Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02555/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2nd November 2018	**On 11th January 2019**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

OMPRAKASH SETRAM KANOOJIYA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Walker, Home Office Presenting Officer
For the Respondent: Mr R Singer of Counsel instructed on a direct access basis

DECISION AND REASONS

This decision has been amended pursuant to rule 42 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to correct a clerical mistake in paragraph 25 of the decision as to the Respondent's submissions on the appeal and consequently to the notice of decision.

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Jones promulgated on 26 February 2018, in which Mr Kanoojiya's appeal against the

decision to refuse his application for leave to remain as a Tier 4 student dated 2 November 2016 was allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Mr Kanoojiya as the Appellant and the Secretary of State as the Respondent.

2. I found an error of law in Judge Jones' decision promulgated on 26 February 2018 following the first hearing of this appeal on 30 July 2018. The background to this appeal is set out in the error of law decision contained in the annex and will not be repeated here save where reference to the background facts is needed. This decision is the re-making of the appeal.

The appeal

Applicable law

3. Paragraph 322(1A) of the Immigration Rules states as follows:

> ***"Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom are to be refused***
>
> *(1A) Where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application."*

4. This paragraph contains two separate possibilities, one of false representations (for which dishonesty by the applicant is required) and one of false documents (something which tells a lie about itself). The distinction between the two is summarised by the Court of Appeal in Sumon Chanda v Secretary of State for the Home Department [2018] EWCA Civ 2424 in the following paragraphs:

> *"11. In AA (Nigeria) v Secretary of State for the Home Department [2010] EWCA Civ 773, at paragraph 67, Rix LJ said:*
>
> > *"First, "false representation is aligned in the rule with "false document". It is plain that a false document is one that tells a lie about itself. Of course it is possible for a person to make use of a false document (for instance a counterfeit currency note, but that example, used for its clarity, is rather distant from the context of this discussion) in total ignorance of its falsity and in perfect honesty. But the document itself is dishonest. It is highly likely therefore that where an applicant uses in all innocence a false document for the purposes of obtaining entry clearance, or leave to enter or to remain, it is because some other party, it might be a parent, or sponsor, or agent, has dishonestly promoted the use of that document. The response of a requirement of mandatory refusal is entirely understandable in such a situation. The mere fact that a dishonest document has been used for such an important application is understandably a sufficient reason for a mandatory refusal. That is why the rule expressly emphasises that it applies "whether or not to the applicant's knowledge"."*

> *12. In JK (India) v Secretary of State for the Home Department [2013] EWCA Civ 1080, it was accepted that personal dishonesty was of no relevance where (as in that case) a false bank statement was provided.*
>
> *13. Both cases are therefore authority for the proposition that, whilst the evidence of deception is required for a false representation, the use of a false document is itself a deception and, in the words of Rix LJ, "a sufficient reason for a mandatory refusal". …"*

Explanation for refusal

5. The Respondent initially rejected the Appellant's application dated 23 August 2011 for further leave to remain as invalid for non-payment of the required fee, but that decision was withdrawn further to an application for Judicial Review and a substantive decision made on the application on 2 November 2016.

6. The application was refused under paragraph 322(1A) of the Immigration Rules on the basis that the Appellant's information as to his sponsor and Confirmation of Acceptance of Study ("CAS") were false, that false representations had been made and a false document submitted. The Respondent had checked the online CAS information system and the CAS number could not be found. The college named confirmed that the Appellant was not registered with them nor had they issued a CAS to him. A CAS letter as opposed to a CAS had been issued and it was the latter which was required. For the same reasons, the Respondent was also satisfied that the Appellant had used deception in his application.

7. In addition, the Respondent refused the application under paragraph 245ZX(a), (c) and (d) of the Immigration Rules because no points could be awarded under Appendix A as no valid CAS had been submitted. Similarly, no points were awarded for maintenance.

