



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/46823/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 25 January 2016**

**Decision & Reasons Promulgated
On 15 February 2016**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD SHAHIDUL ISLAM

Respondent

Representation:

For the Appellant: Mr K. Norton, Senior Home Office Presenting Officer

For the Respondent: Miss A. Cooke, instructed by Farani Javid Taylor Solicitors

DECISION AND REASONS

(Delivered orally on 25 January 2016)

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department. I shall refer herein to Mr Islam as the claimant.
2. The claimant is a national of Bangladesh, born on 10 February 1983. He appealed to the First-tier Tribunal against a decision of the Secretary of State dated 29 October 2014 refusing his application for leave to remain as a Tier 4 (General) Student Migrant.

3. In refusing that application the Secretary of State awarded zero points for Confirmation of Acceptance for Studies (CAS), providing the following reasons for doing so:

“You submitted a CAS, issued by St Patrick's International College. Your sponsor has confirmed in writing to UKV & I that they have withdrawn the offer of sponsorship and are no longer willing to sponsor your studies. As such you fail to meet the requirements of paragraph 116(c) of Appendix A to the Immigration Rules and therefore you are not in possession of a valid CAS.”
4. The appeal came before First-tier Tribunal Judge Amin on 2 June 2015. The claimant ostensibly put his case to the First-tier Tribunal on the basis that there had been procedural unfairness in the Secretary of State's decision making process.
5. In a determination of 16 June 2015 Judge Amin allowed the appellant's appeal “under the Immigration Rules”. Permission to appeal was subsequently granted by First-tier Tribunal Judge McCarthy on 26 August 2015, and thus the matter came before me.
6. The FtT set out relevant matters of fact at paragraphs 11 and 12 of its decision:

“[11]After withdrawal of the CAS certificate the college informed him [the claimant] that he would be issued a 60 day letter from the Home Office allowing him to find an alternative college.

[12] Cross-examined the appellant confirmed that the college compliance officer had informed him that he would be issued with a 60 day letter by the Home Office following the withdrawal of the CAS certificate. The appellant confirmed that he took no steps to ensure that the 60 day letter was issued. However he did liaise with the college and asked them to reinstate his CAS. He corresponded by email. The appellant agreed that there was no reason why he could not return to Bangladesh.”
7. It is beyond dispute that as of the date of the Secretary of State's consideration of his application the claimant did not have a valid CAS because his sponsor college had withdrawn its offer of sponsorship. The claimant did not therefore meet the mandatory requirements of paragraph 116(c) to Appendix A to the Immigration Rules.
8. The FtT's conclusion to the contrary at the end of its decision is irrational and, in any event, is not supported by any reasoning found within the confines of the decision itself.
9. Despite this clear error, Miss Cooke submitted that the FtT's decision should stand because the reasoning it deployed inevitably leads to the conclusion that the Secretary of State's decision was not in accordance with the law. Indeed, Ms Cooke went as far as to say that the FtT had intended to allow the appeal on such basis.

10. The foundation for this submission is contained in the following extract from the FtT's decision:

- "22. I have to agree with the appellant's forceful arguments as advanced in the skeleton argument. This is an appeal in which the CAS was in force at the time the appellant made his application. When the SSHD made her decision the CAS had been revoked. Fairness, as argued by the supporting authorities cited by the appellant, required that the appellant should have been informed of this by the Secretary of State for the Home Department and given an opportunity to deal with the point. This did not happen here.
23. Relying on Patel (Revocation of the sponsor licence - fairness) India [2011] UKUT 00211 (IAC), I find that the policy for issuing a 60 day letter applied here. This would enable the appellant an opportunity to obtain a new CAS. Failure to follow this policy was unlawful and the decision is therefore not in accordance with the law.
24. There is also a general principle of fairness that a person who is subject of a forthcoming decision will be given an opportunity to make representations in advance with a view.
25. In all the circumstances the appeal succeeds for the reasons cited above."

11. At the hearing before Upper Tribunal Miss Cooke properly accepted that the First-tier Tribunal failed to consider a relevant binding authority on the issue of procedural unfairness i.e. that of EK (Ivory Coast) v Secretary of State for the Home Department [2014] EWCA Civ 1517. This I find to be of great significance.

12. The facts of EK bear resemblance to those in the instant case, save for that in EK the college withdrew the applicant's CAS as a consequence of administrative error, whereas in the instant case the withdrawal was through deliberate choice by the sponsor college. The court in EK specifically considered the issue of whether procedural unfairness arose in circumstances where the college had withdrawn the CAS in error and thus leading the applicant to fail for the same reasons as the instant claimant could not meet the requirements of the Rules. It concluded in categorical terms that the circumstances of that case did not give rise to any procedural unfairness. Lord Justice Sales, with the agreement of Lord Justice Briggs, said as follows:

- "24. The position in which the appellant had been placed can, in a general sense, be said to be unfair to her. She obtained a valid CAS letter and made her application for leave to remain to continue her studies on the basis of that letter. She had a limited period time in which she could make such an application on an in-country basis, granted to her by the Secretary of State to give her an opportunity to rectify the position and which had arisen as a result of her first chosen college ... losing its authorisation from the Secretary of State to issue CAS letters. She made her application within time. Unbeknown to her, as a result of an administrative error for which she had no responsibility, the college withdrew her CAS letter. As a result, after the period for making a fresh in country application had elapsed, her application was dismissed

by the Secretary of State. The appellant will have to leave the United Kingdom and make a fresh out of country application if she wishes to continue her studies here.

