Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01859/2016

<u>THE IMMIGRATION ACTS</u>

Heard at Field House	**Decision & Reasons Promulgated**
On 16 July 2019	**On 29 October 2019**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE BLUNDELL

Between

FOYAJ AHAMMAD
(ANONYMITY DIRECTION NOT MADE)

<u>Appellant</u>

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

<u>Respondent</u>

<u>Representation</u>:
For the Appellant: Mr Simret, a legal representative from Londonium Solicitors
For the Respondent: Mr Bramble, Senior Presenting Officer

<u>DECISION AND REASONS</u>

1. The appellant is a Bangladeshi national who was born on 23 October 1986. He appeals against a decision which was issued by the First-tier Tribunal on 2 July 2018, dismissing his appeal against the respondent's refusal of his application for leave to remain outside the Immigration Rules.

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2. The appellant entered the UK in February 2011. He held entry clearance as a student, under Tier 4 of the Points Based System ("PBS"). Two applications for further leave to remain in that capacity were granted, resulting in leave which was valid until 28 February 2015. On 27 February 2015, the appellant applied for further leave as a student. That application was accompanied by a document described as a "Letter of Acceptance for Studies" from a college called St Peter's College of London, situated on the third floor of an address on Commercial Road. The letter stated that the appellant had been made a 'conditional offer' for a course in Tourism and Hospitality Management. The course was due to run from 2 March 2015 to 2 March 2016 and the offer was said to be subject to "Proof of Maintenance Funds".

3. A month later, the appellant varied that application so that it became one for leave outside the Immigration Rules. The reasons for that change of tack were explained in a letter dated 26 March 2015 from his then solicitors. It was said that the appellant had realised that the letter from St Peter's College did not satisfy the sponsorship requirements of Tier 4 of the PBS. Because it was not possible to get a Confirmation of Acceptance for Studies ("CAS") without leave to remain, the appellant sought a short period of leave which would enable him to secure a new sponsor and a CAS and apply for leave to remain under the PBS. Although he had submitted the letter from St Peter's College, his intention was to study for a qualification in Business Management. The letter requested leave outside the Rules and stated that the appellant would be retaining his original passport in order to 'look for CAS letter', although he was content to send the passport to the respondent if requested to do so.

4. The application was refused on 5 October 2015. The respondent refused the application under paragraphs 322(1) and 322(5) of the Immigration Rules. The former ground of refusal was based on the fact that leave was sought for a purpose not covered by the Rules. The latter ground was based on the respondent's conclusion that the appellant had used a proxy to take a TOEIC English Language test at New College of Finance on 17 April 2012. This decision carried no right of appeal and, having received a negative response to a Letter Before Action, the appellant issued a claim for judicial review in the Upper Tribunal (JR/14082/2015). We need not mention the grounds upon which that application was made. It suffices for present purposes to record that it was settled by consent on 17 February 2016, with the respondent agreeing to serve a decision which attracted a right of appeal to the First-tier Tribunal.

5. Very shortly thereafter, on 20 February 2016, the respondent issued the decision under appeal. She refused to grant the appellant leave to remain to enable him to find another

sponsoring college because she considered that such a decision would place him at unfair advantage as compared to others in a similar position, and because it was open to him to return to Bangladesh and make an application for entry clearance as a student. In addition, she maintained that the appellant's presence in the UK was not conducive to the public good because he had used a proxy to take an English language test in 2012.

6. The appellant appealed to the First-tier Tribunal. Judge Bowler found that the respondent had not discharged the legal burden upon her of establishing that the appellant had cheated in his English Language Test. She found that he was unable to meet the Immigration Rules for leave to remain as a student or for leave to remain on Private Life grounds. In assessing Article 8 ECHR, Judge Bowler accepted that the appellant had a protected private life in the UK but she concluded, by reference to Part 5A of the Nationality, Immigration and Asylum Act 2002, that the interference proposed by the respondent was a proportionate one. She dismissed the appeal for these reasons.

7. Permission to appeal was sought from the First-tier Tribunal. Two grounds were advanced. By the first, it was submitted that the judge had 'failed to appreciate the fact the decision of the respondent was confined to Immigration paragraph 322(1) and not related to Article 8 rights or Immigration Paragraph 276ADE'. By the second, it was submitted that the judge had 'failed to consider the fact that the respondent's decision denying opportunity to find a new sponsor was unfair: fettering discretion'. Permission to appeal was refused by Judge Boyes on 2 October 2018.

8. The application was renewed on the papers before Upper Tribunal Judge Hanson. The first ground was as originally pleaded before the FtT. The second ground was that the respondent's decision was procedurally unfair because the appellant should have been given additional time in which to secure a new Tier 4 sponsor. Judge Hanson refused permission, concluding that it was not arguable that the judge should have confined his enquiry as suggested in ground one and that it was not arguable that any procedural unfairness had arisen out of the manner in which the appellant had been treated by the respondent.

