Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24682/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28 May 2014	**On 3 July 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD AMJID KHAN

Respondent

Representation:

For the Appellant: Mr Z Ranjha, Sky Solicitors
For the Respondent: Mr G Saunders, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The respondent, Muhammad Amjid Khan, was born on 1 October 1981 and is a male citizen of Pakistan. I shall hereafter refer to the respondent as the appellant and to the appellant as the respondent (as they were before the First-tier Tribunal).

2. The appellant arrived in the United Kingdom on 28 September 2010. On 20 February 2012, he made a combined application for leave to remain as a Tier 4 (General)

Student Migrant and for a biometric residence permit (BRP). By a decision dated 30 May 2013, that application was refused. The appellant appealed to the First-tier Tribunal (Judge Fox, determining the appeal on the papers at Glasgow) which, in a determination promulgated on 26 February 2014, allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

3. The issue in this appeal may be stated briefly. As noted above, the appellant made his application with supporting documents on 20 February 2012. On 23 May 2012, the UK Border Agency made a decision to revoke the licence of Lincoln's College, London. This was the college from which the appellant had obtained his Certificate of Acceptance for Studies (CAS). On 15 August 2012, the UK Border Agency wrote to the appellant in the following terms:

> Before the final decision is made and in line with our rules and guidance we will suspend consideration of your application for a period of **60 calendar days**.
>
> During the 60 day period it is open to you to withdraw your application and submit a fresh application in a different category or to leave the United Kingdom. If you do decide to withdraw your application, you will need to confirm this by writing to us at the address given at the top of this page.
>
> However, if you wish to remain in the UK as a Tier 4 Student, it is open to you to obtain a new CAS for a course of study at a fully licensed Tier 4 educational sponsor and then submit an application to vary the grounds of your original application.

4. The letter went on to indicate:

> If you obtain a new CAS then you will need to submit fresh and up-to-date documents with your application to vary, for example, bank statements showing you are in possession of sufficient funds to cover your course fees and the maintenance requirement.
>
> You will also need to complete a fresh Tier 4 (General) Application form – the most up-to-date version of this form is available on the UKBA website.
>
> In order for your application to vary to be successful, you will need to show that you meet the requirements of the Immigration Rules which are effective on the day you make the application to vary. The latest version of the Rules are available on our website.
>
> If you fail to submit a new valid CAS together with the requiring supporting documentation within the 60 day period then your application will be considered on the basis of the information currently available and you will therefore fall to be refused.

5. The appellant duly obtained a new CAS and submitted this document, together with details of his financial circumstances, to the respondent. On 30 May 2013, the respondent wrote to the appellant:

> On 20 February 2012 you made a combined application for leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant under the points system (PBS) and for a biometric residence permit (BRP).

6. The appellant was awarded 0 points for maintenance (funds). The explanation given in the letter was that:

> As the closing date of the bank statement submitted in support of your application is dated 5 October 2012 you need to show evidence of £1,600 maintenance for 28 days from 8 September 2012 to 5 October 2012. However, between 12 September 2012 and 26 September 2012 your bank statements state you were in possession of no more than £21 (340 rupees).
>
> As such, you have not demonstrated that you have the level of funds required over the specified 28 day period to be granted as a Tier 4 (General) Student Migrant.

7. In his determination [17], Judge Fox wrote:

> Given that the respondent was prepared to exercise a degree of flexibility in regard to the CAS document it appears unfair that the respondent did not extend that flexibility to other outstanding information which the respondent considered important. It also seems unfair to me that the respondent did not ask the appellant to produce up-to-date information if it was required for his leave application. It seems to me therefore that the respondent has shifted the goal posts. If the only amendment required was a new CAS document and 60 days had been afforded to the appellant to produce it, by implication long, the respondent had accepted a bank statement submitted by the appellant. I find the respondent is fixed for the acceptance of the application and must honour it within the context of this application for leave. The date of the application did not change.

