Upper Tribunal
(Immigration and Asylum Chamber)

Thakur (PBS decision – common law fairness) Bangladesh [2011] UKUT 00151 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 24 February 2011	**On 23 March 2011**

.....

Before

MR JUSTICE SIMON

SENIOR IMMIGRATION JUDGE LATTER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ATA UDDIN THAKUR

Respondent

Representation :

For the Appellant: Mr N Bramble, Home Office Presenting Officer

For the Respondent: Mr A Rahman of AK, Solicitors

1. A decision by the Secretary of State to refuse further leave to remain as a Tier 4 (General) Student Migrant was not in accordance with the law because of a failure to comply with the common law duty to act fairly in the decision making process when an applicant had not had an adequate opportunity of enrolling at another college following the withdrawal of his sponsor's licence or of making further representations before the decision was made.

2. The principles of fairness are not to be applied by rote: what fairness demands is dependent on the context of the decision and the particular circumstances of the applicant.

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the determination of Immigration Judge Youngerwood who allowed an appeal by the respondent against a decision made on 15 July 2010 refusing him further leave to remain as a Tier 4 (General) Student Migrant on the grounds that the decision was not in accordance with the law. In this determination we will refer to the parties as they were before the First-tier Tribunal, Mr Thakur as the appellant and the Secretary of State as the respondent.

Background

2. The appellant is a citizen of Bangladesh born on 23 January 1973. He arrived in the UK on 20 March 2008 with entry clearance as a student giving him leave to remain until 31 December 2009. On 29 December 2009 he applied for further leave to remain as a Tier 4 (General) Student Migrant to continue his studies. At the time of application he was enrolled with the London Commonwealth College of Law and Business Studies on a diploma and higher diploma in tourism and hospitality management. His application was refused on 15 July 2010 because as at the date of decision the college was no longer on the register of Tier 4 sponsors. In his grounds of appeal against this decision the appellant accepted that the college's licence was suspended in January 2010 and then subsequently revoked and that the college ceased operating in July 2010.

3. In his witness statement of 25 October 2010 the appellant said:

"4. The London Commonwealth College of Law and Business Studies was an A rated sponsor college at the time of application and in the middle of January 2010 they had their licence suspended and their licence was subsequently revoked. But the college did not inform us when the college's licence was revoked.

5. I started the course on 25/01/2010 and the expected completion date was 30/01/2011. I attended the college until the end of June 2010. Since July 2010 the college is not operating any more.

6. Since July 2010 I have been trying to get enrolled for a course with another college. I approached a few colleges but none of the colleges agreed to enrol me to start the course immediately, as I don't now have a leave endorsed on my passport. At last on 25 October 2010 I was able to find a conditional offer on PG diploma in management from London West Valley College which is also a UKBA Tier 4 sponsor college (sponsor licence: 07D46KMYX). Their course is due to start on January [2011]."

4. The appeal before the immigration judge proceeded on the basis that as there were no factual matters in issue, the appeal should proceed by way of submissions. The judge was referred to the Tier 4 Policy Guidance on the course the respondent would take if a college's licence was withdrawn and in substance it was argued 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 to enable him to apply for permission to study with another Tier 4 sponsor. It was also argued that he could now comply with the Rules as he had obtained a conditional offer from a licensed sponsor.

5. The judge set out his findings as follows:

"10. Although different policy guidance has been issued in relation to Tier 4 applications, there has been a consistent policy in relation to the position where a Tier 4 sponsor's licence is withdrawn or they are taken over. In relation to the policy guidance for applications made on or after 5 October 2009, which appears to govern the current application, page 52 of the guidance makes it clear that, if the Tier 4 sponsor licence is withdrawn then, where a student is already in the UK studying, the normal position would be that he would be granted 60 days further leave if he was not involved with the reasons why the licence was withdrawn. This enables the student to apply for permission to study with another Tier 4 sponsor.

