



Neutral Citation Number: [2018] EWCA Civ 2496

Case No: C5/2015/0429

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
MRS JUSTICE MCGOWAN
[2014] EWHC 4328 (ADMIN)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2018

Before :

LADY JUSTICE ASPLIN
and
LORD JUSTICE HADDON-CAVE

Between :

THE QUEEN ON THE APPLICATION OF
LONDON ST ANDREW'S COLLEGE
- and -
THE SECRETARY OF STATE FOR THE
HOME DEPARTMENT

Appellant

Respondent

Mr Paul Turner and Mr Jay Gajjar (instructed by **Law Lane Solicitors**) for the **Appellant**
Mr Rory Dunlop (instructed by **Government Legal Department**) for the **Respondent**

Hearing date : Tuesday 30th October 2018

Approved Judgment

LORD JUSTICE HADDON-CAVE :

1. This is an appeal against an order of McGowan J in *London St Andrews College v Secretary of State for the Home Department* [2014] EWHC 4328 (Admin) dismissing the Appellant's claim for judicial review of a decision to revoke its Tier 4 sponsor licence.
2. Permission to appeal was granted by Arden LJ on a single ground, namely whether McGowan J had misconstrued the meaning of the phrase "*any of your duties*" in paragraph 162(d) of Document 3 of the Tier 4 guidance.

The Facts

3. On 8th December 2009, the Appellant was granted a Tier 4 sponsor licence. This enabled the Appellant to assign Confirmations of Acceptance for Studies ("CAS") to migrants which could then be used to obtain leave to enter or remain. On 2nd August 2010, the Appellant was given Highly Trusted Sponsor ("HTS") status.
4. In February 2014, a "*Panorama*" investigation revealed widespread fraud in the use of English language test certificates. Staff at exam centres in the UK, who were supposed to ensure that candidates took the Test of English for International Communication ("TOEIC") provided by Educational Testing Services ("ETS"), were instead helping students to cheat, *e.g.* they allowed proxies to answer questions on behalf of the true candidates in the oral exams, falsified verification checks and even dictated the correct answers to candidates. The Secretary of State for the Home Department ("SSHD") suspended the use of ETS testing in the UK. ETS conducted an investigation. Using voice recognition software and two human verifiers, they identified the English oral exams which had been taken by proxies. When someone was identified by ETS as having used a proxy, their TOEIC was withdrawn as 'invalid'.
5. In a letter dated 24th June 2014, the SSHD informed the Appellant of her decision to suspend the Appellant's licence pending further investigation, in light of the fact that 65 of the CAS which the Appellant had assigned were connected to TOEIC certificates withdrawn by ETS as invalid because they had been obtained by cheating. This caused the SSHD to question whether the Appellant's students genuinely had the intention and ability to study in the UK, and whether the Appellant had satisfied itself of its students' intention and ability to study before assigning them with CAS. Further, there was evidence that the Appellant had failed to assess the academic progression of some of the students adequately before sponsoring them.
6. On 14th July 2014, the Appellant filed the present claim for judicial review. In a letter dated 18th July 2014, the SSHD gave detailed reasons for maintaining the suspension of the Appellant's Tier 4 sponsor licence, reiterating the two points above, and noting that the SSHD was now also aware of an additional 19 TOEIC certificates which had been withdrawn by ETS as questionable (making a total of 84 withdrawn ETS scores).
7. The Appellant made formal written representations received by the SSHD on 29th and 31st July and 4th August 2014, responding to the SSHD's concerns and reasons for suspension.

8. In a letter dated 3rd September 2014, the SSHD informed the Appellant that she had reviewed the matter and was not satisfied that the Appellant had adequately addressed the reasons for the suspension and had decided to revoke the Appellant's Tier 4 sponsor licence with immediate effect. The SSHD relied upon the two reasons previously referred to, namely, (i) the 84 withdrawn ETS scores (see above) and (ii) the failure to assess academic progression properly (citing 7 specific examples of students who also appeared on the Annex A list supplied with the SSHD's letter of 18th July 2014 of students with invalid or questionable ETS). Under the first heading "Withdrawn ETS Scores", the SSHD said this:

"5. You have attempted to address our concerns in relation to these students, taking steps to withdraw sponsorship from those students who remain at the college and have been linked to invalid TOEIC scores. For the rest with questionable scores you have provided information about those undergoing a new SELT test.

6. You have been at pains to stress that the college could not have identified the issues raised in relation to the TOEIC certificates and there was no reason for the college to suspect fraud. You have said that when assigning a CAS the Level 1 user is concerned about whether a SELT is valid at the time of assigning the CAS, not the score obtained.

7. We are not satisfied with your responses for a number of reasons. Whilst we accept that as a college you would not necessarily have been aware of any fraud taking place, we have provided a number of examples of very poor quality students which you have accepted. Coincidentally these poor quality students who have shown little progression despite being in the UK a number of years are the very same students who have obtained a SELT by deception. Even if unaware of the fraud it is clear from the examples provided that when assigning the CAS the Level 1 user and/or the college as a whole paid very little attention to the quality of the student before them.

8. Evidence that a student had shown very little evidence of either ability or intention to study in the UK appears to have been entirely overlooked in favour of an overseas qualification obtained many years ago. Therefore whilst we accept that you may not have been aware of the ETS fraud at the time of assigning the CAS, there were other attributes these students had which made them unsuitable for sponsorship and by sponsoring them you contributed to the risk to immigration control.

