Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23247/2013

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
on 15th July 2014	**on 17th July 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DONG YU
(Anonymity direction not made)

Respondent

Representation:

For the Appellant: Mrs Rackstraw – Senior Home Office Presenting Officer.
For the Respondent: No attendance.

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a determination of First-tier Tribunal Judge Cope promulgated on 28th April 2014 in which he allowed Mr Yu's appeal against the refusal of the Secretary of State to grant him leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant and a direction of his removal from the United Kingdom made pursuant to section 47 Immigration, Asylum and Nationality Act 2006.

2. Neither Mr Yu nor any representative attended the Upper Tribunal hearing today. No explanation has been provided for such a failure and there is no application for an adjournment. I am satisfied there has been valid service of the notice of hearing at the last known address for service for Mr Yu in accordance with the provisions of the relevant procedure rules. In the absence

of any explanation for his failure to attend I have considered whether it is appropriate to proceed with the hearing in his absence. I consider it is appropriate and in the interests of the overriding objectives, fairness, and justice to do so. No explanation has been provided, no grounds warranting the Tribunal not proceeding have been established, there is nothing that cannot be justly determined in his absence, and Tribunal resources have been allocated for the purposes of this hearing which will be lost if the matter is to be put off.

3. Judge Cope records the procedural history of this matter noting that Mr Yu is in the United Kingdom legally as a student. He made an application for further leave to remain as a Tier 4 (General) Student Migrant but the CAS assigned to him by Sunderland University had been withdrawn by the date of decision. The notice of refusal/decision is dated 4th June 2013 and in section 'Attributes - Confirmation of Acceptance for Studies (CAS)' notes that 30 points were claimed for a valid CAS but that none were awarded. The decision maker noted in the refusal:

> "In order for points to be awarded, a Confirmation of Acceptance for Studies (CAS) must not have been withdrawn or cancelled by the Tier 4 Sponsor since it was issued.
>
> The Confirmation of Acceptance for Studies Checking Service was checked on 04 June 2013 and it confirmed that the CAS with reference number …… that you submitted with your application has been withdrawn by Sunderland University.
>
> As such, you are not in possession of a valid CAS and so you have not met the requirements of the rules. Therefore, no points have been awarded for your CAS"

4. It was not disputed before the Judge that the above statement is factually correct. The Judge noted that once the refusal was communicated to Mr Yu and to the University of Sunderland the matter was investigated and the Secretary of State advised on 10th June 2013 that the information given to her regarding the CAS having been withdrawn was a mistake as there were no grounds to justify such a withdrawal. Judge Cope also noted confirmation from the University that the CAS had been withdrawn as a result of an internal process error which arose as a result of a failure to communicate between the University and what is described as a 'partner agency ' the Cambridge Education Group.

5. The Judge records discussing this matter with the Presenting Officer who attended the hearing before him and being advised that the Secretary of State did not concede the appeal, that the Secretary of State had not acted unfairly towards Mr Yu, and that the application had to be refused because there was no CAS and the Secretary of State was not aware of the error by the University until after the decision had been reached. The Secretary of State's view is that the

University should have re-issued a CAS to Mister Yu who could then have made a fresh application for leave to remain.

6. Judge Cope, in paragraph 32 of his determination, refers to the lack of judicial review powers which would have enabled him to quash the refusal of the Secretary of State to withdraw the original decision to refuse leave which I find in itself to be a questionable conclusion on the facts. He states that he was satisfied that Mr Yu not only had a CAS validly issued by the University of Sunderland at the time he made his application but also when his application was dealt with by the Respondent, and indeed after that as well [36]. In paragraphs 45 to 47 the Judge states:

> 45. Here the heart of the case is whether or not the Appellant at the time of decision did have a valid CAS. Given that it is accepted that an error was made by the University in notifying the Respondent that it had been withdrawn it seems to me that the evidence of Ms McLuckie about the error and its nature goes wholly to the question of the validity of the Appellant's CAS. As such then I am satisfied that I can take into account what she has had to say about that error and about the fact that so far as the University is concerned the Appellant always has had a valid CAS.
>
> 46. That being so, it follows that the decision of the Respondent in refusing the application for leave to remain was not in accordance with the law or Immigration Rules - it is well established in this jurisdiction that even if the respondent decision maker was not aware of the actual situation at the time that they took their decision , that decision is not in accordance with the law or rules if at that time the applicant would have had their application granted if the decision maker had known what the true factual situation was.
>
> 47. It is on this basis therefore that I allow the appeal

7. The Judge's decision is challenged on one ground only, namely that the Judge made a material misdirection in law.

Error of law finding

8. The Judge appears to have predicated his decision on the basis that because the withdrawal of the CAS was erroneous Mr Yu must always have had a valid CAS in the eyes of the University. Yet there is no finding that the checks made on 4 June 2013 by the CAS Checking Service, which revealed that the CAS had been withdrawn by Sunderland University, produced an erroneous result. At that time the records clearly showed that the CAS had been withdrawn. If that was the case, and there was no evidence that a valid CAS existed at that time, the refusal on this basis appears to be wholly in accordance with the law. The

application was refused under paragraph 245 ZX (c) with reference to paragraph 116 (c) of Appendix A and 245 ZX (d) of the Immigration Rules.