11. The above policy guidance does not appear to have been considered in any way by the respondent and it is, frankly puzzling that I, and no doubt many other immigration judge's, have had many examples of similar appeals where the respondent appears to be totally ignorant of their own policy.

12. It follows that, on my findings, the decision cannot stand as not being in accordance with the law. I was urged by Mr Rahman to substantially allow the appeal because the appellant now has a conditional offer from a college which is on the register, relying on Section 85(4) of the 2002 Act. However, the offer concerned is a conditional one and is specified as such, depending on the appellant passing an English placement test in the future. In these circumstances I do not consider that this conditional offer complies with the requirements in the rules and, therefore, the appeal can only be allowed for the limited extent indicated above.

My Decision

The appeal is allowed as the decision is not in accordance with the law."

The Grounds and Submissions

6. In the grounds the respondent argued that the policy guidance referred to by the judge did not mandate a grant of 60 days leave to remain in the appellant's circumstances. In the event the judge had failed properly to identify the guidance he was referring to and had failed properly to apply it. In a response filed by the appellant he maintained his argument that the respondent had failed to consider and apply the appropriate Tier 4 policy guidance which should have led to him being granted 60 days' leave. It is also argued that the appellant could meet the requirements of the Rules in the light of the fact that he now had a conditional offer at a licensed college.

Submissions

7. Mr Bramble adopted his grounds and relied on the Tribunal determination in JA (Revocation of Registration – Secretary of State's policy) India [2011] UKUT 52 (IAC) arguing that the policy could not apply to the appellant as he did not have existing leave which could be limited to 60 days or an extant period of six months leave. He accepted that there could be hard cases where an appellant might not have had an adequate opportunity of finding an alternative college but nonetheless the provisions of the policy could not apply to the appellant for the reasons given in JA . Mr Rahman submitted that on this issue JA was wrongly decided and in any event the appellant was entitled to rely on s.85(4) of the Nationality, Immigration and Asylum Act 2002 to show that he could now meet the requirements of the Rules.

The Policy Guidance

8. We were referred to the policy guidance for Tier 4 to be used for applications made on or after 5 October 2009. The relevant guidance in circumstances where the sponsor's licence is withdrawn is set out at page 51. This sets out in tabular form what will happen when a sponsor's Tier 4 licence is withdrawn. In circumstances where the student is already in the United Kingdom studying, the position is as follows:

"We will limit the student's permission to stay:

•
to 60 days if the student was not involved in the reasons why the Tier 4 sponsor had their licence withdrawn (we will not limit the student's permission to stay if he/she has less than six months left. The student may want to apply for permission to stay with another Tier 4 sponsor during this time).

•
Immediately if we think the student was involved in the reasons why the Tier 4 sponsor's licence was withdrawn."

In JA , the Tribunal (Irwin J and SIJ Gill) considered the interpretation of this policy and said:

“16. However, the straightforward position adopted by the Secretary of State in the application of the policy to this appellant is that, when one looked at the situation at the time of withdrawal of the licence of the London School of Business and Computing or at the date of decision on 12 March, or at any subsequent date, Mr Anthony had no continuing leave save that derived from Section 3C of the Immigration Act 1971, which of course continues only until his application for further leave to remain is decided and any appeal against the decision is finally determined. The appellant did not have leave to remain of more than six months to be limited to 60 days or less than six months which would not be further limited. Mr Tufan on behalf of the Secretary of State therefore says that Mr Anthony is not covered by the policy and can found no legitimate expectation upon it.

17. The way the matter was put to us on Mr Anthony’s behalf was very simple. Mr Miah suggested that there should be a grace period of 60 days whatever the circumstances, beginning from the point when the student was aware of the revocation of the licence. In our judgment this submission cannot be sustained in law. It does not arise from the clear wording of the policy stated in the guidance at para 27. Furthermore it is not irrational or unreasonable for the Secretary of State to distinguish between applicants who lodge their applications for extension of their leave at a time when there is still six months or more extant leave to remain and those who do not.

