Neutral Citation Number: [2019] EWCA Civ 1276

Case No: C7/2016/3591

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
Judge Rimington
IA065972015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2019

Before:

THE SENIOR PRESIDENT OF TRIBUNALS
LORD JUSTICE LINDBLOM
and
LORD JUSTICE HICKINBOTTOM

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Between:

Rauf	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

- -
- -

Mr Paul Turner (instructed by **Direct Access**) for the **Appellant**
Ms Hafsah Masood (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 11 July 2019

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Approved Judgment

Sir Ernest Ryder, Senior President:

Introduction:

1. This is an appeal against the decision of Judge Rimington sitting in the Upper Tribunal (Immigration and Asylum Chamber) [UT] made on 2 April 2016 which allowed the Secretary of State's appeal from a decision of the First-tier Tribunal [FtT]. The FtT had allowed Mr Rauf's appeal against the curtailment of his leave and directed that any decision about his leave to remain should not be made for a period of 60 days in order to give him a reasonable opportunity to find a new sponsor. Mr Rauf was granted permission to appeal to this court by Singh LJ, following an oral hearing, on 26 February 2018.

Background:

2. Mr Rauf is a citizen of Bangladesh. On 14 November 2010 he arrived in the United Kingdom with leave to enter as a Tier 4 (General) Student Migrant. His leave was subsequently extended. The most recent grant of leave was made on 26 June 2014 valid until 7 December 2015.

3. On 8 July 2014 his Tier 4 sponsor, the University of Sunderland, emailed him to inform him that it was withdrawing the offer it had made to him to commence his MBA course in August 2014. The email reads:

> "On June 24 the Minister for Security and Immigration, James Brokenshire, told the House of Commons that an investigation is on-going into the alleged abuse of the UK Student Visa System.
>
> It is within this context that the University has decided to put on hold its recruitment to London Campus until we have assurance of the validity of the English language qualifications presented by new applicants.
>
> Regrettably I therefore inform you that the University of Sunderland is withdrawing its offer to you to commence study at its London campus in August 2014.
>
> Whilst we appreciate how upsetting this decision may be to you it is unavoidable and we will take steps to refund to you any amounts already paid if applicable."

4. There are two aspects of that email that became important to the argument before this court and which I identify for convenience at this stage: a) that the Minister had announced that there would be an investigation into English language qualifications and that is what the University said they relied upon for their decision, and b) the decision that was made about the withdrawal of the offer to study was made by the University, Mr Rauf's sponsor. It is also important to note that it is common ground that Mr Rauf is not implicated in any wrongdoing, indeed, it became clear during the

hearing before this court, that because of his existing academic qualifications Mr Rauf did not need the English language qualification that was being investigated.

5. On 3 February 2015 the Secretary of State sent Mr Rauf a decision letter notifying him that his leave was being curtailed under paragraph 323A(a)(ii)(1) of the Immigration Rules with immediate effect because he had failed to commence studying with his Tier 4 sponsor. According to the letter the University of Sunderland had notified the Home Office about Mr Rauf's alleged failure on 4 July 2014. The letter also stated that a decision had been made to remove Mr Rauf from the United Kingdom under section 47 of the Immigration, Asylum and Nationality Act 2006.

6. Mr Rauf appealed the Secretary of State's decision. On 22 February 2016 Judge Courtney sitting in the FtT allowed the appeal. The Secretary of State applied for permission to appeal the FtT's decision which was granted on 6 January 2016 by Judge Frankish. On 2 April 2016 the UT allowed the Secretary of State's appeal.

7. The scheme that was applied by the Secretary of State in the decision that was made is to be found in the Immigration Rules. The relevant version of the Rules is set out below. This appeal does not involve a challenge to the policy but rather a challenge to the application of the scheme on the facts of the case.