The evidence

8. The Respondent relies on the following documents. First, the letter from London Academy of Learning stated to be a 'Confirmation of Acceptance of Study'. Secondly, a UKVI CAS search by CAS number and name. Thirdly, an email exchange between the Respondent and the London Academy of Learning in 2012 where the latter stated that the Appellant was not registered at the London Academy of Learning and the CAS had not been issued to the Appellant by the college.

9. In his written statement, signed and dated 14 November 2017, the Appellant states that he has not submitted any false documents nor made any false statements to the Respondent and that he genuinely obtained his CAS from the college after obtaining admission and enrolling himself on the course. The Appellant states that he has not seen any proof or evidence from the Respondent and can therefore only speculate as to why his CAS was not accepted.

10. The Appellant attended the hearing and gave oral evidence in English, adopting and relying on his written statement dated 14 November 2017. The Appellant denied

submitting a false CAS certificate with his application and referred to his good immigration history to that point.

11. In cross-examination the Appellant stated that he obtained the CAS from the college, collecting it from someone in the admin department. The college had been recommended to the Appellant by a friend who was studying there. He made his application, paid the money for the course and does not know why the CAS was not recognised or accepted.

Closing submissions

12. On behalf of the Respondent, the Home Office Presenting Officer relied on the reasons for refusal letter dated 2 November 2016. The Respondent had emailed the college who confirmed that they had not issued a CAS for the Appellant and that he had never been registered with the college. On the evidence, it was submitted that there must have been a false representation by the Appellant because no valid CAS had been submitted. The Respondent did not produce any evidence or information about why the college's licence had been suspending and subsequently revoked.

13. On behalf of the Appellant, Counsel submitted that everyone knew that the purpose of a CAS was to show that a person had been checked and approved for study by a college and therefore the Appellant would have been mad to submit a false CAS with his application in the knowledge it would be checked and discovered as false.

14. In any event, it was submitted that reliance can not be placed on the evidence from the college itself because it has not been established that the source of the allegation of fraud, the college, was sufficiently reliable and credible. The Respondent has failed to establish that on the evidence and has failed to comply with directions to provide evidence of why the college's sponsor licence was revoked. The Appellant relies on the submission that poor record keeping could have been the reason for this, the revocation being within a year of the issue of the Appellant's CAS. It is plausible that the email from the college was correct but an unreliable records system was being checked such that there was a failure to register the Appellant and a failure to update the CAS system.

15. The Appellant's evidence is that he submitted a genuine CAS with his application and that the document provided, even if in letter format, contained all the required information and was sufficient to meet the requirements of the Immigration Rules. However, Counsel did accept that if not on the online system, it was not a valid CAS.

16. Finally, the Appellant relied on previously amended grounds of appeal under paragraph 276ADE of the Immigration Rules and Article 8 of the European Convention on Human Rights on the basis that the Appellant had lived in the United Kingdom lawfully for 12 years (his previous leave to remain which expired prior to the application(s) in 2011 having been continuously extended by virtue of section 3C of the Immigration Act 1971) such that he would benefit from paragraph 276A1 if there was no fraud. If there is a finding of fraud, then it was submitted that the

public interest is relevant as are the requirements of fairness and the Appellant should be entitled to a 60 day letter after the Sponsor lost its licence.

Findings and reasons

17. The first issue in this appeal is whether a false document was submitted by the Appellant in his application for further leave to remain as a student in 2011. The Respondent has shown that there was no valid CAS on the online system, such that the letter purporting to be a Confirmation of Acceptance of Studies was itself false as a CAS has to be on the online system to be valid. That much appears to have been accepted by Counsel for the Appellant in closing submissions that there can be no valid CAS if it is not on the online system. I find that evidence is sufficient to establish that a false document was submitted whether or not the further evidence in the form of the email exchange with the London Academy of Learning is given weight as being from a reliable and credible source in light of the subsequent revocation of its sponsor licence for an unknown reason or reasons.

