Upper Tribunal
(Immigration and Asylum Chamber)

Patel (revocation of sponsor licence – fairness) India [2011] UKUT 00211 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 May 2011	**On 6 June 2011**

Before

MR JUSTICE BLAKE, THE PRESIDENT

MR BATISTE, A JUDGE OF THE UPPER TRIBUNAL

Between

ASHVIN KUMAR SOMABHAI PATEL

SHILPABEN ASHVIN KUMAR PATEL

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mrs T White , Counsel instructed by Ali Sinclair Solicitors

For the Respondent: Mr S Kandola, Senior Home Office Presenting Officer

(1) Immigration Judges have jurisdiction to determine whether decisions on variation of leave applications are in accordance with the law, where issues of fairness arise.

(2) Where a sponsor licence has been revoked by the Secretary of state during an application for variation of leave and the applicant is both unaware of the revocation and not party to any reason why the licence has been revoked, the Secretary of State should afford an applicant a reasonable opportunity to vary the application by identifying a new sponsor before the application is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.

(4) Leave to remain granted by s.3C Immigration Act 1971 is relevant leave for the purposes of the Immigration Rules and the cases of QI (para 245ZX(1) considered) Pakistan [2010] UKUT 217 (IAC) and HM and others (PBS – legitimate expectation – paragraph 245ZX(I) [2010] UKUT 446 (IAC) have been overruled by QI (Pakistan) v SSHD [2011] EWCA Civ 614, 18 April 2011.

(5) Where the Tribunal allows an appeal on the grounds that the decision was not taken fairly and therefore not in accordance with the law, it may be sufficient to direct that any fresh decision is not to

be made for a period of sixty days from the date of the reasoned decision being transmitted to the parties, in order to give the appellant a reasonable opportunity to vary his application.

(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.

DETERMINATION AND REASONS

Introduction

1.
The appellants are citizens of India and are husband and wife. The second appellant's appeal depends upon the outcome of the first appellant's who will be referred to as "the appellant". The appellant arrived in the United Kingdom on 8 September 2007 and was granted leave to enter as a student until 30 November 2009. During his period of leave he successfully studied for an Information Technology Diploma at South Bank College between November 2007 and April 2009. He then wanted to continue his stay for the purpose of obtaining a post-graduate diploma in Information Technology. He had been accepted on an eighteen month course for that purpose by the Lyceum Academy. On 18 November 2009, the appellant applied for further leave to remain under the points based system with a sponsorship letter from the Lyceum Academy. At that date the Academy was a sponsor approved by the Home Office. The appellant heard nothing more about his application until he received a notice of decision dated 5 March 2010 refusing his application on the basis that the Lyceum Academy had been removed from the list of approved sponsors and he therefore had no sponsorship letter capable of earning him points under the points based system. According to the appellant's evidence the Academy had been removed from the list of sponsors that day or shortly before and he was wholly unaware of this until he received his refusal letter.

2.
The appellant appealed to the First-tier Judge. In August 2010 the Immigration Judge allowed the appeal on the basis that the respondent had not applied to the appellant its policy as the Judge understood it to be. He directed that the application should be reconsidered in the light of the policy. He did consider an alternative case that the refusal was a violation of Article 8 of the ECHR but dismissed that case on its merits. The judge understood that the Home Office policy was that where a point based system application was to be rejected because the sponsor was no longer an approved sponsor a period of sixty days leave to remain was granted to enable an appellant to make an application with an alternative approved sponsor. That was a misunderstanding of the UKBA policy that was restricted to cases where it proposed to curtail leave of more than six months; in those circumstances and where the appellant was unconnected with the reasons for the loss of the sponsor licence UKBA would exercise its powers of curtailment to reduce the leave to two months that would enable the holder of the leave to make a variation application with a new sponsor.

3.
The respondent did not appeal the IJ's decision but on 16 September 2010 wrote refusing to grant an extension of stay because the IJ had misunderstood the policy. It recognised that there was a right of appeal against this fresh decision because by reason of the IJ's allowing of the appeal the leave to remain that had been extended by operation of s. 3C of the Immigration Act 1971 as amended continued.

