



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/00012/2017

THE IMMIGRATION ACTS

Heard at Field House
On 24 April 2018

Decision and Reasons Promulgated
On 07 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MAMIN AHAMMED
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr M West, Counsel

DECISION AND REASONS ON ERROR OF LAW

1. The appellant in this appeal is the Secretary of State for the Home Department and the respondent is Mr Ahammed, a citizen of Bangladesh born on 5 February 1984. However, it is more convenient to refer to the parties as they were before the First-tier Tribunal and therefore I shall refer from now on to Mr Ahammed as “the appellant” and to the Secretary of State as “the respondent”.
2. The appellant was granted leave to enter the UK on 10 October 2007 as a student and he was granted extensions of his leave in this capacity. In July 2014 he applied for further leave to remain as a Tier 2 (General) Migrant but his application was refused

and he appealed. The appeal was heard by Judge of the First-tier Tribunal Eldridge sitting at Harmondsworth on 10 March 2016. The appellant was unrepresented and did not appear at the hearing. There was no attendance by the respondent either so the judge determined the appeal on the papers.

3. The judge noted that the respondent had refused the appellant's application by reference to paragraph 322(1A) of the Immigration Rules. The rule provided for mandatory refusal where false representations had been made or false documents or information submitted or material facts had not been disclosed in relation to an application. The appellant had submitted a Certificate of Sponsorship ("COS") purportedly issued by a company called Acorn Lodge (Bournemouth) Ltd. The respondent found that the certificate number on this document did not appear when cross-checked on their systems and the certificate number was in the wrong format for a COS reference number. However, the judge noted that no evidence to support this assertion had been provided by the respondent and therefore the burden on her to show that the document was false had not been discharged. He allowed the appeal but only on the basis that the matter remained before the Secretary of State to make a lawful decision.
4. The respondent proceeded to make the decision dated 8 December 2016. The brief reasons for refusal stated that the Acorn Lodge COS which the appellant had submitted was false and therefore the application was again refused under paragraph 322(1A). The appellant appealed again and this time he attended the hearing, which was held at Taylor House on 28 November 2017.
5. In her decision promulgated on 13 December 2017, Judge of the First-tier Tribunal Mensah allowed the appeal, again on the basis that it should be sent back to the respondent. She accepted as credible the evidence that the appellant had been deceived by individuals purporting to act as agents for Acorn Lodge. She found the document was false but that the appellant had been an innocent party. The appellant had obtained a fresh COS issued by a new sponsor, DM Digital Television, and he had attempted to vary his application prior to the first decision. However, the new COS had also become invalid because the firm's sponsorship licence had been withdrawn. The judge commented that she could not understand why the respondent had not made a fresh decision on the application to vary, rather than simply re-make the original decision as it had been before Judge Eldridge. She reasoned that, in the circumstances that DM had lost its licence, it was incumbent on the respondent to give the appellant 60 days in which to find a new sponsor and to make another application. It was the failure of the respondent to do this which led her to conclude that the respondent had failed to act consistently with her own published policy and the principles of common law fairness.
6. The respondent sought permission to appeal against the decision of Judge Mensah on the ground that she had erred in her application of paragraph 322(1A) of the rules. The respondent had been bound to note that a false document had been produced with the application. It was explained by the Court of Appeal in *AA (Nigeria) v SSHD* [2010] EWCA Civ 773 that, even if the appellant had used the document in all

innocence, it was still a false document for the purposes of the rule because it was a document which told a lie about itself. It followed that the judge was wrong to find that the appellant did not fall for refusal under paragraph 322(1A). There could be no breach of the common law duty of fairness which required the respondent to deviate from her own rule. Furthermore, the grounds argued that the appellant was unable to vary his application because, at that time, his original grant of leave having expired he only had leave by virtue of section 3C of the Immigration Act 1971.