18. In any event the argument advanced on Mr Anthony’s behalf would not avail him. Mr Antony must be taken to be fully aware that his first educational provider, the London Institute of Technical Education, had had its licence removed before he switched his application by letter so as to found it upon his promised place at the London School of Business and Computing. That switch took place by October 2009 and was notified to the Home Office by letter of 17 December 2009. There was of course no extant or continuing leave to remain at either of the latter dates, leaving aside the statutory extension of leave under Section 3C of the Immigration Act 1971. Paragraph 27 of the guidance cannot have been intended to apply to leave extended under Section 3C. Even if the policy did require some form of extension or further grace period of 60 days from the date of knowledge of the withdrawal of the licence of the institution concerned (which we do not accept, as stated above), the 60 day period in Mr Anthony’s case would have expired well before the date of decision on 12 March 2010.”

9. It is clear that on the facts of JA the Tribunal found not only that the policy did not entitle the appellant to a 60 day period of leave but that in any event he had had an even longer period before the date of decision when he could have attempted to find another college. It is equally clear that the Tribunal were well aware that the application of the policy could in other cases lead to unfairness. In para 13 it said,

“We pause to remark that the guidance seems to us to be capable of giving rise to arbitrary results”

and in para 15,

“however, if the imposition of the limit of leave to remain arises only when a positive decision is taken by the Secretary of State in a given case, it follows that the delay by the Secretary of State before taking a decision is capable of altering the position of the student concerned. We are concerned that the policy therefore may give rise to arbitrary outcomes in different circumstances to those arising here.”

Discussion

10. In this appeal we are concerned with a case where on the facts accepted at the hearing before the judge, it can properly be said that the appellant had no adequate opportunity of finding an alternative college. This appeal proceeded on the basis of the appellant's evidence that he was not aware that his college's sponsor licence had been suspended, that he continued to attend the college during the period of suspension, the college did not inform him that the licence was revoked and that he only became aware of this fact at about the end of June 2010 when the college ceased to operate. It was only after July 2010 he attempted to obtain a place at another college.

11. We will deal firstly with the submission that JA was not properly decided and should not be followed. We do not accept that this is the case. The policy was clearly drafted on the basis that if a licence is withdrawn permission to remain will be limited to 60 days save for cases where a student's permission has less than six months to run. The appellant's leave to remain had expired on 31 December 2009 and he had no continuing leave save that derived from s.3C of the Immigration Act 1971. Leave granted under s.3C is to permit the appellant to remain lawfully during the period of his appeal but restricts any further application for a variation of leave to remain during that period. We are satisfied that the Tribunal in JA was right to find an appellant in such circumstances was not entitled to the grant of 60 days leave under a policy which is framed in terms of limiting current leave to that period.

12. However, that is not an end of the matter as in this case, unlike in JA , we are dealing with a situation where an appellant in his particular circumstances has been deprived as at the date of the respondent's decision of an adequate opportunity of finding another college. This brings into play the common law duty of acting fairly in the decision making process. In R (on the application of Q and others) v Secretary of State for the Home Department [2003] EWCA Civ 364 the Court of Appeal dealt with the principle of fairness as follows:

"69. …It is further common ground that in deciding whether the applicant has so satisfied him the Secretary of State must act fairly, which means both that he must set up a fair system to enable the decision to be made and that he must operate the system fairly: see e.g. Gaima v Secretary of State for the Home Department [1989] Imm AR 205, applying Re HA (Infant) [1967] 1QB 617 at 630.

