



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

Appeal Numbers: IA/53620/2013  
IA/53626/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On: 2 February 2015**

**Determination  
Promulgated**

**On: 9 March 2015**

**Before**

**Deputy Upper Tribunal Judge Chana**

**Between**

**MR SANDEEP KUMAR  
MRS SHARUTI SHAMA  
(anonymity directions not made).**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr M Dogra, instructed by Jade Law Solicitors  
For the Respondent: Mr R Peterson, Senior Presenting Officer

**DETERMINATION AND REASONS**

1. This is an appeal by the Secretary of State for the Home Department ("SSHHD") from the decision of the First-tier Tribunal. However, for the sake of convenience I shall continue to refer to parties as they were referred to at the First-tier Tribunal.
2. The appellants are citizens of India born on 16 June 1984 and 4 February 1988. They are husband and wife. The first appellant's

application for leave to remain in the United Kingdom as a Tier 2 Migrant was refused and a decision was made to remove both appellants from the United Kingdom by way of Directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

3. Permission to appeal was refused on 11 September 2014 by first-tier Tribunal Judge Mark Davies. However, permission to appeal was granted by Judge R Keckic on 15 December 2014 stating that it was arguable that the Judge misdirected himself by applying Tier 4 fairness principle to Tier 2 cases without giving any reason for why they should apply. It was also arguable that given that there was no requirement of sponsorship at the date of the decision and the Judge failed to identify how the respondent had been unfair to the appellant given that the appellant was aware of the raid on the premises where he worked some 10 days prior to his application.

### **First-tier Tribunal's Findings**

4. At paragraph 22- 27 of the determination, Judge Norton Taylor gave reasons as to why he thinks that the fairness principle which commonly apply to Tier 4 applications can apply to Tier 2 cases. There is no recognised prohibition in applying fairness to Tier 2 applications because the common law duty of fairness is applicable to all matters.
5. The Judge stated that there is a common law duty of fairness that can potentially apply to the decision-making process of the respondent. "The Tribunal has jurisdiction to determine issues of fairness and to allow an appeal on these bases wherever appropriate. Second, whether or not a duty of fairness does indeed bite in a particular case will depend on the circumstances pertaining to that case. Third as far as I can see, all the fairness cases have involved students and the revocation of sponsor's licenses. However I cannot think of any compelling reason why those applying in the Tier 2 category should be less entitled to the protection of fairness than students. It is right the students invest a large sum of money into courses and may be at risk of losing both their funds and chance of educational achievements where licences are revoked. Yet Tier 2 applicants will often have their commitment such as property costs, families to support, bills to pay and the like, arising out of their employment (and normally without additional support from third parties) they may well have been in the United Kingdom for longer periods and have established themselves here".
6. "In essence the significance of applications to Tier 2 migrants is (when seen in context) as great as that to Tier 4 migrants. Fourth in student cases, the respondent has taken positive action to revoke the sponsor's licence. The respondent was in a position of knowledge prior to the decision being made on the individual's application. And the same is true in a case such as the present. The respondent raided UK stacks limited and thereafter began an investigation. The respondent ultimately took the decision to revoke the licence. The respondent was

in control of the process throughout. Fifth, as a student could come if forewarned about the licence issue, potentially take remedial action to help themselves by, for example, seeking a new sponsor and verifying their pending application under section 3C (5) of the immigration act 1971, so too could a Tier 2 applicant. They would at least have an opportunity to seek to obtain a favourable result (see Lord Mustill in **Doody [1994] one AC 531, 560**). Sixth, the respondent does not appear as far as I can see, to have engaged with the potential unfairness arising out of situations such as the present. There is no policy or guidance in place. In the decision letter in the first appellant's case is anything to go by, nor is regard to fairness given whatsoever".

