



IAC-FH-CK-V1

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

Appeal Number: IA/40461/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 28th August 2015**

**Decision & Reasons Promulgated
On 3rd September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR HARISHKUMAR KANUBHAI VALAND
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer

For the Respondent: Mr P Saini, Counsel instructed by Shri Venkateshwara Solicitors, Hounslow

DECISION AND REASONS

1. Mr Valand is a citizen of India whose date of birth is recorded as 7th June 1981. He first arrived in the United Kingdom in 2009 and then remained with leave as a student until 7th April 2014. On 4th April 2014 he made application for leave to remain as a Tier 4 (General) Student Migrant under the points-based system. On 26th September 2014, however, a decision was made to refuse the application and to remove Mr Valand from the United Kingdom. He appealed and eventually the matter was placed before Judge of the First-tier Tribunal Borsada. The matter was dealt with

“on the papers”. The Decision and Reasons were promulgated on 9th February 2015.

2. In this case the Secretary of State refused the application having regard to paragraph 245ZX(c) and (d) with reference to paragraph 116(c) of Appendix A because although Mr Valand had submitted a valid CAS with the application by the time the CAS came to be considered on 25th September 2014 the relevant college, namely the Sponsor, had withdrawn the CAS and without a CAS the application was deemed to be unsatisfactory and that it did not meet the requirements of the Rules.
3. Mr Valand submitted in his appeal that there was inherent unfairness in the case because the Secretary of State did not inform him that the CAS had been withdrawn by the college and neither did the college. It was submitted on behalf of Mr Valand that in the circumstances he, Mr Valand, should have been granted 60 days by the Secretary of State to find a new Sponsor and in any event there had been a failure to consider Article 8 of the ECHR.
4. Judge Borsada in a very short Statement of Reasons noted that there was no factual dispute in the case; the CAS was not valid when it was considered by the Secretary of State. However Judge Borsada accepted also having regard to Home Office guidance that Mr Valand should have been informed and been granted 60 days to find a new CAS. There was no evidence, he found, that the Secretary of State had given Mr Valand that opportunity. In those circumstances Judge Borsada found that the Secretary of State had not acted in accordance with her own policy and allowed the appeal to the extent that it was not in accordance with the law.
5. Not content with that decision by Notice dated 13th February 2015 the Secretary of State made application for permission to appeal to the Upper Tribunal. The grounds were as follows:

“Background

1. The Appellant sought leave to remain as a Tier 4 (General) Student under the points-based system (PBS).

Ground One: failure to give adequate reasons for findings on a material matter

2. The Tribunal concluded that the matter should be remitted to the Respondent and that the Appellant should be given 60 days to regularise his stay or leave the United Kingdom.
3. It is respectfully submitted that, in allowing the appeal, the Tribunal has erred in law. It is not clear why the Tribunal finds at paragraph 7 that the Appellant should have been given the opportunity to have 60 days to find a new Sponsor. He should not have been.
4. The Appellant was not disadvantaged by matters of fairness falling within the remit of **Patel (India) [2011] UKUT 211** and not, therefore, entitled to 60 days’ leave. That is because the Appellant’s CAS was no longer valid after he submitted it because it was withdrawn

by his Sponsor, who had not informed him. It was not because the UK Border Agency had suspended or revoked the Sponsor's licence and had not informed him. The matter rests between the Appellant and his Sponsor.

5. Permission to appeal is respectfully sought, an oral hearing is requested.”
6. On 25th March 2015 Designated Judge of the First-tier Tribunal Macdonald granted permission on the basis of the grounds. Thus the matter comes before me.
7. For the Respondent, Mr Saini placed before me the guidance in the case of **Kaur (Patel fairness: respondent's policy) India [2013] UKUT 00344**. The headnote reads:
 - “(1) The Respondent has produced a policy, which is intended to give effect to the principles of common law fairness identified in **Patel (relocation [I think that should be revocation] of sponsor licence - fairness) [2011] UKUT 00211 (IAC)**.
 - (2) In essence, the policy provides that, in cases of potential discretionary refusal under paragraph 322 of the Immigration Rules, caseworkers should follow the '**Patel**' process. Where this is not done, the resulting decision will not be in accordance with the law.”
8. Helpfully the case of **Kaur** has as an annex a copy of the relevant part of the guidance upon which reliance is placed by Mr Saini. The policy in fact relates to refusals under paragraph 322 but the application was one that was made in time and it is the first paragraph of three upon which the reliance is placed. I set out the relevant parts of the policy below.
 - “(1) As with all applications the caseworker will have followed the usual procedures for risk profile, verification checks, standard checks, eligibility checks and identity checks and should be in a position to substantively consider the application.