70. What fairness requires of course depends upon the circumstances of the case. The underlying principles were stated thus in a well known passage in the speech of Lord Mustill in R v Home Secretary ex Doody [1994] 1AC 531 at 560:

'What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the other cited authorities in which the court have explained what is essentially an intuitive judgement. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected cannot usually make worthwhile

representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'

13. We must consider whether the decision relating to the appellant' application in his particular circumstances has met the requirements of fairness as set out in the speech of Lord Mustill. In the policy guidance the respondent has clearly sought to provide protection for Tier 4 students in circumstances where the sponsor's licence of their college is suspended or withdrawn. We have already referred to the provision when a licence is withdrawn and the student is already in the United Kingdom but in the context of the present appeal it would also be helpful to set out the position where the licence is suspended (page 50 of the policy guidance). Where the student is already in the United Kingdom studying the guidance is:

"If the student is already in the United Kingdom and studying with the Tier 4 sponsor, we will not tell him/or her if we suspend their licence. However if the result of the suspension is that the Tier 4 sponsor loses their licence, we will tell the student and his/her permission to stay will be limited."

14. Any such limitation will be in accordance with the policy guidance already referred to in paragraph 8 above as interpreted by the Tribunal in JA . The general principle behind this published policy is that students studying at a college where the sponsor licence is suspended or withdrawn will have an adequate opportunity of finding a place at another college. The appellant, however, is unable to bring himself within the policy because as he is transferring from studying under the previous student rules into the points-based system and as he applied shortly before his leave expired does not have extant leave which can be limited as envisaged by the policy.

15. But this does not mean that the principle set out in the policy guidance that the appellant should have a proper opportunity of finding another college when his own college loses its sponsor licence should not taken into account when the decision is made on his application. This is a case where, on the facts not disputed at the hearing before the judge, the appellant continued to study at his college when its licence had been suspended. He was not aware of the suspension since he was not notified either by the respondent or his own college. He continued to study until the end of June 2010 and it was only when the college closed that he discovered there that was a problem.

16. The decision in his case was made on 15 July 2010. It is not argued that the respondent notified the appellant that his college had lost its licence as envisaged in the policy guidance. We are not satisfied that this is a case where the appellant either knew or should be treated as having known of any problems until his college was closed down at the end of June 2010. In these circumstances we are not satisfied that the appellant had an adequate opportunity of enrolling at another college or of making representations following his discovery that his college had lost its licence and had closed. The respondent's decision, made without the appellant having had that opportunity, contravened the principle of fairness set out by Lord Mustill in ex p. Doody .

17. We are therefore satisfied that the judge was right to find that the decision was not in accordance with the law, not for the reasons he gave that there was a right to a grant of 60 days further leave under the policy, but because the appellant did not have a proper opportunity either of making representations following the closure of his college or of finding an alternative course with a licensed college before the decision was made on his application.

18. We emphasise the guidance given by Lord Mustill that the principles of fairness are not to be applied by rote identically in every situation and that what fairness demands is dependent on the context of the decision and the appellant's particular circumstances. On the facts in JA the Tribunal

found on the chronology of events in that appeal that a 60 day period would have expired well before the decision and in consequence in the circumstances of that appellant there was no unfairness.

19. In the present case the appellant had neither 60 days nor a reasonable period to find an alternative course by the date of decision. We were told at the hearing that the practical problem which appellants are faced with when seeking further leave to remain under the points-based scheme when they were previously granted leave to remain under the student rules is that they have difficulty in persuading colleges to offer them places as there is concern about whether they have extant leave to remain, colleges not being aware that appellants in these circumstances have leave under s.3C It was argued that the appellant was entitled to rely on s.85(4) but the course he subsequently obtained was conditional and the judge found that it did not meet the requirements of the Rules. However, in the light of our decision the appellant will now have the opportunity of producing evidence to the respondent to show that he can meet the requirements of the points based system.

20. In summary we are satisfied that the respondent's decision was not in accordance with the law because of a failure to comply with the common law requirements of fairness so far as this appellant was concerned. Accordingly, this appeal by the respondent is dismissed.

Signed Date:

Senior Immigration Judge Latter,

(Judge of the Upper Tribunal)