9. The appellant then made an application to the Administrative Court under CPR 54.7A. The grounds were settled not by the appellant's solicitors but by leading counsel. It was submitted that the appellant only needed a short period of time with leave to remain in order to obtain a 'formal CAS' and that the issue of law was 'the extent to which a so-called "near miss" under the Immigration Rules can be relevant to the decision-making under

A8 of the ECHR.' It was submitted that the judge's assessment of proportionality was clearly flawed in that:

(i) The judge had failed to consider, in accordance with Rhuppiah [2018] UKSC 58; [2018] 1 WLR 5536, whether the 'little weight' provisions in Part 5 NIAA 2002 should have been overridden by the particularly strong features of the appellant's private life.

(ii) The judge had characterised the appellant's private life unfairly in concluding that he was not in the middle of a course of study.

(iii) The judge had overlooked the fact that the failure to comply with the Immigration Rules was 'miniscule', since the appellant had not been unable to satisfy a 'substantive qualifying criteria' and had submitted a document (from St Peter's College) which showed that he met 'the policy of the Immigration Rules'.

(iv) He had failed to weigh in the balance the fact that the appellant had not been engaged in fraudulent activity in obtaining his English language test.

10. In an order which was sent to the parties on 22 March 2019, Mostyn J granted the appellant permission to apply for judicial review. He observed:

> "The claimant argues that following his acquittal of dishonesty he was, in effect, in a Catch 22: he could not obtain a CAS without LTR, but could not gain LTR without a CAS. This dilemma was not considered either by the first-tier tribunal or by either judge refusing permission to appeal. It seems to me that this omission renders the refusal of permission to appeal arguably incorrect and that there is an important principle which should be considered."

11. There having been no request for a substantive hearing in the High Court, Judge Hanson's decision was quashed by order of Master Gidden on 1 May 2019. So it was that the application for permission to appeal came before the Vice President on 22 May 2019. He granted permission in light of the decision of the High Court, reminding the parties that the Upper Tribunal's task would be that set out in s12 of the Tribunals, Courts and Enforcement Act 2007.

12. Shortly in advance of the hearing, Mr Simret had produced a skeleton argument in which he adopted the submissions made by leading counsel in support of the application for judicial review. Before us, he stated that he was not pursuing the first of the grounds which had been advanced before Judge Hanson. The sole point he wished to pursue was that material matters had

been overlooked by the judge in assessing the proportionality of the respondent's decision. Although the judge had done 'very well' in certain respects, Mr Simret submitted that he had failed to consider whether the appellant should have been given a short period of leave within which to find a new sponsoring college. The judge should, Mr Simret submitted, have 'told the respondent' to give the appellant 'a little bit of extra time'.

13. For the respondent, Mr Bramble submitted that the judge had considered the appellant's appeal inside and outside the Immigration Rules correctly, with proper cognisance of all relevant matters. It was seemingly suggested by the appellant that he had been placed in an invidious position by the respondent's erroneous conclusion that he had cheated in his ETS test but that was never suggested to the respondent.

14. Mr Simret replied, submitting that the judge had been required to consider the proportionality of the respondent's decision. The appellant was asking for a very limited time in which to resolve his situation and it was not in the public interest for the appellant to be returned to Bangladesh. He had been absolved of the TOEIC fraud by the judge. Mr Simret accepted that the appellant had done nothing to secure further leave during the time that his leave was extended by operation of section 3C of the Immigration Act 1971 (whilst this appeal has been pending) and said that he had remained in the UK, being funded by his parents in Bangladesh.

15. We reserved our decision.

Discussion

16. In Shah [2018] UKUT 5 (IAC); [2018] Imm AR 707, the Upper Tribunal (Lane J and UTJ Blum) stated that an application under CPR 54.7A was 'emphatically not an opportunity for a party to raise new grounds of appeal against the decision of the First-tier Tribunal'. The points raised in the grounds before Mostyn J were certainly not to be found within the first of the two grounds pleaded before FtT Judge Boyes or Upper Tribunal Judge Hanson. We very much doubt that those points can be located in the second ground advanced before the FtT or the UT. Mr Bramble did not suggest that he was disadvantaged, however, and we were able to hear argument on the points Mr Simret wished to advance.

17. As we have recorded above, the submission made in the grounds settled by leading counsel was that Judge Bowler had failed to come to grips with the essential point of the appellant's case. The essential point was said to be that he only required a short

additional period of leave within which to secure a new Tier 4 sponsor and that it was disproportionate to expect him to return to Bangladesh in order to secure a new Tier 4 sponsor. It was submitted, in reliance on authorities we need not cite, that the appellant's case was clearly a "near miss" and that it would be disproportionate for him to start all over again by returning to Bangladesh to make an application for entry clearance.

