Upper Tribunal

(Immigration and Asylum Chamber)

JA (revocation of registration – Secretary of State's policy) India [2011] UKUT 52 (IAC)

THE IMMIGRATION ACTS

Heard at Field House **Determination Promulgated**

On 12 January 2011

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Before

The Hon. Mr Justice Irwin

Senior Immigration Judge Gill

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JA

Respondent

Representation :

For the Appellant: Mr. E Tufan, Home Office Presenting Officer

For the Respondent: Mr. A Miah , Counsel, instructed by Law & Lawyers Solicitors

In cases where an educational provider has its licence withdrawn during the period between a student's application for extension of leave as a Tier 4 (General) Student Migrant and the Secretary of State's decision on the application, it is the Secretary of State's practice (as set out in applicable guidance) to limit a student's existing leave to 60 days, if the student has extant leave of six months or more and if the student was not involved in the reasons why the education provider had its licence withdrawn. The guidance states that the leave of a student who has less than six months will not be limited. This guidance does not give rise to any legitimate expectation that the Secretary of State will grant a period of 60 days' leave to any student whose original leave had expired by the date of the decision, so as to afford him an opportunity to register with an alternative education provider. It is not irrational or unreasonable for the Secretary of State to distinguish between students who lodge their applications for extension of their leave many months in advance of the expiry of their leave and those who do not.

DETERMINATION AND REASONS

1. This case is an appeal by the Secretary of State from a decision of Immigration Judge Dawson sitting in the First-tier Tribunal, a determination promulgated on 7 September 2010. Permission to appeal was granted by SIJ McGeachy on 29 September 2010.

2. Before proceeding to deal with the substance of the appeal we wish to point out that directions were made by SIJ McGeachy on 9 December 2010, these included the following:

“It is considered that, if the Upper Tribunal decides to set aside the decision of the First-tier Tribunal , the Upper Tribunal will be able to re-make the decision without any further hearing, if it is able to hear submissions from the representatives of both parties.

The respondent must serve on the Tribunal a witness statement dealing with all the relevant issues in the appeal together with the skeleton argument in support and an indexed and paginated bundle of documents on which she wishes to rely. The appellant must also serve a skeleton argument together with an indexed and paginated bundle of any documents on which she [sic] wishes to rely at the hearing.”

3. These directions were not complied with. Neither side provided a paginated bundle, the respondent to this appeal did not serve a witness statement dealing with the relevant issues and neither side served a skeleton argument setting out the issues. This position is unsatisfactory. Cases such as this which involve considerations of law of potential complexity are poorly served in the absence of developed skeleton arguments. Both sides in this case are to blame. It is quite unacceptable for directions to be ignored in this way. We direct that this portion of this judgment is drawn to the attention of the senior partner of the claimant’s solicitors, Messrs Law & Lawyers, 349 High Street North, London E12 6PQ and to the senior lawyer in charge of the file on behalf of the Secretary of State. We would like a written explanation within fourteen days of this decision as to why the directions were not complied with. It seems clear from submissions made in the course of the hearing that in each case the advocate present was not at fault and the difficulty lies with those responsible for the conduct of the file.

Background

4. The facts of the case are reasonably well set out in the determination and reasons given by the Immigration Judge. Mr Antony is an Indian national born on 25 March 1985. He was granted entry clearance to come to the United Kingdom as a student whilst in Madras on 13 April 2007 which was valid until 31 July 2008. He was subsequently granted an extension of leave from 5 August 2008 until 31 August 2009. On 26 August 2009 Mr Antony was a student studying at the London Institute of Technical Education. On 31 August 2009 his leave to remain was due to expire. On 26 August 2009 Mr. Antony made an application for further leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant in order to study at the London Institute of Technical Education.

