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Upper Tribunal
(Immigration and Asylum Chamber)

Bhanushali (re-using same CAS: new rules) India [2011] UKUT 00411(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 September 2011	.....

Before

UPPER TRIBUNAL JUDGE P R LANE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MANOJ KARSANDAS BHANUSHALI

Respondent

Representation :

For the Appellant: Mr G. Saunders, Senior Home Office Presenting Officer

For the Respondent: Mr H. Makkar, Solicitor, of Malik & Malik Solicitors

(1) In the fast-changing world of the points-based system, it is important (a) to ascertain the precise basis on which an application has been refused; (b) to identify the relevant provisions of the Immigration Rules; and (c) to check the relevant commencement provisions.

(2) Thus, where an applicant had been refused for not having a valid Confirmation of Acceptance for Studies, because the reference number for that Confirmation had already been used, the Immigration Judge should have ascertained what the Immigration Rules required in that regard, in the circumstances of the applicant's case. Had she done so, she would have seen that the reason for the refusal was unsound, having regard to the commencement provisions of HC 908.

(3) Pankina and others [2010] EWCA Civ 719; [2010] Imm AR 689 is not authority for any general proposition that the requirements of the Immigration Rules are to be disregarded, merely because an Immigration Judge considers that their application to a particular person would be "unfair".

DETERMINATION AND REASONS

1. The respondent (hereafter claimant) is a citizen of Indian born on 12 July 1975 who first arrived in the United Kingdom on 15 July 2009, with leave to enter as a student until 19 February 2011. Within the currency of that leave, the claimant applied for a variation of it, in order to remain as a Tier 4 (General) Student Migrant under the points-based system.

2. On 4 April 2011 the claimant's application was refused by the Secretary of State and the claimant appealed to the First-tier Tribunal. Following a hearing at Taylor House on 1 June 2011, Immigration Judge McIntosh allowed the claimant's appeal. Permission to appeal to the Upper Tribunal was given to the Secretary of State by the First-tier Tribunal on 4 July 2011.

3. The reason the claimant's application was refused by the Secretary of State concerned the document known as the Confirmation of Acceptance for Studies (CAS). The Secretary of State's letter of refusal of 4 April 2011 told the claimant that he had been awarded no points in respect of the 30 points claimed under Appendix A to the Immigration Rules for a valid CAS because "the CAS reference number … has already been used with your previous application" and, accordingly, the Secretary of State "is not satisfied that you have a valid CAS". The claimant was told that he "must have a new CAS for each application that is submitted".

4. Paragraph 245ZX of the Immigration Rules, so far as relevant, provides:-

"To qualify for leave to remain as a Tier 4 (General) Student under this rule, an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the applicant will be refused.

Requirements:

…

(c) The applicant must have a minimum of 30 points under paragraphs 113 to 120 of Appendix A."

5. At the date of decision, paragraphs 113 to 120 of Appendix A provided as follows:-

" **Attributes for Tier 4 (General) Students:**

113. An applicant applying for entry clearance or leave to remain as a Tier 4 (General) Student must score 30 points for attributes.

114. Available points are shown in Table 16 below.

115. Notes to accompany Table 16 appear below that table.

Table 16

Criterion	**Points awarded**
Confirmation of Acceptance for Studies	30

116. A Confirmation of Acceptance for Studies will only be considered to be valid if:

(a) it was issued no more than 6 months before the application is made,

(b) the application for entry clearance or leave to remain is made no more than 3 months before the start date of the course of study as stated on the Confirmation of Acceptance for Studies,

(c) the Sponsor has not withdrawn the offer since the Confirmation of Acceptance for Studies was issued,

(d) it was issued by an institution with a Tier 4 (General) Student Sponsor Licence,

(e) the institution must still hold such a licence at the time the application for entry clearance or leave to remain is determined, and

(f) it contains such information as is specified as mandatory in guidance published by the United Kingdom Border Agency.

117. A Confirmation of Acceptance for Studies reference number will only be considered to be valid if:

(a) the number supplied links to a Confirmation of Acceptance for Studies Checking Service entry that names the applicant as the migrant and confirms that the Sponsor is sponsoring him in the Tier 4 category indicated by the migrant in his application for leave to remain (that is, as a Tier 4 (General) Student or a Tier 4 (Child) Student), and

(b) that reference number must not have been withdrawn or cancelled by the Sponsor or the UK Border Agency since it was assigned.

118. In order to be awarded points for a Confirmation of Acceptance for Studies, the applicant must supply, as evidence of previous qualifications, specified documents that the applicant used to obtain the offer of a place on a course from the sponsor.

119. If the applicant is re-sitting examinations or repeating a module of a course, the applicant must not previously have re-sat the same examination or repeated the same module more than once, unless the Sponsor is a Highly Trusted Sponsor. If this requirement is not met then no points will be awarded for the Confirmation of Acceptance for Studies, unless the Sponsor is a Highly Trusted Sponsor.

120. Points will only be awarded for a Confirmation of Acceptance for Studies assigned on or before 20 April 2011 (even if all the above requirements are met) if the course in respect of which it is issued meets each of the following requirements:

(a) The course must meet the United Kingdom Border Agency’s minimum academic requirements, as set out in sponsor guidance published by the United Kingdom Border Agency and the level of course that a Sponsor may offer will depend on whether the sponsor is a Highly Trusted Sponsor.

(b) The course must, except in the case of a pre-sessional course, lead to an approved qualification as defined in sponsor guidance published by the United Kingdom Border Agency.

(c) Other than when the applicant is actually on a work placement, all study that forms part of the course must take place on the premises of the sponsoring educational institution.

