



IAC-FH-CK-V1

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

Appeal Number: IA/00931/2015

THE IMMIGRATION ACTS

Heard at Field House

**On 7 March 2016
Oral judgment**

**Decision &
Promulgated
On 5 April 2016**

Reasons

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**MS SUPINDER KAUR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Awan, Legal Adviser, Mayfair Solicitors

For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. This is a challenge by the appellant to a determination of First-tier Tribunal Judge Hosie promulgated following a hearing at Hatton Cross on 20 July 2015. The appellant, Ms Supinder Kaur, was born on 20 April 1987 and is a national of India who entered the United Kingdom on 28 November 2010 as a Tier 4 (General) Student Migrant with leave valid to 28 June 2014.

2. On 27 June 2014 the appellant obtained a CAS from Zaskin College and applied online for an extension of her student leave to remain under the points-based system and also for a biometric residence permit to enable her to undertake further study in hospitality, tourism and management. This application was refused by a notice of refusal dated 10 December 2014. The reason for the refusal is said to be that the appellant failed to produce the necessary documents or other evidence to establish her claim for leave to remain. As a result her application was refused pursuant to paragraph 245ZX(c) with reference to paragraph 116(c) of Appendix A and paragraph 245ZX(d) of the Immigration Rules.
3. The appellant challenged that decision on appeal and the judge sets out at paragraphs 6 to 11 of the determination the nature of the evidence that was raised before her including, in paragraph 9, the statement that the appellant's representative submitted that reliance be placed upon the appellant's evidence as contained in her witness statement and also the case law produced. The respondent's decision, it was submitted, is unlawful and unfair. The appellant contended the cases of **Patel (revocation of sponsor licence - fairness) India [2011] UKUT 211 (IAC)** and **Thakur (PBS decision - common law fairness) Bangladesh [2011] UKUT 151 (IAC)** are not limited only to circumstances where a college licence is revoked. Both cases give general guidance on what the requirements of fairness demand. When an applicant is unaware of something which has happened between the Home Office, the college and the sponsor it is only fair to allow the applicant to provide a replacement CAS or to otherwise address any issues.
4. The judge was clearly aware of the thrust of the submissions that were made and noted in relation to the Rules that it was accepted that in the absence of a CAS an application for a student migrant visa must fail. The submission made to the First-tier Tribunal was, it was submitted today, that what is engaged here is a matter of common law fairness. The judge sets out the findings at paragraphs 12, 13 and 14 of the decision, paragraph 14 referring to Article 8 ECHR and the other two paragraphs referring to a consideration of the application under the Rules.
5. In paragraphs 12 and 13 the judge makes the following findings:

“12. I noted that the appellant's representative accepted that the appellant does not meet the Immigration Rules in the absence of a valid CAS at the time of the application. I accept the respondent's submission that the withdrawal of the CAS by the college is a matter between the college and the appellant. The appellant did know the reason why her CAS was withdrawn when she was due to commence studies and she was told by the college that she could not start her course without her visa extension. This was her evidence. In the absence of her visa extension being forthcoming her CAS was withdrawn. The appellant does not qualify in terms of the Immigration Rules as

detailed in the respondent's notice of refusal. There has been no misinterpretation of the law and there is no discretion afforded to the respondent. It is therefore not possible to remit the case for reconsideration by the respondent in light of mitigating circumstances.

13. I considered the submissions made in terms of common law fairness in light of the case law referred to. I do not find that there is an issue of common law fairness arising here. The appellant has been in the UK in terms of a student visa for four years. She was aware of the requirements of the visa and the CAS system. I accept the respondent's position that the reason for the withdrawal of a CAS from a student is a matter between the student and the college and there is no obligation on the respondent to communicate that information nor would the respondent necessarily be in possession of that information. The appellant was in touch with her college and she knew that in order to commence studies she needed an extension of her leave. She did not have this and in fact only applied for her visa extension shortly before her course was due to start. The cases of **Patel** and **Thakur** are not on a par in the present circumstances, on the appellant's own evidence."
6. The judge found the decision proportionate in relation to Article 8.
7. The appellant's grounds for permission to appeal set out the chronology of the matter and challenge the decision on two main grounds. One relates to the **Naved (Student - fairness)** point claiming that the judge erred in law in not finding that there was an obligation upon the Secretary of State and, as such, that she did not act fairly, and in paragraph 4 a reference to the difference between the two forms of making an application, the "in person same day premium service" or the postal application service that was employed by the appellant in relation to this matter.
8. The grounds refer to the decision of **Basnet (validity of application - respondent) [2012] UKUT 113 (IAC)** where the Upper Tribunal are said to have noted at paragraph 31: "We are however sufficiently impressed by the marked difference in treatment between the postal application and the personal application to indicate that it has every appearance of substantive unfairness." That was an observation, no more, in relation to **Basnet** and it was confirmed by Mr Awan this was not an issue raised previously.
9. I make an observation, and no more, at this time which is that although the procedures adopted by the Secretary of State in relation to a postal application or for those who turn up in person for the premium service, for which they pay a little more, may be different, there is no restriction upon the individual concerned as to which method of application they choose. If a person chooses to make a postal application they have no legitimate

