



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA109422014

THE IMMIGRATION ACTS

Heard at Field House  
On 29 March 2016

Decision & Reasons Promulgated  
On 25 May 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MANPREET SINGH  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Swain, Counsel, instructed by Eagles Solicitors  
For the Respondent: Mr E Tufan, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of India, date of birth 17 July 1990, appealed against the Respondent's decisions dated 24 January 2014, to refuse an application for leave to

remain as a Tier 4 (General) Student Migrant under the points-based system and to make removal directions with reference to Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. Permission to appeal was given by FtTJ Hollingworth on 21 January 2015. Directions were given on 16 February 2015. On 1 April 2015 the error of law hearing before me went part heard.
3. A resumed hearing on 15 September 2015 was not concluded because the respondent raised new issues including a claimed Notice of Curtailment (20/6/2012) and s.10 removal directions 28 July 2014 not previously raised at the 1 April 2015 hearing. I gave directions for documents to be served by the Respondent on the Appellant and for any reply by the Appellant by 6 November 2015. There was non-compliance with my directions by the Respondent: No explanation was given. A renewed hearing was listed for 26 November 2015 but was postponed to 29 March 2016.
4. The basis of the refusal was that no points were awarded for "attributes" because a Confirmation of Acceptance for Studies (CAS) which the Appellant had used with reference number E4G6DX4C13L0T5 had been withdrawn by the sponsoring college; known as Essex College. It was clear from the reasons for refusal that following the application enquiries had been made by the Home Office UK Visas and Immigration in Sheffield of the college and had been told by the college that the Appellant had

"stopped attending the course despite several warnings".

The Respondent concluded:-

"As such you are not in possession of a valid CAS and so you have not met the requirements of the Rules."

5. It followed, in the absence of a valid CAS, no points were awarded for maintenance. An appeal was made against those reasons and the grounds of appeal show that the

Appellant challenged the allegation reported to the Respondent by Essex College in that he stated

“I enrolled at Essex College to pursue my further studies, where I paid my first year’s fees in full before applying for my visa. Later when I started studying the college started asking for more money in the form of next year’s fees which was not mentioned earlier. When I refused to do so and asked them to report the issue to UKBA they reported me instead and asked me not to attend the college. I want to raise this issue as Essex College is giving all its students very hard time. I kindly request you to look at my case with discretion and allow me to study further. Also take steps where other students don't become victim of these situations.”

Those grounds are dated somewhere around 28 January 2014. The Appellant did not know what Essex College had told the Respondent nor that the CAS letter had been withdrawn.

6. The case file does not contain any notice of hearing or copy of notice of hearing nor any returned copy by the Post Office of the notice of hearing for that before First-tier Tribunal Judge Dineen (the judge) on 20 October 2014 : On what basis he thought the Notice of Hearing was given I cannot tell.
7. The judge in his decision promulgated on 4 November 2014 recorded the basis of the Secretary of State's refusal, the fact of an appeal being made and stated that the Appellant had not appeared at the hearing, did not give any adequate explanation for the absence of a valid CAS and he did not file any evidence or submissions. The judge was satisfied that the Appellant had been notified of the hearing and concluded that the interests of justice required the hearing to proceed. Inevitably, given the absence of evidence of a CAS the appeal would fail. The judge did not for understandable reasons address the grounds of appeal.

8. The first challenge to the decision of the judge was procedural unfairness occasioned by the Appellant not being informed of the hearing by his representative who was said to act for him and yet had no active involvement therefore in the preparation of the necessary case that would have been expected nor the notice from the IAC.
9. In a witness statement, dated 9 March 2015, the Appellant set out something of the history of the matter to which I will return.
10. When permission was granted to appeal to the Upper Tribunal, the Secretary of State made a Rule 24 response on 4 February 2015 and essentially raised three points. First, the judge appropriately addressed the issue. Secondly, in the absence of any corroborative evidence that the Appellant's representative did not advise him of a hearing, the Secretary of State did not accept that there was any basis for an appeal. Thirdly, the judge made no error of law.
11. Given the lack of any documentation relating to the service of the notice of hearing for 20 October 2014, its absence from the case file and the absence of any endorsement on the case file as to a notice of hearing having been sent out, I only have the statement of the Appellant who stated he did not know about the hearing: The Appellant was in contact with someone known as Karan, who is not a solicitor and may or may not be qualified and recognised by OISC. Either way the Appellant's case was that he was not aware of what was going on *vis-à-vis* his appeal and he did not receive correspondence from the Tribunal. In the circumstances it was unclear what if any notice was ever given to Karan and also there was no evidence of the Appellant accepting receipt of relevant correspondence from the IAC.
12. It is difficult to see what evidence the Appellant could produce to corroborate a failure to receive a notice of hearing. Mr Tufan relied upon the case of BT (Nepal) [2004] UKIAT 00311, in particular the general expectation, explained by the UKIAT as it then was, that is not good enough just to criticise solicitors, rather the point should be made to them and they should be offered the opportunity to respond.

Such was the means by which one can be satisfied, assuming they reply to such correspondence, that they had failed to act as claimed by a disappointed Appellant.

