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Case No: CO/1461/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 9th July 2014

Before:

MR ROBIN PURCHAS QC
(sitting as a Deputy Judge of the High Court)

- -

Between:

THE QUEEN
on the application of
AAMIR AFZAAL

Claimant

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

- -
- -

Zia Nasim (instructed by **Morgan Mark Solicitors**) for the **Claimant**
Ben Lask (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 1st May 2014

- -

Approved Judgment

Mr Robin Purchas QC:

Introduction

1. In this application the Claimant applies for judicial review of a decision made on behalf of the Secretary of State on the 13 November 2012 refusing the Claimant further leave to remain as a Tier 4 General Student. Mr Zia Nasim, who appears for the Claimant, relied on four grounds:

    a) that there was no valid condition imposed on the original leave to enter and so no breach (ground 1);

    b) that the evidence provided of available funds was sufficient because the Claimant had an established presence in this country (ground 2);

    c) that the Secretary of State acted unfairly in refusing the application (ground 3); and

    d) that the Secretary of State failed to exercise her discretion (ground 4).

2. The grounds 1 and 2 were not originally pleaded in the Grounds for Judicial Review and first appeared in Mr Nasimôs skeleton argument for the purposes of the hearing on 1st May 2014. No objection was raised on behalf of the Secretary of State in that respect and the case proceeded on that basis at the hearing. Permission was granted on the papers on the 15 May 2013.

3. In the course of his submissions on 1st May 2014 Mr Benjamin Lask, who appears for the Secretary of State, raised a question concerning the Immigration (Leave to Enter and Remain) Order 2000 (ñthe 2000 Orderò), of which the Claimant had not had notice and which Mr Lask frankly acknowledged had only come to his notice the day before the hearing. The point potentially had implications that went beyond the particular facts of the present case and was therefore of some importance. With the agreement of the parties I directed that the question of whether the endorsement on the Claimantôs entry clearance vignette complied with the 2000 Order should be the subject of a subsequent exchange of written submissions, indicating whether either party considered that a further oral hearing was required, in the light of which I would decide whether to have a further hearing or proceed directly to make my decision.

4. Exchanges of written submissions took place following the hearing in accordance with that direction, in the light of which I determined that I did not require a further hearing and am now able to determine the issue as part of this judgment.

5. As part of those subsequent written submissions the Claimant now also relies upon the contention that there was no endorsement of the no study condition on the entry clearance as required by the 2000 Order and accordingly that condition was of no effect. I will consider that as part of Ground 1.

Background

6. The Claimant came to this country from Pakistan on 7 September 2010, having obtained entry clearance as a Tier 4 General Student until the 10 May 2012 to undertake a course at the JFC Training College (ñJFCò). In his written statement dated 29 April 2014 he explained that he started studying at JFC but was not satisfied with its educational standards. He was unaware that there was any condition on his entrance clearance not to study elsewhere and he applied to and was accepted by the Walthamstow Business College (ñWBCò) in January 2011. He continued to study there until January 2012. He had been told by WBC that he did not need to make a formal application to the United Kingdom Border Agency (ñUKBAò) for the change in course.

7. Thereafter on the 16 May 2011 UKBA were notified by JFC that the Claimant had ceased studying with them but, when the matter came to be considered by UKBA on the 6 December 2011, it decided not to curtail the Claimantôs leave as less than 6 months was left on the clearance.

8. On the 10 May 2012 the Claimant obtained confirmation of acceptance (CAS) for a further course of study at the Bedfordshire Business School (ñBBSò) commencing on the 9 July 2012 to run until the 31 August 2013. The 10th May 2012 was the last day of the original entry clearance. He completed an application form which bears that date, seeking further leave to remain. The form identified the new sponsor with its sponsor licence number. It stated that the Claimant was making the application as a person with an established presence so that evidence of means of £5,000 was required. In fact the bank statements submitted with the application demonstrated funds of £9,714.11. The application was received by UKBA on the 15 May 2012, having been sent by first class post.

9. On the 13 November 2012 the Secretary of State wrote to the Claimant refusing to grant leave to remain. The decision letter stated that on the 14 May 2012 the Claimant had made an application for leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant. It referred to the original clearance and explained that the original entry clearance prohibited the Claimant from studying at an institution other than the sponsor body and that he was therefore in breach of that condition of his entry clearance. The letter went on to explain that, as the application was made on the 14 May 2012, being the assumption made from its receipt on the 15 May 2012, the Claimantôs leave had expired on the 10 May 2012 and so funds of £10,600 were required which had not been demonstrated on the evidence submitted. For those reasons, the application was refused.