9. You have stressed that the college played no part in the immigration abuse but we would argue that by sponsoring these students you contributed to it. If the student obtained their SELT prior to being sponsored by you, your sponsorship allowed them to remain in the UK after already obtaining leave by deception. If the student obtained the invalid SELT after being sponsored by you, you were part of their immigration journey and

contributed to them entering or remaining in the UK. This in turn allowed them to commit the fraud.

10. It is for the above reasons that we are not satisfied your withdrawal of sponsorship adequately addresses our concerns about this cohort of students and the risk both you and the students have posed to immigration control.”

9. The SSHD's letter of 3rd September 2014 concluded:

“Guidance

27. We are not satisfied with your explanations in relation to the CAS assigned to students with invalid and questionable TOEIC scores, student assessments and how you demonstrate academic progression. Paragraph 162(d&i) document 3 of the Tier 4 guidance says we will consider revoking your sponsor licence if:

- *You fail to comply with any of your duties.*
- *You assign a CAS stating that the course represents progression but you cannot show how you assessed the progression, or we are concerned about how you have assessed it as authentic; or we find, after you have assigned a CAS stating that there is academic progression, that there is no academic progression.*

Decision

28. For the reasons stated above your licence is revoked with immediate effect.”

10. On 11th September 2014, the Appellant filed an amended claim form. On 7th October 2014, Green J granted permission for judicial review. The SSHD reconsidered the evidence against the Appellant and, on 17th October 2014, produced a supplementary decision letter maintaining the decision to revoke. In that letter the SSHD maintained the two original reasons for revocation (namely, (i) the 84 withdrawn ETS scores and (ii) the failure to assess academic progression properly) and added four further reasons for revocation, namely that (iii) the Appellant had assigned 16 CAS for qualifications which were not approved, (iv) some of the Appellant's students had worked in breach of conditions, (v) that the drafting of the CAS was so poor that it indicated that the Appellant had not properly been assessing migrants' suitability and (vi) the college had chosen to sponsor migrants who were just shy of qualifying for 10 years residency as a gateway to long residency. The letter stated as follows:

“66. There appears to be an endemic problem of poor judgment shown by the college when assigning CAS. This problem is not isolated or limited to students sponsored in the past. When making any decision we must assess the risk of allowing you to remain on the sponsor register, (even if that were with the caveat of zero or reduced CAS) with the wider risk of you remaining a sponsor and all that implies - that you are highly trusted and that

UKVI have confidence in you. In this case we have no such confidence and based on what appear to be serious problems with the decision makers at the college and their historic and continuing poor judgment when deciding who is suitable for sponsorship.

67. You have failed to adequately address the reasons for suspension and we remain of the opinion that you pose a current risk to immigration control...

11. The letter summarised the reasons for the SSHD maintaining her decision to revoke the Appellant's licence:

"69. Having considered your representations we can see no basis on which to exceptionally consider not revoking your sponsor licence. You have not demonstrated that you have robust processes and procedures in place to assess migrants' ability and intention to study. Whilst you claimed to have taken prompt action regarding the issues raised in relation to the dishonest ETS student, it transpires that you did not in fact withdraw sponsorship from all the students as claimed. It was therefore neither prompt nor effective action, as we have pointed out earlier in this letter.

70. We consider you to be responsible for the issues identified and with this in mind we consider revocation to be a proportionate response to the risk posed by the college. We also considered a lesser sanction such as reducing or zeroing your CAS. However, this would mean allowing you to remain on the sponsor register as a highly trusted sponsor. Given all the concerns we continue to have we believe the sponsor register would be severely compromised by your remaining on it and as such as lesser sanction is not appropriate."

12. In a letter dated 13th November 2014, the SSHD reconsidered revocation in light of further evidence and submissions from the Appellant and decided to maintain revocation on the following revised or reconstituted grounds, namely: (i) the Appellant had assigned 16 CAS for students to follow a course of study that did not lead to an approved qualification; (ii) the Appellant had assigned 65 CAS to students whose TOEIC certificates were withdrawn as invalid and 19 CAS to students whose TOEIC certificates were withdrawn as questionable; (iii) the Appellant's evidence only addressed why they had sponsored 7 of the students who appeared to have cheated; (iv) 31 of the sponsored 'students' were working in breach of their conditions, earning substantial sums; and it was of concern that Appellant failed to notice this and was not even aware of the fact that the students it sponsored were not allowed to work; (v) the Appellant's assessments of students' intention and ability to study were of poor quality and in poor English; (vi) in several cases, a student was sponsored on the basis that their course would constitute 'academic progression' when it did not; (vii) the discretionary grounds of revocation in para. 162 (d), (g) and (i) were engaged; and (viii) there were no exceptional circumstances that would make revocation inappropriate.

13. The letter concluded in similar terms to the letter of 11th September 2015 (see paragraphs 66, 67, 79 and 81) and the SSHD maintained her decision to revoke the Appellant's licence (see paragraphs 75, 76, 79, 80 and 81).
14. The lawfulness of the decision set out in this letter was the subject of submissions at the hearing. On the second day of the hearing, the Appellant made new representations as to why the courses for which it had assigned CAS did lead to approved qualifications. The SSHD investigated these new points and accepted them. In a witness statement dated 2nd December 2014, Ms Cram (the Home Office official responsible for authorising and reviewing all licence suspensions) accepted that it was a case of the college not completing the CAS correctly rather than a failure to comply with their requirement to provide approved qualifications. However, she said that, even so, "*it remains the case that the college poses a risk to immigration control and that revocation is appropriate*".

