Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/38800/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 September 2015	**On 2 November 2015**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

RAJAPAKSHA PATHIRANNAHELAGE RAJAPAKSHA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Biggs, Counsel instructed by SEB Solicitors
For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I see no need for, and do not make, an order restricting publication of the details of this appeal.
2. This is an appeal brought by a citizen of Sri Lanka, born in 1986, against a decision of the First-tier Tribunal to dismiss his appeal against a decision of the respondent on 15 September 2014 refusing to vary his leave to remain and to remove him by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. Notice of Appeal was served on 30 September 2014 and so the appellant was not restricted to the more

limited grounds of appeal introduced by the amendments to section 84 of the Nationality Immigration and Asylum Act 2002.

3. The application was refused because the appellant relied on a form CAS which enquiries revealed had been withdrawn by the City of London Academy *and* because, according to the respondent, the appellant had not complied with a request to attend an interview in accordance with paragraph 322(10) of the Immigration Rules.

4. The First-tier Tribunal did not decide if the appellant had ever been invited to attend an interview. It would have been better if it had.

5. The judge did decide that the respondent was under no obligation to extend the appellant's leave as a result of his failing to satisfy the Rules because the form CAS had been withdrawn.

6. It is not an unusual state of affairs for a form CAS to be withdrawn but there is an additional feature in this case. The appellant says that he has twice suffered the frustration of his form CAS being revoked. He was given an extension of 60 days when it happened the first time but not the second. He says that he should have been given an extension on the second occasion.

7. The First-tier Tribunal Judge considered himself bound by the decision in **Kaur v Secretary of State for the Home Department [2015] EWCA Civ 13**. That case decided that where a Tier 4 Sponsor failed to provide evidence in a form CAS there was no obligation on the Secretary of State to investigate the matter further or to inform the student. There was no obligation to give a student caught out by such a deficiency further leave in which to consider his position.

8. Mr Biggs contended that the First-tier Tribunal was wrong. The case of **Kaur** concerned the contention that there was an obligation on the part of the Secretary of State to notify an applicant that the academic course relied upon was deficient if, for example, he did not show academic progress. The Tribunal held that there was no such obligation and the Court of Appeal agreed. That is quite different from the circumstances here. Here the appellant provided an apparently valid form CAS but by the time it came to be considered it had been invalidated by an action of the college. This is conceptually different from the case of an applicant who either provides the wrong form or relies on his sponsor to provide a form and the sponsor does not do as required or does not do it properly. The obligation is on the applicant to make his application properly and not on the Secretary of State to say where an application has gone wrong and offer an opportunity for it to be remedied.

9. The present circumstances are rather different. The appellant reasonably thought that he had satisfied the requirements of the Rules. He had produced, or caused to be produced, documents that were satisfactory. However, unbeknown to him and for reasons that were not his fault, the college had withdrawn the CAS by the time the respondent decided the application.

10. In the case of **Patel (revocation of sponsor licence - fairness) India [2011] UKUT 00211 (IAC)** (a decision of the President of the Immigration

and Asylum Chamber of the Upper Tribunal, Mr Justice Blake and Upper Tribunal Judge Batiste) the Tribunal decided that it would be unfair where a sponsor's licence had been revoked by the Secretary of State and the applicant was unaware of the revocation and was not to blame for licence being revoked for the Respondent not to give the applicant an opportunity to vary his application. This was recognised in part by a policy operated by the Secretary of State and it was particularly wrong when a policy existed that it was not extended to people in broadly similar circumstances.

11. This was reinforced in the decision of the Tribunal (President Blake J and Deputy Upper Tribunal Judge McWilliam) in **Kaur (Patel fairness: respondent's policy) India [2013] UKUT 00344 (IAC)**).

12. It was Mr Biggs' primary point that there should be a way of providing a remedy when an innocent person has been caught out as appears to have happened here.

13. The second point is that there is a remedy. There is a policy. He provided me with a copy of which he claimed was the policy in force at the relevant time. Ms Holmes did not suggest that this was not the correct policy. It is described as "Patel guidance – step by step guide". I assume it applies. There is nothing in that guide or anything else that has been drawn to my attention which suggests that the entitlement to a 60 day period to vary an application necessitated by the cancellation of a form CAS for reasons that are not to the applicant's discredit can only be invoked once. Even if the policy were far more generous than anything required by common law fairness, or indeed arguably even if it were plainly bizarre, the applicant would be entitled to rely upon it and that is what the appellant is doing. Of course it is not bizarre. It is merely giving effect to the principle of fairness identified above.

14. It follows that I am satisfied that the First-tier Tribunal was wrong to dismiss the appeal for the reasons given and I am satisfied that the First-tier Tribunal should have found that the decision not to extend leave by 60 days was not in accordance with the law.

15. However, I cannot substitute a decision to that effect because there is an unresolved issue. The papers before me do not permit an easy answer to the question of whether notice was sent. Certainly the appellant asserts in very clear terms that it was never received but there is some evidence from the respondent to suggest that it was sent and should have been received.

16. I do not consider it desirable for the Upper Tribunal to decide this point because it is a pure question of fact which has not been decided at all. The appellant is not entitled to preserve his appeal rights but it is a relevant consideration that his appeal rights are limited if he wants to appeal a finding of fact made in the Upper Tribunal.

17. I therefore allow the appeal of the appellant because the appeal has not been decided properly. It is for the First-tier Tribunal to decide the case again and I set aside the existing decision. Once the First-tier Tribunal has resolved the question of whether the appellant was invited to a further interview it must then decide if the decision complained of was in accordance with the law. I have indicated circumstances where in my

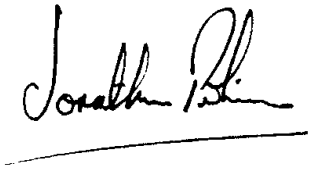
judgment it would not be in accordance with the law and that should be followed unless there are extraordinary circumstances.

18. I have in mind the possibility, which occurs occasionally, that applications either cannot succeed or cannot be refused on an exercise of discretion but that is a very rare event and I do not think it has happened here.

Notice of Decision

19. To the extent indicated above I allow the appeal and I set aside the decision of the First-tier Tribunal. The appeal must be determined again in the First-tier Tribunal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 28 October 2015