10. On 20 November 2012 solicitors acting for the Claimant wrote a pre-action protocol letter. It recited the history of the case including that the Claimantôs leave to enter was valid until the 10 May 2012 and that on the 14 May 2012 he had applied for further leave to remain. The letter accepted that the requirement for funds was £10,600 in those circumstances but said that the Claimant had been advised by his Tier 4 sponsor that he was only required to demonstrate £5,000 funds. The letter went on to say that the Claimant was not aware that he was in breach of the condition of his entry clearance and complained that the Claimant should have been informed of the inadequacy of funds and the breach of condition and allowed to address the deficiencies.

11. Thereafter an application for judicial review was issued on the 11 February 2013 in similar terms, asserting that the application was made on the 14 May 2012 and accepting that the maintenance funding requirement was accordingly £10,600 but contending that the Secretary of State had acted unfairly in refusing the application.

12. In his skeleton argument filed on the 24 April 2014 Mr Nasim made the two further contentions:

    a) that there was no valid condition imposed on the original entry clearance because no condition had been specifically imposed to prevent study at another institution so that there was no relevant breach; and

    b) that in fact the Claimant had posted the application on the 10 May 2012 and therefore it was deemed to have been made on that date; in consequence the Claimant had an established presence in this country and the maintenance requirement was for funds of £5,000 to be shown to be available, which the Claimant had done.

13. The witness statement from the Claimant made on the 29 April 2014 confirmed that he had posted the application on the 10 May 2014 and so had an established presence in this country. Mr Nasim explained that he had been instructed late in this application and that his instructions from the Claimant were given at that time as to the date of posting.

14. I will deal with the four grounds of challenge in turn.

Ground 1 - No study condition

Legal framework and guidance

15. Section 3 of the Immigration Act 1971 (ñthe 1971 Actò) provides so far as relevant:

> ñ(1) Except as otherwise provided by or under this Act, where a person is not a British citizen ... (b) he may be given leave to enter the United Kingdom (or when already there leave to remain in the United Kingdom) either for a limited or for an indefinite period; (c) if he is given limited leave to enter or remain in the United Kingdom, it may be given subject to all or any of the following conditions, namely:
>
> a. a condition restricting his employment or occupation in the United Kingdom;
>
> (ia) a condition restricting his studies in the United Kingdom;
>
> b. a condition requiring him to maintain and accommodate himself and any dependants of his without recourse to public funds;

> c. a condition requiring him to register with the police;
>
> d. a condition requiring him to report to an immigration officer or the Secretary of State; and
>
> e. a condition about residence.
>
> (2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom for persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances ....ò

16. The Immigration Rules were made by the Secretary of State pursuant to section 3(2) of the 1971 Act. Rule 245ZW applies to Tier 4 General Student clearance and provides for the period and the conditions of grant. Sub-paragraph (c) provides:

> ñEntry clearance will be granted subject to the following conditions:
>
> a. no recourse to public funds;
>
> b. registration with the police if this is required by paragraph 326 of these rules;
>
> c. no employment (subject to specified exceptions);
>
> d. no study except (certain specified exceptions including supplementary study)ò.

17. Article 2 of the 2000 Order provides:

> ñSubject to article 6(3), an entry clearance which complies with the requirements of article 3 shall have effect as leave to enter the United Kingdom to the extent specified in article 4 but subject to the conditions referred to in article 5.ò

18. Article 3 provides:

> ñ(1) Subject to paragraph 4 an entry clearance shall only have effect as leave to enter if it complies with the requirements of this article.
>
> (2) The entry clearance must specify the purpose for which the holder wishes to enter the United Kingdom.
>
> (3) The entry clearance must be endorsed with:
>
> (a) the conditions to which it is subject; or

> (b) a statement that it is to have effect as indefinite leave to enter the United Kingdom.
>
> ...ò

19. Article 4 deals with visitor visas and is not relevant to the present application.

20. Article 5 provides:

> ñAn entry clearance shall have effect as leave to enter subject to any conditions, being conditions of a kind that may be imposed on leave to enter given under section 3 of the Act, to which the entry clearance is subject and which are endorsed on it.ò

21. Part 9 of the Immigration Rules provides general grounds for the refusal of entry clearance or leave to remain in the United Kingdom, which include by paragraph 322(3) ñfailure to comply with any conditions attached to the grant of leave to enter or remainò.

22. Paragraph 245Z sets out the requirements for leave to remain. That includes that the applicant must not fall for refusal under the general grounds for refusal and, secondly, that he demonstrates a minimum of 30 points under the relevant provisions. That includes the demonstration of the relevant level of funds depending on whether the applicant has an established presence studying in the United Kingdom or not. An applicant will have an established presence for this purpose if the application is made within the period of his current leave.

