Neutral Citation Number: [2016] EWCA Civ 1145
Case No: C6/2015/4006

IN THE COURT OF APPEAL (QUEEN'S BENCH DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 3 November 2016

Before:

LADY JUSTICE BLACK
LORD JUSTICE SALES
and
LADY JUSTICE SHARP

Between:

THE QUEEN ON THE APPLICATION OF NYASULU
Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

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Mr Gordon Lee (instructed by Aylish Alexander) appeared on behalf of the **Appellant**
Mr Tom Poole (instructed by GLD) appeared on behalf of the **Respondent** did not appear and was not represented

Judgment

(Approved)

LORD JUSTICE SALES:

1. This is an appeal from the decision of the Upper Tribunal of 26 October 2015 in which the Upper Tribunal (Upper Tribunal Judge Gill) refused permission to the appellant to apply for judicial review of a decision of the Secretary of State refusing the appellant's application for leave to remain as a Tier 4 Student under the Points Based System.

2. The appellant is a national of Malawi, who was granted leave to enter the UK as a student in September 2007. This leave was extended to 12 April 2013.

3. On 13 April 2013 the appellant applied for leave to remain as a Tier 4 (General) Student Migrant. Her application was refused because she had not provided a Confirmation of Acceptance for Studies ("CAS"). She appealed and her appeal eventually came to the Upper Tribunal (Deputy Upper Tribunal Judge Froom).

4. In a determination promulgated on 20 May 2014 Judge Froom dismissed the appeal under the Immigration Rules but allowed the appellant's appeal under Article 8 on the grounds that her removal would be disproportionate because it would interrupt her studies. The appellant attended the hearing before Judge Froom, and Judge Froom, recognising that she was unrepresented, explained to her the issues for determination and the procedure to be followed: see paragraph [3] of his ruling.

5. As a result of the Upper Tribunal's decision the Secretary of State wrote a letter to the appellant dated 10 November 2014 granting her leave to remain for 60 days, from 10 November 2014 to 9 January 2015, to provide her with an opportunity to obtain a CAS

so that she could make a new application for leave to remain as a Tier 4 (General) Student Migrant.

6. The letter was headed "Points-based System – allowed appeal under Tier 4 (General) Student". It is common ground that this is a reference to the appeal that had just taken place before Deputy Judge Froom. The first paragraph of the letter stated as follows:

> "Following your allowed appeal you have been granted leave to remain outside the immigration rules due to the fact that you have not been issued with a valid Confirmation of Acceptance of Studies (CAS). You have been granted leave to remain for a period of 60 days until 09 January 2015 to enable you to obtain a CAS and submit an application. You will be allowed to switch into the Tier 4 category, on an exceptional basis within this period of leave. If you do not make an application by the end of this period you are expected to leave the United Kingdom."

7. The appellant found a new course of study and obtained a CAS. On 8 January 2015 the appellant applied for leave to remain as a Tier 4 General Student Migrant.

8. The materials which she was required to submit in support of her application were specified in the Immigration Rules. If she was to be treated as someone without an established presence in the United Kingdom -- that is, somebody who did not have leave under the Rules to be here as a student (see paragraph 14 of Appendix C to the Immigration Rules) -- then the documentation required to be submitted included bank statements to demonstrate that she had access to sufficient funds for her maintenance in the UK by showing that she had at least £8,160 in her bank account for a relevant period: see paragraph 245ZX(d) of the Immigration Rules. By contrast, if the appellant was properly to be regarded as someone with an established presence in the UK as a

student with leave within the Rules, she only had to submit evidence of available funds of the order of £2,000.

9. The appellant believed that she was a person with an established presence in the UK for the purposes of the Rules. She submitted with her application bank statements showing a balance of £2,101.26 for the relevant period.

10. In fact, it is now common ground that under the Immigration Rules the appellant did not qualify as someone with an established presence in the UK. Therefore the evidence of available funds which she submitted was insufficient.

11. On 24 February 2015 the appellant's application was refused because she had not supplied the evidence required for the award of the necessary points for maintenance. It is agreed that this decision was correct, on a proper interpretation of the Immigration Rules. On a review of the decision the Secretary of State maintained it.

12. However, in these proceedings the appellant seeks to challenge the lawfulness of the decision on the basis that, she says, the Secretary of State was under a duty to alert her to the fact that she was not someone with an established presence in the UK for the purposes of the Rules and that she therefore needed to submit evidence of a higher level of funds available for maintenance to be able to achieve the points required for her application to be successful.

13. At first instance in the Upper Tribunal, at an oral hearing Judge Gill refused permission to apply for judicial review. Judge Gill found that the letter of 10 November 2014, particularly as read in the light of the decision of Judge Froom, to which it gave effect, sufficiently conveyed to the reader that it contained a grant of exceptional leave for a short period outside the Rules to give an opportunity for the

appellant to make an application to become a Tier 4 Student under the Rules. The appellant should therefore have appreciated that she was not a person with an established presence in the UK for the purposes of her application. Compliance with the requirements of the Rules was her responsibility; the Secretary of State had no duty to advise her about the effect of the Rules and no duty to inform her that the materials she had submitted were insufficient, so as to give her a chance to deal with any problems. Judge Gill held that there had been no arguable breach by the Secretary of State of any duty of fairness and that the appellant derived no support for her case from the decision of the Supreme Court in *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59. The appellant appeals to this court with permission granted by Lindblom LJ.