25. However, in my judgement, there was no breach by the Secretary of State of her public law duty to act fairly in considering the appellant's application for leave to remain. The Secretary of State is not responsible for the general unfairness which the appellant has suffered. That is the result of the actions and omissions by the college. There is no basis on which any of the decisions of the Secretary of State, the FTT and the Upper Tribunal can be impugned as unlawful.”
13. The court also made relevant comments at [38] - [40] regarding the Upper Tribunal's decisions in Patel [2011] UKUT 00211; Thakur [2011] UKUT 00151 and Naved [2012] UKUT 14; identifying that the former two cases were materially different to the circumstances before it, each relating to a scenario in which the Secretary of State had revoked a college's licence and thereafter had refused the applicants' applications in circumstances where they had not been given an opportunity to protect themselves against the consequences of the Secretary of State's actions. As to Naved, Sales LJ said at [40]:
- “If the Upper Tribunal intended to lay down a principle formulated in a bald way, I disagree with it. As a formulation, it leaves out of account the highly modulated and fact-sensitive way in which the general fact sensitive public law duty operates. It also pays insufficient attention to the issue which lies at the heart of the cases in this area, which concerns the fair balance to be struck between the public interest in having the PBS regime operated in a simple way and the interest of a particular individual who may be detrimentally affected by such operation.”
14. As identified above, the FtT failed to engage with the decision in EK, relying instead on the decisions in Naved and Patel. In my conclusion there is no material difference between the circumstances of the appellant in EK and that of the instant claimant. The college withdrew the claimant's CAS in the instant case through deliberate action, as opposed to by accident in EK, but the consequences for both were the same and in neither case was it the action of the Secretary of State that led to the CAS being withdrawn, or to the failure of the applicant to meet the requirements of the Rules.
15. In my conclusion the failure of the FtT to consider and apply the decision in EK amounts to an error of law capable of affecting the outcome of the appeal and I therefore set aside the First-tier Tribunal's decision.
16. Re-making the decision for myself I observe that the Secretary of State bears no responsibility for the situation the instant claimant finds himself in, and was not, in my conclusion, required as a matter of procedural fairness to provide the claimant with an opportunity to 'protect' himself by granting him leave.
17. Miss Cooke submitted, in the alternative, that the Secretary of State's decision was not in accordance with the law for her failure to consider relevant policy. I reject this submission. It is for the claimant to

demonstrate the existence of the policy upon which he seeks to rely and thereafter to demonstrate that the Secretary of State failed to consider and apply such policy.

18. This submission does not begin to get off the ground because it has not been demonstrated that the policy relied upon, which is said to be that annexed to the Tribunal's decision in Kaur (Patel fairness: respondent's policy) [2013] UKUT 00344, has any purchase on the facts of the instant case.
19. Miss Cooke asserts that the aforementioned policy does not limit itself to situations in which the sponsor college's licence is revoked and that the claimant's circumstances fall directly within its ambit. I do not agree with the latter contention.
20. The relevant section of the policy states as follows:

“Although the applicant does not possess a valid CAS and so falls to have their case refused, as their application was submitted ‘in time’ we will delay the refusal of their application for a period of 60 days to allow them to obtain a new CAS and to submit a request to vary the grounds of their original application.

In such cases, the caseworker will write to the applicant using ICD4500 and information leaflet ICD4499 explaining that their previous sponsor has surrendered their licence or had their licence revoked and that they have 60 days to either leave the UK or to find a new sponsor, obtain a new CAS and submit all required documents to show they meet the requirements of the Immigration Rules...”
21. In my conclusion there is no merit in the submission that the policy is of application in all scenarios in which an applicant's CAS becomes invalid during the period in which the Secretary of State's decision is awaited. The policy itself identifies only two relevant factual scenarios which trigger consideration under its third section - each of which also require an applicant to have made an in time application - that being either where (a) the sponsor college has surrendered its sponsorship licence or (b) the sponsor college's licence has been revoked by the Secretary of State. The claimant does not fall within the confines of either scenario, his being a case where the sponsor college withdrew the CAS, not where the sponsor college's licence has ceased to exist. I find that the claimant does not attract the benefit of the aforementioned policy.
22. Miss Cooke also sought to reinvigorate the Article 8 ECHR claim, but accepted that this claim had been withdrawn before the First-tier Tribunal. The fact of such withdrawal does not preclude me from exercising my discretion to reopen the issue but in the circumstances of this case I decline to do so. As already indicated, it was specifically withdrawn before the First-tier Tribunal. There is no new evidence of any substance on this issue before me and it appears the claimant simply wants to have another bite at a cherry he has previously discarded.


23. Had I exercised my discretion and allowed the claimant to argue this ground I would, in any event, have dismissed it. Whilst it is clear that the claimant has built up a private life in the United Kingdom through his studies, and that he has paid considerable sums of money to obtain qualifications that he would not now obtain should he be required to leave the United Kingdom, it is not suggested he meets the requirements of the 'private or family life' Immigration Rules.
24. In giving consideration to the claimant's Article 8 private life claim outside the confines of the Rules, little weight must be attached to such private life as a consequence of the application of s.117B(5) of the Nationality, Immigration and Asylum Act 2002. Looking at the claimant's circumstances as a whole there is nothing in the least bit compelling about them, a conclusion I reach even having taken full account of the circumstances which led to the claimant's application being refused by the Secretary of State. Had I allowed the claimant to argue article 8 grounds I would, without hesitation, have concluded that requiring him to leave the UK would be proportionate to the legitimate aim of maintaining immigration control.

Notice of Decision

The decision of the First-tier Tribunal is set aside.

Having re-made the decision under appeal for myself I dismiss Mr Islam's appeal.

Signed:



Upper Tribunal Judge O'Connor