been experienced by the appellant in doing no more than speaking to a receptionist who, understandably, may have advised a prospective applicant who is not a British national that a copy of their passport was required.

18. Having considered the decision together with the evidence made available and submissions relied upon by both advocates, I find the appellant has failed to establish any arguable legal error material to the decision to dismiss the appeal.

Decision

19. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity

20. The First-tier Tribunal did not make an anonymity order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Judge of the Upper Tribunal Hanson

Dated the 15 September 2017