Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34278/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 24 April 2017	**On 5 May 2017**

Before

Deputy Upper Tribunal Judge Pickup
Between

Shezad Shezad
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr S Muquit, instructed by Farani Javid Taylor Solicitors
For the respondent: Mr P Armstrong, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Maxwell promulgated 13.9.16, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 11.11.15, to refuse his application made on 29.9.14 for LTR as a Tier 4 Student.

2. The Judge heard the appeal on 22.8.16.

3. First-tier Tribunal Judge Parkes refused permission to appeal on 13.1.17. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Gill granted permission to appeal on 21.2.17.

4. Thus the matter came before me on 24.4.17 as an appeal in the Upper Tribunal.

Error of Law

5. For the reasons summarised below, I found such error of law in the making of the decision of the First-tier Tribunal such as to require the decision of Judge Maxwell to be set aside and remade afresh.

6. The appellant first came to the UK on with entry clearance issued on 30.4.11, valid until 30.9.14.

7. On 19.1.15 the appellant's application for LTR as a Tier 4 student migrant was refused. It was refused because his Confirmation of Acceptance for Studies (CAS). issued by Queensbury College was no longer valid. That institution's licence as an educational sponsor was revoked on 18.8.14, invalidating the CAS issued to the appellant.

8. However, his appeal against that decision was allowed by the First-tier Tribunal on 6.8.15, on the basis that the decision was not in accordance with the law and that it remained for the Secretary of State to make a decision. The Tribunal directed that the appellant be granted 60 days to find a fresh educational sponsor.

9. Following the appeal, the Home Office wrote to the appellant on 4.9.15, agreeing to suspend further consideration of his application for a period of 60 days, and invited him to either withdraw his application or obtain a new CAS for study in the UK with an approved educational sponsor.

10. By 11.11.15, beyond the 60-day period allowed, the appellant had not submitted any new CAS. The period in fact ended on 3.11.15. In the circumstances, the application was doomed to failure and it was refused under paragraph 322(9) of the Immigration Rules, a general ground of refusal. In addition, it was refused under paragraph 245ZX, because without a valid CAS the appellant could not qualify for the necessary points under Appendix A of the Rules.

11. The grounds of appeal to the First-tier Tribunal were that the decision of the Secretary of State was not in accordance with the law. The appellant's dilemma is explained in his letter of 1.11.15. Following his successful appeal, he obtained a place at the London College of Advanced Management, paying a fee of £2,500. However, that college's licence was also revoked. He was unable to recover the fee paid. He applied to yet another college, but the new course was not due to start until January 2016 and they would not grant him a CAS because it did not start within 28 days of the expiry of his permission to stay, pursuant to the requirements of the policy guidance.

12. Judge Maxwell heard the appeal in the absence of representation on behalf of either the appellant or the respondent. The appellant had written to the Tribunal seeking an adjournment, because he had "important liver surgery," due to take place on the listed day for hearing. He also stated that in the event the adjournment application was refused, he wanted the appeal to be decided on the papers. The adjournment application was refused in the absence of supporting medical evidence.

13. Judge Maxwell considered that the latter refusal decision of 11.11.15 was wrong to suggest that the appellant had a right of appeal against the refusal. Judge Maxwell stated, "The earlier application is decided and the failure of the appellant to respond means there is, in fact no application for the respondent to consider. As there is no application, there is no immigration decision and therefore no valid appeal before me." In that light, the Judge considered that there could be no advantage in adjourning the hearing, as, in his view, there was no valid appeal.

14. As Judge Gill pointed out as arguable in her reasons for granting permission to appeal, when the Secretary of State reconsidered afresh the appellant's application of September 2014, the decision contained within the letter of 11.11.15, together with the decision to remove him from the UK by directions, was a decision on the appellant's original application of 29.9.14.

15. The Rule 24 reply of the Secretary of State, dated 17.3.17, states that her view is that the decision of 11.11.15 was an immigration decision in relation to the application of 29.9.14, and a decision within the meaning of section 82, giving rise to a right of appeal.

16. By the terms of the previous appeal decision of Judge Beg, the application remained outstanding, not validly decided, with no immigration decision. In effect, the decision had been set aside. It follows that the Secretary of State was entitled to and in fact required to make a (fresh) decision on that application. I find that it qualifies as a decision under section 82 of the 2002 Act, against which a right of appeal was preserved under the transitional provisions made by the amendment to section 82 by the Immigration Act 2014. The appellant had a right of appeal, which he duly exercised. It follows that Judge Maxwell's decision, finding that the application had been decided and thus nothing for the Secretary to consider was wrong. The conclusion that there was no jurisdiction to hear the matter was a clear error of law.

17. Whilst there was a right of appeal, it is clear that the appeal could not succeed, for the simple reason that the appellant submitted no new valid CAS before the decision of 11.11.15, or in fact at any time since.

18. However, as Judge Maxwell erred in law on the issue of jurisdiction, the appellant's leave still continues under section 3C of the 1971 Act until such time as there is a lawful decision by the First-tier Tribunal. Judge Gill additionally granted permission on this ground. This may give the appellant further time to obtain a valid CAS, as his leave continues under section 3C, and make a new application. However, that is a matter for the appellant.

19. Judge Gill did not grant permission on the grounds relating to the issue of fairness. No matter whether there were failings on the part of his previous representatives, the fact remains that he submitted no valid CAS. The Tribunal does not have the power to allow an appeal against the decision of 11.11.15 notwithstanding that he did not submit a valid CAS. There is no basis to dispense with that requirement. Any unfairness arising as a result of failings by his legal representatives cannot render the decision of the Secretary of State unlawful. These grounds were not renewed before me and I address them no further.

Remittal

20. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. I considered immediately remaking the decision at the hearing on 24.4.17. However, in light of the appellant's complaint that he has not been given a fair opportunity to obtain a CAS, I acceded to the submission that remittal to the First-tier Tribunal would be appropriate, to allow him at least a chance of pursuing study in the UK with a valid CAS.

21. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing. I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusions:

22. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

I make no fee award.

Reasons: The outcome of the appeal remains to be decided.

Signed

Deputy Upper Tribunal Judge Pickup

Dated