expectation other than that their application will be considered in the same way as all other postal applications in accordance with the Secretary of State's published guidance and instructions to its caseworkers. A person who makes a postal application has no legitimate expectation that they will be treated in the same way as a person who makes a same day premium service application. As I have stated, that was not raised before the First-tier Tribunal and is not a matter that establishes legal error before this Tribunal today.

10. Permission was granted by First-tier Tribunal Judge Shimmin on 20 January 2016 on the basis it was arguable that the respondent's decision is not fair and that the respondent should have given the appellant a period of leave to enable her to obtain a replacement CAS. The position is that the appellant's leave previously granted had expired at that time although was continued by virtue of Section 3C. The suggestion further leave should be granted would have required the Secretary of State to effectively grant a fresh period of leave just for the purpose of making an application to obtain a CAS.
11. In any event, the matter before us today appears to be a fairly narrow issue. A skeleton argument has been filed by Mr Awan on behalf of the appellant and in the course of his earlier discussions and submissions a number of concerns arose. The fact that Mr Awan is a solicitor is totally irrelevant. The law relating to the obligation owed by representatives to the Tribunal applies whether a person is a solicitor, a barrister, a legal executive, a litigant in person, or a self-represented person.
12. The obligations imposed upon the Upper Tribunal are clearly set out in the 2007 Act in relation to applications of this nature, namely that the Tribunal has to ascertain whether it has been established that there is a legal error, an error of law as we call it, material to the decision made by the judge as the first step. The way the Upper Tribunal assess that error and the arguments put forward is to look primarily at the evidence that was before the judge and the submissions that were raised before the judge hearing the First-tier Tribunal appeal.
13. It is of concern that an experienced solicitor would think it is acceptable to raise in his grounds of appeal something that was not raised before the First-tier Judge as if that somehow suggested error in the decision that was made by the judge. That trend continued in relation to the approach taken before the Upper Tribunal in which Mr Awan originally tried to run an argument that **EK (Ivory Coast)** was wrongly decided and should not be followed for, he said, arguable reasons. This was a matter not only not raised before the First-tier Tribunal but also a matter not contained within his skeleton argument or grounds upon which permission to appeal had been sought. That was a clear attempt to ambush both the Secretary of State and the Tribunal and I consider such conduct by a solicitor or any legal representative to be wholly unacceptable. These are not 'Robinson obvious' points.

14. In addition, within the skeleton argument is set out an argument based upon the application of Section 116C of the Immigration Rules and the lawfulness of the decision to withdraw a CAS. This is at paragraphs 12 and 13 of the skeleton argument. These again are matters that do not appear to have been raised before the First-tier Tribunal and, of greater concern, the judge clearly records that it was accepted before the First-tier that in the absence of a CAS the application for a student visa must fail. It appears on the face of it that having said one thing to the First-tier Tribunal another completely different thing has been said to the Upper Tribunal. Whilst it is accepted that grounds can be raised and applications can be made at various stages of the proceedings to amend pleadings, for which permission will be considered and granted or refused, it is not acceptable practice for a legal adviser to effectively attempt ambush in this manner.
15. When Mr Awan was given time after his preliminary submissions had been raised to draft an application to amend his grounds if that is what he was seeking to do and to set out the basis on which he believed he could support a case that **EK (Ivory Coast)** was incorrectly decided, he returned to the Tribunal and indicated that he was not proceeding with that argument. If that argument was as important and clear as he initially submitted one is entitled to expect that it would have appeared in the earlier pleadings and, having been given the opportunity to go and right the wrong which had been created, that he would have taken the opportunity to set out the basis of his claim and make such an application as was required, but he did not choose to do so. I understand why he did not. The reason being, in simple terms, that such an application has no arguable merit.
16. The issue of whether those points were **Robinson** obvious and could be inferred from the submissions made also arose during the course of the submissions but I do not find that these points are **Robinson** obvious. It is arguable that **Robinson** obvious points are only applicable to asylum cases, in any event, which is where the issue initially arose, but even if one extends the principle generally to all types of immigration appeals it has not been established on the facts that the points Mr Awan attempted to raise fall within the relevant criteria.
17. The Tribunal is therefore left needing to consider the matter on which permission was granted, namely that more should have happened, i.e. the First-tier Tribunal should have found that the decision of the Secretary of State was not in accordance with the law as a result of the failure of the Secretary of State to go back to the appellant to say this is what had happened and inviting her to put matters right. It was accepted that the time that this decision was made was at a time when the jurisdiction existed within the First-tier Tribunal for such a finding to be made, if appropriate.