18. The Appellant makes what essentially amounts to a bare assertion about the genuineness of the CAS letter he submitted and at its highest, can only suggest that there may have been an issue of poor record keeping at the college which affected not only the lack of a record of him with the college at all but also their failure to update the online CAS system. Although it is regrettable that the Respondent has failed to comply with the directions to confirm the reason for the revocation of the sponsor licence, it is only speculation on the Appellant's behalf that this was for poor record keeping and further, the submission has to go further that any poor record keeping went back some eight months before the revocation of the licence (the CAS letter being dated 16 December 2011 and the licence revoked on 15 August 2012) and meant that the Appellant's details were omitted from any records kept by the college and that the college failed to update the online CAS system when the certificate was issued or at any time in the following year even for a course start date of January 2012.

19. As set out in the error of law decision, the Respondent is not required to prove that the sponsor licence was not withdrawn for poor record keeping and in any event, poor record keeping as a reason for revocation of itself does not give sufficient information as to how poor it was and whether therefore likely that in the previous year, neither the Applicant's details nor the online CAS system with his particular CAS would have been recorded/updated at all. I take into account the Respondent's failure to submit any evidence on this point but do not find for that reason that no weight can be attached to the email exchange with the college.

20. Due to the history of this application, being initially rejected as invalid in 2011 and then substantively considered only in 2016 following an application for Judicial Review, both parties are hampered by the passage of time in terms of obtaining further or more detailed evidence for this appeal. However, there is no evidence from the Appellant of any attempt to support his assertion that the CAS was genuine and that he had successfully applied to the London Academy of Learning to study a

Diploma in Business and Administrative Management. There is for example no evidence of the application or any correspondence between the Appellant and the London Academy of Learning, no evidence of payment of the course fees of £2500 said on the CAS letter to have been paid as fees for the first year and so on.

21. On the evidence available, I am unable to find that a genuine CAS was issued to the Appellant by the London Academy of Learning and find that letter purporting to be a CAS dated 16 December 2011 was a false document submitted by the Appellant with his application for further leave to remain. Paragraph 322(1A) of the Immigration Rules provides for a mandatory refusal of the application in such circumstances and there can be no dispute that the substantive requirements for a grant of further leave to remain as a student set out in paragraph 245ZX of the Immigration Rules could not be met either as there was no valid CAS.

22. There is however a separate question as to whether the Appellant made false representations and/or was dishonest in his application given that these were also reasons for refusal by the Respondent under paragraph 322(1A) of the Immigration Rules and for the purpose of possible future application of paragraph 320(7B) of the same to any further applications for entry clearance or leave to remain.

23. This is not a case in which it could be said that the CAS letter submitted by the Appellant was so obviously false on its face that the Appellant must have known it was false, contrary to, for example, the facts in the case of Chanda referred to above in which the applicant could not explain clear false statements on the face of the document, a degree certificate, nor any evidence of study at all. For example, in the present case, it has not been suggested by the Respondent that any of the information contained on the CAS letter or in the Appellant's application for leave to remain (other than the CAS number itself) was false or inconsistent with the Appellant's details.

24. In these circumstances, there is little basis for an inference to be drawn that the Appellant must have been dishonest when he submitted representations about the college and a CAS. The Appellant has been consistent in his account that he thought the CAS was genuine and had no reason to doubt it, which is plausible in light of the above. In this case I find that although the Respondent had satisfied the initial burden of proof in relation to dishonesty, the Appellant has provided an innocent explanation to the minimum level of plausibility and the Respondent has not discharged the legal burden of establishing dishonesty on the facts and evidence available in this appeal. There is insufficient evidence on the balance of probabilities to make such a finding and no strong inference that can be drawn from the document itself. The reliance on false representations and dishonesty in the decision letter can not therefore be maintained, although the application itself still falls for refusal under paragraphs 245ZX and 322(1A) of the Immigration Rules for the reasons set out above.

