



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

Appeal Number: IA/00158/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 8 December 2017**

**Decision & Reasons  
promulgated  
On 18 December 2017**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**RAVIKUMAR RAKESHKUMAR BRAHMBHATT**  
(anonymity direction not made)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Swain instructed by Eagles solicitors  
For the Respondent: Miss Vijiwala Senior Home Office Presenting Officer.

**ERROR OF LAW FINDING AND REASONS**

1. This is an appeal against a decision of First-tier Tribunal Judge Herlihy, promulgated on 12 January 2017, in which the Judge dismissed the appeal.

## **Background**

2. The appellant, a national of India born on 22 September 1986, appealed against a decision to refuse an application dated 28 July 2014 for a variation of his leave to remain as a Tier 4 (General) Student Migrant under paragraph 245ZX of the Immigration Rules.
3. The respondent refused the application on the basis the appellant had failed to submit a valid CAS leading to a refusal pursuant to paragraph 117 of Appendix A of the Rules and under paragraph 245 ZX(c), and unlike mandatory grounds by reference to paragraph 322 (1A).
4. Having considered the matter with the required degree of anxious scrutiny the Judge sets out findings of fact in [7] of the decision under challenge which can be summarised in the following terms:

- i. That a Document Verification Report relied upon by the respondent in support of additional ground of refusal pursuant to paragraph 322(1A) is incomplete and did not provide to a high degree of proof that a certificate from LEBC relied upon by the appellant is false [7.6].
- ii. At [7.7] and [7.8]:

7.7 Paragraph 322(1A) is mandatory ground of refusal. In considering the totality of the evidence before me, I find that the Respondent has not established that the Appellant did submit a false document. I therefore find that the Respondent has not established that the documents submitted with the application was false and I am not satisfied that the Respondent has established that the assertion that the Appellant submitted a false document is supported by the evidence.

7.8 The Respondent has also refused the Appellant's application for further leave to remain as a Tier 4 student because the Appellant failed to submit a valid CAS. It is not disputed by the Appellant or his Representative that he failed to submit a valid CAS; and there has been no challenge to the finding by the Respondent that a valid CAS was not submitted by the Appellant. The requirement to provide a valid CAS is clearly set out in the Immigration Rules and the Appellant cannot comply and thus the appeal falls to be dismissed.

5. The Judge finds that the appellant is unable to satisfy the requirements of paragraph 245ZX(d) of the Rules.
6. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal on 20 September 2017 on the basis:

"It is arguable that the Judge has set out an insufficient analysis set against the matrix of findings of fact in relation to the issue of the application of the principle of fairness, given the extent of the information provided to the Respondent by or on behalf of the Appellant and given the response of the Respondent. It is arguable that the Judge has not dealt sufficiently with the relationship between the nature and extent of the duty to act fairly set against the facts of the case.

## **Error of law**

7. The changes introduced by the Points-based System in relation to student applications are to be found at Tier 4. A fundamental change introduced by the new system was a transfer of the responsibility for administering the system to the individual colleges providing sponsorship to prospective students. The respondent produces comprehensive guidance both with the application process and information produced on the Internet relating to Tier 4 applications, setting out the responsibilities and obligations of both a Tier 4 sponsor and an applicant for leave in this capacity.
8. In relation to the nature of the documentation an applicant is required to file the Tier 4 guidance provides the following:

### **Documents you will need to send with your application**

11. To claim points, you must send the documents required by the Immigration Rules that are applicable to you. We will only accept the documents specified in the Immigration Rules as evidence.
12. If you qualify for our differentiation arrangements you will normally be required to provide fewer evidential documents. If you are exempted from having to provide a document - or a group of documents - under our differentiation arrangements, this will be specifically stated in this guidance. We may request these or other documents from you.
13. The Home Office will refuse any application where a request is made for the supporting documents to be submitted, if the specified documents are not provided to us within the period specified in that request.
14. You qualify for our differentiation arrangements if:
  - o you are sponsored by a sponsor with Tier 4 Sponsor status; and
  - o you are applying for entry clearance in your country of nationality or for leave to remain in the UK; and
  - o you are a national of one of one of the countries listed at Appendix H of the Immigration Rules. You can check this at: [www.gov.uk/government/collections/immigration-rules](http://www.gov.uk/government/collections/immigration-rules)

We will confirm your nationality using your passport.
15. Documents must be issued by an authorised official of the issuing organisation and be:
  - o original (unless we say otherwise); and
  - o on the official letter-headed paper or stationery of the organisation.
16. If you are in the UK, where a document is not in English or Welsh, the original must be accompanied by a fully certified translation by a professional translator/translation company. This translation must include:
  - o details of the translator/translation company's credentials; and

o confirmation that it is an accurate translation of the original document; and the translator/translation company's contact details.