4.
On 9 February 2011 a second Immigration Judge of the First-tier Tribunal considered this appeal. He recognised that it was now clear that the first judge had misunderstood the policy in reaching the

decision the previous August. This error was established in no fewer than three decisions of the Upper Tribunal namely MM and SA (Pankina: near–miss) Pakistan [2010] UKUT 481 (IAC); JA (Revocation of registration - Secretary of State's policy) India [2011] UKUT 52 (IAC); and Patel (Tier 4 – No sixty day extension) India [2011] UKUT 187 (IAC). The law is now certain on what the respondent's policy was.

5.
Nevertheless the appellant's application for permission to appeal to the Upper Tribunal was granted on the basis that the second Immigration Judge had not considered the alternative Article 8 claim and had confined his consideration to the applicable Immigration Rules relating to the point based system.

6.
In the skeleton argument prepared for the purposes of this appeal, Mrs White drew attention to the important decision of the Upper Tribunal in the case of Thakur (PBS decision - common law fairness) Bangladesh [2011] UKUT 151 (IAC) promulgated on 23 March 2011. That was a case where the Tribunal proceeded on the basis that the appellant was unaware that his college had lost it sponsor's license and he had "no adequate opportunity of finding an alternative college". It drew attention to and relied upon the case of R (on the application of Q) v Secretary of State for the Home Department [2003] EWCA Civ 364 where the Court of Appeal applied the common law principle of fairness to immigration decision making (see paragraphs 69 to 70).

7.
The Tribunal agreed with the previous UT decisions clarifying what the sixty day policy was but concluded that those decisions either did not or did not need to address the question of fairness, on the particular facts before them. In both JA and Patel the Tribunal expressed some concern as to the potential for arbitrariness of the application of the sixty day policy in revocation cases but without having some similar opportunity of enrolling at another college and substituting that college in the immigration application in refusal cases.

8.
The Tribunal in Thakur observed as follows at [19]:

"In the present case the appellant had neither sixty 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 section 3C."

The Tribunal concluded that the respondent's decision was not in accordance with the law because of the failure to comply with common law requirements of fairness.

9.
Mr Kandola accepted that the principle in Thakur applied in this case. He did not seek to oppose the appeal. We nevertheless concluded that we should hear submissions about what the content of the duty of fairness was in this class of case and how the duty could be fulfilled in the course of this appeal. Having received further submissions from the parties we indicated that his appeal would be allowed with reasons to be given later. We now give those reasons.

Jurisdiction

10.
Under s. 82 of the Nationality Immigration and Asylum Act 2002 there is a general right of appeal in respect of immigration decisions as they are defined. By s. 84 the grounds of appeal may include:

a) that the decision is not in accordance with the immigration rules;

b) that the decision is unlawful by reason of the Race Relations Act;

c) that the decision is unlawful by reason of the Human Rights Act;

d) that the decision breaches the appellant's rights under the EE Community Treaties in respect of entry or residence United Kingdom;

e) that the decision is otherwise not in accordance with the law;

f) that the person taking the decision should have exercised differently discretion conferred by the immigration rules;

g) removal would be contrary to obligations under the Refugee Convention or the Human Rights Act 1998.

11.
By s. 86:

"(2) The Tribunal must determine:

a)
any matter raised as ground of appeal and;

b)
any matter which section 85 requires it to consider;

(3) the Tribunal must allow the appeal insofar as it thinks that:

a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including Immigration Rules) or;

b) a discretion exercise in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently".

12.
The "law" referred to in ss. 84 and 86 includes the general requirements of public law fairness that may apply in the context of immigration decision making.

The requirement to act fairly

13.
Although the requirements of fairness always depend upon the context and the specific facts of the case, it is clear from Thakur and the authorities there cited that people making applications for an extension of stay are entitled to be treated fairly by the Secretary of State in determination of those applications

14.
We also note the discussion of procedural fairness in De Smith's Judicial Review (Sixth Edition 2007) at paragraphs 7-003 to 7-009. We accept the author's proposition that the law has advanced from

imposing a public law requirement of fairness in particular situations, to the general proposition that wherever a public function is being performed there is an inference that the function is required to be performed fairly, in the absence of an express indication to the contrary.

15.
We further note that in the case of the R (on the application of) New London College Limited and Secretary of State for the Home Department [2011] EWHC 856 (Admin) Wyn Williams J concluded that there was a duty on the defendant to act fairly when considering whether to revoke status of approved sponsor at a college.

