IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Contractor (CAS-Tier 4) [2012] UKUT 00168 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13 March 2012	.....

Before

MR JUSTICE COULSON

UPPER TRIBUNAL JUDGE STOREY

UPPER TRIBNUNAL JUDGE McKEE

Between

MR A M CONTRACTOR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: The appellant did not appear and was not represented

For the Respondent: Mr T Melvin, Home Office Presenting Officer

1) UKBA's announcement in March 2011 of changes to the Immigration Rules which came into force on 21 April 2011 means that in general those who stood to be affected by those changes had adequate time to take appropriate action and hence that in general no Patel fairness issues arise.

2) This applies to the CAS-related requirement set out at para 116(da) that a new course had to be at an A-rated college and also to the CAS-related requirement set out at para 118(c)(iii) for an applicant starting a new course at below degree level to achieve Level B1 in the English Language Test in all four components.

DETERMINATION AND REASONS

1. This is an appeal from a decision of the First-tier Tribunal (IJ David Clapham, SSC) promulgated on 25 August 2011, when he refused the appellant's appeal against the respondent's decision of 23 June 2011 in which she refused the appellant's application for leave to remain as a Tier 4 Student.

2. On 22 March 2011, the respondent announced the Government's plans to make changes to the Points Based System. The changes were explained in a document entitled 'Student Visas: Statement of Intent and Transitional Measures' published by the respondent in March 2011. The relevant changes came into force on 21 April 2011.

3. The provisions of paragraph 116 of Appendix A of the Immigration Rules apply to all Confirmations of Acceptance for Studies (CASs). The provisions at paragraph 118(b) of Appendix A apply to those CASs which were assigned on or before 20 April 2011. Paragraph 118(c) applies to CASs assigned on or after 21 April 2011.

4. The relevant parts of the various paragraphs for the purposes of this appeal are as follows:-

"116. A Confirmation of Acceptance for Studies will only be considered to be valid if:

…

(d) it was issued by an institution with a Tier 4 (General) Student Sponsor Licence,

(da) where the application for entry clearance or leave to remain is for the applicant to commence a new course of study, not for completion of a course already commenced by way of re-sitting examinations or repeating a module of a course, the Sponsor must hold an A-rated or Highly Trusted Sponsor Licence,

(e) the institution must still hold such a licence at the time the application for entry clearance or leave to remain is determined…

118. (c) For Confirmation of Acceptance for Studies assigned on or after 21 April 2011, one of the requirements in (i) to (iii) below is met:

(i) the course is degree level study and the Confirmation of Acceptance for Studies has been assigned by a Sponsor which is a Recognised Body… or

(ii) the course is {a} degree level study and the Confirmation of Acceptance for Studies has been assigned by a Sponsor which is not a Recognised Body … and: (4) the applicant provides an original English language test certificate from an English language test provider approved by the Secretary of State for these purposes, which is within its validity date, and clearly shows:

i the applicant's name,

ii that the applicant has achieved or exceeded level B2 of the Council of Europe's Common European Framework for Language Learning in all four components (reading, writing, speaking and listening) … or

(iii) the course is for below degree level study and … : … (4) the applicant provides an original English language test certificate from an English language test provider approved by the Secretary of State for these purposes, which is within its validity date, and clearly shows:

i the applicant's name

ii that the applicant has achieved or exceeded level B1 of the Council of Europe's Common European Framework for Language Learning in all four components (reading, writing, speaking and listening) …"

5. The appellant's existing leave to remain in the UK as a student expired on 31 May 2011. On that date, he applied for leave to remain to undertake a diploma computing course at Herbert College. His application relied on a CAS assigned by Herbert College on 31 May, the same day as his leave expired. Accordingly, he made his application on the very last possible day.

6. On 23 June 2011, the respondent refused the application on the basis that Herbert College was not an A Rated or Highly Trusted Sponsor. It held a B Rated Sponsor Licence. In addition, the refusal letter noted that the appellant's course was below degree level and that, although he had submitted the results of a Pearson Test of English, he was required to score a minimum of 43 points in each of the four areas of listening, reading, speaking and writing in order to achieve or exceed Level B1. He had failed to achieve 43 points in both reading and writing.

7. The appellant appealed and when the First-tier Tribunal upheld the grounds of refusal, the appellant appealed again.

8. There can be no doubt whatsoever that the respondent was entitled to refuse the appellant's original application for leave to remain. First, Herbert College was not A-Rated and was not a Highly Trusted Sponsor. Thus, because the appellant was applying to study a new course, his CAS failed to meet paragraph 116(da) and (e) of the Immigration Rules.

9. Secondly, the appellant's application failed to comply with paragraph 118(c)(iii). The appellant had failed to achieve level B1 in two of the four components. In such circumstances, his application was bound to be refused. For these reasons, the First-tier Tribunal was right to uphold the respondent's refusal.

10. That leaves the issue of fairness. In Patel (revocation of sponsor licence – fairness) [2011] UKUT 00211 (IAC), the Upper Tribunal ruled that, on the facts of that case, the respondent had acted unfairly when she revoked a college's status after the application had been made (at a time when it was still an approved sponsor) and failed to inform the applicant of the revocation. She also failed to give him an opportunity to vary the application. There was a suggestion in the appellant's grounds of appeal in the present case that the respondent had acted unfairly in failing to give him sufficient warning of two changes in the Immigration Rules introduced in April 2011; the first stipulating that a new course had to be at an A-rated college (para 116(da)), and the second requiring an applicant starting a new course at below degree level to achieve Level B1 in the English Language Test in all four components (para 118(c)(iii)).

11. The fact that UKBA announced the proposed changes to the Immigration Rules in March 2011, and that such changes did not come into force for a further 4 weeks, meant that, in general terms, those who stood to be affected by the changes had adequate time to take appropriate action. In this case, both the appellant and Herbert College would have been aware of the proposed changes to the Immigration Rules in March 2011, at least a month in advance. As to the requirement that the college be A-rated, it does not appear that either the appellant or Herbert College ever made any enquires into these changes and the potential effect that they would have on the CAS assignment that was made. On the contrary, the appellant did nothing until the very last day of his existing leave, when he applied to extend it.

12. As to the contention that the appellant did not have sufficient time to undertake the necessary English Language Test, the evidence is that, immediately before his application, the appellant underwent the Pearson Test in order that he could submit the results as part of his application, in accordance with the changes in the Rules. The timing of those changes did not, therefore, prevent the appellant from attempting to comply with them. The difficulty for the appellant was that he failed the necessary English Language Test. Unhappily, that was nobody's fault but his own. In those circumstances, having been given reasonable notice of the changes to the Rules and having acted in accordance with those changes, the appellant was not treated unfairly; the reasons for the refusal of his application come down to the particular facts of his case.

13. We do not say that there could never be a case in which an applicant endeavouring to meet these changes would not be unfairly treated. Fairness is always a matter of fact and degree, as demonstrated by Patel . But it seems to us that one of the main considerations as to fairness will be the respondent's treatment of the institution in question and, in particular, her level of knowledge as to whether or not that institution was about to be downgraded. That was the critical factor in Patel ; it is not a factor of any relevance here.

14. For those reasons, this appeal is dismissed.

Signed

Mr Justice Coulson

Sitting as a Judge of the Upper Tribunal