23. Guidance published by the Secretary of State for considering leave to remain includes guidance that even where the ground is established the relevant officer should consider whether there are any exceptional compelling circumstances which would justify granting an application as a matter of discretion.

24. In respect of failure to comply with conditions of stay, advice is given that ñConditions of stay means the conditions endorsed on an applicantôs entry clearance for UK residence permitò. Examples of the endorsements are given, including óno recourse to public fundsô, óno recourse to public funds, no work or engaging in businessô and óregister with the policeô. The guidance continues that ñwhere evidence shows that one or more of the above conditions has been broken, you must refuse further leave to remain under paragraph 322(3) as well as any refusal under the substantive rules.ò

25. The Secretary of State also provided advice for applicants under Tier 4. The introduction advises students coming to the United Kingdom to read the guidance together with the relevant paragraphs of the Immigration Rules, giving a link to the rules. That advice is repeated in paragraph 48 of the guidance. Paragraph 248 advises that an application will be taken to be made where the application form was sent by post on the date of posting. Paragraphs 275 to 277 deal with students who want to take a course of study with a different Tier 4 sponsor. Paragraph 277 specifically advises that, if a student wants to study with a new sponsor, he must always make a new application from inside the United Kingdom. Paragraph 280 further advises that,

if a student is applying to study with a Tier 4 sponsor, he cannot start the new course until the application has been approved.

Evidence

26. In addition to the background facts set out above, I should describe some of the processing of the Claimantôs entry clearance in a little more detail. The Secretary of State relied upon the witness statement of Caroline Adams dated 29 April 2014. Ms Adams is a Higher Executive Officer with the Home Office Immigration & Visas Group. She explained that as a result of paragraph 245ZW(c) all Tier 4 student clearances were subject to the no study condition. An entry clearance vignette was fixed to the Claimantôs passport when clearance was granted. The vignette states so far as relevant ñEntry clearanceò and below that ñVisa Tier 4 (General) Student 4J853HRF7ò. It then gives the name of the Claimant followed by the passport number and other details of the Claimant. Below that against ñobservsò it states ñSPX4J853HRF7 No recourse to public funds. Work limited to max 10 hrs per week during term timeò.

27. Ms Adams explained that the description of Tier 4 General Student was a reference to the type of clearance subject to paragraph 245ZW of the Rules, as set out above. The number given was the unique reference for the Claimantôs Tier 4 sponsor with SPX as a reference to that body as the sponsor body. The other references are to the further conditions required under the rule in respect of no recourse to public funds and the limitation on employment during term time, again in accordance with the rules. Ms Adams stated that the references to SPX and the JFC number would have made clear to Home Office officials that the condition applied limiting study to JFC.

28. She pointed out that, in applying for clearance, the Claimant had to obtain a CAS which would have been marked with a specific sponsor reference number. I have also been supplied as part of the subsequent written submissions with the relevant application form for entry clearance, which in part 3 required identification of the sponsor body and its respective reference number.

29. The further submissions on behalf of the Secretary of State included as Annex C the Secretary of Stateôs guidance ñPlaying by the Rulesò, which at page 4 advised entrants to this country to know their visa and what it allows them to do in this country. The guidance sets out an illustration of the information on the visa, including a note on the illustrated vignette óno work or recourse to public fundsô on which there is the comment:

> ñConditions: If your visa allows you to work it will say so here. If you are sponsored to work or study in the UK, your sponsor number will be included here. If your visa says óNo recourse to public fundsô you are not allowed to claim benefits or apply for government funded accommodation. You should check whether you are allowed to access NHS healthcare, as other than in an emergency, many visitors are not.ò

Submissions

30. Mr Nasim submits that the powers of the Secretary of State under Section 3(1) of the 1971 Act are discretionary. For a condition actually to be imposed, there is necessarily a further administrative act required to apply the condition. Section 3(2) of the 1971 Act confirms that rules can be made to include conditions ñto be attachedò in various circumstances. Thus he submits that the rules do not themselves attach the condition. They must be attached as a specific administrative act.

31. Thus paragraph 245ZW(c) is consistent in providing that entrance clearance will be granted, subject to the specified conditions, including the no study condition. That accords with the guidance that provides that the conditions of stay means the conditions endorsed on the applicantôs entry clearance. That in turn is consistent with the 2000 Order which makes it clear that entry clearance will take effect subject to Articles 3 and 5 which are in turn expressly subject to the conditions which are endorsed on the clearance. In the circumstances, he submits that it can be seen that for the condition to have effect, it must be shown to have been endorsed on the relevant clearance.

32. In the present case, inclusion of the reference number of the sponsor was inadequate to endorse a condition that the Claimant was not to study other than with the sponsor organisation. It can be seen from the examples of the endorsements given in the guidance that the effect of the condition was to be included such as ónо recourse to public funds, no work or engaging in businessô. The fact that in this case the Claimant was not aware of the condition is itself consistent with the failure effectively to endorse the effect of the condition or the condition at all on the relevant clearance.