Proceedings

15. In a judgment handed down on 19th December 2014 McGowan J dismissed the Appellant's claim for judicial review on all grounds put forward.
16. The Appellant raised several grounds of appeal but was refused permission to appeal on all grounds by the single judge on the papers. At an oral renewal hearing, the Appellant obtained permission to appeal on the one ground set out above from Arden LJ as aforesaid.
17. On 6th August 2018, the SSHD filed a Respondent's Notice, setting out the following different or additional reasons for upholding McGowan J's order, namely, (a) the evidence provided by the Appellant was not sufficient to allay the SSHD's suspicions; and (b) paragraphs 162(g) and (i) of the Guidance Document 3 (see below) were, either separately or cumulatively, sufficient grounds for revocation in any event.

The Legal Framework

18. The requirements for Tier 4 Sponsors and HTS status are set out in guidance provided by the SSHD, which has changed from time to time. In July 2014, the guidance for Tier 4 sponsors (entitled "*UK Visas & Immigration Tier 4 of the Points Based System Guidance for Sponsors*") was split into 3 'documents', namely: '*Document 1: Applying for or Renewing a Tier 4 Sponsor Licence and Highly Trusted Sponsor*'; '*Document 2: Assigning CAS and Sponsoring Students*'; and '*Document 3: Sponsors Duties and Compliance*'. The three guidance documents expressly cross-refer to each other. It is clear that they were intended to be read together.

Guidance Document 2

19. Section 3 of Guidance Document 2 concerned "*Assigning a CAS*". Within that section, paragraphs 100 and 107 provided as follows:

"Academic progression

100. Since 4 July 2011, if you assign a CAS to a Tier 4 (General) student to take a course in the UK after they have finished

another course in the UK under Tier 4 (General) or as a student prior to the introduction of the Points Based System, it must represent academic progression from the previous course. This applies whether the student is applying from overseas or in the UK....”

“107. If you are required to confirm the student’s academic progression on the CAS, and you do not, we will refuse the student’s application. We will also take action against you if:

a) you cannot show how you assessed the progression, or we are concerned about how you assessed it; or

b) we find, after you have assigned a CAS stating that there is academic progression, that there is no academic progression.” [Emphasis added]

20. Paragraphs 120-133 of the Guidance Document 2 provided as follows:

“How to assign a CAS

121. If you wrongly assign a CAS, we may take action against you....

124. Before you assign a CAS you must assess a student’s ability to follow a course of study. ...

125. Before you assign a CAS you must be satisfied that you and/or the student can meet the criteria below titled Checklist for assigning a CAS.

Checklist for assigning a CAS

<i>Are you satisfied:</i>	√
<i>The student intends and is able to follow the course of study concerned?</i>	
<i>The student will successfully complete their course on the date specified on the CAS? This includes any CAS issued for the Doctorate Extension Scheme...</i>	
<i>The student is aware of their responsibility to abide by the conditions of their Tier 4 visa, including their obligation to study at their sponsor institution (unless studying at a partner institution or undertaking supplementary study), their working restrictions or that they will leave the UK when their visa expires unless they have obtained further valid leave?</i>	
<i>The CAS you are assigning is for a course that represents academic progression if the student is continuing their studies in the UK? See ‘Academic progression’ in the previous section.</i>	

Guidance Document 3

21. The Guidance Document 3 was divided into three sections. Paragraphs 1-2, in Section 1 of the Guidance Document 3, provided an overview of the purpose of sponsor duties:

“Why do I have sponsor duties?”

1. As a licensed sponsor you will benefit directly from migration and we expect you to play your part in ensuring that the system is not abused. This means that you must fulfil certain duties. Some duties apply to all sponsors under the points-based system, others are specific to sponsors who are licensed under certain tiers or categories. You must meet these duties to ensure that immigration controls remain effective. These duties aim to:

- a) prevent you abusing our process for assessing you;*
- b) quickly find and address any patterns of student behaviour that may cause concern;*
- c) address weak processes which can cause those patterns; and*
- d) monitor your and your students' compliance with immigration rules.*

2. You must be able to show that you are able to meet these sponsor duties so that you can gain and keep your licence and achieve or maintain HTS status...”

22. Section 2 of the Guidance Document 3 clarified sponsor duties. The opening paragraph explains the scope of the section in this way:

“What are my sponsor duties?”

This section gives information on:

- Record keeping duties*
- Reporting changes that affect your sponsor licence*
- Reporting changes to student circumstances”*

23. Section 2 contains the following paragraph:

“13. In addition to your duties as a Tier 4 sponsor, you are expected to contribute to supporting immigration control. In particular, you must take reasonable steps to ensure that every student at your institution has permission to be in the UK. Failure to do this may lead to the revocation of your licence.” [Emphasis added]

24. Section 3 of the Guidance Document 3 was headed “*Compliance*”. Within this section, under a heading, paragraphs 92 and 99 provided:

“Compliance

How will we check that you are complying with your sponsor duties

92. *The introduction of this policy does not in any way change your ongoing responsibilities as a Tier 4 sponsor. We expect you to continue to thoroughly assess each student’s intention and ability to undertake their course of study with you before you assign a CAS to them.”*

“Complying with the law

99. *To ensure that you are complying with our immigration laws, you must only assign a CAS to a student whom you believe will:*

a) meet the requirements of the Tier 4 category under which you assign the CAS; and b) comply with the conditions of their permission to stay in the UK.”