9. The Judge refers to one piece of case law in paragraph 13 that of Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 but fails to referred to the case of Rahman v Secretary of State for the Home Department [2014] EWCA Civ 11 (12th February 2014) which is perhaps more pertinent to the issues in this appeal. In their judgement in Rahman the Court state:

> 32. I am not sure whether the appellant had an opportunity to check the CAS following its completion by the sponsor, and I note that part of the argument for the appellant is that he should not be penalised for the shortcomings of an institution of study over which he had no control. Nevertheless I agree with the tribunal that the situation here is very different from that in *Naved* and that fairness did not require the Secretary of State to give the appellant an opportunity to address any deficiency in the CAS. There was no question in this case of the Secretary of State obtaining additional information without reference to the applicant and relying on it to refuse the application. The Secretary of State simply applied the terms of the Immigration Rules themselves. Under the Rules it was the appellant who had the responsibility of ensuring that his application was supported by a CAS that met the requirements laid down. If the CAS did not meet those requirements, it could not earn him an entitlement to points. If the deficiency in the CAS was the result of a mistake on the part of the sponsor (a point which, as I have said, was not even raised by the appellant in the tribunals below), it was a matter to be pursued between the appellant and the sponsor. There was no obligation on the Secretary of State to give the appellant an opportunity to seek an amendment to the CAS before a decision was taken on the application. Indeed, the importance of all relevant information being provided as part of the application was underlined by the tribunal in *Naved* itself, in the passage I have quoted from paragraph 21 of the determination.

10. In accordance with Rahman the Secretary of State was not required to seek further information as to why the CAS was withdrawn or give Mr Yu the opportunity to address any deficiencies in it. The approach of the Judge in accepting that the CAS had been withdrawn, albeit erroneously, but then applying the doctrine of fairness/reasonableness to allow him to make a finding that the decision, based upon information received that it had been cancelled and did not exist at the date of decision, was unlawful arguably also falls foul of the principles outlined by the Upper Tribunal in the case of Fiaz (cancellation of leave to remain-fairness) [2012] UKUT 00057(IAC) in which the Tribunal held that the jurisdiction to determine that a decision is not in accordance with the law because of a lack of fairness, is not to be degraded to a general judicial power to depart from the Rules where the judge thinks such a course appropriate, or to turn a mandatory factor into a discretionary one: fairness in this context is essentially procedural.

11. I find the Judge erred in allowing the appeal by failing to apply the correct legal principles. The fact Sunderland University subsequently stated that the withdrawal of the CAS was a mistake does not change the fact that at the date of decision there was no valid CAS and so the decision made was lawful.

12. I also find the Judge erred in his application of the doctrine of fairness and appears to have used this principle as justification for his departing from the rules. If fairness is essentially procedural it has not been shown that there is any unfairness in the approach of the Secretary of State within the decision making process.

13. I therefore set the determination aside and proceed to remake the decision.

Discussion

14. As acknowledged by all parties, at the date of decision there was no valid CAS. Although it appears Sunderland University subsequently accepted this was as a result of internal error it is clear on the facts that existed when the decision was made that Mr Yu was unable to meet the requirements of the relevant immigration rules.

15. No procedural irregularity by the decision maker has been established on the facts. The existence of a valid CAS is a matter between Mr Yu and the University. If they subsequently discovered the error it was open to them to issue a fresh CAS which would have enabled Mr Yu to make a fresh application.

16. On the factors known to this Tribunal it is clear that at the relevant date Mr Yu was unable to meet the requirements of the rules and his appeal challenging that aspect of the decision must be dismissed.

17. In relation to the section 47 decision, that was made within the refusal dated 4 June 2013. Section 51 of the Crime and Courts Act 2013 substituted a new section 47 (1) and (1A) into the Nationality and Immigration Act 2006 from 8 May 2013 (Crime and Courts Act 2013 (Commencement no 1) Order (SI 2013/1042). The amendment to s.47 is not retrospective. From 8 May 2013, removal decisions made under s.47 will be lawful even if made before the applicant has notice of the variation decision. This means that notice of the two decisions can be given in the same document. Such a direction is therefore lawful. On the material available to the Upper Tribunal no basis of a decision other than dismissing the appeal against that direction has been established.

Decision

18. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

19. 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 in the absence of an application or any justification for such an order on the facts.

Signed…….
Upper Tribunal Judge Hanson

Dated the 16th July 2014