"Curtailment of leave in relation to a Tier 2 Migrant, a Tier 5 Migrant or a Tier 4 Migrant

323A. In addition to the grounds specified in paragraph 323, the leave to enter or remain of a Tier 2 Migrant, a Tier 4 Migrant or a Tier 5 Migrant:
(a) is to be curtailed if:
[. . .]
(ii) in the case of a Tier 4 Migrant:

(1) the migrant fails to commence studying with the Sponsor, or

(2) the Sponsor has excluded or withdrawn the migrant, or the migrant has withdrawn, from the course of studies, or

(2A) the migrant's course of study has ceased, or will cease, before the end date recorded on the Certificate of Sponsorship Checking Service, or

(3) the Sponsor withdraws their sponsorship of a migrant on the doctorate extension scheme, or

(4) the Sponsor withdraws their sponsorship of a migrant who, having completed a pre-sessional course as provided in paragraph 120(b) (i) of Appendix A, does not have a knowledge of English equivalent to level B2 of the Council of Europe's Common European Framework for Language Learning in all four components (reading, writing, speaking and listening) or above.

(b) may be curtailed if:

(i) the migrant's Sponsor ceases to have a sponsor licence (for whatever reason); or
[. . .]

(iv) paragraph (a) above applies but:

(1) the migrant is under the age of 18;

(2) the migrant has a dependant child under the age of 18;

(3) leave is to be varied such that when the variation takes effect the migrant will have leave to enter or remain and the migrant has less than 60 days extant leave remaining;

(4) the migrant has been granted leave to enter or remain with another Sponsor or under another immigration category; or

(5) the migrant has a pending application for leave to remain, or variation of leave, with the UK Border Agency, or has a pending appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002, or has a pending administrative review."

Decision appealed:

8. In the FtT, Judge Courtney began by noting that at "*first blush the refusal letter made no apparent sense*". The relevant decision letter stated that on 4 July 2014 the University of Sunderland had informed the Home Office that Mr Rauf had failed to commence studying with them. That was a month before the start date of his course in August 2014.

9. The Judge also found that it was misleading of Mr Rauf to assert in his witness statement that the reasons for his inability to start his course were unknown to him when he had not only been informed by email of the University's reasons for withdrawing the course but he had also produced that email to the tribunal from his own mobile phone.

10. Judge Courtney undoubtedly took a generous course in allowing Mr Rauf's appeal but that course was almost inevitable given that the Home Office presenting officer conceded before that tribunal that Mr Rauf should have been given 60 days in which to identify a new sponsor by the Secretary of State. It subsequently transpired that the concession that was made was wrong, having regard to the Immigration Rules and, in any event, Mr Rauf had had approximately 7 months in which to find an alternative sponsor and to make an application to vary his leave to remain, neither of which he had done before the curtailment decision was made.

11. In the Upper Tribunal Mr Rauf was neither present nor represented. There is an issue of fact about this but Judge Rimington concluded that she "*was satisfied that [Mr Rauf] had been advised of the date, time and venue of the hearing…and in light of the overriding objective of the Upper Tribunal Procedure Rules (sic) it was fair to proceed*

and in the interests of justice." That conclusion, made in accordance with rules 2 and 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008, has never been set aside and there is no application before this court relating to it. We have heard submissions that an application was made under rule 43 for the decision of the UT to be set aside and re-made (conventionally known as a review) on the basis that Mr Rauf and his representatives were absent, but again no-one pursued that application and it was not put in issue before this court when permission was granted.

12. That context is important because, having come to that conclusion, Judge Rimington decided that the presenting officer's concession to the FtT was made in error. Although there was an interesting distinction made by the parties before us about concessions that are erroneous in fact and/or in law, as the hearing before this court progressed it became common ground that the issue for this court was very narrow, namely whether what was accepted by everyone to be an erroneous concession should have been permitted to be withdrawn by the UT.