7. The Judge noted at paragraph 9 that the first appellant arrived in the United Kingdom on 16 December 2008 as a working holidaymaker. On 8 November 2010 he was granted leave to remain as a Tier 2 migrant until 15 October 2013. The second appellant arrived in the United Kingdom as her husband's dependent on 23 February 2012 and her leave also ran until 15 October 2013. The first appellant had been employed by UK Stacks Limited since 20 August 2010 and this employment was the basis upon which the initial period of his Tier 2 leave was granted. The appellant remained in this employment until his last application to the respondent which was refused.
8. On 4 October 2013 the respondent carried out a raid on UK Snacks Limited, presumably because of concerns about the company's compliance with legal obligation. The first appellant was aware of this raid at the time it occurred. However the respondent did not inform the first appellant of the need to find another sponsor or take any other action at that time. The appellant then submitted his application to the respondent 14 October. At the point of submission the appellant had no knowledge as to whether the sponsor's licence had been revoked or not. He was aware that UK Snacks Limited was being investigated. Therefore the licence was in fact in place until an unspecified date on which the respondent revoked it. The respondent refused the application on 28 November 2013 and the respondent did not contact the first appellant to inform him that the sponsorship licence of UK snacks limited had been revoked prior to the decision to refuse his application.
9. "Turning back to the appeals before me and in the light of the above I conclude that the respondent was under a duty to act fairly in respect of the first appellant's application. The respondent obviously knew about the results of the investigation into UK Snacks Limited prior to her decision on the application. The revocation of the sponsor's licence was fatal to that application (as points were awarded under appendix B and C). There is no reason as to why the respondent could not have contacted the first appellant to inform him of the situation prior to the decision on the application being made. The respondent did nothing. Indeed, to compound this the respondent does not even set out what happened with the sponsor's licence in the decision letter. There is no explanation (even in brief form (as to the nature and result of the

investigation. On the reading of the decision letter in isolation, one may think it was the first appellant who was at fault for his application's failure. I would add that whilst the first appellant was aware of the raid on his employers, he was entirely justified in making his application on 14 October. As far as he was aware the sponsor's licence was in place, as indeed it was until the revocation. No one yet knows the date of that revocation because the respondent has failed to state it. The appellant should have been afforded an opportunity to seek another sponsor and to vary his pending application if he so desired. The respondent acted in a materially unfair manner in respect of the first appellant's application. The appeals succeed on these bases and he allowed both appellant's appeals".

### **Grounds of Appeal**

10. The respondent in her grounds of appeal states the following which I summarise. The respondent refused the appellant's application because he did not have a valid certificate of sponsorship. The Judge concluded that this was a case with the principles of fairness applied. The Judge relied analogously on the cases of **Thakur** and **Patel** at paragraph 26 of the determination. The Judge materially erred in law by concluding that these fairness cases which applied to Tier 4 students also applies to Tier 2 cases. The Judge simply does not give any valid or adequate reasons for stating that fairness principles apply equally to Tier 2 migrants particularly when the required sponsorship did not exist at the date of decision. It is simply not clear as to how the Secretary of State acted materially unfairly to the appellants.

### **The hearing.**

11. At the hearing I heard submissions from both parties. For the respondent, Mr Peterson submitted that in the original application, the main appellant stated that he did not have a valid certificate at the date of application. Even if the appellant would have been given an opportunity to obtain another employer there is no evidence that he has done so in the interim.
12. On behalf of the appellant I have taken into account the skeleton argument provided. It is stated that the common law duty of fairness may frequently arise in the context of Tier 4 cases but there is no prohibition on it applying to Tier 2 cases because the common law duty of fairness as applicable to all matters. In **Patel (revocation the sponsor's licence-fairness) India [2011] UKUT 02111 (IAC)** it is noted at paragraph 14

“we also note the discussion of procedural fairness in De Smiths judicial review (sixth edition) at paragraphs 7-003 to 7-009. We accept the authors proposition that the law has advanced from imposing public law requirement of fairness in particular situations, to the general proposition that where ever a public function

is being performed there is an inference that the function is required to be performed there is an inference that the function is required to be performed fairly, in the absence of an express indication to the contrary”.