25. At the First-tier Tribunal hearing and affirmed again before me, the Respondent accepts that if there was no fraud by the Applicant, he would satisfy the

requirements of paragraph 276A1 of the Immigration Rules by reference to paragraph 276B(i), (ii) and (v) of the same. The reference to 'fraud' rather than the making of false representations and/or dishonesty is not perfectly precise in the context of this appeal and the findings above as to a false document being submitted but not false representations or dishonesty, but I would infer that it equates to the latter such that paragraph 276A1 can be satisfied by the Appellant as indicated by the Respondent as there was no fraud.

26. In the alternative, the Appellant submitted that he would at least be entitled to a 60 day letter given the withdrawal of the Sponsor licence in August 2012. However, the CAS relied upon by the Appellant was invalid, not because the Sponsor licence had been revoked, but because it was never a valid CAS on the online system. In these circumstances, the subsequent revocation of the Sponsor licence is irrelevant and would not, as a matter of procedural fairness or otherwise, require the issue of a 60 day letter.

Notice of Decision

For the reasons given in my decision promulgated on 25 September 2018, the making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it was necessary to set aside the decision.

The decision of the First-tier Tribunal is set aside and re-made as follows:
Appeal allowed under the Immigration Rules, specifically under paragraph 2761 of the same.

No anonymity direction is made.

Signed  Date 31st December 2018

Upper Tribunal Judge Jackson

ANNEX

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02555/2016

THE IMMIGRATION ACTS

Heard at Field House
On 30th July 2018

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE JACKSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OMPRAKASH SETRAM KANOOJIYA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Mr R Singer of Counsel, instructed on a direct access basis

DECISION AND REASONS

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Jones promulgated on 26 February 2018, in which Mr Kanoojiya's appeal against the decision to refuse his application for leave to remain as a Tier 4 student dated 2 November 2016 was allowed. For ease I continue to refer to the parties as they were

before the First-tier Tribunal, with Mr Kanoojiya as the Appellant and the Secretary of State as the Respondent.

2. The Appellant is a national of India, born on 30 November 1976, who was first granted leave to enter the United Kingdom as a student on 25 July 2006 to 30 November 2007. The Appellant was periodically granted further periods of leave to remain as a student, latterly as a Tier 4 (General Student) to 27 August 2011. On 24 August 2011, the Appellant applied for further leave to remain as a Tier 4 (General Student) which was initially rejected by the Respondent and resubmitted to the Respondent on 19 December 2011. Further to an application for Judicial Review issued by the Appellant, the Respondent agreed to reconsider the rejection of the Appellant's application dated 24 August 2011. It is the resulting decision dated 2 November 2016 refusing the application which is the subject of this appeal.

3. Separate to the Appellant's application for leave to remain as a Tier 4 (General) Student, he also sought leave to remain on private and family life grounds which was refused and his appeal against that refusal was dismissed by the First-tier Tribunal in a decision promulgated on 19 September 2016.

4. The Respondent refused the application under paragraph 322(1A) of the Immigration Rules on the basis that the Appellant had submitted a false Confirmation of Acceptance for Studies (CAS) and for the same reason found that the requirements of paragraph 245ZX(a) of the Immigration Rules had not been satisfied. The Respondent considered that the CAS was forged on the basis that the CAS letter submitted (not a CAS as required) included a number which did not exist and the London Academy of Learning, who purported to have issued the CAS, confirmed to the Respondent that they did not do so and that the document was forged.

5. Judge Jones allowed the appeal in a decision promulgated on 26 February 2018. In essence, Judge Jones was not satisfied that the CAS was fraudulent due to a lack of evidence of the same and the evidence which was submitted by the Respondent was very late in the day. In addition, it was recorded that the Respondent had conceded that the Appellant's college, the London College of Learning, lost its sponsor's licence due to poor record keeping. In the absence of fraud by the Appellant, the Respondent had accepted that the Appellant had the benefit of leave to remain continuing pursuant to section 3C of the Immigration Act 1971 (during his appeal against the refusal) and as such had accumulated 10 years' lawful residence in the United Kingdom which would allow for him to be granted limited leave to remain for a period to undertake an English language and Knowledge of Life in the UK test.