13. In the UT, the parties' submissions centred around whether the FtT had been bound by an earlier and well known decision of the Upper Tribunal: *Patel (revocation of sponsor licence – fairness) (India)* [2011] UKUT 00211 which established that where a sponsorship licence had been revoked by the Secretary of State during an application and the applicant was unaware of the revocation, the Secretary of State should afford the applicant a reasonable opportunity to identify a new sponsor before their application is determined. The UT rightly decided that *Patel* did not apply and went on to decide that the FtT decision was an error of law given that the Home Office concession was based on an erroneous view of the Secretary of State's own policy as set out in the Rules. Judge Rimington held that the decision to curtail Mr Rauf's leave was open to the Secretary of State under paragraph 323A of the Immigration Rules and re-made the decision under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

14. The correctness of *Patel* is not an issue before this court. Indeed, both parties now accept that the second issue in this appeal is not directly a *Patel* question. It is, as I shall explain, a simple question of public law fairness.

15. Accordingly, the parties have focused their submissions on two questions that arise out of the grounds of appeal for which permission was granted: a) whether the UT was right to have permitted the concession made on behalf of the Secretary of State to be withdrawn, and b) whether, outside of *Patel,* the decision of the Secretary of State was fair.

Question one:

16. Despite the difficulty which he faces in trying to circumvent a finding of fact and an exercise of judgment that have not been put in issue before this court, Mr Paul Turner, who appears on behalf of Mr Rauf but who has not previously represented him, submits that the UT denied Mr Rauf the opportunity to put forward an argument against going behind the concession. He realistically does not submit that a tribunal cannot allow a concession of law and/or fact to be withdrawn but submits that the UT did not consider or apply the relevant law, citing in particular: *CD (Jamaica) v Secretary of State for the Home Department* [2010] EWCA Civ 768 at [14-18].

17. Ms Masood, who appears on behalf of the Secretary of State submits that the UT did not go behind the concession of its own initiative. The Secretary of State sought to withdraw the concession. She submits that Mr Rauf had a sufficient opportunity to address the Secretary of State's change of position. In particular, his representatives were sent a *Notice of Decision* on 13 January 2016, enclosing a copy of the FtT's decision granting the Secretary of State permission to appeal to the UT. That decision contained reasons which identified the Secretary of State's change in position. Mr Rauf had an opportunity to provide a written response pursuant to rule 24 of the Upper Tribunal Rules and although he did not attend the hearing in the UT, the UT was satisfied that he had been provided with notice.

Question two:

18. Although Mr Turner accepts that this is not a case where the Secretary of State has withdrawn a sponsor's licence, he submits that the case should be decided analogously with *Patel* because the Secretary of State's action caused the University to withdraw the course on which Mr Rauf would have studied. He submits that this court should read for contextual information the speech referred to in the University's email, which he submits on any reading establishes the fact that the University's decision was triggered by the Minister. He accordingly says that the UT judge failed to consider and on the materials available decide that the Secretary of State had triggered the University's decision and that the unfairness is in not providing a discretionary opportunity to find a new sponsor.

19. When pressed, Mr Turner focused his complaint as follows: "Mr Rauf had, as a direct result of the actions of the Secretary of State, suffered in that he was not given the same opportunity as those whose sponsors had their licences revoked or against whom fraud was alleged".

20. Ms Masood submits that the unfairness in *Patel* arose because there had been a change of position of which the Secretary of State was aware, which he brought about, in circumstances where the student was not at fault and had no opportunity to protect themselves. In contrast in the present case, the change in position was not brought about by the Secretary of State but by the University. The sponsor's licence had not been removed. The sponsor chose to withdraw its offer to Mr Rauf. It cannot sensibly be said that a decision by a Minister to carry out an investigation into the abuse of the UK student visa system made the Secretary of State responsible for the University's decision. There is no residual unfairness, the case does not fall within the spirit of *Patel* and, in any event, Mr Rauf had 7 months to find another sponsor and protect his position.

Discussion:

21. Paragraph 323A(a)(ii) of the Immigration Rules states that a Tier 4 Migrant's leave to remain will be curtailed. The language is mandatory. The effect of any decision made in accordance with the policy will be the same whether the applicant fails to commence studying with the sponsor (limb 1), or the sponsor has excluded or withdrawn the applicant from the course of studies (limb 2). No-one sought to argue this appeal on any distinction between limbs 1 and 2 of the Rules because the effect is the same.