13. The general proposition in BT holds good. The question here is not so much should that proposition be applied but the circumstances where Karan was not OISC approved representative. If any firm existed or still exist, is extremely difficult to say. Doing the best I can with the material I have got, and where the Secretary of State has not challenged the Appellant's witness statement in substance or at all by way of submissions, I am satisfied that there is at least evidence to show first, that there is no correspondence with the Tribunal from Karan about the matter and there was no correspondence alerting the Tribunal to the fact that Karan was not acting or not qualified to act or otherwise unable to act at the material times.
14. I am satisfied that notice of the date, time and place of hearing before First-tier Tribunal Judge Dineen was not given to or received by the Appellant and there is nothing to indicate that anything was sent by the Tribunal to the Appellant or Karan concerning the hearing on that date. If a part of the case file has become lost then that may explain the absence of material but I see no reason in the light of all the other material which is contained on the file to assume that a few pages have somehow or other become lost.
15. In those circumstances therefore I was satisfied that there was a procedural error of law and that on this basis the Original Tribunal's decision cannot stand.
16. The Secretary of State at the resumed hearing on 15 September 2015 sought to raise two immigration decisions, not previously raised relating to:- first, a claimed decision to Curtail the Appellant's leave; and secondly, a decision to make Removal Directions with reference to Section 10 of the IAA 1969: These took the Appellant and his representatives by surprise and were strongly disputed as ever happening. These matters having been raised by the Senior Presenting Officer, Mr Kandola, but without any evidence being properly served led to the hearing being adjourned: A

previous hearing having been adjourned because of failure to comply with directions by the Respondent. Nevertheless I gave the opportunity to the Respondent, with directions given at the hearing, to provide the evidence of the decisions; with evidence of any address provided for service on the Appellant and any evidence the decisions of 20 June 2012 and 28 July 2014 were actually sent out to the Appellant.

17. I wish to be entirely clear this was no criticism of Mr Tufan's conduct of the hearing but it is plain that there was, from September 2015, ample opportunity for the Secretary of State to either comply with the directions or to notify the Tribunal why directions were not being complied with. Mr Tufan was only very recently in receipt of the relevant files and did the best he could in the short time available to acquire some of the documents but even these did not fully or effectively meet the directions given. He therefore has no evidence, other than the notices themselves, which are dated, to show that there has been the service of them, let alone where the documents were sent. The Respondent has no post book or other paper or electronic record maintained to record such matters. I note the abject and unexplained failures of the Secretary of State, bearing in mind two adjournments amounting to just about a year in total, have delayed the consideration of this appeal.
18. Quite how it can be said that the Respondent was properly either assisting the Tribunal at meeting the overriding objective or represented the cooperation expected of the Respondent to an appeal, I do not know. Seemingly no explanation will ever be forthcoming about those repeated failures and unnecessary delays.
19. Thus whether or not notice was ever given to the Curtailment and Removal Directions is unknown. Yet a further issue was then raised at the hearing that the Appellant had been involved in falsely participating in English language examination referred to as "ETS". These wholly new points did not feature in the Reasons for Refusal Letter of 24 January 2014. There is no explanation why if they were relevant, they were not referred to at the material time.

20. I find they did not form a consideration before FtT Judge Dineen, I do not find, those matters not being referred to by the judge, represented any error of law. They were simply an ad hoc approach during the conduct of the appeal by another Senior Presenting Officer to raise new issues. In the absence of the particulars which I directed to be provided I am not satisfied that it would be fair to consider them now nor would it meet the overriding objective of the Procedure Rules, nor to do so would it be anything other than acquiescence in a lamentable failure by the Respondent to comply with the directions and belatedly raise a new issue.
21. Accordingly, I indicated, having heard argument, that I would not proceed to hear this appeal based upon the Curtailment, Removal Directions or ETS issues, nor had any permission been given on such grounds, nor was there any application to amend the grounds made to me nor were they raised with the Judge nor their relevance to the appeal's outcome or demonstrate the judge's decision would have been to dismiss the appeal in any event. It seemed to me that if those matters are to be pursued they will have to be when a further decision of the Secretary of State is made.
22. Also relied upon on by the Appellant was the failure by the Respondent to take steps, as recorded in the immigration decision, to make proper enquiries of Essex College and/or the Appellant about the CAS being withdrawn. It was clear that in seeking to streamline and speed up PBS decisions that the Secretary of State has done much to make that process faster and has introduced a CAS Checking Service. The Secretary of State has also in the relevant period been active in reviewing colleges, which have the status to issue CAS letters, and has taken active steps against colleges by way of suspending or removing their registration.
23. The case of EK (Ivory Coast) [2014] EWCA Civ 1517 Mr Tufan regarded as a "killer" point: The case addressed the question of the consequence of there being no CAS letter or any CAS letter being withdrawn, for an applicant. EK confirmed that the

absence of CAS letter is essentially fatal to any appeal and the obvious recourse is for an applicant to remove from the UK and to apply again, to return to study.