8. It should be emphasised that the "60 day" arrangement referred to in the documents and which I have quoted above does not appear in the Immigration Rules. I have been provided by the appellant with copies of a number of policy guidance documents including one entitled "Tier 4 of the points-based system – policy guidance" which is "to be used by all prospective and existing Tier 4 sponsors from 9 July 2012." Whilst the guidance is provided for educational providers who wish to join or remain on the Sponsor Register, part of the guidance relates to applicants who have "have an application under consideration with the Home Office." Part of that guidance is relevant to the current appellant's circumstances and provides as follows:

> If the Tier 4 Sponsor's licence is revoked your CAS will become invalid and your application may be refused. However, if you were not involved in the reasons why the Tier 4 Sponsor had their licence revoked or why it was surrendered we will delay the refusal of your application for 60 days to allow you to regularise your stay or leave the UK. The action you can take to regularise your stay in the UK depends on what leave you have:
>
> - If your permission to stay is expired whilst you are awaiting a decision on your application [the present appellant made his application for further leave to remain the day before his existing leave expired] you will delay the refusal of your application of 60 days to allow you to obtain a new CAS from a different sponsor and vary your application or leave the UK.
>
> In all cases we will write to you informing you of the date by which you should provide a new CAS. If you fail to provide the CAS within the specified period your application will be considered on the basis of the evidence submitted with your application.

9. It is not in dispute that the appellant could not meet the maintenance requirements for the period 8 September 2012 to 5 October 2012. Equally, there is no dispute that the bank statements and other supporting documents which he submitted with his application in February 2012 did meet those maintenance requirements for the required 28 day period prior to the initial submission of his application.

10. The respondent submits that the judge erred in law by allowing the appeal under the Immigration Rules. The respondent submits that the appellant had to show that he had the necessary funds for the required period preceding his submission of the new and valid CAS document.

11. The language used in the policy guidance document and the letter of 15 August 2012 is significant. The policy guidance from which I have quoted above makes no reference to an applicant submitting a new CAS also being required to submit fresh maintenance documents. The policy guidance at [581] simply notes that the respondent would write to the student "informing them of the date by which they should provide a new CAS if they intend to do so." The application would be considered (and no doubt refused) on the "basis of the evidence submitted with the application" if the applicant failed to provide a new CAS within the specified period; no mention is made of any sanction which would follow from a failure to provide up-to-date financial evidence. The letter of 15 August 2012 (unlike the policy guidance) refers to variation of an application. The variation of the applications or claims for leave to remain are subject to the provisions paragraph 34E – 43I of the Immigration Rules:

Variation of Applications or Claims for Leave to Remain

34E. If a person wishes to vary the purpose of an application or claim for leave to remain in the United Kingdom and an application form is specified for such new purpose or paragraph A34 applies, the variation must comply with the requirements of paragraph 34A or paragraph A34 (as they apply at the date the variation is made) as if the variation were a new application or claim, or the variation will be invalid and will not be considered.

34F. Any valid variation of a leave to remain application will be decided in accordance with the immigration rules in force at the date such variation is made.

34G. For the purposes of these rules, the date on which an application or claim (or a variation in accordance with paragraph 34E) is made is as follows:

(i) where the application form is sent by post, the date of posting,

(ii) where the application form is submitted in person, the date on which it is accepted by a public enquiry office of the United Kingdom Border Agency of the Home Office,

(iii) where the application form is sent by courier, the date on which it is delivered to the United Kingdom Border Agency of the Home Office, or

(iv) where the application is made via the online application process, on the date on which the online application is submitted.

34H. Applications or claims for leave to remain made before 29 February 2008 for which a form was prescribed prior to 29 February 2008 shall be subject to the forms and procedures as in force on the date on which the application or claim was made.

34I. Where an application or claim is made no more than 21 days after the date on which a form is specified under the immigration rules and on a form that was permitted for such application or claim immediately prior to the date of such specification, the application or claim shall be deemed to have been made on the specified form.

