Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number IA/06187/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons promulgated**
On 30 September 2014	**On 18 May 2015**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Md Alim Uddin
(Anonymity order not made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation
For the Appellant: Mr Z Khan of Universal Solicitors.
For the Respondent: Mr P Duffy, Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge North promulgated on 26 June 2014 dismissing the Appellant's appeal against the decision of the Respondent dated 15 January 2014 to refuse to vary leave to remain and to remove him from the UK pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.

Background

2. The Appellant is a national of Bangladesh born on 2 February 1978. He entered the UK on 22 May 2011 with leave valid until 28 February 2013 granted pursuant to entry clearance as a Tier 4 (General) Student migrant. On 15 February 2013 the Appellant applied for further leave to remain as a Tier 4 (General) Student migrant. The application was refused for reasons set out in a combined 'reasons for refusal' letter and Notice of Immigration Decision dated 15 January 2014, essentially on the basis that the Respondent considered that he had failed to submit a valid Confirmation of Acceptance for Studies ('CAS'). The section 47 removal decision was communicated in the same document.

3. The Appellant appealed to the IAC.

4. The First-tier Tribunal Judge dismissed the Appellant's appeal for reasons set out in his determination.

5. The Appellant sought permission to appeal which was granted by Designated First-tier Tribunal Judge J M Lewis on 20 August 2014. The grant of permission to appeal was on the basis that Judge North's failure to address the Appellant's submissions in respect of common law fairness was an arguable error of law.

6. The Respondent has filed a Rule 24 response dated 28 August 2014 resisting the challenge to the decision of Judge North. However, in the event Mr Duffy did not seek to place any particular reliance upon the matters set out at paragraph 3 of the Rule 24 response: the facts set out therein did not refer to the decision under appeal, and indeed did not obviously refer to the Appellant's case at all; insofar as they might have referred to an earlier withdrawal of a different CAS, this was not germane to the issues that were at the core of the appeal.

Consideration

7. The key aspects of the chronology of this case are referenced at paragraph 6 of the decision of the First-tier Tribunal, and are also discernible from the Respondent's bundle before the First-tier Tribunal. The Appellant applied for further leave to remain on 15 February 2013. The application was made on the basis of pursuing a BTEC Extended Diploma in Strategic Management and Leadership at London St. Andrews College, the course dates being given on the application form as 19 February 2013 until 30 March 2014. The Appellant submitted a CAS in support of the application. On the Appellant's own evidence he wrote to the college on 30 July 2013 to indicate that he was struggling to pay the next instalment of his fees and requesting time to clear the payment. He states that he was given time until the end of August 2013, but on 23 August 2013 the college informed him

not to attend further and that his sponsorship had been withdrawn because he had failed to pay the balance of his fees.

8. In this latter context the following, at paragraph 7 of the First-tier Tribunal's decision, is particularly germane:

> "The Appellant gave evidence to adopt his written statement. He was questioned by the presenting officer and he acknowledged that he had been told on 23/08/2013 that his CAS would be withdrawn. The Appellant acknowledged that he had contacted the Home Office 5 months later. It was put to him that he had inconsistently said in his written statement that he genuinely believed he was a student who made a valid application and that he was surprised at the withdrawal of his CAS on no notice. The Appellant acknowledged that he had been told verbally in August 2013 that the college intended to withdraw his CAS."

9. In light of the evidence before him the Judge found "*the Appellant's college withdrew the Appellant's CAS and gave the Appellant proper notice. It had grounds to do so in connection with non-payment of fees*" (paragraph 8). The following sentence then appears – to which I return below:

> "The Appellant was aware of that from August and had adequate time to rectify the situation before he submitted his next application."

The Judge went on to conclude "*that there was no manifest injustice in the way the Appellant was treated either by his college or the Respondent*", and that the Respondent had correctly assessed the Appellant's application under the points based system. The Judge went on to reject a submission based on Article 8 private life (paragraph 9). (There is no challenge to the Article 8 decision in the grounds in support of the application for permission to appeal; further the Tribunal in granting permission to appeal did not of its own motion identify any basis of challenge in this regard.)

10. In advancing his case before the First-tier Tribunal the Appellant had placed reliance on the decision in **Thakur (PBS decision – common law fairness) Bangladesh [2011] UKUT 151 (IAC)** - see decision of First-tier Tribunal at paragraph 3. Reliance was also placed on this case before me. Additionally my attention was directed to the cases of **Patel (revocation of sponsor licence – fairness) India [2011] UKUT 211 (IAC)** and **Naved (Student – fairness – notice of points) [2012] UKUT 14(IAC)**.

11. The Appellant's principal submission is that the First-tier Tribunal inappropriately applied a test of 'manifest injustice' rather than a test of 'fairness'. It was argued that the appropriate test was that set out in **Thakur**, essentially "*what fairness demands is*

dependent on the context of the decision on the particular circumstances of the applicant", and that the Judge had failed to apply such a consideration.

12. I do not accept that submission. In my judgement the Appellant seeks to place too much weight and significance on the choice of the Judge's words – "*no manifest injustice*" – as being somehow indicative of an approach at variance with the common law duty of fairness. In the overall context of this case such words do not bear the weight contended.

13. In the line of cases dealing with fairness in the context of the Points Based System it is to be noted that there is an exploration of fairness premised on decisions being taken on the basis of matters beyond the control of the applicant or on the basis of information unknown to the applicant.