33. While the guidance indicates the basis for applying for a variation in the clearance to cover a new sponsor, it does not directly address the condition imposed in the first place. In any event, the guidance is incapable of satisfying the requirement for endorsement of the condition on the relevant clearance.

34. Mr Lask submits that the regulatory provisions are in mandatory form and the effect of the rules is to impose the no study condition without the need for any further administrative action. While Section 3(1)(c) of the 1971 Act is discretionary, by section 3(2) the relevant rules can expressly provide for conditions which are required to be attached. That is precisely the effect of paragraph 245ZW(c), which states that the clearance will be subject to the no study condition. Thus in granting clearance under the Rules, the clearance is necessarily subject to a condition to that effect.

35. As to the 2000 Order, Mr Lask submits that, properly understood, Article 3 is subject to Article 5 and Article 5 only applies to conditions that may be imposed as a matter of discretion. For sound administrative reasons it does not seek to apply to conditions that are in any event required to be imposed under the rules. In the present circumstances, accordingly, Article 5 does not apply to the no study condition or other conditions required under the rules to be applied in any event.

36. Mr Lask also referred me to the decision of the First Tier Tribunal in *Ali Adil v. SSHD* 1A/23411/2013, where the judge had reached a contrary view as to the requirement for endorsement. Mr Lask submitted that for the reasons set out above that decision was incorrect. In any event it was not binding on this court.

37. If, contrary to those submissions, the court concluded that endorsement is required by virtue of the 2000 Order, he submits that the wording on the clearance vignette was sufficient to constitute an endorsement. He submits that endorsement does not require the giving of notice to the Claimant and is to be contrasted with provisions that expressly require notice to be given. An endorsement is effected by inscribing a reference or code which can be understood to apply to the relevant condition by reference to other documents or material. It does not require that the condition terms are set out in full or indeed in summary.

38. By way of example, he referred in his written submissions to endorsement on a driving licence of motoring offences, which are by reference to stated code references. He also referred to the Shorter Oxford English Dictionary (Fifth Edition), which includes the following definition:

> ñWrite a supplementary or official comment or instruction on (a document), esp. on the back, often to extend or limit its provisions; spec. sign (a bill of exchange) on the back to accept responsibility for paying it; sign (a cheque) on the back make it payable to someone other than the stated payee. Also, write (a comment etc) on a document; inscribe (a document) with (a comment etc]; make (a bill etc) payable to another person by a signature on the back.ò

39. In the present case, Mr Lask submits, the endorsement is not simply the reference to the sponsor reference number. It also includes the description of the clearance as ñVisa Tier 4 General Studentò, which necessarily requires the imposition of a no study condition, an endorsement which is made complete by the identification of the specific sponsor body.

Consideration

40. Section 3 of the 1971 Act clearly distinguishes the discretionary power to grant clearance and impose conditions under Section 3(1) and the provision for rules to be made under section 3(2) that prescribe, among other things, ñthe conditions to be attached in different circumstancesò. Thus under the rules made pursuant to section 3(2) of the 1971 Act the conditions to be attached in the case of the Tier 4 Student Clearance are specified, that is that entry clearance will be granted subject to the following conditions which are then set out, including the no study condition. In my judgement, that does not require any further administrative action to impose the condition on the grant of clearance in accordance with the rules, subject to any further regulatory requirement such as is found in the 2000 Order.

41. Turning then to the 2000 Order, it seems to me that the requirements of the Order should, so far as possible, be read in a straightforward manner and so as to be consistent in the application of the individual Articles. Article 2 provides, so far as relevant, that entry clearance which complies with the requirements of Article 3 shall have effect as leave to enter the United Kingdom but subject to the conditions referred to in Article 5. Accordingly, for the entry clearance to have effect it must comply with the requirement of Article 3. Again, so far as relevant, under Article 3, the entry clearance must be endorsed with the conditions to which it is subject unless it is to

have effect as indefinite leave to enter the United Kingdom. There is nothing on the face of Article 3 which indicates that it only applies to some of the conditions to which it is subject or any other limitation in that respect.

42. Article 5 provides that an entry clearance shall have effect as leave to enter subject to any conditions, ñbeing conditions of a kind that may be imposed on leave to enter given under section 3 of the Act, to which the entry clearance is subject and which are endorsed on it.ò The reference to endorsement is consistent with the parallel requirement for endorsement in Article 3. On first reading, the description of the conditions as conditions of a kind that may be imposed on leave to enter, given under section 3 of the Act would echo the terms of section 3(1)(c) with the power to impose conditions, including conditions relating to a restriction on studies in the United Kingdom.