18. The importance of **EK (Ivory Coast)** is that this was a case in which it was held that the Secretary of State was not responsible for a college's administrative error in withdrawing a Confirmation of Acceptance for Studies before an application for leave to remain had been determined under the points-based system. When the Secretary of State saw that the CAS had been withdrawn the general public law duty of fairness had not obliged her to adjourn any decision to give the claimant notice of the problem and an opportunity to rectify it.
19. Two points arise from that. The first one is that in the guidance to Tier 4 sponsors it is clearly stated that if a Tier 4 sponsor is withdrawing a CAS that they give notice directly to the student applicant. In this case Judge Hosie makes a specific finding that the applicant was aware that the CAS had been withdrawn. The second point, although there is criticism that permission was not granted on this point, is that the judge was in fact right to make a finding that issues in relation to the grant and withdrawal of a CAS are matters between the college, the education provider, and the student because that is not a matter in relation to which the Secretary of State is involved.
20. The whole purpose of the Tier 4 system, and the guidance issued to those on the Tier 4 sponsors register approved for providing Tier 4 services, is that the obligation to ensure compliance has been moved from the Secretary of State to the Tier 4 sponsor. It is their responsibility to ensure that the requirements of the Rules are met and to decide whether to issue a CAS or not. In this case it appears that what happened is that at the date when the appellant's course was due to start she possibly did have a valid CAS because it had not been withdrawn at that point, but she did not have an extension of her leave. Therefore she was not permitted to start the course and the college withdrew the CAS.
21. The second decision is a far more recent one of the Court of Appeal. This is **Kaur v Secretary of State [2015] EWCA Civ 13** in which it was held that the respondent had no obligation to give notice either to an applicant for leave to remain or to their sponsoring academic institution that she considered there to be a deficiency in the Confirmation of Acceptance for Studies document before making an adverse decision on that basis.
22. The importance of the case of **Kaur**, which was an appeal to the Court of Appeal against a decision of Upper Tribunal Judge Rintoul, is that in that case Zane Malik, instructed by Mayfair Solicitors who are the solicitors in this case, raised two points. The first related to the meaning of paragraph 120A, which is not a live issue. The second point is summarised by the Court of Appeal in paragraph 2(ii) of their judgment in **Kaur** given by Lord Justice Burnett in the following terms:

“Even if the Secretary of State did not have to accept the CAS as confirming academic progress, she was obliged to make further enquiries of the academic institution before refusing the application

on the basis of **Naved v Secretary of State for the Home Department [2012] UKUT 14 (IAC)**, which was applied by analogy in **Pokhriyal**.”

23. If this is an attempt by Mayfair Solicitors to re-run arguments that Zane Malik put before the Court of Appeal on instructions from this firm, as if they are trying to seek a different or alternative outcome, i.e. to go behind the decision of the Court of Appeal, that is again wholly unprofessional and unacceptable in terms of their professional conduct. I make no finding in relation to whether that is their intent because I did not ask Mr Awan to make any comment on the point. I make a general observation and no more.
24. What we can be satisfied about is that Mr Malik would have done his level best to persuade the Court of Appeal that decisions such as **EK** and the other cases considered were wrongly decided, but the Court of Appeal were clearly not with him.
25. I refer to the court’s decision in relation to what they class as the second question at paragraphs 38, 39, 41 and 42 of the judgment of the Court of Appeal where they state the following:

“38. The very brief reference to **Naved** in the course of Jackson LJ’s judgment founds Mr Malik’s submission that there was, in this case, an obligation upon UKBA to go back to Citizen 2000 to seek clarification of the CAS. The reach of **Naved** has been considered twice in this court since **Pokhriyal** in cases concerning Tier 4 Students and deficiencies in the CAS: see **Rahman v Secretary of State for the Home Department [2014] EWCA Civ 11 [2014] 1 WLR 3574** and **EK (Ivory Coast) v Secretary of State for the Home Department [2014] EWCA Civ 1517**. In neither case was **Pokhriyal** cited nor, as it happens, was **Rahman** cited in **EK (Ivory Coast)**. Be that as it may, in both cases this court distinguished **Naved** and concluded that when a Tier 4 sponsor fails to provide the evidence via a CAS which is required to enable the student to secure the necessary points, there is no obligation founded in fairness which obliges the Secretary of State further to investigate with the sponsor or to inform the student.

