Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/04210/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd May 2016	**On 6th June 2016**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

FAIZUDDIN SYED
(ANONYMITY ORDER NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Chowdhury of PGA Solicitors.
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and background facts:

1. The appellant has been granted permission to appeal the decision of Judge of the First-tier Tribunal Boardman who, following a hearing on 17 August 2015, dismissed his appeal in a decision promulgated on 8 September 2015 against a decision of the respondent of 14 January 2015 by which the respondent refused his application of 3 January 2014 for leave to remain as a Tier 4 (General) student.

2. Prior to his application of 3 January 2014, the appellant had been granted leave as a Tier 1 (Post-Study) Migrant until 10 January 2014. Since his application was made in time, his leave was extended under s.3C of the Immigration Act 1971 when he made his application.

3. With his application of 3 January 2014, the appellant submitted a "confirmation of acceptance for studies" ("CAS") issued by London West Valley College ("LWVC") with reference number E4G7XN6D14W0J2.

4. In the respondent's decision of 14 January 2015, it is stated that the college had confirmed in writing that it had withdrawn the offer of sponsorship and were no longer willing to sponsor the appellant's studies. The precise wording in the decision letter was as follows:

> "… Your sponsor has confirmed in writing to UKV&I that they have withdrawn the offer of sponsorship and are no longer willing to sponsor your studies….

5. The respondent therefore considered that the appellant did not have a valid CAS and therefore did not meet the requirements of para 116(c) of Appendix A of the Statement of Changes in the Immigration Rules HC 395 (as amended) (hereafter referred to collectively as the "Rules" and individually as a "Rule"). The respondent therefore awarded the appellant no points in respect of his CAS. Given that it was necessary for him to be awarded 30 points for a CAS, the respondent concluded that the appellant did not meet the requirements of para 245ZX(c) of the Rules.

The judge's decision

6. Before the judge, it was accepted on behalf of the respondent that, if the licence of LWVC had been revoked, the respondent should have granted the appellant 60 days' leave in order to enable him to find another sponsor pursuant to the decision of the Upper Tribunal in Patel (revocation of sponsor licence – fairness) India [2011] UKUT 00211 (IAC). It was accepted on the respondent's behalf that, in these circumstances, the appellant's appeal should be allowed to the limited extent that the respondent's decision was not in accordance with the law. If, on the other hand, the judge decided that LWVC had withdrawn the CAS, it was submitted on the respondent's behalf that no 60-day letter was appropriate because the college could have withdrawn the CAS for a number of reasons.

7. Accordingly, the factual dispute between the parties before the judge was whether the appellant's CAS was cancelled or withdrawn only as a result of LWVC having had its licence revoked or whether it was withdrawn for other reasons.

8. The evidence before the judge may be summarised as follows:

   i). There was no evidence from the respondent as to whether the confirmation said in the decision letter to be "*in writing*" from LWVC comprised of a letter or document or whether it consisted of an entry in the database that was then checked by the decision maker before making a decision.

   ii). The judge had evidence from the appellant, both oral and in a witness statement, that his CAS was cancelled only because LWVC's licence was revoked and there were no other reasons. He did not produce supporting evidence from LWVC.

   iii). The appellant said that he started his course at LWVC in November 2013. He attended classes at the college but a month after he started his classes, the respondent suspended the licence of the college. The college then said that they were dealing with problems with their licence and would let him know when the

problems had been resolved. He phoned them but they told him to wait for their call. In May 2014, he went to the college and discovered that the college's licence had been revoked. He had heard nothing from them in the meantime. He had paid fees to the college. When he found out in May 2014 that the licence of the college had been revoked, he asked the college for a letter to help him find another college. He also asked for his fees back. He did not do anything else to find another sponsor because he was waiting to receive his fees back from the college.

iv). When the licence of the college was revoked, the college told the appellant that the respondent would send him a 60-day letter to enable him to find another sponsor. He was waiting for a letter from the respondent but instead the respondent refused his application.

v). The appellant gave evidence that the campus of the college was closed after June 2014. When he went to the campus, it was locked most of the time. On some occasions, the receptionist told him that "*there was not any concerned person to answer my query".*

vi). Since coming to the United Kingdom, he has twice been a victim of the respondent revoking the licences of his sponsors. He has lost a substantial amount of money.

9. The judge decided that it was for the appellant to produce evidence to show that his CAS was cancelled due to the revocation of the licence of LWVC. He said that the appellant had been on notice since receipt of the refusal letter that the respondent's case was that the CAS had been withdrawn and had not produced evidence to support his case. On the other hand, according to the refusal letter, the appellant's CAS had been withdrawn by LWVC. On this basis, he found that the appellant did not have a CAS and therefore that he did not meet the requirements of the Rules.