14. We have been assisted at this hearing by the succinct and well-directed submissions made by Mr Lee on the part of the appellant. He has not sought to base any argument on the *Mandalia* case and we do not have to concern ourselves with that. Putting *Mandalia* to one side, and despite Mr Lee's helpful submissions on behalf of the appellant, I have to say that I consider that Judge Gill was right, essentially for the reasons she gave.

15. The starting point for analysis is the decision of Judge Froom and the letter of 10 November 2014. As I have already explained, the appellant attended the hearing before Judge Froom, who went out of his way to explain to her what the issues were in the case. Although I would accept that the heading in the letter of 10 November was unhelpful and might, if taken out of context and divorced from the rest of the letter, have been capable of being misleading, when read in proper context against the issues determined by Judge Froom and having regard to the terms of the main paragraph in

that letter (set out above), I consider that it was clear - both from the decision of Judge Froom that he had allowed the appellant's appeal outside the Immigration Rules and from the terms of the letter of 10 November 2014 - that the appellant did not have current leave to remain in the United Kingdom as a student within the Rules. Rather, she had been granted exceptional leave outside the Rules so as to enable her to make an application to bring herself once more within the Rules if the application was accepted.

16. On a fair and objective reading of the letter in its proper context, it told the appellant that she had been granted an exceptional form of leave outside the Immigration Rules so as to afford her an opportunity to make an application to bring herself within the Immigration Rules once more as a Tier 4 Student. The Secretary of State was not obliged to explain any further than is set out in the letter that the appellant did not qualify as a person with established presence in the UK for the purposes of the relevant Immigration Rules governing her application under the Points Based System.

17. The Points Based System is intended to operate in a way which is simple, predictable and expeditious\; see *EK (Ivory Coast) v Secretary of State for the Home Department* [2014] EWCA Civ 1517, paragraph [59], per Briggs LJ; and *Kaur v Secretary of State for the Home Department* [2015] EWCA Civ 13, paragraph [41], per Burnett LJ. It does not allow for any concept of a "near miss" in an application. An application either satisfies the relevant points requirement or it does not: see e.g. *Miah v Secretary of State for the Home Department* [2012] EWCA Civ 261, [2013] QB 35, paragraph [25]; and *Patel v Secretary of State for the Home Department* [2013] UKSC 72, [2014] 1 AC 651, paragraphs [45]-[57]. The general public law obligation of fairness has to be applied in the context of the Points Based System having regard to these features of the regime: see *EK (Ivory Coast)* at paragraph [31], per Sales LJ. There is no legal

requirement of fairness which imposes any duty on the Secretary of State to explain the Immigration Rules to an applicant or to do anything further to help an applicant get her application in order if there is something wrong with it. On the contrary, the onus is clearly on the applicant to ensure that her documentation is in order and to check that she is submitting the correct materials as required by the relevant rule: see *Alam v Secretary of State for the Home Department* [2012] EWCA Civ 960, [2012] Imm AR 974 at paragraph [45], per Sullivan LJ; *Rodriguez v Secretary of State for the Home Department* [2014] EWCA Civ 2, at paragraph [100] per Davis LJ; and *EK (Ivory Coast)* at paragraph [29], per Sales LJ, and paragraph [59], per Briggs LJ.

18. In his submissions to this court Mr Lee drew attention to paragraph [38] in my judgment in *EK (Ivory Coast)*. In that paragraph I referred to certain authorities arising in a different context, where it had been found that the general public law duty of fairness imposed additional obligations on the Secretary of State. Mr Lee sought to contend that the present case should go, by analogy, with those decisions.

19. I do not agree. At the end of that paragraph, I referred by way of contrast with those authorities to the case before the court, in which the relevant material in respect of the appellant's application in the form of a CAS letter had not, in the event, been available to support his application. I said this:

> "In the present case, by contrast, the Secretary of State had no means of knowing why the appellant's CAS letter had been withdrawn and was not responsible for its withdrawal, and the fair balance between the public interest in the due operation of the [Points Based System] regime and the individual interest of the appellant was in favour of simple operation of the regime without further ado."

20. That is the relevant part of paragraph [38] in my judgment in *EK (Ivory Coast)* which affords guidance in this case. In my view, the present case is a straightforward one. The appellant made her application to be admitted as a Tier 4 Student but failed to adduce with her application the evidence which the Rules stated was required to support that application. Accordingly, in my view, the appellant has no good arguable case that there was any unlawfulness in her treatment at the hands of the Secretary of State.

21. For these reasons, I consider that the Upper Tribunal judge was right to refuse to grant the appellant permission to seek judicial review. I would dismiss this appeal.

LADY JUSTICE BLACK:

22. I agree.

LADY JUSTICE SHARP:

23. I also agree.

Order: Application refused