If, during the course of these checks, it transpires that the application will fall to be refused under 322(1A) (false representations, false documents or information submitted in relation to the application, etc) then the case should be refused outright on this basis. As 322(1A) is a mandatory ground for refusing an application, it would not be appropriate to provide the opportunity for the applicant to vary the grounds of their application.

If the application falls to be refused under 322(2) to 322(12), then as full consideration of the application is required then caseworkers should proceed in the way set out below.

The caseworker should first of all check whether or not the application was submitted prior to the expiry of the applicant's leave to enter or remain.

If the application was submitted after the expiry of the applicant's leave (out of time) then the caseworker should proceed to step 2.

If the application was submitted before the expiry of the applicant's leave (in time) then the caseworker should proceed to step 3.”

It was common ground that the application in this case was made before the expiry of the applicant's leave and so it is paragraph or step 3 that applies.

- “3. 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 of the required documents to show that they meet the requirements of the Immigration Rules.

...”

9. Mr Saini then took me to the case of **Patel (revocation of sponsor licence - fairness) India [2011] UKUT 00211**. The headnote at (2) reads:

“Where a Sponsor licence has been revoked by the Secretary of State during an application for variation of leave and the applicant is both unaware of the revocation and not party to any reason why the licence has been revoked, the Secretary of State should afford an applicant a reasonable opportunity to vary the application by identifying a new Sponsor before the application is determined.”

Clearly that part of the subheading relates only to circumstances in which it is the Secretary of State that has taken the step being objected to but Mr Saini suggested that I ought to look also to paragraphs 21 and 22 of the substantive judgment. That reads as follows:

- “21. If this is correct it follows that not only will any fresh application made after a refusal not be one that can be considered in accordance with the Immigration Rules, it is also not one that can be the subject of an appeal to this Tribunal because it is made by someone who has no leave to remain. Moreover, the evidence in this and other cases that have come before the Tribunal on the same point indicates that responsible Sponsors are unwilling to give unconditional sponsorship letters to students who would otherwise qualify for admission for the course under offer if they have no leave to remain. We accept that in some cases Sponsors may be unwilling to issue such documentation on a misapprehension of whether a person has leave pursuant to Section 3C of the Immigration Act 1971. We take this opportunity to emphasise that a person with Section 3C leave who has an in time application for an extension of leave under consideration may vary that application by substituting a new college Sponsor and sponsorship letters need therefore not be contingent on the outcome of the application.

22. Where the applicant is both innocent of any practice that led to loss of the sponsorship status and ignorant of the fact of such loss of status, it seems to us that common law fairness and the principle of treating

applicants equally mean that each should have an equal opportunity to vary their application by affording them a reasonable time with which to find a substitute college on which to base their application for an extension of stay to obtain the relevant qualification. In the curtailment cases, express Home Office policy is to afford 60 days for such application to be made.

23. Although we accept that there is no such policy for refusal cases, fairness requires that such cases be treated in broadly the same way. The applicant must be given an equal opportunity before refusal of application to amend it in the way we have described. This was clearly not done in this case. The Home Office knew that it had suspended the college in January 2010 but no one else did. The applicant could not have known that subsequently the college's status as an approved Sponsor was revoked before his application for an extension of stay was decided."
10. Mr Saini relied only on paragraphs 21 and 22 but they must be read in the context of the decision as a whole and that is why I have added paragraph 23 because the case of **Patel** was concerned with a situation in which it was the Secretary of State that had revoked the licence.
11. I indicated very early on in the appeal to Mr Saini having heard his submissions that the authorities to which I was being referred were cases in which it was the Secretary of State that had made the decision rather than as in this case, the Sponsor. Having heard all of the submissions made by Mr Saini I informed Mr Wilding that it was not necessary for me to hear from him.
12. It is clear that the policy upon which Mr Saini relies applies not to the circumstances which appertain in this appeal. The first paragraph under the policy at 3 cannot be read in isolation of the remaining parts. It is clear that if a caseworker is to write to an applicant using form ICD4500 in conformity with the policy explaining that their previous Sponsor has surrendered their licence or had their licence revoked that is a very different set of circumstances to one in which the Sponsor itself has revoked the CAS. On the facts of this case there was no unfairness by the Secretary of State. If there was any unfairness at all it was on the part of the college. That is not a matter for which the Secretary of State can be held responsible. To allow an appeal to succeed on the basis upon which Mr Saini suggests is open to abuse. A CAS may be revoked for good reason quite independent of any decision taken by the Secretary of State. It may be, I do not know, that the applicant, Mr Valand, did not attend that college. He said in his evidence before the First-tier Tribunal by way of written statement that he did not know the reason why the CAS had been revoked but if he is to suggest that there has been unfairness then in my judgment he must show that the decision was material, in other words were the reason why the CAS had been revoked been known it would have made a material difference. I am far from saying, however, that that would have been a sufficient basis for allowing the appeal in the First-tier Tribunal. I simply refer to the argument as advanced by Mr Saini, who put

forward his submissions on the basis of fairness generally and in relation to the guidance.