25. Paragraph 131 of Document 3 stated:

“What will happen if you do not comply with your sponsorship duties

131. *If we consider that you have not been complying with your duties, have been dishonest in your dealings with us or you are a threat to immigration control in some other way, we will take action against you. This action may be to... revoke or suspend your licence.”*

26. Paragraph 160 of Document 3 set out a table of circumstances in which the SSHD “*will revoke*” a sponsor’s licence, *i.e.* when the revocation is automatic.
27. Paragraph 162 of Document 3 set out a table of circumstances when the SSHD “*will consider revoking*” a sponsor’s licence, *i.e.* the revocation is not automatic but discretionary. These included the following:

<i>d</i>	<i>“You fail to comply with any of your duties.”</i>
<i>g</i>	<i>“We find that students that you have sponsored have not complied with the conditions of their permission to stay in the UK. ...”</i>
<i>i</i>	<i>“You assign a CAS stating that the course represents progression but you cannot show how you assessed the progression, or we are concerned about how you have assessed it as authentic; or we find, after you have assigned a CAS stating that there is academic progression, that there is no academic progression.”</i>

28. Below this table, the following appeared in paragraph 163:

“163. We may not always revoke your licence in the circumstances set out in the table above. Whilst we cannot precisely define the exceptional circumstances in which we will not, this decision will be based on such factors as the number of breaches, previous history and the efforts you have made to address these issues. However, we may immediately suspend it and may withdraw any CAS that you have assigned but which have not yet been used to support an application for leave to come to or stay in the UK. We will look for evidence that you were either not responsible for what happened or, if you were, you took prompt and effective action to remedy the situation when it came to light. For example if one of your employees was wholly responsible for what has happened and that person was dismissed when it came to light.”

Applicable legal principles

29. I summarised the legal principles applicable to Tier 2 and Tier 4 sponsorship cases in *R (Raj & Knoll) v SSHD* [2015] EWHC 1329 (Admin) and my summary was cited by Tomlinson LJ in *R (Raj & Knoll) v SSHD* [2016] EWCA Civ 770 in the Court of Appeal at [23]:

“(1) The essence of the system is that the Secretary of State imposes “a high degree of trust” in sponsors granted (‘Tier 2’ or ‘Tier 4’) licences in implementing and policing immigration policy in respect of migrants to whom it grants Certificate of Sponsorship (“CoS”) or Confirmation of Acceptance (“CAS”) (per McGowan J in London St Andrews College v Secretary of State for the Home Department (supra) (2014) EWHC 4328 (Admin) at [12]) (and see Silber J in R (Westech College) v Secretary of State for the Home Department (2011) EWHC 1484 (Admin)).

(2) The authority to grant a certificate (CoS or CAS) is a privilege which carries great responsibility: the sponsor is expected to carry out its responsibilities “with all the rigour and vigilance of the immigration control authorities” (per McGowan J in London St Andrews College v Secretary of State for the Home Department (supra) at [13]).

(3) The Sponsor “must maintain its own records with assiduity” (per McGowan J in London St Andrews College v Secretary of State for the Home Department (supra) at [13]).

(4) The introduction of the Points-Based System has created a system of immigration control in which the emphasis is on “certainty in place of discretion, on detail rather than broad guidance” (per Lord Hope in R (Alvi) v Secretary of State for the Home Department [2012] UKSC 33, reported at [2012] 1 WLR 2208 at [42]).

(5) *The CAS in the 'Tier 4' scheme (the equivalent of the CoS in the 'Tier 2' scheme) is very significant: the possession by a migrant of a requisite CAS provides strong, but not conclusive, evidence of some of the matters which are relevant upon the migrant's application for leave to enter or remain (Global Vision per Beatson LJ at [12], citing Lord Sumption SCJ in R (New London College Ltd) v Secretary of State for the Home Department [2013] UKSC 51 .*

(6) *There is no need for UKBA to wait until there has been breach of immigration control caused by the acts or omission of a sponsor before suspending or revoking the sponsorship, but it can, and indeed should, take such steps if it has reasonable grounds for suspecting that a breach of immigration control might occur (per Silber J in R (Westech College) v Secretary of State for the Home Department (2011) EWHC 1484 (Admin) at [17–18]).*

(7) *The primary judgment about the appropriate response to breaches by licence holders is that of the Secretary of State. The role of the Court is simply supervisory. The Secretary of State is entitled to maintain a fairly high index of suspicion and a 'light trigger' in deciding when and with what level of firmness she should act (R (The London Reading College Ltd) v Secretary of State for the Home Department (2010) EWHC 2561 Admin per Neil Garnham QC.*

(8) *The courts should respect the experience and expertise of UKBA when reaching conclusions as to a sponsor's compliance with the Guidance, which is vitally necessary to ensure that there is effective immigration control ((per Silber J in R (Westech College) v Secretary of State for the Home Department (2011) EWHC 1484 (Admin) at [29(d)]."*

30. I would endorse the following further principles to be derived from the judgment of Silber J in *R (Westech College) v Secretary of State for the Home Department* [2011] EWHC 1484 (Admin) (*supra*):

- (1) The SSHD has stringent powers to suspend or revoke a sponsor's licence if the SSHD becomes concerned that a sponsor is not complying with its obligations and must be sensitive to any factors which might suggest the possibility of any breaches of immigration control having occurred or being about to occur because of lapses or omissions committed by a Sponsor (*per Silber J in Westech, supra*, at [17]).
- (2) There is a clear need in some circumstances for the SSHD to invoke the SSHD's powers where there is a risk that the sponsor might not be complying with its duties provided of course that UKBA complies with its public law duties (*per Silber J in Westech, supra*, at [18]).

