



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/31953/2015

THE IMMIGRATION ACTS

Heard at Field House
On 2 August 2017

Decision & Reasons Promulgated
On 9 August 2017

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

ASHAD MIAH
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Biggs, Counsel, instructed by JKR Solicitors

For the Respondent: Ms N Willocks-Briscoe, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 16 September 2015 to refuse him further leave to remain in the United Kingdom as a Tier 4 (General) Migrant under the points-based system.
2. The application in question was made on 27 June 2014, at which point the course applied for would have come within the 5-year postgraduate category under paragraph 245ZX(c) with reference to paragraph 116(e) of Appendix A and 245ZX(d) of the Immigration Rules.
3. On 29 October 2012, the appellant began to study an ACCA accountancy course and the London School of Business and Finance, in anticipation of the respondent's decision. The course was due to be completed on 10 June 2015. However, on 17 November 2012, before he could complete his course, the appellant suffered an accident at work. A vehicle drove into the petrol station where he worked, leaving him with PTSD and physiological problems and there is a certain amount of medical evidence indicating that he remained in both physical and psychological difficulties until shortly before his application for further Tier 4 leave, made on 27 June 2014.
4. The appellant's Tier 4 sponsor was Greenwich London College, which lost its Tier 4 sponsor status in early 2015, invalidating the CAS which the appellant had submitted in June 2014 with his application. The appellant had still received no response to his application for further Tier 4 leave by June 2015, over a year since his application.
5. On 19 June 2015, the respondent gave the appellant notice of the invalidity of his CAS and provided him with what the respondent described as a *Patel* letter, giving him 60 days in which to obtain a new sponsor and a valid CAS. There were then only 4 months left of the 5-year cap on study: applying the decision in *Patel* (Tier 4 - no '60-day extension') India [2011] UKUT 187 (IAC), the 60-day period was inapplicable as the appellant had less than 6 months' leave to run.
6. On 13 August 2015, six days before the expiry of the 60-day letter, Universal Solicitors wrote to the respondent, informing her that it had not proved possible for the appellant to obtain a further CAS because the period for which he had been in the United Kingdom for the purpose of study would reach 5 years on 28 October 2015. No educational institution was prepared to issue him with a CAS to complete his ACCA course on that basis, without confirmation that the respondent was prepared to extend or waive the 5-year cap.
7. Universal Solicitors explained that the appellant had been unable to complete his ACCA course after the accident, for health reasons: his health had been affected for up to 20 months and the appellant had only just been fit to begin studying again in June 2014, when he made the present application. They set out the medical treatment which the appellant had received. They cited and relied upon transitional provisions at [124] of the respondent's August 2015 Tier 4 guidance.

8. On 16 September 2015, the respondent refused the Tier 4 application on the basis that the appellant had not produced a valid CAS within the 60-day period. The appellant appealed to the First-tier Tribunal.

First-tier Tribunal decision

9. On 21 October 2016 the First-tier Tribunal dismissed the appellant's appeal in a very brief decision, with the *ratio decidendi* in the last paragraph:

"4. It is no longer open to an appellant to appeal on the basis that a decision was 'not in accordance with the law'. The appeal was not based on that ground. In any event, the reliance placed upon the appellant under Tier 4 of the points-based system – Policy Guidance version 08/15 Paragraph 124 refers to 'exceptional compelling or compassionate circumstances for example serious illness or disability'. Even if I had jurisdiction to entertain this appeal upon the grounds that it was not in accordance with the law, which I do not, I would also have found that the appellant had failed to satisfy me to the relevant standard [the balance of probabilities] that, first, the respondent did not consider this policy guidance (it is clear from the refusal letter that it did), but that, although the appellant did suffer physical and psychiatric injuries, they did not amount to exceptional or compelling and compassionate circumstances, such that the period of leave counted towards the [5-year] time limit would not be substantially extended."

Permission to appeal to Upper Tribunal

10. The appellant appealed to the Upper Tribunal. Permission was granted by Deputy Upper Tribunal Judge McCarthy on the basis that:

- (i) it was arguable that the respondent's decision was contrary to her own policy and thus not in accordance with law;
- (ii) the First-tier Tribunal had arguably failed to consider the transitional provisions for the implementation of the Immigration Act 2014, the effect of which was that the pre-2014 regime remained applicable to this application and the 'not in accordance with law' ground was available to the appellant;
- (iii) even if that were not the case, applying *SF and others* (Guidance, post-2014 Act) [2017] UKUT 120 (IAC),

"Even in the absence of a "not in accordance with the law" ground of appeal, the Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular outcome in the instant case. Only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal";

and that

- (iv) it was arguable that the First-tier Tribunal had not paid proper attention to the factual and legal arguments presented by the appellant.

The respondent's Tier 4 guidance

11. The respondent's August 2015 guidance at [124] is as follows:

"124. We will count the full period [of Tier 4 leave granted] unless there are exceptional compelling and compassionate circumstances (for example, serious illness or disability)."

12. However, the August 2015 policy is not the applicable policy, because at [126] it says this:

"Transitional arrangements

126. Where you are applying for leave with a CAS issued on or before 9 August 2015, we will consider applications in accordance with the Rules and guidance in place on 2 August 2015."

The CAS relied upon in the 2014 application was issued before 27 June 2014. Although the application was outstanding in August 2015, it is therefore the April 2015 Rules and Tier 4 Guidance which apply.

13. The April 2015 guidance contains no provision equivalent to [124] of the August 2015 policy. Serious illness and exceptional circumstances apply in the April 2015 guidance only to extension of time for making the Tier 4 renewal application.
14. Although there is no express provision for waiver or extension for serious illness in the April 2015 policy, Ms Willocks-Briscoe who appeared for the respondent accepted that it would be disproportionate if the respondent did not consider extension or waiver in appropriate circumstances.

Discussion

15. The appellant contends that his ill health following the accident amounts to exceptional circumstances for which the respondent should be prepared to waive or extend the 5-year cap. The evidence adduced in the 13 August 2015 letter suggested that for about 20 months, the appellant had not been able to study on his 3-year ACCA course. There is no sign in the September 2015 letter that the respondent considered whether to extend or waive the 5-year cap, despite the appellant's express request that she so consider.
16. The respondent's refusal letter treated the request for extension or waiver of the 5-year cap on health grounds as an application for a further 60-day extension, which on the facts of this application, would have been futile. The respondent's failure to engage with the 13 August 2015 and confirm that a waiver or extension of the 5-year period would be granted, made it impossible for the appellant to obtain any valid CAS.
17. Accordingly, I am satisfied that the respondent's decision is not in accordance with law, alternatively, that she has not exercised discretion outside the Rules as

contemplated in *SF and others*. The respondent's offer of a 60-day extension in June 2015, and again in September 2015, was frustrated, without such consideration, by the fact that in June only four months of the 5-year period remained, and in September only 2 months. The respondent's failure to consider whether to waive or extend the 5-year cap was disproportionate and unlawful.

18. I therefore allow this appeal to the extent that the appellant's application of 27 June 2014 for further Tier 4 leave remains before the respondent for a lawful decision in due course, taking into account the request made in the letter of 13 August 2015 and the matters therein set out.

Conclusions

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I re-make the decision in the appeal by allowing it to the extent that the appellant's Tier 4 application remains before the respondent for a lawful decision.

Signed: *Judith A J C Gleeson*

Date: 7 August 2017

Upper Tribunal Judge Gleeson