7. Permission to appeal was granted by the First-tier Tribunal because it was arguable that Judge Mensah had erred in the way in which she applied paragraph 322(1A).
8. The appellant did not file a rule 24 response opposing the appeal.
9. I heard submissions from the representatives as to whether the decision of the First-tier Tribunal contains a material error of law. I shall refer to these in dealing with the issues as they arise.
10. As Judge Mensah noted, the appellant accepts that the Acorn Lodge COS was false. He had known this since around June 2014, which is why he obtained the COS from DM and attempted to vary his application in July 2014. Mr West criticized the respondent for not acknowledging this in the decisions. I pause to note that, had Judge Eldridge been informed by the appellant that he knew the COS was false, his decision was likely to have been different.
11. Paragraph 322(1A) reads as follows:

“322. In addition to the grounds for refusal of extension of stay set out in Parts 2-8 of these Rules, the following provisions apply in relation to the refusal of an application for leave to remain, variation of leave to enter or remain or, where appropriate, the curtailment of leave, except that only paragraphs (1A), (1B), (5), (5A), (9) and (10) shall apply in the case of an application made under paragraph 159I of these Rules.

Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom are to be refused

(1) ...

(1A) where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant’s knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application.”

12. In *AA (Nigeria)* the Court of Appeal discussed the meaning of “false” in the context of both representations and documents. In relation to the latter, it approved the respondent’s guidance which stated that applications should be refused if a false document was submitted even if the applicant was unaware it was false. At paragraph 67, Rix LJ explained:

"First, "false representation" is aligned in the rule with "false document". It is plain that a false document is one that tells a lie about itself. Of course it is possible for a person to make use of a false document (for instance a counterfeit currency note, but that example, used for its clarity, is rather distant from the context of this discussion) in total ignorance of its falsity and in perfect honesty. But the document itself is dishonest. It is highly likely therefore that where an applicant uses in all innocence a false document for the purpose of obtaining entry clearance, or leave to enter or to remain, it is because some other party, it might be a parent, or sponsor, or agent, has dishonestly promoted the use of that document. The response of a requirement of mandatory refusal is entirely understandable in such a situation. The mere fact that a dishonest document has been used for such an important application is understandably a sufficient reason for a mandatory refusal. That is why the rule expressly emphasises that it applies "whether or not to the applicant's knowledge"."

13. Mr West argued the submission of the false COI was not the submission of a false document. Rather it was a representation because the appellant had only been required to provide a certificate number. Therefore, the fact the representation was innocent meant the rule did not apply to him.
14. I consider that argument misconceived because it confuses the manner in which a document has to be delivered with the object itself. Mr West's submissions, which he acknowledged he could not support with any authority, were presumably based on the fact that Tier 2 applicants do not physically submit a COS but acquire a reference number from their proposed employer, which they submit to the respondent. The sponsor must have a sponsorship licence and must have access to the Sponsorship Management System in order to request a COS. It is then assigned to the applicant. Whilst it is true that all the applicant delivers to the respondent is a reference number in their application form, this is merely a secure means of delivering to the respondent the COS, which is a certificate. To argue that paragraph 322(1A) cannot bite in the circumstances, such as the present case, in which a fraudulent COS has been provided would deprive the rule of any useful effect.
15. I consider the appellant did submit a false document and Judge Mensah erred in finding the rule was wrongly applied in the circumstances that she believed the appellant was an innocent party. I follow paragraph 67 of *AA (Nigeria)*.
16. Mr West argued the respondent was wrong to have ignored the appellant's attempt to vary his application by substituting a COS from DM. I should mention that Ms Everett did not pursue the argument set out in her colleague's grounds seeking permission to appeal to the effect that a variation was not permissible under section 3C. As Mr West explained, subsection 3C(5) disapplies subsection 3C(4) where the application for a variation of leave to enter or remain is pending (subsection 3C(1)(a)). The appellant made his variation application prior to the first decision.
17. However, Ms Everett defended the respondent's decision to apply paragraph 322(1A) notwithstanding the submission of a valid COS in July 2014. This was a matter the judge said she did not understand. However, I think it becomes clear if the wording of the rule is considered. The respondent's decisions referred to the date of application as being 9 July 2014. That is, of course, the date of the *varied* application.

