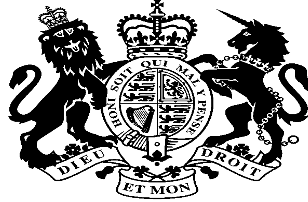

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31109/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal	**Decision Promulgated**
on 10 May 2017	**On 11 May 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAJA NABEEL QAISIR
(anonymity direction not made)

Respondent

Representation:

For the Appellant: No appearance.
For the Respondent: Mrs Aboni Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Thomas ('the Judge') promulgated on 30 March 2016 in which the Judge allowed the appeal to the limited extent that the Secretary State should consider a policy of fairness in line with the Judge's findings at [7] of the decision.

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2. This matter was originally listed for hearing before Deputy Upper Tribunal Judge Dr Storey on 21 February 2017 but could not proceed as the applicant claimed he was unable to attend as he had been involved in an accident. The matter was therefore re-listed for hearing today. The appellant's case was called on by the Tribunal Clerk at the beginning of the day but there was no response or attendance. The matter was therefore put back with a further check being made at the end of the morning list, 12:45, with, again, there being no attendance by the appellant. The case was listed for hearing at 10 AM. The decision was reserved.
3. The Upper Tribunal received a fax at 13:22 containing a Statement of Fitness for Work issued for the purposes of Statutory Sick Pay, dated 10 May 2017, and a copy of a prescription issued on the same date for two prescribed medications, Naproxen which is used to treat pain or inflammation and Lansoprazole, a prescriptive antacid.
4. Other than informing the Tribunal that on 10 May 2017 the applicant was fit enough to travel to his doctors to obtain a Statement of Fitness for Work indicating he is not fit for work, there is no indication why the Tribunal has been provided with these documents. They do not, for example, explain why the appellant failed to attend his hearing especially as it appears he was able to travel the 1 ½ miles from his home address to his GP surgery which is only slightly shorter than the 2 ½ miles between the appellant's home address and the Hearing Centre. Or why what is described as 'Muskeletol pain' prevented him attending to give evidence.
5. Notwithstanding the indication of the appellant suffering pain, there is no indication that he was unable to attend the hearing. There is no medical evidence to support such a conclusion.
6. The decision had been reserved prior to the receipt of the medical documents and their subsequent receipt does not alter this position. The question is whether these documents provide a satisfactory explanation for the appellant's failure to attend, which they do not, and whether fairness requires a different decision being made and the matter being relisted to a future date, which it does not. Both parties received a fair hearing of the application notwithstanding the appellant's failure to attend.
7. The appellant was aware of the date, time, and place of the hearing, and for the reasons set out below the dismissal of the claim, if legal error is found, is the only available outcome irrespective of whether the appellant attends or not.

Background

8. Mr Qaisir is a citizen of Pakistan born on 8 February 1989. On 13 October 2014, he made an application for leave to remain as a Tier 4 (General) Student Migrant which was refused on 2 September 2015 and a direction for his removal, pursuant to section 47 Immigration, Asylum and Nationality Act 2006, was made.
9. Mr Qaisir elected for the merits of the appeal to be decided on the papers without an oral hearing. The Secretary of State refused the application by

reference to paragraph 322(2) of the Immigration Rules, on the basis that evidence provided by ETS satisfied the decision-maker that the appellant's English-language certificate had been obtained fraudulently by the use of a proxy. Accordingly, Mr Qaisir was not found to meet the requirements of paragraph 245ZX(a) of the Rules. Further, Mr Qaisir did not provide a valid CAS which is a mandatory document required for leave as a Tier 4 Migrant.

10. The Judge sets out her findings at paragraphs [6 – 8] which are in the following terms:

> "6. The Respondent has refused the application under paragraph 322(2) of HC 395 and bears the burden of proof that her decision is reasonable and in accordance with the law. The refusal was on the basis that the Appellant produced a fraudulent TOEIC certificate. The Respondent has not however, provided the certificate or any evidence from ETS to substantiate her decision. In the absence of any such evidence, I find that the Respondent has not discharged the burden of proof in respect of her decision under 322 (2) of HC 395.
>
> 7. The Applicant has provided a CAS dated 15 May 2013 for Birmingham Informatics College Ltd, Sponsor licence number VH0RB28R4. The Appellant's case is that the college has in the past year, had its licence revoked. Applying the principles in the cases of Patel (revocation of sponsors licence -fairness) [2011] UKUT 211 (IAC) and Kaur (Patel fairness: respondents policy) [2013] UKUT 344 (IAC), I find, in this instance where the Respondent has not substantiated her decision under section 322 (2) and where the Appellant's application had not been decided for almost a year, during which time it appears, the Sponsorship licence was revoked, that the Respondents should have considered whether or not the Appellant is entitled to a 60 letter under her policy of general fairness.
>
> 8. Given the above findings, the Respondent's decision is not in accordance with the law. I allow the appeal, **limited to the extent,** that the Respondent should consider her policy fairness in line with my findings in paragraph 7 above."