13. The Judge of the first-tier Tribunal cannot have erred in law by her finding that the common law duty of fairness applies given that there was no express prohibition to the contrary and stated that there is no policy guidance in place. Secondly she found that gaining guidance from similar situations i.e. Tier 4 cases with the duty is considered, and applying them in similar situations if applicable.
14. It was argued that the respondent’s question as to how she was unfair to the appellant when the appellants knew at least 10 days prior to his application that the raid had been carried out on the premises. It is submitted that the ground that there was “no required sponsorship at the date of decision” is irrelevant. The issue of unfairness arises in the present matter because at the time the application was made, the sponsor did have a valid licence for sponsorship and it is the fact that it was subsequently revoked that raises the argument of whether the respondent should have notified the main appellant of this in advance and given him an opportunity to find an alternative sponsor. Judge Norton Taylor at paragraph 30 of her determination stated that while the first appellant was aware of the raid on his employers he was entirely justified in making his application on 14 October as far as he was aware the sponsor’s licence was in place, as indeed it was until the revocation. No one yet knows the date of that revocation because the respondent has failed to state it. The fact that the sponsor’s premises were raided did not automatically mean that its licence would be revoked.

**Is there a material error of law in the determination of the First-tier Tribunal?**

15. First-tier Tribunal Judge Norton-Taylor allowed the appellant’s appeal and found that the appellants cannot succeed under the Immigration Rules as there is no valid certificate of sponsorship so they cannot meet the requirements of paragraph 245 HD (F) in conjunction with appendix A. The Judge stated that the issue of fairness is raised in the grounds of appeal and there is real merit to the fairness argument in these appeals. The Judge concluded in a situation such as that arising in these appeals, the respondent is under a common law duty of fairness to provide an applicant with the opportunity to take remedial action in respect of their pending application.
16. The relevant provisions of paragraph Appendix A provide that an applicant will only if he has a sponsorship licence. As at the date the application, it is common cause that the appellant sponsor licence had been revoked after they carried out a raid on UK Snacks Limited on 4 October 2013. The appellant then made an application on 14 October

which was 10 days after the raid and his application was refused on 28 November 2013 for the appellant's application not complying with the Immigration Rules. There was however no evidence before the Judge exactly when the licence was revoked. The Judge stated that the fact that there was a raid on the premises does not automatically mean that the licence would be revoked which is a logical conclusion.

17. On the strict interpretation of the law, the respondent's decision was in accordance with the Immigration Rules in force as at the date of decision because the appellant's sponsor licence had been revoked and he did not have a sponsor licence on the date of his application which the Judge noted in her determination.
18. The Judge noted that the respondent did not contact the appellant and afford him an opportunity to take remedial action such as look for another sponsor. She stated that given that it was the respondent who was in control of the entire process including the raid, it would have been fair in the circumstances for the respondent to have contacted the appellant so that he could take remedial action. The Judge was entitled in the circumstances to find that the respondent has not acted fairly by not contacting the appellant and giving him an opportunity to take whatever remedial action which was available to him.
19. The case of **Thakur (PBS decision-common law fairness) Bangladesh [2011] UKUT 151 (IAC)** was relied on, where reference is made to earlier guidance by Lord Mustill: "(1) where an act of parliament confers an administrative power there is a presumption that it would be exercised in a manner which is fair in all the circumstances. (ii) The standards of fairness are not immutable. They may change with the passage of time bought in the general and in their application to decisions of a particular type. (iii) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision and this is to be taken into account in all its aspects. (iv) an essential feature of the context is the statute which creates the discretion, as regards to both its language and the shape of the legal and administrative system within which the decision is made. (v) Fairness will often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken with a view to procuring its modification, or both. (vi) since the person affected cannot usually make worthwhile representations without knowing what factors may weigh against his interests, fairness will often require that he is informed of the gist of the case which he has to answer".
20. The respondent's argument essentially is that there is no requirement for the respondent to act fairly for Tier 2 applications as fairness only applies to Tier 4 applications. I do not accept the respondent's submission that in the circumstances of these two appellants that she should not have given the appellant an opportunity to find another

sponsor. The Judge give ample reasons which I have set out above for why principles of fairness apply to the circumstances of these two appellants. The Judge correctly found that he respondent was in a better position to alert the appellant and it would have been fair for the respondent not to make a decision until they had afforded the appellant an opportunity to find another sponsor because she was in charge of the whole process.

21. I find that the Judge did not make an error of law by stating that the respondent had not applied principles of fairness to the appellants in their particular circumstances.
22. I therefore uphold the determination of First-tier Tribunal Judge Norton Taylor as not being erroneous in law.

## **DECISION**

The Secretary of State's appeal is dismissed

Signed by

A Deputy Judge of the Upper Tribunal

Mrs S Chana

Dated this 23<sup>rd</sup> day of March 2013