Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42070/2013

THE IMMIGRATION ACTS

Heard at Stoke	**Determination Promulgated**
on 31st July 2014	**On 23rd September 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

AARTEE GUNGARAM
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Pickering instructed by Jacobs Solicitors.
For the Respondent: Mr Harrison –Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Pooler promulgated on 5th March 2014 in which he dismissed the Appellant's appeal on all grounds against the refusal to vary her leave to remain in the United Kingdom and a direction for her removal made pursuant to section 47 Immigration Asylum and Nationality Act 2006.

2. The Appellant is a citizen of Mauritius born on 1st February 1981. The date of the decision under challenge is 30th September 2013.

3. The Judge notes the chronology is not disputed. The Appellant entered the United Kingdom as a visitor on 30th January 2005 with leave valid until 13th July 2005 which was extended by subsequent applications as a student until 30 November 2009 and 21 August 2011. On 21 July 2011 she made the application leading to the decision appealed to the First-tier Tribunal. The Appellant asserts she received no correspondence after the application was made until receiving a letter from the Respondent dated 21st August 2013 advising her that her application to study an ACCA qualification QCF level 5 was refused as it was not a course of study leading to an approved qualification, although the Appellant was advised that a decision had been made exceptionally to allow her the opportunity to vary her application to study ACCA at QCF level 6. Such a course of study required to the Appellant to demonstrate an ability to speak English at a level B2 of the Common European Framework of References for Language (CEFR) as a result of which the Appellant was asked to send original evidence that she had attained such a level. A timescale of seven working days from the date of the letter was set with it being stated that the refusal of the application, on the basis the course does not lead to an approved qualification, would follow in the absence of such evidence. Judge Pooler refers to further correspondence thereafter resulting in an extension of time to 16th September 2013 in which to provide evidence of the required English-language ability and, in absence, of the refusal on 30th September 2013.

4. The Judge found that in the context of this appeal we was not persuaded the Secretary of State had failed to act fairly in relation to the request for additional evidence. It was noted the Appellant asked for more time, which was granted to 16th September 2013, and to the fact there was no further contact from the Appellant until after the date of decision which is also noted to have been after she had taken and failed her English-language test certificate. The Judge found it was open to the Appellant to have contacted the Respondent and to have asked for further time, but she failed to do so. The refusal decision was therefore found to be unlawful.

5. In relation to the Article 8 elements, based on private and family life, it was noted that Miss Pickering did not seek to persuade the Judge that the Appellant had established a family life and it was noted that she did not meet the requirements of the Immigration Rules relating to family. Paragraph 276ADE of the Rules was considered relating to private life but it was found the Appellant could only meet this requirement if she could demonstrate that she had no ties to Mauritius which the Judge found had not been established on the facts. Judge Pooler concluded there was no good arguable case for granting leave on a private life basis for the reasons set out in the determination.

Error of law

6. The determination is challenged on two grounds the first being that as the Appellant made her application on 21st July 2011, prior to the introduction of the new Immigration Rules in July 2012, the human rights element should have been considered under the Razgar principles and not under Appendix FM or 276ADE.

7. In submissions Miss Pickering referred to the Court of Appeal decision in Edgehill and submitted an analogy could be drawn between the two cases although I find no merit in such a submission as there was no provision in the Immigration Rules prior to July 2012 relating to human rights applications. Of more importance, is that in December 2012 the Rules were changed by the introduction of paragraph A277C which states:

A277C. Subject to paragraphs A277 to A280, paragraph 276A0 and paragraph GEN.1.9. of Appendix FM of these rules, where the Secretary of State deems it appropriate, the Secretary of State will consider any application to which the provisions of Appendix FM (family life) and paragraphs 276ADE to 276DH (private life) of these rules do not already apply, under paragraphs R-LTRP.1.1.(a), (b) and (d), R-LTRPT.1.1.(a), (b) and (d) and EX.1. of Appendix FM (family life) and paragraph 276ADE (private life) of these rules. If the applicant meets the requirements for leave under those provisions (except the requirement for a valid application), the applicant will be granted leave under paragraph D-LTRP.1.2. or D-LTRPT.1.2. of Appendix FM or under paragraph 276BE of these rules.