The grounds and the grant of permission

10. In essence, the grounds contend that the judge had failed to take into account "*the principle of fairness*". The respondent had contended that the appellant's CAS was withdrawn but failed to state when the CAS was checked and failed to produce evidence that the CAS had been withdrawn.

11. In granting permission, Designated First-tier Tribunal Judge Zucker observed that, whilst the refusal letter refers to the college having confirmed in writing that the appellant's CAS had been withdrawn, there appeared to be no such letter on file nor was there anything to suggest that the letter had been served on the appellant. Judge Zucker observed that, whilst the legal burden was on the appellant, the respondent arguably had an evidential burden to produce the letter, "*the better to enable the appellant to present his appeal*" and that, in the circumstances, it was arguable that there was unfairness.

Proceedings in the Upper Tribunal prior to 3 May 2016

12. This appeal was first listed for hearing on 29 March 2016 before Deputy Upper Tribunal Judge Symes. The respondent's representative, with the support of the appellant, requested an adjournment to provide the respondent with a further opportunity to investigate the true basis upon which the appellant's CAS was found to be flawed. Judge Symes adjourned the hearing, and directed the respondent to file

and serve any further evidence in her possession relevant to the circumstances in which the appellant's CAS was found to be inadequate by the decision-maker.

The hearing on 3 May 2016

13. Ms Isherwood informed me that, despite her best efforts to obtain evidence to comply with the directions issued by Judge Symes, she could not locate any such evidence. She informed me that it is not possible for the respondent to comply with the directions. There was no such evidence available now, even if it had been available at the date of the decision.

14. Ms Isherwood submitted that the judge was entitled to find on the evidence that the appellant had not established that his CAS was cancelled because the college had lost its licence.

15. I then announced my decision that I was satisfied that the Judge Boardman had materially erred in law and that his decision should be set aside. I therefore set his decision aside. My reasons are given at para 24 below.

16. In relation to the re-making of the decision on the appellant's appeal, Mr Chowdhury informed me that the appellant did not wish to give oral evidence.

17. I therefore proceeded to hear submissions from Mr Chowdhury and Ms Isherwood.

18. Mr Chowdhury relied upon a letter from UK Visas and Immigration to LWVC dated 2 April 2014 in connection with its responsibility of supervising the licence of the college. The letter dealt with representations made on behalf of LWVC in response to an invitation by the respondent to do so after upon informing LWVC on 24 December 2013 that its licence was suspended.

19. Mr Chowdhury also produced an *extract* of the respondent's guidance to sponsor-institutions. He relied upon para 478 of the version in force as at December 2013 which stated:

> "478. You can withdraw a CAS that you have assigned to a student if they have not yet used it to support an application for a visa or an extension of stay. You must do this using the SMS."

20. Mr Chowdhury submitted that the terms of the applicable guidance as at the date of the decision made it clear that a college may only withdraw a CAS letter that has been assigned to a student if the student has not used the CAS letter to support an application for a visa or an extension of a stay. He submitted that it follows that LWVC could not have withdrawn the appellant's CAS, as he had used it to support an application for an extension of his stay.

21. Ms Isherwood submitted that the appellant had had ample opportunity to produce evidence that his CAS was withdrawn only because LWVC's licence was revoked. He had had ample opportunity between May 2014 when, on his evidence, the licence of the college was revoked, and 14 January 2015 when the respondent's decision was made, to obtain another CAS. However, she also accepted that, notwithstanding the fact that the appellant's leave was extended under s.3C of the Immigration Act 1971, he could not have obtained another CAS from another college in reliance upon the fact that his leave had been extended under s.3C and that he needed to have a *"60-day letter"* in order to obtain another CAS. Nevertheless, she asked me to dismiss the

appeal on the basis that he could have written to the respondent to request a *"60-day letter"* but failed to do so.

22. Although I had given both Mr Chowdhury and Ms Isherwood copies of the judgments of the Court of Appeal in EK (Ivory Coast) v SSHD [2014] EWCA Civ 1517 and R (Raza) v SSHD [2016] EWCA Civ 36 at the commencement of the hearing before me, neither party addressed me on the judgments.

23. I reserved my decision.

Assessment

24. The following are my reasons for concluding that Judge Boardman materially erred in law:

    i) I am grateful to Ms Isherwood who had obviously tried very hard to obtain evidence to comply with the directions of Judge Symes. It may well be that, as at the date on which she attempted to obtain the evidence, it was no longer in existence. Nonetheless, it is clear that the decision maker had some evidence *"in writing".* The decision letter did not state that it had come to light that the CAS had been withdrawn when the relevant database was checked.

    ii) Since the decision maker had evidence "*in writing*", it was unfair for the judge to proceed to determine the appeal without making some attempt to ensure that the written evidence that was before the decision maker was served on the appellant to enable him to present his appeal. In the particular circumstances of this case, it was unfair not to do so, given that: (a) the respondent's assertion as to the contents of the written evidence before the decision maker did not, of itself, amount to evidence; and (b) nevertheless, and notwithstanding that the statement in the decision letter that the withdrawal of the CAS had been confirmed in writing did not amount to evidence, it was regarded by the judge as determinative of the appeal.

