



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/27579/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 12 July 2016

Decision &

Promulgated

On 27 July 2016

Reasons

Before

UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**DEEPKUMAR PANKAJBHAI PATEL
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer

For the Respondent: No Appearance

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellant, a citizen of India born on 11 August 1990, as the appellant herein. The appellant first entered the UK on 16 February 2011 as a student. He was granted leave until 27 August 2012. On 24 August 2012 he applied for leave to remain as a Tier 4 (General) Student. He was granted leave to remain until 28 June 2014 on that basis. On 4 March 2013 he was granted leave to remain until 18 August 2014, again as a Tier 4 (General) Student. An application for further leave to remain on 18

August 2014 was refused on 21 July 2015 and the appellant's appeal against that decision has resulted in the proceedings before the Tribunal.

2. The Secretary of State's decision stated that the appellant in his application of 24 August 2012 had submitted a TOEIC certificate from Educational Testing Service ("ETS") to the Home Office and to his sponsor in order for them to provide him with a Confirmation of Acceptance for Studies (CAS).

3. The respondent stated as follows:

"ETS has a record of your speaking test. Using voice verification software, ETS is able to detect when a single person is undertaking multiple tests. ETS undertook a check of your test and confirmed to the SSHD that there was significant evidence to conclude that your certificate was fraudulently obtained by the use of a proxy test taker. ETS have declared your test to be 'Invalid' due to the aforementioned presence of a proxy tester who sat the test in your place, and the scores have therefore been cancelled by ETS.

On the basis of the information provided to her by ETS, the SSHD is satisfied that your certificate was fraudulently obtained.

As false document(s) have been submitted in relation to your previous application, this application is refused under paragraph 322(2), of the Immigration Rules.

In light of this, the Secretary of State has deemed that refusal is appropriate and is not prepared to exercise discretion in your favour."

4. As the application had been refused under one of the general grounds for refusal the Secretary of State was not satisfied that the appellant met the requirements of paragraph 245ZX(a) of the Immigration Rules.
5. In relation to the appellant's CAS this had been checked on 21 July 2015 but the appellant's sponsor was not listed at that date and therefore the appellant could not receive the required amount of points. The respondent recorded in Section B of the decision letter that the appellant had been informed on 21 July 2015 that the sponsoring college had not been listed as a Tier 4 sponsor at that date and the appellant had been allowed 60 days to obtain a new sponsor and CAS but he had not provided a new CAS within that period.
6. The appellant filed grounds of appeal. He asserted that he met the requirements of paragraph 245ZX(c) of the Immigration Rules and had a valid CAS letter. He stated:

"The appellant will show that meets [sic] the appropriate requirement and does not fall for refusal under the Immigration Rules and on the balance of probabilities the appeal should be allowed. The respondent is respectfully requested to reconsider his [sic] decision."

7. The appeal came before a First-tier Judge on 18 January 2016. The appellant did not appear and was not represented. The judge found that the appellant had been notified of the hearing and had not contacted the Tribunal and was satisfied that the appeal could be dealt with in his absence.
8. The judge noted that the respondent had given the appellant 60 days in which to lodge a valid CAS. However, this had been notified to the appellant on the same date as the refusal of the application. The judge considered that there had been a defect of procedure and the Secretary of State's decision was not in accordance with the law. The matter was sent back to the Secretary of State for a lawful decision.
9. The Secretary of State applied for permission to appeal on the basis that the First-tier Tribunal had failed to deal with both strands of the refusal decision. The judge had not addressed the deception issue at all. Evidence had been provided to support the allegation of deception. Reference was made to the witness statements of Rebecca Collings and Peter Millington and the spreadsheet confirming that the appellant's TOEIC English test was invalid.
10. If the Tribunal had addressed the deception aspect it would have been clear that this was not a case where there were issues of fairness arising. Reference was made to **Patel (India) [2011] UKUT 211**.
11. The appellant did not appear and was not represented before me. There was no explanation for his absence. Notice of the proceedings appeared to have been properly served on the appellant on 21 June 2016. In the premises I find it appropriate to proceed with the hearing in the appellant's absence under Rule 38.
12. Mr Tarlow relied on the grounds of appeal and submitted that the deception allegation had been missed by the First-tier Judge. The deception aspect was the main thrust of the refusal and the judge had simply misjudged that part of the decision. There was a material error of law and I should remake the decision.
13. At the conclusion of the submissions I reserved my decision.
14. This does appear to be a case where the First-tier Judge clearly erred in law. As Mr Tarlow submits the main thrust of the decision was the deception issue which had not been dealt with by the judge. Furthermore the appellant did not raise any challenge to the respondent's contention that he had used deception - I have referred to the grounds of appeal above. On top of that the appellant did not attend the hearing.
15. The case of **Patel**, to which the Secretary of State referred in the grounds of appeal, states that fairness requires that refusal cases should be dealt with in broadly the same way as curtailment cases. In curtailment cases the Home Office policy applied where an applicant was inter alia: "innocent of any practice that led to loss of the sponsorship status" and

the comments about unfairness did not apply where applicant had not been “a bona fide student at the college where he is seeking to extend his stay, or where he has participated in the practices that may have led the college to lose its sponsorship status. ...”

16. As the Tribunal states in paragraph 13 of its decision, the requirements of fairness always depend upon the context.
17. The context of this case was that the respondent alleged deception and put forward evidence to support that conclusion. The grounds of appeal did not directly challenge this allegation. The appellant makes no reference to the issue of deception but simply maintains that his CAS was valid. Furthermore the appellant did not participate in the appeal process at either level and did not attend the hearing before the First-tier Tribunal or before me. Finally, although the appellant has had ample opportunity to lodge further material or obtain a CAS nothing has been done at all.
18. The Secretary of State has made an allegation of deception. This has been supported by the evidence contained in the respondent’s bundle as Mr Tarlow submitted. The burden is on the respondent to make good the allegation of deception. The challenge has gone unrebutted by the appellant, who did not engage in any meaningful way with the appeal proceedings. The burden has clearly been discharged. In the context of this case there was no unfairness in the respondent’s decision-making process.

Notice of Decision

The decision of the First-tier Judge was materially flawed in law. I remake the decision. I allow the appeal of the Secretary of State. The decision of the First-tier Judge is reversed.

Appeal dismissed.

Anonymity

The First-tier Judge made no anonymity order and I make none.

FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed
G Warr, Judge of the Upper Tribunal

Date 26 July 2016