Grounds

11. The Secretary of State sought permission to appeal on the basis the Judge failed to give adequate reasons for a finding on a material matter. It is said the Secretary of State provided witness statements in the form of the generic material (familiar to those dealing with ETS cases in this jurisdiction) together with an extract from the ETS spreadsheet to assist her case. That spreadsheet records details of the test centre, nationality, family name, given name, certificate number, and specifically whether the results are stated to be 'invalid' or 'questionable'. In relation to Mr Qaisir the results are stated to be invalid.

12. The grounds also challenge the Judges findings in relation to the CAS claiming no fairness issue arises.

13. Permission to appeal was granted by another judge of the First-Tier Tribunal, the operative part of which is in the following terms:

"... it is notable that the respondent had not provided the TOEIC certificate which was alleged to be fraudulent. However, it is arguable that the Judge fell into error in finding that the respondent had not provided any evidence from ETS to substantiate the decision. Within the respondent's bundle there was material including a spreadsheet from ETS. It is arguable that the Judge fell into error in failing to appreciate this evidence was before the Tribunal and failing to give it any consideration. The grounds of appeal are, therefore, arguable. Permission is granted on all grounds pleaded."

Discussion

14. There have been several decided authorities relating to ETS cases which have established that where an allegation of the use of deception in taking an English language test is made by the Secretary of State, she bears an initial evidential burden of establishing such deception. It has been held that the generic evidence together with information from the ETS lookup tool, contained in the spreadsheet, is sufficient to discharge the evidential burden that, on the balance of probabilities, Mr Qaisir employed deception.
15. It is important to note the specific terminology used in the spreadsheet that the results are 'invalid' rather than 'questionable'. This is strongly suggestive that as a result of the voice analysis undertaken by ETS, both computer-based and the further verification employees of that company, the voice on Mr Qaisir's voice recording has been identified as that of an individual who has been recorded as having sat other English tests on behalf of him or herself and other individuals.
16. The Judge fails to make any reference to either the statements or the spreadsheet in the determination or to make specific reference to decided authorities of both the Upper Tribunal and Court of Appeal.
17. The finding the Judge's conclusions in relation to the failure of the Secretary of State to provide any evidence to substantiate the decision is clearly a finding infected by arguable legal error and a possible misdirection in relation to relevant legal principles.
18. Mr Qaisir was required to prove he had a valid CAS with his application. This is a mandatory document which will result in a refusal of the application if not provided. The CAS referred to by the Judge was used in the application granted on 12 June 2013 when Mr Qaisir was granted further leave to remain in the United Kingdom as a Tier 4 Migrant until 13 October 2014. A CAS can only be used once and it appears therefore that Mr Qaisir had no valid CAS for the application refused on 2 September 2015 which is the subject of the appeal.
19. The refusal specifically states "for applications made on or after 22 February 2010 it became mandatory that applications as a Tier 4 (General) Student Migrant are accompanied by a Confirmation of Acceptance for Studies (CAS). You have provided no evidence to establish that you have been assigned a CAS and no valid CAS has been found. It has therefore been decided that you have not met the requirements and no points have been awarded for your CAS."
20. This is not a case of an individual having been granted a valid CAS which was later declared invalid as a result of a sponsoring college losing its licence, of which the applicant had no notice. Page 2 of the refusal letter specifically states

"In view of the fact that you have claimed 30 points under Appendix A of the Immigration Rules for a valid Confirmation of Acceptance for Studies (CAS) but no CAS reference number has been submitted with your application, the Secretary of State is not satisfied that you have a valid CAS. The Secretary of State is therefore not satisfied that you have met the requirements to be awarded 30 points under Appendix A of the Immigration Rules."

21. As no CAS number was provided no fairness issue arguably arises within the remit of *Patel* or *Kaur*.
22. The decision of the Judge is set aside.
23. In going on to remake the decision the Secretary State has discharged evidential burden to prove the use of deception. The evidence provided by Mr Qaisir to rebut the Secretary States case is extremely limited as noted by the Judge in [4] of the decision under challenge. This does not discharge the burden upon the appellant and it is accordingly find the Secretary of State has discharged the burden upon her to the required standard to prove the use of deception and submission of false documents in relation to a previous application. The appellant's appeal against the refusal pursuant to paragraph 322 (2) of the Rules is dismissed.
24. In any event, the appeal must fail as it has not been made out that Mr Qaisir had a valid CAS at the time of his application. This is a mandated requirement the omission of which means the appeal must be dismissed in any event.

Decision

25. **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.

26. 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 pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…………………………………………….
Upper Tribunal Judge Hanson

Dated the 10th of May 2017