43. The question then arises whether the scope of that requirement is limited because the rules, pursuant to section 3(2), have imposed a requirement to impose a no study condition on all such clearances. In my judgement that is not a natural reading of the language of Article 5 which seems to me to be referring to the scope of conditions that the section in the 1971 Act permits to be imposed, irrespective of what the rules may have separately required pursuant to section 3(2). Moreover, it would lead to an inconsistency with Article 3 in the reference to endorsement, which could not be easily reconciled on the language of the relevant Articles including Article 2. Furthermore, if it was intended to limit the application of Article 5 to conditions that are not required to be imposed under the Immigration Rules, it is surprising that that limitation was not expressly applied in the 2000 Order by reference to the rules made pursuant to the 1971 Act.

44. While in this respect I do not rely on reference to the guidance of the Secretary of State in this respect, it seems to me that a construction that is both straightforward and requires endorsement of all conditions, whether obligatory or not, by virtue of the 2000 Order, is consistent with the guidance to which I have referred above. I note that Ms Adams, in her witness statement, did not suggest that such a requirement did not apply in practice. In these circumstances, I reject the submission of the Secretary of State that Article 5 of the 2000 Order should only apply to discretionary as opposed to all conditions to be imposed on the entry clearance.

45. I then turn to the question of endorsement. In my judgement Mr Lask is correct when he submits that endorsement is not the same as the giving of notice and it does not depend on communication of the full effect of a condition to the reader. It is a note or reference that endorses on the entry clearance the application of the condition to which the reference is made. In the present case the relevant endorsement includes both the description of the relevant entry clearance, that is as a Tier 4 General Student clearance followed by the reference number of the sponsor body, and its repetition in conjunction with the other obligatory conditions, which are set out in the vignette.

46. In my judgement in the context of the relevant grant of entry clearance in accordance with the Immigration Rules that was a clear indication on the face of the vignette that the conditions include, as required under the Rules, limitation to the particular identified sponsor body. No doubt the reference could be made more clearly, not least by the description of the endorsements as conditions rather than under the rubric

observations. However that does not, in my judgement, lead to a conclusion that the endorsement was ineffective for the purpose of the 2000 Order.

47. I have also had regard to the fact that the relevant guidance to officials in this respect gives examples of endorsement including conditions which are mandatory under paragraph 245ZW such as no recourse to public funds and that the examples are in a form that summarises the effect of the condition, a formulation that was followed for the other endorsements on the Claimantôs clearance vignette. However, in my judgement the inclusion of the sponsor reference for the second time as part of those explicit endorsements in fact reinforces the fact that this was properly a reference to the limitation on the entry clearance to that sponsor body.

48. In those circumstances the condition was, in my judgement on the facts endorsed, on the Claimantôs entry clearance for the purposes of the 2000 Order and as such the condition was valid. On the evidence the Claimant was plainly in breach of that condition. For all the above reasons the first ground of challenge fails.

Ground 2 - Inadequate funding

Legal framework

49. By paragraph 245ZX of the rules an applicant for further leave to remain must have a minimum of 10 points under paragraphs 10 to 14 of Appendix C to the rules. By paragraph 14 an applicant will have an established presence if he has existing entry clearance. By paragraph 11, 10 points would be available if the funds shown in the table are available. Under the table where an applicant does not have an established presence he must show funds of £800 per month for the period of the course, up to a maximum of 9 months. In the Claimantôs case, together with the course fees, that would amount to £10,600. If the applicant had an established presence, he would need to show funds of £800 per month for a maximum of two months. In the Claimantôs case that would total £5,000 including the course fees.

50. By paragraph 34G of the rules, an application will be made by post on the date of posting. That is also reflected in the relevant guidance provided by the Secretary of State, which includes advice as to the date of posting as follows:

> ñThe date of application is é the date of posting for postal applications ... you must accept the Postmasterôs evidence of the date of posting. If the envelope in which the application was posted was missing or if the postmark is illegible, you must take the date of posting to be at least one day before it was received. You must take the date of processing on the payment contractorsô stream sheet as the date that the application was received. In the above situation, there is also accompanying correspondence with the application that matches the likely date of posting, when that date is earlier than the postage date calculated using the above method, you must take this earlier date as the application date. If you are unsure, you must accept the date that is most favourable to the applicant.ò

51. The guidance also includes a requirement to consider the exercise of discretion where leave would not otherwise be available in accordance with the rules.