(d) The course must meet one of the following requirements:

(i) be a full time course of degree level study that leads to an approved qualification as defined in UKBA guidance;

(ii) be an overseas course of degree level study that is recognised as being equivalent to a UK Higher Education course and is being provided by an overseas Higher Education Institution,

(iii) be a full time course of study involving a minimum of 15 hours per week organised daytime study and, except in the case of a pre-sessional course, lead to an approved qualification, below bachelor degree level as defined in paragraph 120(a).

(e) If the course contains a course-related work placement, any period that the applicant will be spending on that placement must not exceed half of the total length of the course spent in the United Kingdom except where it is a United Kingdom statutory requirement that the placement should exceed half the total length of the course. Where the student is following a course of study below degree level study (excluding a foundation degree course), the course can only be offered by a Highly Trusted Sponsor."

6. At paragraphs 3 to 5 of the determination, the Immigration Judge recorded the evidence of the claimant, who said that he had enrolled at the Britannia College of Excellence and had been issued with a CAS by them. This was deemed acceptable and had enabled the claimant to be given his initial leave to enter the United Kingdom. The claimant told the Immigration Judge that when he made his current application, Britannia College had advised him that the same CAS reference could be used. The claimant followed that advice. He told the Immigration Judge he considered this would be appropriate as he was at the same college, the course details were the same and his circumstances had not changed.

7. At some point, however, the claimant appears to have formed the view that the Secretary of State required a new CAS and the claimant accordingly approached the college but was advised by them "that they did not have any CAS left on their computer system" (paragraph 3). The college did, however, send the Secretary of State a letter of explanation, confirming that the claimant was a student with them pursuing an ACCA course and that "unfortunately at the present time the college has run out of CAS and we are unable to issue students with a replacement CAS" (paragraph 4). The Immigration Judge was informed that the claimant's ACCA course commenced on 3 January 2011 and was due to end on 2 January 2014. The claimant provided documentary material to confirm that he had an 84% attendance up to 16 May 2011 and also that he had more than adequate funds for the period of 28 days prior to the application.

8. At paragraph 7, the Immigration Judge recorded the submission of the Presenting Officer that "the guidance is clear that the CAS may only be used once". The claimant's representative submitted that the claimant had used his best endeavours to obtain a CAS.

9. At paragraph 10, the Immigration Judge appeared to accept that the claimant could not meet the requirements of the Immigration Rules. The Immigration Judge was, nevertheless, satisfied that the claimant was a genuine student pursuing an ACCA course and that he "would have produced a CAS if this were available to the college".

10. At this point, the Immigration Judge apparently considered that the Court of Appeal judgment in Pankina v SSHD [2010] EWCA Civ 719; [2010] Imm AR 689 meant that she was free to do whatever was necessary in her view to achieve a "fair" result. Thus:-

"11. Having regard to the principles of Pankina I find that it would be unfair in the circumstances to deny the [claimant] the right to continue his studies on the basis of a CAS issued with the permission of the college, which could not be replaced administratively.

12. For the reasons I outline herein I allow this appeal."

11. It is unclear what the Presenting Officer before the Immigration Judge was referring to, when speaking of a “guidance note”. The letter of refusal of 4 April makes no reference to any guidance. The thrust of that letter is simply that, because the claimant’s CAS reference number had already been used, the claimant failed to show that he had a valid CAS and thus failed under the Immigration Rules (paragraph 245ZX and Appendix A).

12. Instead of looking at those Rules, as at the date of decision, in order to decide whether the claimant met them, the Immigration Judge apparently decided that compliance with the Rules was effectively irrelevant, if she found that it would be “unfair” to stop the claimant continuing his studies in the United Kingdom.

13. Nowhere in Pankina is there authority for such an approach; and Mr Makkar did not seek to defend the determination. On the contrary, he conceded that it should be set aside for error of law and the decision in the appeal re-made.

14. For the Secretary of State, Mr Saunders made it clear that he was at a loss to understand why the claimant’s application had been refused, having regard to the terms of Appendix A as at the date of decision. The CAS had been issued on 16 December 2010, which was not more than six months before the application was made (paragraph 116(a)). There was no suggestion that any of the other provisions of paragraph 116 or paragraphs 117 to 120 were not satisfied, in the circumstances of the present case.

15. An explanation for the refusal might lie with the Statement of Changes in Immigration Rules (HC 908), which were laid before Parliament on 31 March 2011. Amongst the extensive changes made to HC 395, we find this at paragraph 50:-

“50. In Appendix A, after paragraph 116(e) insert:

……..

(ea) the migrant must not previously have applied for entry clearance, leave to enter or leave to remain using the same Confirmation of Acceptance for Studies reference number where that application was either approved or refused (not rejected as an invalid application or withdrawn.”

16. The changes made by HC 908, however, took effect only on 21 April 2011. Even then, “if an applicant has made an application for leave before 21 April 2011 and the application has not been decided before that date, it will be decided in accordance with the rules in force on 20 April 2011” (page 3).

17. The only explanation for the Secretary of State’s decision in the present case is that the official who took it on 4 April 2011 did so by reference to HC 908, on the mistaken assumption that the amendment to paragraph 116, to which I have just referred, had already been made, and, moreover, was applicable to the claimant. Neither assumption was correct.

18. Mr Makkar informed me that he was aware of a significant number of cases of a similar kind, where applicants had been refused on the basis of the same incorrect application of HC 908. Mr Saunders did not demur. Be that as it may, what this case shows is that it is important in the fast-changing world of the points-based system (a) to ascertain the precise basis on which an application has been refused; (b) to identify the relevant provisions of the Immigration Rules; and (c) to check the relevant commencement provisions.

Decision

19. The determination of the Immigration Judge contains an error of law and I have decided to set it aside. I re-make the decision by allowing the claimant’s appeal under the Immigration Rules.

Signed

Upper Tribunal Judge P R Lane

Immigration and Asylum Chamber