The appeal

6. The Respondent appeals on the basis that there was a material mistake of fact in the First-tier Tribunal's decision leading to an error of law. The Home Office Presenting Officer did not concede at the hearing that the London College of Learning lost its sponsor's licence for poor record keeping, only that that was one possible reason out of a wide number of reasons upon which an institution may lose its licence. The finding that the CAS was not fraudulent was materially based upon the incorrect

assertion of a concession about why the sponsors licence was lost which undermined the evidence from the London Academy of Learning that the CAS was not issued by them.

7. Permission to appeal was granted by Judge Landes on 11 May 2018 on all grounds.

8. At the oral hearing, the Home Office Presenting Officer relied on the grounds of appeal that there was a material error of law in the decision and submitted in addition that the First-tier Tribunal simply failed to consider the evidence of fraud before it and the Presenting Officer's submissions which are recorded in paragraph 20 of the decision. That included an e-mail from the London College of Learning stating categorically that the Appellant was not a student and there was no evidence of poor record keeping at the college to undermine such evidence. The Appellant had been aware of the issue as early as 28 May 2012 as it was raised in a refusal letter then, so the matter had not been raised as late as suggested by the First-tier Tribunal.

9. On behalf the Appellant, it was submitted that the error in relation to the stated concession by the Presenting Officer was immaterial as the Respondent offered no evidence to categorically rule out that the college lost its licence because of poor record keeping. It was submitted that the Respondent's evidence was considered in paragraphs 11 and 18 of the First-tier Tribunal decision (albeit accepted that this was in the section setting out the evidence rather than expressly forming part of the findings). Further, Mr Singer relied on what he described as the positive credibility findings in respect of the Appellant made by the First-tier Tribunal which have not been challenged.

10. As a whole, it was submitted on behalf of the Appellant that adequate findings of fact were made by the First-tier Tribunal when the decision is read as a whole.

Findings and reasons

11. In the course of this appeal, the Appellant has accepted that there is a mistake of fact in the decision of the First-tier Tribunal, in that the Home Office Presenting Officer did not concede that the London College of Learning has lost its sponsor licence due to poor record-keeping, to the contrary that was one reason which could be the basis for such a decision but the specific reason in this case was not known. However, he submits that the error was not material to the outcome of the appeal.

12. It is necessary considering slightly more detail the First-tier Tribunal's decision in light of the Appellant's submissions. In the section dealing with the submissions of the parties, Judge Jones recorded, so far as relevant, the following:

> *"11. … In this regard as to the CAS, poor record-keeping was one of the grounds for the licence holder losing their sponsorship credentials. There is correspondence between the Home Office and the college which might suggest that the CAS number could not be recognised – but it has be borne in mind that the Appellant is in no position to challenge this – and the Home Office themselves took this London College of Learning licence away (revoking it) because of poor record-keeping.*

> …
>
> *14. He has not seen any evidence of these alleged communications at the time of making his statement in November 2017, and is unaware how any officer of the Respondent has been able to check the system, and guard against the risk simply the collage in themselves whose licence was revoked for poor record-keeping can be relied on. Because of this the college has closed and he has had no opportunity of investigating these matters further himself given the passage of time.*
>
> …
>
> *23. It is submitted respectfully that the Appellant has been closely cross-examined as to the limited steps he could take at that time with the college having been closed down; and the belated production of the evidence which is said to establish his "guilt". As a matter of fairness the Tribunal has required the production of this documentation, which again, only shows a paucity of information based on a simple email – whereby a simple error could have been made in the establishment that itself was shut down by the Home Office for poor record-keeping. They are shaky foundations it is submitted for the basis of decision."*