Article 8

16.
We recognise that the point on which permission to appeal was granted was the application of Article 8 ECHR to a points based refusal. We recognise that whilst there is no human right to an extension of stay under the points based system, bona fide applicants who have been permitted to enter the United Kingdom to pursue a course which may lead either to qualification or some other benefit in the United Kingdom may well develop a private life during such a stay which should not be arbitrarily interfered with and requires justification, although this is far from saying that Article 8 will fill any gap in the failure to comply with Immigration Rules (see CDS (PBS: "available": Article 8) Brazil [2010] UKUT 305 (IAC) and MM and SA [2010] UKUT 481 (IAC).

17.
We are prepared to accept that the appellants have established a private life in the United Kingdom by reason of their lawful presence here for four and three years respectively. Normally the requirement of consistent application of immigration policy will justify interference with such private life because of the importance of the principle that the Secretary of State's treats applicants fairly and consistently. However any structured analysis of the Article 8 claim in this case would require consideration of whether the interference in question was in accordance with the law. At that point the Article 8 analysis reflects the Tribunal's general jurisdiction to determine whether decisions are in accordance with the law.

Error of law

18.
For reasons which we will briefly explain we conclude that this decision was not made in accordance with the law, because the appellant's application was not treated fairly. The IJ appears to have given no consideration to this matter although submissions relying on Article 8 were advanced before him. We conclude that there was material error of law in his approach to this case. We set aside the decision and remake it.

Remaking the decision

19.
The salient facts in the present case are as follows:-

1) The appellant was lawfully present in the United Kingdom with leave to remain as a student and was a bona fide student.

2)

He made a bona fide application for an extension of stay as a student at a college which was an approved sponsor at the time of the application;

3)
Unbeknown to the appellant the college was removed from the list of approved sponsors by the Home Office during the time it was considering the application;

4)
Removal of the college from the list of sponsors was taken at about the same time as the decision to refuse the application, there was therefore no opportunity for the appellant to be informed of the consequences on his application of the respondent's action.

20.
A refusal of leave to remain is a very serious step for the appellants. Subject to a successful appeal their leave to remain expires and their continued presence in the United Kingdom is unlawful and susceptible to summary removal. Further, there are now statutory restrictions on what material can be submitted post decision in certain classes of case: see s.85A NIAA 2002 inserted by s.19 Borders Act 2007 as from 23 May 2010; Commencement Order. Although we accept that such a person is free to make a subsequent application for leave that application cannot by definition comply with the Immigration Rules since the applicant has no leave to remain. We recognise that a broad construction of what is a variation of an existing application for leave to remain is required to be taken see JH (Zimbabwe and the Secretary of State for the Home Department) [2009] EWCA Civ 78 at paragraphs 35 and 36. However, we consider it unlikely that a fresh application made after a refusal of the existing could be said to amount a variation of the refused application, albeit that leave is extended whilst an appeal can be brought (s. 3C (2)(b)). Variation of an extant application is all that is permissible by s. 3C (5) of the Immigration Act 1971 by way of exception to the rule prohibiting applications for variations of s.3C leave: see s.3C (4).

21.
If this is correct it follows that not only will any fresh application made after a refusal not be one that can be considered in accordance with the Immigration Rules, it is also not one that can be the subject of an appeal to this Tribunal because it is made by someone who has no leave to remain. Moreover, the evidence in this and other cases that have come before the Tribunal on the same point indicates that responsible sponsors are unwilling to give unconditional sponsorship letters to students who would otherwise qualify for admission for the course under offer if they have no leave to remain. We accept that in some cases sponsors may be unwilling to issue such documentation on a misapprehension of whether a person has leave pursuant to s. 3C of the Immigration Act 1971. We take this opportunity to emphasise that a person with s. 3C leave who has an in-time application for an extension of leave under consideration may vary that application by substituting a new college sponsor and sponsorship letters need therefore not be contingent on the outcome of the application.

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.

26.
We accordingly conclude that the first Immigration Judge was right to reach the conclusion that the appeal should be allowed but gave the wrong reasons for doing so, by misunderstanding the policy relied on, rather than concluding that the decision was not in accordance with the law because it was unfair.