(i) In **Thakur** the applicant's CAS became invalid during the pendency of the application because the Respondent withdrew the college's licence, and it was argued in accordance with the Respondent's Tier 4 Policy Guidance that the appellant should have been granted 60 days further leave to remain "*if he was not involved in the reasons why the licence was withdrawn*" (paragraph 4). It is also to be observed that it was found "*the appellant had neither 60 days nor a reasonable period to find an alternative course by the date of decision*" (paragraph 19). In contrast, on the basis of the findings herein, the reason for the withdrawal of the Appellant's CAS was exactly down to the conduct of the Appellant in that he was unable to pay his course fees; further the Appellant had a period of five months from the date of the withdrawal of his CAS in which on his own evidence he took no action to try to find an alternative course - a period necessarily far in excess of 60 days.

(ii) In **Patel** the headnote makes reference to the duty of the Respondent to afford a reasonable opportunity to an applicant to vary his application when the Respondent has revoked the sponsor's licence during the pendency of the application where "*the applicant is both unaware of the revocation and not party to any reason why the licence has been revoked*" (paragraph (2) of headnote, and see paragraph 22 of the body of the decision). The Tribunal expressly observed in the context of revocation of a sponsor's licence that "*none of this applies*" where the applicant "*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*"

(paragraph 25). In my judgement by analogy the requirement to extend a period of grace of 60 days does not apply in the instant case both because the Appellant was directly responsible for the withdrawal of his CAS, and because he had had an adequate opportunity to obtain a new CAS – either by paying the appropriate fees or finding an alternative course provider. Of course, in this context, I recognise that the Appellant would have faced a practical difficulty if he was in financial straits. However such a practical difficulty does not avail the Appellant in immigration terms, and does not otherwise render the Respondent's decision unfair. If the reality of the situation was – as it seems to have been accepted by the Appellant – that he was not in a position to pay his course fees, it can hardly be said to be in any way 'unfair' – either by reference to the normal usage of such a word or the more legalistic usage in the context of the common law duty of fairness – that the Appellant was refused leave to remain for the purpose of studies.

(iii) In **Naved** the Tribunal held, as per the headnote "*Fairness requires the Secretary of State to give an applicant an opportunity to address grounds for refusal, of which he did not know and could not have known*". Plainly in the present case the Appellant knew that his CAS had been withdrawn.

14. In my judgement, in the very particular circumstances of this case the principles enunciated in the case law cited above do not avail the Appellant. His case is to be distinguished on the facts. I find that there is nothing in the approach of the First-tier Tribunal Judge that contravenes the guidance set out in case law, or otherwise runs contrary to the common law duty of fairness. The Appellant knew that his CAS had been withdrawn, and the Appellant had a substantial period of time in which to seek to resolve the matter. It cannot have come as a surprise, and he has no basis for complaint, that the Respondent refused his application because of the withdrawal of the CAS. I do not find the claimed communication with the Respondent after the withdrawal of the CAS makes any material difference to the outcome of the application or appeal.

15. In this latter context I accept that the Judge did not make a clear finding, and did not otherwise make a finding as to the general credibility of the Appellant. However, in all the circumstances of the case, it is to be noted that the Appellant at no point asserted that he had taken any steps to obtain a replacement CAS between being informed by the college of its withdrawal and his claimed contact with the Respondent about five months later. Indeed it might be thought that such a lack activity was consistent with what the Appellant had said about his lack of means. Be that as it may, in any event in my judgement the nature of any communication with the Respondent about five

months after the withdrawal of the CAS makes no material difference to the acknowledged fact that the withdrawal was in consequence of the Appellant's own conduct in not paying his fees, and makes no material difference to the inescapable fact that a passage of time in excess of the 60 days that would ordinarily be afforded pursuant to the Respondent's policy elapsed without the Appellant rectifying his predicament. In such circumstances the potential error on the part of the Judge in not making a clear credibility assessment or finding of fact in this regard is not material because it could have made no difference to the outcome of the appeal.

16. In any event it is to be noted in this context that the Appellant admitted in his oral evidence that the details of his first witness statement signed on 1 May 2014 did not reflect the true circumstances. Had it been pertinent, it seems to me inevitable that a decision-maker would have concluded that in the absence of supporting evidence the Appellant's evidence on its own was unreliable – and moreover likely reflected what he considered it expedient to assert rather than actual events. However, for the reasons already identified, the absence of any clear finding in this regard by the First-tier Tribunal Judge was not, in my judgement, material.

17. I have noted above that the Judge, at paragraph 8, made a reference to the Appellant having "*had adequate time to rectify the situation before he submitted his next application*". Initially the reference to "*his next application*" appears confusing because there was no such next application. However, it seems to me that in context the Judge most likely had in mind the circumstance that if the Appellant had rectified the situation by obtaining a valid CAS it would have been open to him either to vary his application or make a new application. Accordingly in the circumstances I do not consider this initially confusing phrase to be indicative of any error of law.

18. Accordingly, in all of the circumstances I find that the First-tier Tribunal Judge did not materially err in law. The decision of the First-tier Tribunal stands.

Notice of Decision

19. The decision of the First-tier Tribunal contained no material error of law and stands.

20. The appeal is dismissed.

21. No anonymity order is sought or made.

Deputy Judge of the Upper Tribunal I. A. Lewis 11 May 2015