13. It can be seen that there is repeated reference to the mistaken fact as to the reason why the London College of Learning lost its sponsor licence. The conclusions and findings on the appeal thereafter are relatively brief and are contained essentially in the following two paragraphs:

> *"26. On the totality of the evidence before me I find that essentially the information provided before me does not make out the alleged fraud as the Respondent would have it. I am mindful of the decision in **AA (Nigeria)** and that the burden resting with the Respondent in this regard. What is clear to me though the Appellant was closely cross-examined; he was consistent and reliable to an appropriate standard as in terms of his genuinely submitting applications and being left then in somewhat of a vacuum without information that has been provided only until of late (2018) concerning the alleged fraud. This seems to amount to an individual who is not named at the college checking a register which was said to be pockmarked with errors, such that the college licence was revoked for poor record keeping.*
>
> *27. The Appellant in reality has been left in a difficult position in ignorance of the material facts that he was to face in terms of the allegation put him, and only presented with this evidence some years on, and so late in the day so as to seek to address it with the college that had long since been shut down because of its poor record keeping. I find this to be somewhat "shaky" if I use Mr Singer's description, in terms of this allegation of fraud's foundations – but also I find that the Appellant's tenacity in terms of pursuing the matters through Judicial Review speak in some measure as to his sincerity in this matter."*

14. The First-tier Tribunal has clearly attached little if any weight to the e-mail from the college stating that the Appellant was not a student there and they had not issued a CAS to him, on the basis that the college had poor record keeping as shown by the loss of their sponsor licence for that reason. There is no apparent consideration of the

Respondent's evidence that the Appellant had not submitted an actual CAS, only a letter and that checks on the Respondent's system both against the Appellant's name and the CAS number he relied upon showed no results. Against this evidence, only the Appellant's tenacity in pursuing his claim is taken into account in his favour to find that the Respondent had not discharged the burden of proof upon her.

15. The accepted mistake of fact in the First-tier Tribunal's decision amounts to a material error of law as it infected the findings of fact in relation to the CAS, being repeatedly relied upon to undermine the Respondent's evidence that the CAS was fraudulent. In the absence of any concession by the Respondent that het London College of Learning lost its sponsor's licence even in part for poor record keeping, those findings can not be sustained. That is particularly so in light of the failure to expressly consider the Respondent's other evidence in support of the decision.

16. Counsel for the Appellant suggests that the error of law is not material because in any event the Respondent was put to proof that the sponsor's licence was not revoked for this reason and unless he could establish that, the First-tier Tribunal was bound to allow the appeal. However, that puts the case too highly. The burden of proof in relation to the allegation of fraud is on the Respondent and the standard is the balance of probabilities. The First-tier Tribunal are required to assess all of the evidence as a whole to reach a finding on whether a CAS was fraudulent and the Respondent is not required to prove anything in particular in relation to the revocation of the sponsor's licence, albeit the evidence (or lack thereof) may be a relevant factor to consider as part of that assessment.

17. Counsel for the Appellant also relied on the positive credibility findings made as a reason why the error of fact would not be material, however, as can been seen from paragraphs 26 and 27 of the decision set out above, those findings are incredibly limited and go only so far as the Appellant being consistent about the applications he submitted and pursuing the claim. There are no express positive credibility findings about his study or the CAS so the limited findings made do not show the error was even arguably immaterial.

18. For these reasons, the appeal against the First-tier Tribunal's decision is allowed as it involved the making of a material error of fact which amounted to an error of law and as such it is necessary to set aside the decision. The appeal will be adjourned to a further hearing in the Upper Tribunal before UTJ Jackson to remake the decision.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

No anonymity direction is made.

Directions

Hearing adjourned to the first available date after 28 August 2018 before UTJ Jackson at Field House.

The Appellant and Respondent to file and serve any further evidence upon which they wish to rely no later than 14 days before the relisted hearing.

Signed  Date 9th August 2018

Upper Tribunal Judge Jackson