27.
The next question is how immigration judges faced with this problem should deal with similar applications. First, in our judgment they cannot remit a decision for reconsideration because they do not have the powers of the High Court to quash decisions and remit. Their powers are those set out in the statute and these include the power under s.87 of the 2002 Act to give a direction for the purpose of giving effect to its decision. Secondly, they cannot direct that leave to remain as a student be granted if in truth there has been no assessment of the applicant's ability to comply with the relevant rules as the fresh sponsorship letter tends only to be provisional rather than absolute (see also SP (allowed appeal: directions) South Africa [2011] UKUT 188 (IAC). Thirdly, we doubt that in the normal case allowing the appeal under Article 8 and directing that exceptional leave be granted is appropriate where the only problem is that the applicant has not had a fair opportunity to submit an amended application.

28.
We have carefully considered whether an applicant needs a fresh grant of leave to remain in order to make a fresh application as a student with leave to remain within the rules that would bring eligibility under the rules and a right of appeal in the case of dispute. However, we do not think such a course is necessary in this case or generally. Where a judge finds that there was a duty to act fairly that has not been complied with in the particular circumstances of the case, he or she can allow the appeal on the basis that the decision is not in accordance with the law.

29.
In those circumstances no lawful decision has been made on the application and the application remains to be determined by the Secretary of State or the relevant officer and the leave to remain

granted pursuant to s. 3C continues uninterrupted. A direction may be given to that effect where necessary specifying the time needed before the application can be determined to allow a fair opportunity to make representations.

30.
Where there has been no lawful refusal of an application, the application for leave to remain can be varied under s. 3C (5) as interpreted in JH (Zimbabwe) above. We note that the decision of the UT in QI (para 245ZX(1) considered) Pakistan [2010] UKUT 217 (IAC) concluding that s.3C leave was not leave for the purpose of the Immigration Rules has been over-ruled by the CA in QI (Pakistan) v SSHD [2011] EWCA Civ 614 18 April 2011. It follows that subsequent UT decisions applying it (such as HM and others v SSHD [2010] UKUT 446 (IAC)) should no longer be followed. Hereafter, colleges can be informed either by the Home Office or by reference to this decision that such a leave entitles a college to make an offer to a student that can be considered by the Home Office. The offer need not be conditional on the grant of leave, because the student already has leave sufficient for this purpose.

31.
Accordingly in this case we state as follows:

1)
the decision is not in accordance with the law and therefore ceases to have effect;

2)
the application for leave to remain remains outstanding and must be determined in accordance with the law as set out in this judgement;

3)
what is required to give effect to the principle of fairness in this case is for a direction to be given that the fresh decision is not to be made for a period of sixty days from the date of the reason decision being transmitted to the parties to enable the appellant to obtain a fresh sponsorship letter that is current and enable his existing application to be varied to include study at the place set out in the new sponsorship letter.

32.
For the future, having clarified the requirements of fairness and how they are to be met in an individual case, we would expect the UKBA in a case of this kind where the particular circumstances identified at para [22] above are met to inform the applicant that the college is no longer on the approved list of sponsors and that a period of sixty days will be allowed for any variation of the application that the applicant may wish to make before it is determined. If the applicant fails to respond to the invitation there has been no breach of the duty of fairness.

33.
We were informed that UKBA is concerned as to the potential costs of imposing a duty of having to inform the applicant that the college was no longer sponsored. We are unpersuaded that this diminishes the duty to act fairly or the way in which the duty is discharged in the present case. The consequences of unfair decision making are much more costly than the consequences of sending out a simple letter. The present case is a good example. It has been considered by three judges on three separate occasions and with significant case management directions being given in between. Public cost of such measures far exceeds the cost of sending out a routine letter in standard terms that will enable all classes of applicants to be treated equally.

34.
We are equally unpersuaded that merely putting a list of unapproved sponsors on the website will serve as a substitute for notification of a change of circumstances since the application has been made. Of course, such a course may increase transparency and fairness in respect of applicants who can learn the status of their college before they apply and may therefore be a useful move. But it is unrealistic to expect an applicant who has applied to monitor the Home Office website every day just in case there has been a change in the sponsorship status of the college and relying on the college to notify those to whom it has issued sponsorship letters of a change of status may be equally ineffective.

35.
For these reasons we remake the decision by allowing the appeal and giving the directions set out in paragraphs 31 (2) and (3) of this determination.

Signed Date

Mr Justice Blake

President of the Upper Tribunal

(Immigration and Asylum Chamber)