- (3) The expertise and experience of the SSHD (and UK Border Authority (“UKBA”)) in being able to detect the possibility that a sponsor might not be or be at risk of not complying with its duties is something that the courts must and does respect because, unlike the SSHD, courts do not have this critically important experience or expertise (*per* Silber J in *Westech*, *supra*, at [18]).
- (4) An entity which holds a sponsor licence has substantial duties to ensure that the rules relating to immigration control are adhered to strictly and properly, such that if the SSHD were concerned that a sponsor is not complying with those duties, it would entitle, if not oblige, UKBA to prevent that sponsor from either granting more CAS or revoking its licence (*per* Silber J in *Westech*, *supra*, at [19]).

Submissions

31. Mr Paul Turner and Mr Jay Gajjar appeared on behalf of the Appellant. Their written argument on the one ground of appeal on which leave was granted can be summarised in four points:
 - (1) McGowan J’s construction of paragraph 162(d) expands the meaning of the phrase “*your duties*” beyond that set out in the Guidance documents, which cannot be correct given the need for legal certainty.
 - (2) Even if paragraph 162(d) was satisfied, the SSHD had a discretion whether to revoke. It was irrational of McGowan J to uphold the exercise of that discretion given the unusual circumstances of widespread fraud within ETS.
 - (3) The decision of the SSHD and McGowan J was based on the ‘misconceived assumption’ that students who cheated in English language exams were not proficient in English.
 - (4) The Court cannot be satisfied that the same decision would have been reached if the SSHD, or the Judge, had only relied on the remaining grounds for revocation.
32. Mr Paul Turner supplemented these points in his oral submissions. He submitted that if he was right about the construction point, the SSHD’s main justification for revocation (*i.e.* breach of “*duties*”) fell away and there remained an insufficient basis upon which the SSHD could revoke the Appellant’s licence because very few individuals were specifically identified as falling into the categories comprising the remaining grounds for revocation (*i.e.* ‘lack of academic progress’ or students ‘working’). He submitted that the SSHD was wrong to rely upon what the SSHD alleged was the Appellant’s acceptance of “*very poor quality students*” as a ground for revocation (see for instance the SSHD’s initial revocation letter of 3rd September 2014); there was, he submitted, no duty to recruit good people. He accepted that the test was one of *Wednesbury* rationality.
33. Mr Rory Dunlop appeared for the SSHD. It was not necessary to call upon him but we were much assisted by his able skeleton argument in which he submitted that the appeal must be dismissed for two principal reasons. First, McGowan J did not err in her construction of paragraph 162(d). The “*duties*” in paragraph 162(d) are not limited to those set out in Section 2 of Guidance Document 3. They also include the duties set

out in Guidance Document 2, including the duty on sponsors to satisfy themselves that any migrant to whom they are assigning a CAS has the ability and intention to study the course. Second, even if McGowan J did err in her construction of paragraph 162(d), she was nonetheless correct to dismiss the claim for at least two reasons. First, the Appellant's licence would, in any event, have been revoked on the basis of paragraphs 162(g) and 162(i) of Guidance Document 3. Second, the SSHD's discretion to revoke is not limited to the grounds set out in paragraphs 160 and 162 of Guidance Document 3. The SSHD would, in any event, have revoked the Appellant's licence on the basis that the Appellant posed a threat to immigration control.

McGowan J's judgment

34. McGowan J dealt with the Appellant's main argument on construction in paragraphs 24 to 27 of her judgment:

"24. The new regime of HTS status transfers that duty to the Sponsor. The Sponsor is responsible for the recruitment of students and ensuring that they are able to and will seek to comply with all requirements. It is the responsibility of the SSHD to monitor the Sponsor and their compliance with their duties, see Westech at para 16, [cited] ...

25. It was suggested by the Claimant that the index to Section 2 of the guidance creates a definitive and closed list of the duties imposed on a Sponsor. The index lists the following: record keeping duties, reporting changes that affect the Sponsor licence, mergers takeovers etc, insolvency, surrendering the licence, reporting changes in students' circumstances and reporting student case studies. The proposition that these are the only duties cannot be right as the list does not include topics such as the duty to ensure "academic progression" or the provision of "approved qualification" courses which the Claimant recognises elsewhere in submissions are duties imposed upon the HTS Sponsor. In any event, it is quite simply an index to the chapter and must be read in conjunction with paragraph 162 (see above) which sets out the circumstances in which a failure to comply will result in the revocation of a licence.

26. The Defendant contends that there was a failure of the Sponsor to comply with its duties in that it accepted poor quality students. It is submitted on the part of the Claimant that there is no such duty. That submission is entirely at odds with the principle of granting HTS status. It is for an admitting college to ensure that a student to whom a CAS will be or has been awarded has the capacity and intention to attend and successfully complete the course on which a place is granted. That is not to say that a Sponsor is necessarily in breach if a reasonable number of students fail either to complete the course, by attendance or result. There will, as in any educational establishment, be students who fail and who could not properly have been identified as likely to fail before admission. The duty to examine the credentials of an applicant to a college cannot be

avoided by the college itself, any more than the responsibility for assessing their aptitude and proficiency in English can be said to rest with the SSHD. As is clear throughout the jurisprudence the grant of a Tier 4 licence carries with it the responsibility for completing these sort of checks, refusing admission to a student who does not or cannot comply and reporting back to the SSHD in a manner that allows supervision by the SSHD of those decisions.