It must also be dated and include the original signature of the translator or an authorised official of the translation company.

17. If you are outside the UK, where a document is not in English or Welsh, the original must be accompanied by a full translation that can be independently verified by the Home Office. The original translation must contain confirmation from the translator/translation company that it is an accurate translation of the original document, the date of the translation, the translator/an authorised official of the translation company's full name and signature, and the translator/translation company's contact details.
18. Where a translation of an overseas qualification or award certificate is submitted, we will not take it as a direct translation of the academic level of that award. We will always use UK NARIC to assess the equivalency of overseas qualifications.
19. If you have submitted specified documents in which:
  - o some of the documents within a sequence have been omitted (for example, if one page from a bank statement is missing) and the documents marking the beginning and end of that sequence have been provided; or
  - o a document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or
  - o a document is a copy and not an original document; or
  - o a document does not contain all of the specified information.

we may contact you and/or your representative in writing, and request the correct documents. We will only make this request once.

20. We will not ask for additional documents where:
  - o you have not provided a specified document at all; or
  - o requesting the missing or correct document will not lead to your application being granted because it will be refused for other reasons
21. The requested documents must be received at the address specified in the request within 10 working days of the date of the request. Working day means any day other than Saturday or Sunday, a bank holiday, Christmas Day or Good Friday.
22. If you have submitted a specified document that:
  - o in the wrong format, or
  - o is a copy and not an original document, or
  - o does not contain all of the specified information, but the missing information is verifiable from:
    - other documents submitted with the application,
    - the website of the organisation which issued the document, or
    - the website of the appropriate regulatory body;

we may approve your application exceptionally if we are satisfied that the specified documents are genuine and that you meet all the other

requirements. We reserve the right to request the original documents in the correct format and to refuse applications if the specified documents are not provided.

9. The appellant asserts unfairness in that he claims to have informed the respondent prior to the refusal that he had been unable to obtain a valid CAS and requested details from the respondent of alternative colleges which might have been able to issue him with a CAS.
10. As stated above, the obligation to establish an entitlement to a grant of leave as a Tier 4 migrant falls upon the applicant. The Secretary of State does not purport to be able to offer advice in relation to colleges able to offer courses at any specific time. The list of Tier 4 sponsors is a public document available to all, including the appellant. Not only is it not made out there is a legal obligation upon the respondent to provide a list of colleges who may be able to assist an individual student, depending upon their personal circumstances and chosen course, it is not made out that failing to provide such information makes any resultant decision arguably unfair.
11. The fact the appellant might have been able to secure admission at a particular college but that that college refused to offer a CAS as they had no vacant or unassigned CAS to assign to him, is not a matter for which the respondent is arguably responsible. A Tier 4 sponsor will decide how many places on an individual course they are willing to offer to prospective students and then, no doubt, offer those to applicants who they feel able to benefit from their course and who have established that they can satisfy any applicable entry criteria. A statement by the prospective college to the appellant that they have no unassigned CAS is a statement that they have no vacancies on the course which the appellant wishes to study. There is no obligation upon a Tier 4 sponsor to produce an infinite number of courses solely to meet demand, as to do so may have serious consequences on the ability of the sponsor to satisfy their Tier 4 obligations.
12. The decision of other prospective colleges the appellant claims told him they would not accept him as he did not have a valid visa, is only a reflection of the accepted legal position. A person who is not a British national is not entitled to study within the United Kingdom unless they have been given permission. A person who provides a course of study to an individual without ascertaining that that person has legal status to remain in the United Kingdom as a student may open themselves up to action being taken by the Home Office by way of a revocation of their sponsors licence or a financial penalty. A decision by a college not to issue the applicant with a CAS until he was able to show he had a lawful right to study in the United Kingdom appears to be a perfectly logical and lawful decision.
13. The applicant asserts the respondent failed to respond to correspondence giving rise to arguable unfairness. In relation to a letter dated 11 September 2016, referred to at some length by Mr Swain in his submissions, Miss Vijiwala advised the Upper Tribunal that a search of the respondent's case management system during the course of preparing for this hearing did not disclose any entry

indicating the respondent had in fact received such correspondence. If a letter had not been received it cannot be arguably unfair for the alleged recipient not to have responded to it.