22. The Secretary of State's decision letter may have been inaptly worded but its import was clear and unequivocal. The reason Mr Rauf did not commence his course at the University of Sunderland was because the University withdrew its offer. There is no application to adduce further evidence about that before this court, the University is not a party to the claim and there is no evidence before us of the contextual evidence that was available to the tribunals below with the consequence that it is not for this court to speculate about the University's reasoning beyond what it said in the email that it used to communicate its decision. That was the admitted fact that both tribunals relied upon.

23. It cannot be said that the Secretary of State was wrong to curtail the appellant's leave under paragraph 323A(a)(ii) of the Immigration Rules given the University's decision and its effect or that in accordance with the policy set out in those Rules the Home Office presenting officer's concession was anything other than wrong.

24. This is not a *Patel* fairness case and in any event Mr Rauf had ample time in which to identify a new sponsor and apply to vary his leave to remain. Despite his admirable determination, Mr Turner could identify no residual lack of fairness on the part of their Secretary of State that the UT had failed to consider. There is no identified unfairness that is the direct result of the Secretary of State's actions as submitted by Mr Turner. There was no change of position by the Secretary of State only by the University. The Secretary of State was not implicated in that in such a way as to require that an opportunity be given to deal with the consequence: the only possible causative question would have been the fact relied upon by the University which was the announcement of the investigation by the Minister and no more. That did not on its face require all courses or students on courses to be withdrawn, most particularly perhaps in respect of students like Mr Rauf who did not need an English language test. That was the responsibility of the University.

25. In so far as Mr Turner was suggesting that Mr Rauf should have been afforded an equivalent substantive protection to others who faced the different circumstances of either the sponsor's licence being revoked or a fraud investigation, the simple answer to that proposition is that procedural fairness does not import an asserted principle of substantive fairness as to outcome let alone comparison.

26. Accordingly, no procedural unfairness point is made out.

27. It is clear that the Secretary of State was entitled under the Immigration Rules to curtail Mr Rauf's leave with immediate effect. This case has been complicated by the concession made by the Home Office presenting officer in the FtT. That concession was withdrawn in the UT. The only remaining question is whether the judge was right to permit that. The hearing in the UT was regular i.e. in accordance with the Tribunal Procedure (Upper Tribunal) Rules 2008 and on the basis of a finding of fact that cannot now be complained of in this court.

28. Mr Rauf cannot now be heard to say that he has been denied an opportunity to make representations about the concession. He had that opportunity. The only other basis for the contention that the UT fell into error is that it did not consider the law relating to withdrawals of concession. Mr Turner did not pursue this with any particularity. He would have had difficulty doing so considering the general principles to which we were referred in *CD (Jamaica)* [2010] EWCA Civ 768. The facts of that case are very different from this and the ultimate decision that was appealed was a refusal to allow a

concession to be withdrawn that was overturned in this court. The principle to be applied was extracted from a decision of Goldring LJ in *NR (Jamaica) v SSHD* [2009] EWCA Civ 856 which is summarised at [18] of *CD (Jamaica)* in the following terms:

> "The real question that the tribunal had to determine was whether all the essential issues in the case could fairly be resolved by allowing the concession to be withdrawn or whether the prejudice was such, and the damage to the public interest such, that the Secretary of State should not be allowed to withdraw the concession."

29. Putting to one side any more sophisticated examination of the law, Mr Turner could not have got past first post in any complaint that a concession which was simply an erroneous reading of the Immigration Rules which is mandatory and a proper reflection of the legislation has any prospect of not being withdrawn in the circumstance where there was no prejudice. There was no prejudice on the facts of this case because, on his own case, the best Mr Rauf could have achieved was 60 days grace and he had already had 7 months of the same.

30. I have considerable sympathy for the position Mr Rauf has found himself in but the claim against the Secretary of State is not made out. I would dismiss this appeal for the reasons I have given.

Lord Justice Hickinbottom

31. I agree.

Lord Justice Lindblom:

32. I also agree.