27. The basis of the decision of the SSHD that the college was failing to comply with its duties is not answered by the suggestion that such duties do not fall on the Sponsor. They do and there is no irrationality or unreasonableness in requiring the Claimant to maintain its HTS status by such compliance.”

Analysis

Sponsorship system is based on trust

35. The starting point for this analysis is to emphasise that the watchword for the sponsorship system is *trust*. As the authorities have repeatedly said, the efficacy of the sponsorship system depends fundamentally on trust (see *e.g. Raj & Knoll, supra*). This fundamental point is too often overlooked, or ignored, by claimants seeking to challenge the suspension or revocation of their sponsor licence. The SSHD must be able to trust those to whom Tier 4 (or Tier 2) sponsorship status is accorded. This is because those with a sponsor licence are given the power to assign CAS (or Certificate of Sponsorship) which can then be used by migrants to obtain visas and leave to enter or remain. However, with power comes responsibility. A key responsibility is to identify which of the migrants applying for student visas have both the ability and intention to study, and which are merely trying to use study in the UK as an excuse to come to, live or work in the UK (see below and Silber J in *Westech, supra*).
36. The second point to emphasise is that, under the sponsorship system, the discretion accorded to the SSHD to suspend or revoke Tier 4 (or Tier 2) sponsorship licences is very broad. This is necessarily so because the system depends on the SSHD trusting those accorded HTS to carry out roles and responsibilities previously accorded to immigration officers.
37. With this introduction, I turn to consider the Appellant's various arguments.

(1) 'Judge misconstrued meaning of "your duties" in paragraph 162(d)'

38. On behalf of the Appellants, Mr Turner submitted that the phrase "*your duties*" in paragraph 162(d) of Guidance Document 3 was limited to the three duties specifically referred to in section 2 of Guidance Document 3 (namely, "*Record keeping duties*", "*Reporting changes that affect your sponsor licence*" and "*Reporting changes to student circumstances*") and McGowan J was wrong to hold that it included broader sponsor duties.

39. In my view, it is clear even from a cursory reading of the Guidance Documents that Mr Turner's submission on construction is essentially unarguable. Mr Turner ignores both the express wording of Guidance Document 3 and the themes running through the Guidance Documents 2 and 3 generally. He also approaches the question of construction in an impermissible manner. The Guidance Documents are what they say on the tin, namely *guidance* documents. As such, they have to be read sensibly, purposefully and holistically. They are not statutes or to be construed rigidly and myopically.
40. The following points are pertinent to construction.

Guidance Document 3

41. First, Section 1 of the Guidance Document 3 (entitled "*Sponsor Duties Overview*") explains the *raison d'être* for sponsor duties. Under the heading "*Why do I have sponsor duties?*", paragraph 1 tells sponsors that they are expected to "*play your part*" in ensuring that the system is not abused and emphasises that sponsors must meet their duties to ensure immigration controls "*remain effective*". Section 1 explains that the duties aim to:

- "a) prevent you abusing our process for assessing you;*
- b) quickly find and address any patterns of student behaviour that may cause concern;*
- c) address weak processes which can cause those patterns;*
and
- d) monitor your and your students' compliance with immigration rules."*

Paragraph 2 of Section 1 provides that sponsors must be able to show that they are able to meet "*these sponsor duties*" so that they could gain and keep their sponsor licence. Mr Turner accepted during argument that these sub-paragraphs comprised sponsor duties.

42. Second, Section 2 plainly does not comprise an exhaustive list of all the "*duties*" imposed on sponsors, nor does it purport to do so. Whilst the drafters could have made the point expressly, it is nevertheless clear implicitly that the introduction to Section 2 was intended merely to highlight information on three particular sponsor duties (see above) and not to be an exclusive list. Nowhere does Section 2 suggest that these three duties comprise the totality of all sponsor duties. Nor as a matter of common sense could it because, as McGowan J rightly pointed out at paragraph [25] of her judgment, Section 2 does not include such matters as "*academic progression*" and "*approved qualification*" which the Appellant concedes are duties imposed on Tier 4 sponsors.
43. Third, paragraph 13 of Section 2 sets out the broad overarching duty of sponsors:

"13. In addition to your duties as a Tier 4 sponsor, you are expected to contribute to supporting immigration control."
[Emphasis added]

44. Fourth, paragraph 92 of Section 3 (entitled “*Compliance*”) provides a complete answer on its own to the Appellant’s argument on construction. Paragraph 92 provides as follows:

“92. ...*We expect you to continue to thoroughly assess each student’s intention and ability to undertake their course of study with you before you assign a CAS to them.*” [Emphasis added]

45. It was, therefore, every sponsor’s express duty, before granting a CAS, thoroughly to assess each student’s “*intention and ability*” to undertake the course in question.

Guidance Document 2

46. Fifth, the same basic duty is voiced in Document 2. Section 3 of Guidance Document 2 (entitled “*Assigning a CAS*”) spells out in detail what a sponsor is required to do before assigning a CAS. The duty is made clear in the following paragraphs in Section 3:

- (1) Paragraphs 100 provides that assigning a CAS after a previous course in the UK or abroad “*must represent academic progression from the previous course*”.
- (2) Paragraph 107 provides that the SSHD will take action if a sponsor cannot show how it has assessed progression, or “*we are concerned about how you assessed it*”.
- (3) Paragraph 124 provides: “*Before you assign a CAS you must assess a student’s ability to follow a course of study*”.
- (4) Paragraph 125 states: “*Before you assign a CAS you must be satisfied that you and/or the student can meet the criteria below titled Checklist for assigning a CAS*” and attaches a checklist which requires in terms that the sponsor must be satisfied *inter alia* that “[t]he student intends and is able to follow the course of study” (see above).