8. In Edgehill the Tribunal had applied the provisions of the post July 2012 rules in ignorance of the transitional provisions in a case in which the pre-July 2012 rules contained a specific provision under which the applicant may have been able to succeed. This is not the case in this appeal and no arguable legal error is established.

9. The second Ground is based on a 'fairness' argument. It is asserted the Judge failed to apply the principles arising from the cases of Thakur, Patel and Naved on the basis that through no fault of her own the Appellant was on a course that did not exist and the Judge erred in finding that the Secretary of State had been fair in offering to 16th September 2013 rather than 60 days in circumstances where the Appellant was not at fault. The period allowed was 24 days whereas the Appellant eventually passed the test on 12th October 2012 50 days from receipt of the letter.

10. This ground is also without merit. The 60 day period relates to a situation in which an individual's College may lose their sponsorship licence as a result of which it is the policy and practice of the Secretary of State to curtail any extant leave to 60 days to allow that

person an opportunity to find an alternative place of study or, if their leave is below 60 days, to allow that leave to expire. Although Miss Pickering submitted there was analogy such an argument has no merit. The Secretary of State exercised discretion when advising the Appellant that her application was defective but that she was to be given additional time to remedy the defect. She may have been admitted to a course that did not exist but that is a matter between her and the College and she cannot argue prejudice as her application was not simply refused. Seven working days was granted to obtain the necessary English-language evidence and when this proved to be too restrictive, a request for an extension of time was made and granted. It is noted that part of the reason for the delay in the English-language evidence becoming available is the fact the Appellant failed the test she initially took. There is no evidence the Appellant contacted the Secretary of State directly advising her that the extension to 16th September 2013 was insufficient or requesting additional time. There is evidence the Appellant contacted her MP and that correspondence originated there from, including e-mail correspondence dated 5th September 2013. The evidence indicates the MP accepted the Secretary of State's position in response prior to the deadline; but an MP has no authority in matters such as occurred in this case relating to the imposition of a timetable.

11. Whilst a timetable of seven working days from the date of a letter may in some circumstances be said to be short, the extension has not been shown to be unreasonable. In relation to the authorities relied upon by Miss Pickering; in Kaur (Patel fairness: respondent's policy) [2013] UKUT 344 it was held that the 60 day period was a policy designed to deal fairly with applicants whose college of choice loses a sponsorship licence whilst the application of leave to remain is outstanding but this decision provides no support for the assertion this Appellant should have been granted a similar period, expressly or by analogy. Naved (student – fairness - notice of points) [2012] UKUT 00014 is a case in which the tribunal held that fairness required the Secretary of State to give an applicant an opportunity to answer grounds for refusal of which he did not know and could not have known failing which a decision could be contrary to the law. In this case the Secretary of State provided Miss Gungaram an opportunity to address grounds which could have led to refusal in relation to a matter that it is arguable she should and could have known about, and so no breach of principle is established. This is not a case of a change occurring in relation to a post application situation.

12. In Thakur (PBS decision - law fairness) Bangladesh [2011] UKUT 00151 it was found the principles of fairness are not to be applied by rote: what fairness demands is dependent on the context of the decision and the particular circumstances of the applicant. In this case Judge Pooler set out the correct legal self-direction in the determination and it has not been established on the facts that the actions of the

Secretary of State can be said to be perverse, irrational, or contrary to the law. This is a case in which the Judge examined the relevant issues and principles and has given adequate reasons for findings made. No arguable the legal error material to the decision or otherwise has been established in the determination.

Decision

13. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

14. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make not such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……
Upper Tribunal Judge Hanson

Dated the 19th September 2014