5. In October 2009, Mr. Antony switched to studying with the London School of Business and Computing because the London Institute of Technical Education was not successful in its registration under the points-based scheme. There exists on the file a letter of 17 December 2009 notifying the Secretary of State of this change. However, in February 2010, the London School of Business and Computing was suspended as an approved education provider. Although we have no precise detail, the Immigration Judge found, in an unchallenged conclusion, that the licence was subsequently revoked.

6. The Immigration Judge continues the narrative in this way:

“[Mr. Antony] then started searching for a new college offering courses that suited him but encountered difficulties without approval from the Home Office. He has however been successful and on 17 May 2010 began a course of studies with Overseas Nurses Training Organisation Ltd based in Leeds. They had provided a visa letter dated 22 July 2010 by way of confirmation of [Mr. Antony’s] enrolment on an NVQ level 4 in health and social care programme which is to run until 21 May 2012. [Mr. Antony] has been informed by the college that unless his appeal is successful, he will not be able to continue with this college.”

7. It follows from the above that at the time when Mr Antony originally applied for an extension of his leave to remain there was a period of five days only unexpired. At the date of the decision (12 March 2010) the outstanding application (as varied by the letter dated 17 December 2009) was in relation to an educational provider whose licence had been revoked and at that point Mr Antony was many months beyond the expiry of his original leave to remain.

8. The argument successfully mounted by Mr Antony before the Immigration Judge was based on a legitimate expectation said to arise from a part of the UK Border Agency “Tier 4 of the Points Based system – Policy Guidance” dated 1 June 2009. The relevant sections read as follows:

“27. If your approved education provider’s licence is withdrawn, all visa letters become invalid.

What will happen

….

If you are already in the United Kingdom studying; we will limit your permission to stay to:

•
60 days if you were not involved in the reasons why your approved education provider had their licence withdrawn (we will not limit your permission to stay if you have less than six months left. You may want to apply for permission to stay with another approved education provider during this time).

•
Immediately if we think you were involved in the reasons why your sponsor’s licence was withdrawn.”

9. There is no suggestion in this case that Mr Antony was involved in the reasons why the licence of the London School of Business and Computing was withdrawn.

10. The crucial conclusion of the Immigration Judge was expressed in paragraph 8:

“[Mr. Antony] cannot succeed under the Immigration Rules because at the time of the [Secretary of State’s] decision he did not have a valid visa letter. Nevertheless he has a legitimate expectation in accordance with the [Secretary of State’s] published guidance to at least be granted the 60 days in order to regularise his position by enrolling at another college. In failing to follow her own guidance, the [Secretary of State] cannot be said to be acting lawfully.”

11. The central points made by the Secretary of State in the appeal are succinctly put forward in the grounds as follows:

“It is submitted the IJ arguably misunderstood the terms of this policy. The policy states that if the student is already in the UK studying, the student’s existing permission [emphasis added] to stay will be limited, for those with permission to stay of more than six months, to 60 days if the student was not involved with the reasons why the licence was revoked … [Mr. Antony’s] current leave to remain expired on 31 August 2009 (with his leave continuing under s. 3C of the Immigration Act 1971),

therefore, as [Mr. Antony's] leave to remain did not have more than six months to run, this part of the policy did not apply to him. It is submitted there was no leave to limit."

Interpretation of the Policy Guidance

12. On the face of the language contained in the guidance, it is clearly and explicitly confined to a possible decision to limit the existing "permission to stay". The more accurate term is, of course, "leave to remain", the term which we will hereafter use. The guidance indicates what decision will be taken. As a matter of language, if there is no question of a contribution to the circumstances leading to the withdrawal of the sponsor's licence, the policy is clear. If the existing leave to remain is longer than six months it could be limited to 60 days. If the existing leave to remain is less than six months, it will not be further limited. In neither case on the face of the language does the policy contemplate a direct extension to the student's leave to remain.

13. We pause to remark that the guidance seems to us to be capable of giving rise to arbitrary results. Even before we address the question of when the outstanding leave to remain is to be calculated, it will immediately be obvious that those with outstanding leave to remain of less than six months will often be better off than those who have a longer period of outstanding leave to remain.