Summary on construction

47. In summary, in my judgment, it is plain from the express wording of the Guidance Documents that Tier 4 sponsors have a basic duty properly to satisfy themselves that students to whom they are assigning CAS have both the “*intention and ability*” to follow the course of study proposed.
48. In my judgment, therefore, McGowan J was correct in paragraphs 24 to 27 as to the construction of the Guidance Documents. In particular, she was right to hold (at paragraph [26]):

“26. ...*It is for an admitting college to ensure that a student to whom a CAS will be or has been awarded has the capacity and intention to attend and successfully complete the course on which a place is granted.*”

49. McGowan J was also right to have regard to the principle underlying the grant of sponsor licences (see paragraph [26]).

Appellant's further arguments

50. Mr Turner contended that the SSHD (and McGowan J) wrongly suggested that sponsors had a duty not to accept “*very poor quality students*”. This is not, in fact, what the SSHD said. In its initial revocation letter of 3rd September 2014 (see above), the SSHD suggested that the fact that the Appellant was accepting “*very poor quality students*” was indicative or symptomatic of its failure to comply with its basic duty to ensure that students to whom it was going to grant CAS had the “*intention and ability*” to complete the course in question, *i.e.* a failure by the Appellant to comply with its paragraph 92 duty (see above). As McGowan J went on to make clear (in paragraph [26]), sponsors will not necessarily be in breach if a number of students fail the course, either by attendance or result, but the grant of a Tier 4 licence to sponsors carries with it the responsibility for carrying out relevant checks, “*refusing admission to a student who does not or cannot comply*”.
51. Further, as Mr Dunlop submits, the Appellant’s construction would make a nonsense of the sponsor scheme because the SSHD would have no power to revoke the licence of a sponsor that had repeatedly provided CAS to migrants without making any checks as to whether those migrants had the ability or intention to study in the UK.
52. Mr Turner relied upon a number of authorities in support of his argument as to the narrow scope of sponsor’s duties and the limited nature of the SSHD’s discretion. In my judgment, these authorities were unhelpful and irrelevant. *Alam v SSHD* [2012] EWCA Civ 960, *EK (Ivory Coast) v SSHD* [2014] EWCA Civ 1517, *Kaur v SSHD* [2015] EWCA Civ 13 and *Pokhriyal v SSHD* [2013] EWCA Civ 1568 were appeals by individual migrants against decisions by the SSHD to refuse leave to remain, *i.e.* in a context where there is a premium on predictability and certainty at the expense of discretion. *Odelola v SSHD* [2009] UKHL 25, *Pokhriyal v SSHD* [2013] EWCA Civ 1568 and *R (Alvi) v SSHD* [2012] UKSC 33 are of no relevance since the SSHD’s Guidance Documents are not contained within the Immigration Rules.

Summary

53. In summary, in my judgment, the Appellant’s appeal on construction should be dismissed. McGowan J’s decision on construction was correct for the reasons she gave. This is sufficient to dispose of this appeal. It is not necessary, therefore, to deal with the remaining points raised by the Appellant but I do so briefly.

(2) ‘SSHD’s exercise of discretion was irrational given the ‘exceptional’ circumstances of widespread ETS fraud’

54. Mr Turner seeks to argue that, because the Appellant did not know about the exceptional circumstances involving widespread ETS fraud (as the SSHD acknowledged), the fact that some of the students to whom it assigned CAS were valid turned out to be “*poor students*” cannot be laid at the Appellant’s door and the Judge was wrong and irrational to hold that the SSHD was entitled to rely on this as a factor.
55. There are three separate answers to this point.

56. First, this argument is not open to the Appellant. Mr Turner attempts to revive a ground of appeal on which the Appellant was refused permission to pursue, namely ground (4) that 'the Administrative Court's approach to the question of discretion under paragraph 163 of Document 3 is legally flawed'. Permission having been refused by Arden LJ on this ground, it is not open to Appellant to rely on it at the substantive hearing (see s.54(4) of the Access to Justice Act 1999 and *McHugh v McHugh* [2014] EWCA Civ 1671 at [13]-[16]).
57. Second, the submission is fallacious and ignores the sponsor's basic duty to assess students before assigning CAS to them (see above). As the SSHD explained in the suspension and revocation letters, the investigations showed a pattern of the Appellant repeatedly accepting poor quality students who co-incidentally, (i) had shown little progress and (ii) were the very same students who had obtained ETS by deception (see e.g. the SSHD's letter dated 3rd September 2014).
58. Third, in any event, the submission runs contrary to the correct approach to a judicial review of a revocation decision in the context of ETS English-language cheating. I agree with and endorse the following approach set out by Andrews J in *R (Cranford College) v SSHD* [2015] EWHC 1090 (Admin) at [19] (and followed by Cobb J in *R (London College of Finance and Accounting) v SSHD* [2015] EWHC 1688 (Admin) at [39]):
- "i) If a Tier 4 sponsor has assigned CAS's to a significant number of students with "invalid" ETS TOEIC results, and then failed to report them as having inadequate English, that gives grounds for reasonable suspicion that the sponsor was failing in its duties to:*
- a) Adequately assess the ability and intention of the students to study on the chosen course before assigning CAS's to them and*
- b) Monitor, and report bogus students to the UKBA.*
- ii) The onus is on the sponsor to allay that suspicion, for example by providing examples of coursework demonstrating that the students did in fact speak/understand English to the appropriate standard;*
- iii) If the SSHD takes a Wednesbury reasonable view that the evidence is insufficient to allay that suspicion, she is entitled to revoke the Tier 4 licence."*
59. The fact that the Appellant had assigned 65 CAS to students with invalid ETS TOEIC certificates, and 19 students with questionable ETS TOEIC certificates, created a reasonable suspicion that the Appellant was not checking that the migrants it was sponsoring had the ability and intention to pursue the course for which they were to be granted a CAS. In this case, that suspicion - that the Appellant was failing to conduct proper checks - was reinforced by the very poor quality and poor English in the CAS themselves. As the SSHD explained in her letter of 17th October 2014, it appeared from the CAS themselves that the Appellant's staff were either not taking the necessary care over the assessments or lacked the necessary English language skills themselves to