12. Paragraph 34E refers to varying "the purpose of an application or claim for leave to remain ..." On the most obvious construction of the rule, the present appellant did not seek to vary the "purpose" of his application which has throughout remained the same (that is, to remain as a Tier 4 (General) Migrant). Is it possible then that the appellant has, in effect, "varied" his application by seeking to change the educational provider with whom he intends to study? I do not find that the wording of paragraph 34E can bear such a construction. Significantly, paragraph 34E refers to the possibility that "an application form is specified for such new purpose ..." A change of educational sponsor would not involve the appellant using a new application form. Further, the reference in paragraph 34E to paragraph 34A would also indicate that the appellant was not varying his application in the manner intended by paragraph 34. Paragraph 34A requires an applicant to use the correct form for the new varied application and to pay any specified fee; the appellant was not required to send in a further fee with his new CAS. Paragraph A34 is also referred to in paragraph 34E. This provides:

A34. An application for leave to remain in the United Kingdom under these Rules must be made either by completing the relevant online application process in accordance with paragraph A34 (iii) or by using the specified application form in accordance with paragraphs 34A to 34D.

(i) "The relevant online application process" means the application process accessible via the visas and immigration pages of the gov.uk website and identified there as relevant for applications for leave to remain for the immigration category under which the applicant wishes to apply.

(ii) "Specified" in relation to the relevant online application process means specified in the online guidance accompanying that process.

(iii) When the application is made via the relevant online application process:

(a) any specified fee in connection with the application must be paid in accordance with the method specified;

(b) if the online application process requires the applicant to provide biometric information that information must be provided as specified;

(c) if the online application process requires supporting documents to be submitted by post then any such documents specified as mandatory must be submitted in the specified manner within 15 working days of submission of the online application;

(d) if the online application process requires the applicant to make an appointment to attend a public enquiry office of the United Kingdom Border Agency the applicant must, within 45 working days of submission of the online application, make and attend that appointment; and comply with any specified requirements in relation to the provision of biometric information and documents specified as mandatory.

(iv) Where an application for leave to remain in the United Kingdom is made by completing the relevant online application process, the application will be invalid if it does not comply with the requirements of paragraph A34(iii) and will not be considered.

Notice of invalidity will be given in writing and deemed to be received on the date it is given, except where it is sent by post, in which case it will be deemed to be received on the second day after it was posted excluding any day which is not a business day.

It is not clear how the requirements of paragraph A34 are relevant in the present circumstances. I hold that this appellant was not required, notwithstanding the language used in the letter sent to him by the respondent, to "vary" his application in

any manner which brought his application under the provisions of paragraph 34 of the Immigration Rules. I find that the "60 day" concession was provided to the appellant wholly outside the context of the Rules and, in consequence, the Rules did not compel the appellant to comply with financial or other requirements both at the date of his initial application and at the date when he submitted the new CAS form.

13. I acknowledge that the letter sent to the appellant told him (albeit in somewhat vague terms) that, in order for his "application to vary (*sic*) to be successful" he would need to "meet the requirements of the Immigration Rules which are effective on the day you make the application to vary." However, that requirement appears nowhere in the respondent's official policy guidance. Further, whilst it may be permissible for the respondent to grant a concession, outside the Immigration Rules, ameliorating the potentially harsh consequences of matters which may be wholly outside the control of an applicant for entry clearance (i.e. in this case, the revocation of the licence of the appellant CAS sponsor) it is not lawful for the respondent to impose upon an applicant stricter conditions than those contained in the Immigration Rules (see *Pankina* [2010] EWCA Civ 719). The Immigration Rules which deal with Tier 4 (General) Migrants provide for the maintenance requirement to be met for a 28 day period prior to the making of the application; the respondent's letter to the appellant dated 15 August 2012 seeks to extend that requirement to a further 28 day period occurring some eight months later. I find that, whilst the appellant was entitled to take advantage of the "60 day" period offered to him by the respondent in which to submit a new CAS document, he was not required to meet the maintenance requirements for the period 8 September 2012 to 5 October 2012.

14. It follows that the First-tier Tribunal did not err in law by allowing his appeal under the Immigration Rules. The appellant was awarded 30 points for his CAS and he should have been awarded maximum points for proving that he met the maintenance requirements for the 28 day period prior to the submission of his original application in February 2012.

DECISION

15. This appeal is dismissed.

Signed Date 12 June 2014

Upper Tribunal Judge Clive Lane