Evidence

52. As set out above, the application for leave to remain was dated 10 May 2012. It stated that the Claimant had an established presence and so qualified for a reduced maintenance level of £1600 which with the course fee of £3,600 amounted to £5,000. The application enclosed bank statements which showed funds of up to £9,714.11. The application also enclosed the CAS from the BBS which was dated the 10 May 2012. The envelope, which was not date stamped, was marked first class and was stamped as received by UKBA on the 15 May 2012, which accorded with the stream sheet kept in the processing department, which in fact showed it received at 0730 hours. The 15 May 2014 was a Tuesday. There was no direct evidence of the date of posting enclosed with the application or otherwise made available.

53. In the decision letter dated the 13 November 2012 it was stated that the application was made on the 14 May 2012. I was told that was taken as the normal date for posting of a first class letter in accordance with the relevant guidance one day before its receipt. That meant that the application was posted and therefore in accordance with the rules made after the original entry clearance had expired on the 10 May 2012 so that the Claimant did not in fact have an established presence when the application was made. Accordingly the maintenance required was £10,600 for which the demonstrated available funds were inadequate.

54. When the decision letter was received by the Claimant, it was apparent that he took legal advice and his solicitors wrote the pre-action protocol letter dated 20 November 2012. Again as set out above, that letter summarised the facts, including that the entry clearance had expired on the 10 May 2012 and that the application was made on the 14 May 2012. The consequent requirement for funding is also acknowledged in that letter and that the demonstrated funds were therefore inadequate for the required level. The ground of challenge was that he had not been given the opportunity to remedy that inadequacy.

55. When the claim for judicial review was issued on the 11 February 2013 the facts and grounds set out the same position and it was confirmed by the statement of truth signed by the solicitors. As I have indicated, the first suggestion the application was made during the currency of the original clearance on the 10 May 2012 appeared in the skeleton argument of Mr Nasim dated 24 April 2014. That was confirmed by the subsequent witness statement from the Claimant made on the 29 April 2014, which was some two days before the hearing. In his written statement the Claimant stated that he purchased postal orders for the UKBA application fee on the 10 May 2012 and that was the date he posted the application. He provided Post Office receipts recorded at 4.46 pm on the 10 May 2012 including the fee amount of £394. He explained that he had lost his postal receipt but he was sure that he made the application on the 10 May 2012. He does not explain why this had not been suggested earlier in response to the decision letter or in the pre-action protocol letter or in the application for judicial review.

56. I was told by Mr Nasim that he had raised the question when he had been instructed which was relatively shortly before the hearing. He could not explain why it had not been raised earlier.

Submissions

57. Mr Nasim accepts that the question for the Court is whether on the evidence before her it was open to the Secretary of State to conclude that the application had been made after the expiry of the entry clearance. However he submits the onus remains on the Secretary of State to establish the grounds for refusal. Mr Nasim accepts that the evidence of the postal orders was not before the Secretary of State and is not directly relevant as such in this respect. However he submits that as a matter of fact, taken with the date on the application form of the 10 May 2012 and the fact that the Claimant was at the Post Office on that date, this corroborates his direct evidence in his witness statement that that was the date on which he posted the application. That is also supported by the enclosed CAS which was also dated the 10 May 2012.

58. Mr Nasim accepts that the witness statement was not before the Secretary of State, but submits that the other evidence should have been apparent to her from the date on the application form and the enclosed payment of the fee in the form of the postal orders. Moreover, the application was expressly on the basis that the applicant had an established presence in the United Kingdom which was only consistent with it having been made during the currency of the existing entry clearance. Thus at the very least she should have been put on enquiry and, if enquiry had been made of the Claimant at that stage, on the evidence the court should conclude that it would have been explained to her that the application had in fact been made on the 10 May 2012 as the application form states.

59. Mr Nasim submits that in the circumstances, in accordance with the UKBA guidance, the other documentation should have indicated the date of posting earlier than the calculated date of one day before receipt on the 15 May and that should have been the date most favourable to the Claimant, that is the 10 May 2012. Thus Mr Nasim submits that it is clear that the Claimant was directly concerned with making the application on the 10 May, that was the date on the application and the time when he was actually at the Post Office when it would have been likely that with the material available, the application would have been posted. It was, he suggests, inherently improbable that the Claimant would have taken the application away to be posted some days later when it was plain that in those circumstances he would no longer have an established presence in the United Kingdom and the application would have been deficient.

60. In all the circumstances, the conclusion of the Secretary of State that the application was posted on the 14 May was inconsistent with the available evidence and her own guidance and was perverse. Alternatively, she failed to take into account a material consideration or acted unfairly in not giving the opportunity to the Claimant to remedy the deficiency, the last point being the subject of the subsequent ground of challenge.