14. The next question is at what point is the outstanding leave to remain to be calculated? Mr Tufan, for the Secretary of State, began by arguing that the relevant point in time for calculating the outstanding leave to remain, and indeed for the imposition of any limit, was at the time of the revocation of the relevant licence. However, this would mean that students would be subject to what might be very considerable limit to their existing leave to remain without even being aware of it. It also involves the proposition that such a limit on leave to remain might arise automatically, without a positive decision by the Secretary of State. Under pressure of discussion Mr Tufan abandoned this proposition. We regard him as wise to do so. Not only does the proposition involve obvious unfairness but it rests on the idea that the policy guidance institutes an automatic limit on existing leave to remain without any positive decision by the Secretary of State. We do not regard that as either fair or legally tenable.

15. If the policy guidance is indicating what will be the approach of the Secretary of State when taking a specific decision, then when will that arise? In our view it could arise, as here, when an outstanding application for further leave to remain is considered. It could arise if the Secretary of State informed the relevant students of the revocation of the licence of their educational provider, and at the same time or subsequently took a positive decision, which would have to be communicated to the students, limiting the leave to remain of those with more than six months left. However, if the imposition of the limit of leave to remain arises only when a positive decision is taken by the Secretary of State in a given case, it follows that the delay by the Secretary of State before taking such a decision is capable of altering the position of a student concerned. We are concerned that the policy therefore may give rise to arbitrary outcomes in different circumstances to those arising here.

16. However, the straightforward position adopted by the Secretary of State in the application of the policy to this appellant is that, whether one looks at the situation at the time of withdrawal of the licence of the London School of Business and Computing or at the date of decision on 12 March, or at any subsequent date, Mr. Antony had no continuing leave save that derived from s. 3C of the Immigration Act 1971, which of course continues only until his application for further leave to remain is decided and any appeal against the decision is finally determined. This appellant did not have leave to remain of more than six months to be limited to 60 days or less than six months which would not be

further limited. Mr. Tufan on behalf of the Secretary of State therefore says that Mr. Antony is not covered by the policy and can found no legitimate expectation upon it.

17. The way the matter was put to us on Mr. Antony's behalf was very simple. Mr Miah suggested that there should be a grace period of 60 days whatever the circumstances, beginning from the point when the student was aware of the revocation of the licence. In our judgment this submission cannot be sustained in law. It does not arise from the clear wording of the policy stated in the guidance at paragraph 27. Furthermore, it is not irrational or unreasonable for the Secretary of State to distinguish between applicants who lodge their applications for extension of their leave at a time when there is still six months or more extant leave to remain and those who do not.

18. In any event, the argument advanced on Mr. Antony's behalf would not avail him. Mr Antony must be taken to be fully aware that his first educational provider, the London Institute of Technical Education, had had its licence removed before he switched his application by letter so as to found it upon his promised place at the London School of Business and Computing. That switch took place by October 2009 and was notified to the Home Office by letter of 17 December 2009. There was of course no extant or continuing leave to remain at either of the latter dates, leaving aside the statutory extension of leave under s. 3C of the Immigration Act 1971. Paragraph 27 of the guidance cannot have been intended to apply to leave extended under s. 3C. Even if the policy did require some form of extension or further grace period of 60 days from the date of knowledge of the withdrawal of the licence of the institution concerned (which we do not accept, as stated above), the 60 day period in Mr Antony's case would have expired well before the date of decision on 12 March 2010.

19. For these reasons we conclude that the Immigration Judge did indeed fall into an error of law by concluding that Mr. Antony had a legitimate expectation that he be granted a further 60 days in order to regularise his position by enrolling at another college. Accordingly, the decision of the First-tier Tribunal must be set aside. We re-make the decision following this hearing and we dismiss Mr Antony's appeal from the decision of the Secretary of State.

Signed Date:

Mr Justice Irwin

(Sitting as a Judge of the Upper Tribunal)