25. I therefore proceed to re-make the decision on the appellant's appeal.

26. In my judgement, Mr Chowdhury's reliance upon the letter from UK Visas and Immigration to LWVC dated 2 April 2014 was misconceived. In the first place, this risked opening up satellite issues relating to the procedures in place for the supervision of sponsor-institutions. Secondly, and in any event, I could not see anything in this letter which is relevant to the appellant's appeal.

27. In relation to Mr Chowdhury's reliance upon the *extracts* of the guidance to sponsors, I am not prepared to accept that the extracts of the version of the guidance in place at the date of the decision suffices to demonstrate that LWVC did not withdraw the appellant's CAS for reasons unconnected with the revocation of his licence. In any event, for the reasons given below, even if it is the case that the appellant's CAS was withdrawn only because LWVC's licence was revoked, this makes no difference to the outcome, for the reasons given at paras 38-43 below.

28. It is now known that the written evidence that the appellant's CAS was withdrawn by LWVC either does not exist any longer or it cannot be located. However, this does not make a material difference to the outcome of the appeal for reasons which I will now give.

29. Essentially, the appellant's case is that: (i) his CAS was withdrawn by LWVC only because its licence was revoked and for no other reason; (ii) accordingly, the 'principle' in Patel (revocation of sponsor licence – fairness) India [2011] UKUT 00211 (IAC) (Blake J and Mr Batiste, Judge of the Upper Tribunal) applies by analogy; (iii) accordingly, the respondent's failure to grant him 60 days' leave in order to enable him to vary his application by finding another sponsor was in breach of the general public law duty of fairness; and (iv) her decision was therefore not in accordance with the law, a ground of appeal that was included in his Notice of appeal.

30. Paras (2), (3) and (6) of the head note of Patel, read as follows:

> "(2) Where a sponsor licence has been revoked by the Secretary of state 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 Secretary of State should afford an applicant a reasonable opportunity to vary the application by identifying a new sponsor before the application is determined.
>
> (3) It would be unfair to refuse an application without opportunity being given to vary it under s.3C(5) Immigration Act 1971.
>
> (6) By analogy with the present UKBA policy on curtailment of leave where a sponsor licence is revoked a 60 day period to amend the application would provide such a fair opportunity."

31. Paras 22-26 of the judgment in Patel, which are also relevant, read:

> "22. Where the applicant is both innocent of any practice that led to loss of the sponsorship status and ignorant of the fact of such loss of status, it seems to us that common law fairness and the principle of treating applicants equally mean that each should have an equal opportunity to vary their application by affording them a reasonable time with which to find a substitute college on which to base their application for an extension of stay to obtain the relevant qualification. In the curtailment cases, express Home Office policy is to afford sixty days for such application to be made.
>
> 23. Although we accept that there is no such policy for refusal cases, fairness requires that such cases be treated in broadly the same way. The applicant must be given an equal opportunity before refusal of application to amend it in the way we have described. This was clearly not done in this case. The Home Office knew that it had suspended the college in January 2010 but no one else did. The applicant could not have known that subsequently the college's status as an approved sponsor was revoked before his application for an extension of stay was decided.
>
> 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.
>
> 25. None of this applies where the applicant has not been a *bona fide* student at the college where he is seeking to extend his stay, or where he has participated in the practices that may have led the college to lose its

> sponsorship status, or where he has had actual knowledge of the cessation that the termination of the college's status as a sponsor either before the application for an extension of stay was made or shortly thereafter and when he had adequate opportunity to amend the application by seeking to substitute an approved college for an unapproved one."

32. Although I handed to the parties copies of the judgments of the Court of Appeal in EK (Ivory Coast) and R (Raza), neither Mr Chowdhury nor Ms Isherwood addressed me on the judgments.

33. In R (Raza), the Court of Appeal considered a challenge by on behalf of the Secretary of State to the correctness of the guidance of the Upper Tribunal in Patel. I draw from paras 28-38, in particular paras 37-38, of R (Raza) that Patel remains good law; it has not been overruled by the judgment in EK (Ivory Coast).

34. However, although I have considerable sympathy for the appellant, Patel cannot assist him. Even if he is correct in stating that his CAS was only withdrawn because LWVC's licence had been withdrawn and even if Patel can be extended to include a person whose CAS has been withdrawn as opposed to a person whose sponsor has had its licence revoked (an issue I do not need to decide), it is plain that he knew in May 2014 – over 7 months before the respondent's decision in January 2015 - that the LWVC's licence had been withdrawn. He therefore cannot bring himself within para 22 and head note (2) of Patel.