24. However what was clear from EK was that fairness required a Secretary of State to give an applicant an opportunity to address grounds for refusal which he did not know and could not have known, failing which, as the Tribunal said, the resulting decision may be set aside on appeal as contrary to law. On the basis of that principle an Appellant may be given notice of a problem with a CAS letter or a college's registration and have an opportunity to deal with it.
25. At paragraphs 41 and 42 of EK, Lord Justice Sales recognised, as it was put, that there may be circumstances, matters which are fact sensitive and would have to be determined, so that notwithstanding there being some appropriate information given to the Secretary of State about problems with the application, there may be circumstances where it is appropriate for an applicant to be informed of a negative reply and to be asked for comments which addressed the adequacy of a college's response giving rise to the need for some further enquiry by the Secretary of State.
26. Lord Justice Floyd at paragraphs 45 to 51 of EK concluded that there may be circumstances where the Secretary of State gives an opportunity to an applicant to comment on information arising. The decision of Lord Justice Briggs at paragraph 59 of EK does not essentially demur from that but plainly he was not encouraging the generality of reopening such applications absent of there being a proper reason to do so.
27. There was no doubt in this case, as the Secretary of State's Notice of Immigration Decision confirmed, an enquiry was made by the Respondent but she did not inform the Appellant of the outcome or college's reply.
28. The Appellant lodged evidence in support of the appeal, which I have already referred to, in which he challenged the reasons the Essex College gave for the



withdrawal of the CAS letter. He challenged the claimed failure to attend Essex College by him and the absence of any evidence of his failure to attend: For example by way of college records or confirmation of the number of days that the Appellant had 'failed' to attend the college. Therefore it was wholly unclear on his unchallenged version of the facts, on what basis the college had proper reasons to withdraw the CAS. The Secretary of State, which was unchallenged, gave no notice of this matter to the Appellant at any stage before the decision of the Secretary of State; which was unfair, argued Mr Swain.

29. Also relied upon by Mr Swain, in his detailed and evidently correct summary of the history of the case, were extracts from published guidance provided by the Secretary of State to registered sponsor colleges. The Secretary of State advised CAS Sponsors on what basis they may cancel a CAS. It was argued by Mr Swain, if the Secretary of State had been following her own guidance, considering the college's response in cancelling or withdrawal of the Appellant's CAS, as the guidance suggests, it is apparent that nothing was done as expected to inform the Appellant. Rather the Respondent's decision was taken simply without further ado; assuming there was a proper basis for the college to have withdrawn the CAS: Even though there was nothing to suggest apparently that the applicant student had been given notification of it by the College. In addition the Secretary of State's direction to CAS Sponsors is that if a CAS is withdrawn the college must notify the student. (My emphasis) Even if "must" is not mandatory, it is clearly relevant to fairness.
30. Mr Tufan says "well that is as well may be but the fact is the complaint, the Appellant has, is with his college". They were the ones who withdrew the CAS. They are the ones responsible and "they have left him in the position where he cannot successfully apply to remain". In most respects I agree with Mr Tufan but where I disagree with him for it was plain the Secretary of State had not ascertained and certainly did not say so if she did, that any notice of this has been given to the Appellant in advance of the Respondent's decision.. On the contrary, the Appellant's unchallenged evidence insofar as he can prove a negative, was that he was not told.

He thinks to the best of his knowledge that the withdrawal of the CAS was motivated by the greed of the College seeking to obtain more money in advance than that which they were entitled to or had been agreed. The fact that the college has apparently gone out of business, I disregard as confirmatory of that, but rather, I accept the unchallenged evidence of the Appellant of what happened to him.

31. In these circumstances I am satisfied, were it necessary to do so, that the Secretary of State in failing to follow her published guidance and/or take the opportunity to notify the Appellant in the factual circumstances which I have set out above amounted to an error of law, in the Secretary of State's decision on attributes.
32. I do not criticise the judge, but it demonstrated that the whole approach to the Secretary of State's decision, as expressed through the Notice of Immigration Decision, was flawed in law by failing to follow the published guidance and/or unfair in the failure to inform the Appellant as contemplated in EK.
33. I am satisfied the Original Tribunal's decision cannot stand and the Respondent's decision was not in accordance with the law. The appropriate course is for this matter to be returned to the Secretary of State to make a decision in accordance with the law.
34. Further, whilst I make no directions about it, it is evident that the Secretary of State will, in looking at this matter, need to give the Appellant some time to find a college and see whether he can obtain a CAS letter bearing in mind he now has no status to remain and make a further application. At the present time almost inevitably a college will be unwilling to ascribe a CAS letter to the Appellant who has no leave to remain: This problem will be a matter for the Secretary of State before reviewing the decision made, there being no sponsor college in existence, no possibility to take up that CAS letter again. The Appellant may need some leave or time to obtain another CAS. It is for the Secretary of State on what basis she wishes to engage with a proper consideration of the application.

35. No anonymity order is made.

**Decision**

35. The Original Tribunal decision can not stand. The appeal is allowed to the extent it is returned to the Secretary of State to make a decision in accordance with the law.

**FEE AWARD**

The Appellant has incurred significant costs. I would propose to make a fee award in the sum of £140.

Signed

Date 25 May 2016

Deputy Upper Tribunal Judge Davey