61. Mr Lask submits that the conclusion of the Secretary of State as to the date of posting was amply supported on the evidence before her. Receipt on the 15 May was recorded

at the time and marked on the envelope, which showed that the letter had been posted first class. There was nothing to indicate any disruption or breakdown in the postal service and no other evidence why the letter should have taken longer than one day to have been delivered. That the application form was dated the 10 May records the date on which the application was drafted and was consistent with the assertion that the Claimant then had an established presence. It told one nothing about the date on which the application was in fact made by being posted. The date on the CAS of the 10 May 2012 does nothing to support posting on the same day as it was dated, particularly in the absence of any other supporting evidence or indication that it was faxed or otherwise provided to the Claimant on the same day.

62. Where an application is made at the very end of an entry clearance period, it can reasonably be expected that there should have been some direct evidence of posting which should have been provided if indeed it was posted within that period. It was not necessary for the Secretary of State to conclude that it had been posted on the 14 May. The only question was whether it was open to her reasonably to conclude on the evidence that it was posted at some time after the 10 May 2012, that is the previous Thursday.

63. Mr Lask submits that there is nothing here to indicate a failure to take into account material considerations or otherwise act perversely in reaching the conclusion which was reached. He notes that as part of the evidence before the court, albeit not before the Secretary of State, there was no response to the decision letter pointing out any error in the conclusion as to the date the application was made. On the contrary, that was asserted as part of the pre-action protocol letter and confirmed by the Statement of Truth supporting the subsequent application for judicial review. In light of that response at the time any weight to be attached to the assertion now made by the Claimant as to the date of posting should be treated with considerable caution.

Consideration

64. In my judgement, while the burden was on the Secretary of State to establish the grounds for refusal, in the present case she had ample evidence to make her finding that the application had been posted and therefore made on the 14 May 2012 or, in any event, after the expiry of the original entry clearance. The receipt of the application on the 15 May by first class post suggested a posting date of the 14 May. The date on the application form is plainly inconsistent with that factual position, not just by 24 hours, but effectively three days to the previous Thursday. That the application was in fact posted later than the 10 May was also consistent with the absence of any enclosed certificate of posting or other documentation to support that it had been made within the period of the entry clearance and the assertion in the application form that the Claimant had an established presence in the United Kingdom.

65. It was not for the Secretary of State to speculate why the application was posted later than the date on the application form and whether or not that was because the necessary CAS was not to hand. She was entitled in my judgement to make the finding which she did, that was that the application had been posted on the 14 May and in any event after the expiry of the original entry clearance. For all these reasons

her conclusion was neither perverse nor one that failed to take into account the material considerations before her. This ground also fails.

Ground 3 - Unfairness

Authorities

66. I was referred to a number of authorities including *R (Q) v. SSHD* 2004 QB 36 and in particular to the opinion of Lord Phillips at paragraphs 69 and 70. I was also referred to *R (oao Forrester) v. SSHD* 2008 EWHC 2307 per Sullivan J, as he then was, at paragraph 7. Additionally, I was referred to a number of decisions of the Upper Tribunal including *Thakur* 2011 UKUT 151 (IAC**)** and *Naved* 2012 UKUT 14(IAC) paragraphs 14 to 16. The principle is clearly set out in *Q* that the Secretary of State must act fairly in the administration of the Act and decisions taken under it. The standard of fairness is that the powers must be exercised in a manner that is fair in all the circumstances. That is a question that is quintessentially fact and context specific.

Submissions

67. Against that background Mr Nasim submits that the Secretary of State failed to act fairly for two principal reasons:

a) The Secretary of State determined the application on the basis of a breach of condition in circumstances where she should have brought the question of breach to the Claimantôs attention and sought his response before concluding that it would justify refusal. If she had done so, the Claimant would have explained that he was not aware that he was acting in breach of any condition and that he had been advised by the subsequent sponsor that he did not need to make a new application and that it would notify the Secretary of State. In any event, the Secretary of State was notified that the Claimant had ceased to study at JFC during the currency of the clearance but had done nothing about it. In all the circumstances she had acted unfairly.

b) Mr Nasim also submits that in respect of the date of posting the application for further leave the Secretary of State should have raised the question when the application was made with the Claimant before making her decision. It was clear on the face of the application that the application was on the basis that it was made during the currency of the clearance, that is on the 10 May 2012, and that as a result the Claimant had an established presence in the UK. The date on which it was made was crucial to the success of the application, having regard to the level of funding required, and therefore in the absence of any specific date from the post mark, the fair course to have taken was to raise the matter with the Claimant including whether there was evidence of posting on the 10 May 2012. The failure to do so, while drawing an inference against the Claimant leading to the refusal of leave, was unfair. On the evidence now before the court, the court can conclude confidently that, had that enquiry been made, the Secretary of State would have been given evidence of posting on the 10 May 2012 and it

cannot be ruled out accordingly that her overall decision would have been different, whatever conclusion is reached on the breach of condition.