13. I am reinforced in my view that there is considerable merit in the Secretary of State's grounds that by reference to the facts of the case of **EK (Ivory Coast) -v- Secretary of State for the Home Department [2014] EWCA Civ 1517**. At paragraph 24 there is a discussion on that case. It reads as follows:

- "24. The position in which the Appellant has 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 of 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 which had arisen as a result of her first chosen college, Bliss 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, St Stephen's 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 judgment, 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 actions and omissions by St Stephen's. 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.
26. The Secretary of State accepts, correctly, that the Immigration Rules do not exclude the general public law duty to act fairly which rests upon the Secretary of State in exercising her functions: see, e.g., **Alam -v- Secretary of State for the Home Department [2012] EWCA Civ 960**, [44]. The question, therefore, is whether that duty imposed an obligation on the Secretary of State, when she saw that the CAS letter on which the Appellant's application for leave to remain was based had been withdrawn, to adjourn any decision on the application to give the Appellant notice of the problem and an opportunity to rectify it. In my view, it did not.
27. It is well-established that the precise content of the duty to act fairly varies according to the particular decision-making context in which it falls to be applied. I refer to the classic statement by Lord Mustill in a case concerning the procedure to be followed by the Secretary of State in setting tariff periods of mandatory imprisonment for prisoners serving life sentences, **R -v- Secretary of State for the Home Department, ex p. Doody [1994] 1 AC 531**, at 560D - G (in particular, principles (2), (3) and (4)):

'What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often cited authorities in which the courts have explained what is

essentially an intuitive judgment. They are far too well-known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) 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. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very 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. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'

See also **Lloyd -v- McMahon** [\[1987\] AC 625](#), 702 - 703 per Lord Bridge:

'... The so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.'

28. The points-based system is intended to simplify the procedure for applying for leave to enter or remain in the United Kingdom in certain classes of case, such as economic migrants and students. This is to enable the Secretary of State to process high volumes of applications in a fair and reasonably expeditious manner, according to clear objective criteria. This is in the interests of all applicants. It also assists applicants to know what evidence they have to submit in support of an application.
29. As Sullivan LJ observed in **Alam**, it is an inherent feature of the points-based system that it 'puts a premium on predictability and certainty at the expense of discretion'."

14. Then at paragraph 32:

"In my judgment, acceptance of the Appellant's submission that the general duty of fairness required the Secretary of State to postpone making a

decision on her application in order to raise with her the cancellation of her CAS letter would undermine the benefits associated with the points-based system in a significant and inappropriate way. It may often be the case that a CAS letter is withdrawn between the filing of an application with the Secretary of State and the making of a decision on that application for reasons to do with the student (such as failing to attend the course or failing to pay the tuition fees), and in relation to which it would not be appropriate to grant leave to enter or remain. There is no way in which the Secretary of State can tell whether withdrawal of a CAS letter reflects that type of underlying situation or a situation in which some administrative error has occurred on the part of the sponsoring college in which the applicant is in no way implicated. It would be a serious intrusion upon the intended straightforward and relatively automatic operation of decision-making by the Secretary of State under the points-based system if in every case of withdrawal of a CAS letter she had to make enquiries and delay making a decision.”

15. In my judgment for the reasons I have stated the guidance to which Mr Saini made reference and upon which he relies has no application in this case. When one reads point 3 as a whole it is clear that it does not relate to a circumstance in which the CAS has been withdrawn by the college even if it is not known to the applicant. As for the question of fairness I can do no better than refer simply to the guidance in **EK**.
16. In the circumstances the Secretary of State has made out her grounds and the judge in the First-tier Tribunal clearly erred. The appeal should not have been allowed. In the circumstances I shall set the decision aside and remake it such that the appeal to the First-tier Tribunal is to be dismissed. The applicant did not produce a valid CAS at the time of the decision. The Secretary of State was right to refuse the matter. There was no cross-appeal and no suggestion that I should deal with any Article 8 matters.

Notice of Decision

The appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal is set aside and remade such that the appeal is dismissed.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Zucker