35. Although I acknowledge that Ms Isherwood accepted before me that the appellant could not have obtained a CAS without a "60-day" letter, I have a concern as to whether this concession was correctly made, given that para 3 of the judgment in R (Raza) shows that the claimant in that case was able to obtain a CAS at a time when he had no leave at all.

36. Even if I am wrong and the concession made by Ms Isherwood was correctly made, it is a fact-specific issue whether the respondent's failure to grant the appellant leave for 60 days was in breach of the general public law duty to act fairly. It is plain from the appellant's own evidence that he did nothing, from May 2014 onwards, when he first knew that LWVC's licence was revoked. He admitted he had done nothing. He did not make any attempt to obtain a CAS from another sponsor. If he had done so and if he had encountered difficulties in obtaining a CAS without a letter from the respondent granting him leave, he could have written to the respondent to request that he be granted leave for 60 days. For these reasons, Patel cannot assist the appellant.

37. However, there is another alternative reason why this appeal must be dismissed, which I will now explain.

38. In EK (Ivory Coast), Sales LJ stressed that the Points-Based System (PBS) is intended to simplify the procedure for applying for leave to remain or remain in the United Kingdom for certain classes of case to enable the Secretary of State to process high volumes of applications in a fair and reasonably expeditious manner, according to clear objective criteria (para 28). At para 29, Sales LJ endorsed the observation of Sullivan LJ at para 45 of the judgment in Alam v SSHD [2012] EWCA Civ 960 that: *"the price of securing consistency and predictability is a lack of flexibility that may well result in "hard" decisions in individual cases, but that is not a justification for imposing an obligation on the Secretary of State to conduct a*

preliminary check of all applications to see whether they are accompanied by all of the specified documents, …"

39. At para 31 of EK (Ivory Coast), Sales LJ said:

> "31. This context informs the way in which the general public law duty of fairness operates in relation to the PBS. The duty supplements the PBS regime, but ought not to be applied in such a manner as to undermine its intended mode of operation in a substantial way. Application of the duty of fairness should not result in the public benefits associated with having such a clear and predictable scheme operating according to objective criteria being placed in serious jeopardy."

40. In EK (Ivory Coast), the appellant's CAS was withdrawn by her college as a result of an administrative error. She produced evidence to that effect. It was her case that, pursuant to the general public law duty of fairness, the Secretary of State should have given her notice of the withdrawal of the CAS letter and postponed making any decision on her application in order to allow her an opportunity to correct any error which might have been made by the college or to find another college which would issue her with a CAS letter.

41. At para 32, Sales LJ said:

> "32. In my judgment, acceptance of the Appellant's submission that the general duty of fairness required the Secretary of State to postpone making a decision on her application in order to raise with her the cancellation of her CAS letter would undermine the benefits associated with PBS in a significant and inappropriate way. It may often be the case that a CAS letter is withdrawn between the filing of an application with the Secretary of State and the making of a decision on that application for reasons to do with the student (such as failing to attend the course or failing to pay the tuition fees), and in relation to which it would not be appropriate to grant leave to enter or remain. There is no way in which the Secretary of State can tell whether withdrawal of a CAS letter reflects that type of underlying situation or a situation in which some administrative error has occurred on the part of the sponsoring college in which the applicant is in no way implicated. It would be a serious intrusion upon the intended straightforward and relatively automatic operation of decision-making by the Secretary of State under the PBS if in every case of withdrawal of a CAS letter she had to make inquiries and delay making a decision."

42. Although the appellant has attempted to bring himself within the scope of Patel by stating that his CAS was withdrawn only because LWVC's licence was revoked and for no other reason, his circumstances are in fact analogous to the circumstances of the applicant in EK (Ivory Coast). Acceptance of his submission that the general public law duty of fairness required the respondent to grant him a period of 60 days' leave would in fact have involved the respondent having to investigate whether his CAS was withdrawn only because the licence of the college had been revoked or for other reasons. In effect, she would have to make enquiries in every case of withdrawal of a CAS letter and delay making a decision.

43. I am satisfied that, in the words of Sales LJ, this "*would undermine the benefits associated with the PBS in a significant and inappropriate way" and "be a serious*

intrusion upon the intended straightforward and relatively automatic operation of decision-making under the PBS".

44. Accordingly, I have concluded that the respondent's decision is in accordance with the law. The appellant cannot bring himself within Patel. In the alternative, the respondent did not act in breach of the general public law duty to act fairly, pursuant to EK (Ivory Coast).

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law such that it fell to be set aside. I set it aside. I re-make the decision in the appeal by dismissing it.

Signed Date: 16 May 2016
Upper Tribunal Judge Gill