perform such assessments or both. The Appellant's responses, however, failed to allay the SSHD's suspicions. A sponsor college carrying out proper checks on its applicants should have been able to provide evidence to allay the SSHD's reasonable suspicion by providing, *e.g.* coursework from the relevant students to demonstrate that they spoke reasonable English. All that the Appellant provided was a witness statement from Mr Arefin, which only addressed 7 out of the 84 students whose TOEIC certificates were either invalid or questionable and failed to explain the poor quality and poor English in the CAS. It should be noted that Cranford College attempted to provide such evidence but "*rather than allaying the SSHD's legitimate concerns, ...[their evidence] did the opposite*" (see *Cranford* at [40]).

(3) 'SSHD's and McGowan J's decision was based on a 'misconceived assumption' that students who cheated in English language exams were not proficient in English'

60. Mr Turner argued that the SSHD's (and McGowan J's) decision was based on a 'misconceived assumption' that students who cheated in English language exams were not proficient in English'.
61. This argument is also not open to the Appellant. The point was not taken below and there was no evidence, statistical or otherwise, to support it.
62. In any event, in my view, the point has no merit. The mere fact that *not everyone* who cheats in English language exams does so because their English is poor (there may be other reasons), does not mean that *no one* who cheats in English language exams does it because their English is poor. If there are 84 migrants who cheated in their ETS exam, common sense suggests that at least *some* of them did it because they could not speak English to the requisite standard. This is enough to raise a reasonable suspicion that a college is not fulfilling its duties to assess the migrant's ability and intention to study (*c.f. Cranford (supra)*).

(4) 'The Court cannot be satisfied that the same decision would have been reached if the SSHD, or the Judge, had only relied on the remaining grounds for revocation.'

63. Mr Turner argued that, on the hypothesis that McGowan J erred in her construction of "*any of your duties*" in paragraph 162(d) of Guidance Document 3, the Court cannot be satisfied that the same decision would have been reached if the SSHD had only relied on the remaining grounds for revocation. I disagree.
64. Paragraph 162(d) was not the only ground for revocation in Section 2 of Guidance Document 3. There were two further grounds for revocation, each of which would have been sufficient on its own to justify revocation and neither of which the Appellant has permission to challenge, namely: (i) paragraph 162(g) ("*students failure to comply with conditions of stay in UK*") and (ii) paragraph 162(i) ("*academic progression*"). As regards (i) paragraph 162(g), the Appellant sponsored 31 migrants who breached their conditions by working. As regards (ii) paragraph 162(i) the Appellant issued CAS on the basis of academic progression when there was no such academic progression. The numbers involved in these breaches were not *de minimis* as Mr Turner suggested.
65. In any event, there does not have to be an actual breach of a sponsor's duties for the SSHD to be entitled to exercise her powers. The SSHD has a broad residual discretion to suspend or revoke sponsor status where the SSHD has reasonable public law-compliant grounds for suspecting either that there is a risk that the sponsor might not

be complying with its duties, or that there is a risk that a breach of immigration control might occur (*c.f.* Silber J in *Westech, supra*, at [17]-[18]).

66. It follows that even if none of the grounds for revocation were made out, and the SSHD could not establish a breach of any specified duty, the SSHD would still have been entitled to revoke the Appellant's sponsor licence in light of her reasonable, articulated, un-allayed concerns that the Appellant could not be trusted to comply with its duties or act in a manner that was conducive to immigration control. It is plain that the SSHD was not so satisfied. As the SSHD's suspension and revocation letters repeatedly stated: "*We remain of the opinion that there is an endemic problem of poor judgment shown by the college when assigning CAS*". In my judgment, the SSHD was fully entitled on public law grounds to have formed such a view. There was an overwhelming ground for concern about the Appellants.

Conclusion

67. For the reasons set out above, this appeal must be dismissed.
68. It is a matter of regret and concern that this case has taken over four years to come to appeal and has been pursued despite a complete lack of merit on any ground.
69. Finally, I again cite McGowan J's postscript at [36] as I did in *Raj & Knoll (supra)*:

"It must be understood that the grant of [sponsor] status is a fragile gift, constant vigilance about compliance is a minimum standard required for such sponsors. The burden of playing an active role in the support of immigration control is a heavy one. The SSHD is entitled to review purported compliance with a cynical level of supervision."

LADY JUSTICE ASPLIN:

70. I agree.