14. When this matter was put to Mr Swain in his reply he confirmed that the appellant was unable to provide any evidence by way of recorded delivery slips to establish that the letter had been posted and, although a copy of the alleged letter was handed up by Mr Swain, that document is undated. The appellant therefore fails to establish that the letter of 11 September was in fact sent to the respondent as alleged.
15. Even if the letter was posted and the respondent failed to respond to it prior to the refusal, the applicant fails to make out a breach of the common law duty of fairness sufficient to establish arguable legal error in the decision of the Judge.
16. The appellant asserts at [13] of the application for permission to appeal that the decision to refuse the Tier 4 application on the basis that a CAS had not been provided was unfair and therefore unlawful as the respondent was duty-bound to at least provide the appellant with further opportunity to find a CAS having been notified of UK Business College's inability to provide a CAS despite the earlier conditional offer. As stated above, the appellant has failed to establish any legal obligation upon the respondent. The appellant fails to establish what is meant by the term "duty-bound" which seems to infer a legally binding obligation. The respondent in the above guidance indicates that she will only ask once for additional documentation and may not ask at all if the document has not been provided. The appellant was fully aware in this case of the fact there was no CAS and it is not made out the has been a breach of published policy or any lawful obligation if the respondent does not give more than one opportunity to an applicant to remedy a defect in their application, or no further obligation if that is in accordance with her published policy. Such policy has not been found to be unlawful.
17. There is no arguable merit in an 'evidential flexibility' argument for two reasons; firstly, that this is a case involving a missing document which the appellant failed to provide and secondly because this is a case in which, in light of the refusal pursuant to paragraph 322(1A), the decision-maker was entitled to find it was a matter that would be refused in any event. The fact the Judge found that the mandatory ground of refusal had not been made out has no retrospective effect when considering the lawfulness or fairness of the decision at the date it was made, which is the relevant date when one considers the merits of a challenge to a refusal in relation to an application of this nature.
18. The submission on the respondent's behalf that the credibility of the Points-based System requires a strict interpretation of the requirements set out in the Rules that an individual must show they can satisfy to entitle them to a grant of leave is not technically correct, as the common law duty of fairness cannot be ignored even in a points-based case.

19. In relation to the application of the common law duty of fairness, in *Marghia (procedural fairness) [2014] UKUT 00366 (IAC)* it was held that the common law duty of fairness is essentially about procedural fairness. There is no absolute duty at common law to make decisions which are substantively "fair". The Court will not interfere with decisions which are objected to as being substantively unfair, except the decision in question falls foul of the Wednesbury test i.e. that no reasonable decision-maker or public body could have arrived at such a decision. It is a matter for the Secretary of State whether she exercises her residual discretion. The exercise of such residual discretion, which does not appear in the Immigration Rules, is absolutely a matter for the Secretary of State and nobody else, including the Tribunal – Abdi [1996] Imm AR 148.
20. The appellant's argument appears to be predicated on the basis that because he believes he should have been given the opportunity to find another college the decision is unfair, because he thinks it is. This is not the requisite legal test. It is not made out the respondent acted in conflict with her published policy or that she was legally obliged to do more than she did.
21. In relation to the reliance by both parties upon the decision in *EK (Ivory Coast) v Secretary State the Home Department [2014] EWCA Civ 1517*; in that case it was held that the Secretary of State for the Home Department was not responsible for a college's administrative error in withdrawing a letter of 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 letter 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.
22. In addition, Miss Vijiwala relied on the further decision of the Court of Appeal of *Kaur v SSHD [2015] EWCA Civ 13* in which it was held 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.
23. Whilst it is accepted that the common law duty of fairness may be relevant in a case, even if problems are not caused by the Secretary's States conduct, it has not been established the Judge erred in law in finding that the respondent's refusal is lawful. The finding by the Judge that the appellant had failed to satisfy the mandatory requirements of the Rules is a finding within the range of those available to the Judge on the evidence. It is clear the Judge did not find the appellant was assisted by the Common Law duty of fairness even though the facts relied upon were brought to the Judge's attention who was clearly aware of the same. For the appellant to succeed on this point it was necessary to establish that the respondent's public law duty meant she was required to act in a manner different from that in which she did as a result of a binding obligation. In this appeal, no such

obligation was established. The finding of the Judge that the appeal should be dismissed is therefore one not arguably affected by legal error material to the decision to dismiss the appeal. It is not made out that no reasonable decision-maker or public body could have arrived at such a decision.

**Decision**

**24. There is no material error of law in the Immigration Judge’s decision. The determination shall stand.**

Anonymity.

25. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....  
Judge of the Upper Tribunal Hanson

Dated the 1<sup>4</sup>th of December 2017