If it were the original date of application it would have been out of time and not a variation application at all. The appellant's Tier 4 leave expired on 24 May 2014. The point is that it is a single application, albeit one which has been varied by substituting a new sponsor. The fact remains that the appellant had submitted a false document (the Acorn Lodge COS) within that single application process. It followed that the respondent was bound to refuse it because of the mandatory nature of the rule and there was no need to go on to consider the new COS.

18. Mr West argued by reference to the case of *R (on the application of Aafia Thebo) v ECO Islamabad* [2013] EWHC 146 (Admin) that the respondent should have exercised her residual discretion in these circumstances. However, it is well-established that a failure to do so is not justiciable by the Tribunal within its power to allow an appeal on the basis the decision is not in accordance with the law. It also ignores the fact the DM COS had been cancelled by no later than 8 December 2016 because DM had lost its sponsorship licence.

19. As seen, Judge Mensah allowed the appeal on the basis the decision breached the respondent's duty of common law fairness. Although she expressed this in terms of a failure to apply her policy, there is in fact no 60-day policy in respect of Tier 2 applicants. However, it is clear the judge relied on *Patel (revocation of sponsor licence – fairness) India* [2011] UKUT 00211 (IAC) in which a presidential panel of the UT held that, where a sponsor licence has been revoked by the respondent 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 respondent should afford an applicant a reasonable opportunity to vary the application by identifying a new sponsor before the application is determined. The panel said at [24]:

“It is obviously unfair for the Secretary of State to revoke the college's status after the application has been made when it was an approved sponsor and not to inform the applicant of such revocation and not afford him an opportunity to vary the application.”

20. This was evidently the principle Judge Mensah had in mind.

21. The context of that case was a Tier 4 applicant and the principle has been limited to circumstances in which the respondent took steps to withdraw the sponsor's licence and did not tell the applicant before making a decision to refuse their application. For example, in *EK (Ivory Coast) v SSHD* [2014] EWCA Civ 1517 the Court of Appeal distinguished the case of an applicant whose CAS was withdrawn by her college as a result of an administrative error. The court found by a majority that there had been no breach of her public law duty by the respondent, who was not responsible for the unfairness, in the general sense, which the appellant had suffered. The PBS placed the onus of ensuring that an application was supported by evidence to meet the relevant test upon the applicant. It is inherent in the scheme that the applicant takes the risk of administrative error on the part of a college (see [33]). In *Patel and Patel v SSHD* [2018] EWCA Civ 229, a differently constituted court applied the same reasoning where the college had withdrawn the CAS without giving any reasons.

22. The reason DM lost its sponsorship licence is unknown. However, there is a more

fundamental reason that the common law duty of fairness cannot assist this appellant and therefore the judge erred in so deciding. In *R (on the application of Islam and Pathan) v SSHD (Tier 2 licence – revocation – consequences)* [2017] UKUT 00369 (IAC), the issue to be decided was whether, in the circumstances that a Tier 2 sponsor’s licence was revoked while an application for Tier 2 leave was pending, the respondent could rationally decide not to allow the applicant 60 days in which to secure an alternative sponsor. The UT held that it could. The respondent was entitled to draw distinctions between the Tier 2 and Tier 4 systems which justified not extending the 60-day policy to the former.

23. For all of these reasons Judge Mensah erred in allowing the appeal and her decision is set aside. The respondent’s appeal is allowed.
24. By virtue of the reasons I have given for setting aside the decision, it is clear there can only be one outcome to the appeal and I substitute a decision dismissing it. The appellant’s application was bound to be refused because paragraph 322(1A) applied. The appellant submitted a false document. There is no duty on the respondent to afford the appellant an opportunity to obtain an alternative COS. The COS assigned to him by DM was cancelled and therefore the appellant could not meet the requirements of the Tier 2 rules.

NOTICE OF DECISION

The Judge of the First-tier Tribunal made a material error of law and her decision allowing the appeal is set aside. The following decision is substituted: The appeal is dismissed.

An anonymity direction has not been made.

Signed

Date 26 April 2018

Deputy Judge of the Upper Tribunal Froom