18. As we were taken through the evidence by Mr Simret, however, it became abundantly clear that this case cannot properly be described as a near miss. When the appellant made his application for further leave to remain, he relied on the 'Letter of Acceptance for Studies' to which we have already referred. Contrary to the submissions made in the High Court and before us, this letter did not state that the appellant would be granted a CAS if only he was granted leave to remain. On the contrary, it stated that the offer was subject to "Proof of Maintenance Funds". Before Judge Bowler, therefore, the appellant was not a person who was demonstrably certain to secure a new sponsor if only he had a short period of further leave to remain; he was a person who had been unable to secure a sponsor because, on his own evidence, he had not been able to show proof of adequate funding to that sponsor.

19. The appellant appeared before Judge Bowler in June 2018. His application for further leave to remain had been made more than three years before that hearing. The application was in time, as a result of which the appellant has had leave to remain as a result of section 3C of the Immigration Act 1971 throughout, including the period during which his ultimately successful application for judicial review was pending: Saimon [2017] UKUT 371 (IAC); [2018] Imm AR 188. The appellant adduced no evidence at all to show that he had been unable to secure a sponsoring college in the UK during this lengthy period, whether because of his immigration status or because of the respondent's erroneous allegation that he had cheated in an English language test in 2012. There was, quite simply, no proper basis upon which it could have been submitted that the appellant merely needed a short additional period of leave to remain in order to secure a sponsor and regularise his position.

20. We need not repeat or analyse the review of 'near miss' authorities in the grounds which were before Mostyn J because we do not consider that this case can, in any rational sense, be described as a near miss. The appellant wishes to secure leave to remain as a student under Tier 4 of the PBS but he does not have a sponsor. The reason he did not secure a sponsor in 2015 was – on his own evidence – because he was unable to persuade his potential sponsor that he had sufficient funds. Without a college at which to study or funds with which to fund his studies,

the appellant could not be said to be anywhere near to meeting the requirements for leave to remain as a student. To suggest that his case was a near miss was to mischaracterise the situation. The margin by which he failed to meet the Rules cannot properly be said, as was suggested to the High Court, to be 'miniscule'. Were that label apt, it would apply equally to a single person who sought leave as a spouse or an individual with no relevant medical training who sought leave to undertake a clinical attachment. On any proper view of the facts, the appellant's miss was as good as a mile, to use Sedley LJ's expression from Pankina [2010] EWCA 719; [2011] QB 376, as cited with approval by Lord Carnwath (with whom the other Justices agreed) at [46] and [53] of Patel [2013] UKSC 72; [2014] 1 AC 651.

21. Nor, with respect to the author of the grounds, could it properly be said that there were very strong features of the appellant's private life which came close to overriding the general normative guidance provided by s117A(2) of the Nationality, Immigration and Asylum Act 2002 on the little weight which is to be attached to a private life which accrues during a period of precarious immigration status (Rhuppiah refers, at [49]-[50]). On the evidence before the FtT, the appellant was fortunate to secure a finding that Article 8 ECHR was engaged in its private life aspect.

22. The appellant made two statements before the FtT. The first, dated 10 October 2017, recounted the history, denied the allegation of cheating, and concluded by stating that the appellant wanted to undertake a further course in Business Administration. The second statement, made on 31 May 2018, responded in greater detail to the allegation of fraud and referred to the appellant's educational achievements and aspirations in the UK. He said that he had worked in the care sector and made friendships in the UK and that it would be a blow if he had to return to Bangladesh. This was not a private life with very strong features. It could not conceivably override the statutory public interest factors in Part 5A NIAA 2002. The nature of the appellant's case before the FtT and before us is instead to attempt to use what is inaccurately described as a near miss under the Rules to provide substance to a human rights case which is otherwise lacking in merit, contrary to what was said by Lord Carnwath at [56] of Patel.

23. Although the argument before us explored the proportionality of the respondent's decision in greater detail than the arguments before Judge Bowler, our consideration of the additional arguments serves only to confirm the correctness of the decision reached at first instance. The appellant would very much like to continue his studies in this country but his desire in that regard is outweighed by the public interest in his removal, as Judge Bowler

correctly held. There is no error of law in her decision, which shall stand.

24. We add this. It is particularly unfortunate that the appellant, whose position was correctly determined by the First-tier Tribunal in July 2018 should have been able to remain in the UK for more than an additional year by advancing to the High Court grounds which it appears could not have shown any error in the Upper Tribunal's decision refusing the permission application and which were in any event inaccurate in their assertions on the evidence. Equally, it is particularly unfortunate that the appellant has been put to the cost of such proceedings. This serves to demonstrate the particular responsibilities shared by all those with any involvement in Cart applications. Because there is in practice no opportunity to correct errors or overstatements before the routine treatment of cases where permission is granted, practitioners must ensure that there is a focus on the specific decision under challenge, that the grounds for challenge to that decision and that the grounds are wholly accurate and realistic.

Notice of Decision

The First-tier Tribunal did not err in law and its decision dismissing the appeal shall stand.

No anonymity direction is made.

MARK BLUNDELL
Judge of the Upper Tribunal (IAC)
24 October 2019