39. The head note in **Naved**, drafted by UTIAC itself, states that

‘fairness requires the Secretary of State to give an applicant an opportunity to address grounds for refusal, of which he did not know and could not have known failing which the resulting decision may be set aside on appeal as contrary to law ...’

In **EK Sales LJ**, with whom Briggs LJ agreed, decided that the head note set out a bald proposition which was not of universal application in the field of immigration decision making. They did not question the decision in **Naved** itself. The facts of **Naved** were such that UKBA bore substantial responsibility for an error which had occurred and resulted in leave being refused. The applicant had provided information about his course. Without telling him, UKBA approached his college for confirmation of his having studied on and completed the course. The college replied identifying a different person and said he had not completed the course. Neither the college nor UKBA noticed the mistake. The two students shared the same surname. The applicant had in fact completed the course successfully.”

26. At paragraph 40 the court in **Kaur** found:

“40. In **Rahman** the application for leave to remain was refused on the basis that the sponsor had failed to confirm academic progress. Richards LJ, who gave the only reasoned judgment, considered expressly the question whether, in those circumstances, the Secretary of State was obliged as a matter of fairness to give the applicant an opportunity to address the deficiency in the CAS before the decision was made. There was some uncertainty whether the applicant was aware of the deficiency but either way, the answer was no. **EK (Ivory Coast)** reached the same conclusion on different facts. The applicant in that case relied upon a CAS which she supplied with her application. Between the date of her application and the date upon which UKBA made its decision the sponsor withdrew the CAS, it appears by mistake. The applicant was unaware of that. Her application was refused. Sales LJ (with whom Briggs LJ agreed in a separate judgment) distinguished **Naved** and concluded that in the context of the points-based system there was no obligation to inform the applicant to enable her to make good the deficiency. ”

27. In paragraphs 41 and 42 the court found:

“41. The points-based system for determining whether to grant leave to enter or remain in the United Kingdom, which applies to students as well as a number of other categories of applicant, is designed to achieve predictability, administrative simplicity and certainty. It does so at the expense of discretion, that is to say it is prescriptive. The consequence is that failure to comply with all its detailed requirements will usually lead to a failure to earn the points in question and thus refusal: see e.g. Sullivan LJ in **Alam v Secretary of State for the Home Department [2012] EWCA Civ 960** at [44], Davis LJ in **Secretary of State for the Home Department v Rodriguez [2014] EWCA Civ 2** at [100]; Sales

LJ in **EK (Ivory Coast) v Secretary of State for the Home Department [2014] EWCA Civ 1517** at [28] and Briggs LJ at [59]. It was that important background which informed the decision in **EK (Ivory Coast)**.

42. By contrast, the issue was not elaborated or reasoned in **Pokhriyal**. In any event, the reference to an analogy with **Naved** was an obiter dictum. It appears to have been mentioned by Jackson LJ because UTIAC had referred to **Naved**. UTIAC observed that if UKBA had asked the Tier 4 sponsor for clarification of the CAS before refusing AH's application, no confirmation of academic progress would have been forthcoming. That was because in UTIAC's view the subsequent letter of 4 June failed to do so. It follows, in my judgment, that both **Rahman** and **EK (Ivory Coast)** are binding authority on the question whether the Secretary of State should, as a matter of fairness, give notice to an applicant for leave to remain or the Tier 4 sponsor that she considers there to be a deficiency in the CAS before making an adverse decision on that basis. There is no such obligation."
28. Not only are the three decisions of the Court of Appeal, **Rahman**, **EK (Ivory Coast)** and **Kaur**, binding on that court, they are decisions of a higher court binding upon this Tribunal. In this appeal it has not been made out that the judge made any arguable legal error based upon the points she was asked to consider when dismissing the appeal under the Immigration Rules. The common law duty of fairness was not found to be engaged on the basis of the facts and the law, such as to place any obligation upon the Secretary of State to consult the appellant. No arguable unfairness in the procedure adopted is made out in relation to the decision on the basis of the material, pleadings and submissions available to the First-tier Tribunal or to this Tribunal today.
29. In relation to Article 8, that has not been the subject of a grant of permission but if one takes as a starting point that there is no arguable legal error in the dismissal of the appeal under the Immigration Rules, having looked at the Article 8 issue myself prior to coming down to hear submissions today, had that been a ground before this Tribunal it would have been found that no arguable legal error material to the decision to dismiss the appeal on human rights grounds has been made out.
30. For these reasons this decision shall stand and the appeal shall fail.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed

Date

Upper Tribunal Judge Hanson