68. On the breach of condition, Mr Lask submits that there was no unfairness on the part of the Secretary of State. The Secretary of State was entitled to assume that the Claimant was aware of the condition. The guidance provided was explicit in advising applicants to have regard to the specific rules which in turn are unequivocal in this respect. Moreover, the guidance itself deals with the situation where an applicant seeks to study with a different sponsor. That the Claimant may have chosen to ignore that advice and take advice from his new sponsor college was necessarily a matter for him. It did not create unfairness on the part of the Secretary of State. That the Secretary of State chose not to terminate the entry clearance in the last 6 months of that clearance was not unfair but a discretion exercised in favour of the Claimant. Moreover, given the breach of condition, it was not a breach that was capable of remedy and amply supported the refusal of renewal. There was nothing in the matters before the Secretary of State that amounted to exceptional circumstances justifying the discretionary grant of leave.

69. On the date of posting Mr Lask submits that on the material before the Secretary of State there was a valid application and therefore no need to revert to the Claimant to address any technical deficit. There was no evidence of posting. On the facts as set out above, it was plain that the application was posted after the 10 May 2012 and hence subsequent to the expiry of clearance. The consequences that flowed from that were set out in the rules. She was entitled to deal with the material submitted on that basis, including the inadequacy of the funds demonstrated. There was no material submitted that supported making an exception to enable the grant of leave outside the rules. In the context of maintaining efficient and effective immigration control and administration, the Secretary of State dealt with this application in a manner that was fair and proportionate in accordance with the guidance and the rules.

Consideration

70. As to the breach of condition, I am wholly unpersuaded that the Secretary of State acted unfairly. For the reasons set out above, in my judgment the requirements of the rules were clearly set out in the guidance and in the rules themselves. In any event, it is wholly unsurprising that, where clearance is granted to an applicant to study at a particular college for a specific period of time, that clearance does not permit the applicant to study elsewhere, or not to study at all. I conclude that there is nothing in this ground of challenge.

71. On the date of posting, as Mr Lask submits, this was on its face a valid application and it was not a case where there had been some manifest technical defect or, for example, that the payment for the fee had failed. It is not suggested that the system as to renewal is unfair in itself. Furthermore, for the reasons set out above, it was an application that had been received at a time and in circumstances where the Secretary of State was entitled to conclude that it was in fact posted after the 10 May 2012. That was notwithstanding the date on the application and that the application form had been filled in on the basis that the applicant had an established presence in the UK. It is expressly not the case that the date on which the application form was filled in was necessarily the date of posting. It would have been open to the Secretary of State to

have regard to her experience in these matters and, for example, the fact that an application could not be made until the relevant CAS has been received, which in this case itself was dated 10 May 2012.

72. I accept, as Mr Lask submits, that there is a requirement on the Secretary of State to administer the control of immigration in a manner that is both fair and proportionate in all the circumstances. What then is it which would have required the Secretary of State as a matter of fairness to have gone back to the Claimant to seek evidence of posting or further evidence of means when the Secretary of State had concluded that the application had in fact been made after the expiry of the clearance when the rules made it quite clear that the evidence of means that the Claimant had produced was inadequate to support the grant of leave. For the reasons set out above, the rules are clear and to that extent, it is for an applicant to ensure that he provides the necessary evidence to support the grant of leave. It is in my judgement simply unrealistic to expect the Secretary of State in cases such as this to go back to an applicant who has failed to provide evidence sufficient to support the application to enquire whether the applicant wishes to submit further evidence to support the application.

73. In my judgement accordingly, there is nothing that shows unfairness on the part of the Secretary of State. Moreover, I note that the Claimant had the opportunity to respond to the Secretary of Stateôs decision letter, pointing out the alleged mistake as to the date when the application was made and asking the Secretary of State to reconsider the matter. I am told that in these circumstances the Secretary of State would normally have reconsidered the decision. As set out above, in the present case not only was there no request for reconsideration but in both the pre-action protocol letter and the application for judicial review, it was specifically accepted that the application was made on the 14 May 2012 after the original entry clearance had expired. Any suggestion to the contrary was only made some 18 months later in the context of the present proceedings.

74. For the above reasons this ground fails.

Ground 4 - Discretion

75. I can deal with this ground shortly. Mr Nasim submits that the letter dated the 13 November 2012 does not expressly refer to the exercise of the Secretary of Stateôs discretion whether or not to refuse further leave to remain. The guidance to which I have been referred makes it clear that discretion should be considered in every case. In my judgement in the present case, there is nothing to suggest that that discretion was not considered. The absence of specific reference in the decision letter is consistent with the fact that no grounds were advanced in support of a grant of further leave as a matter of discretion. In my judgement, accordingly, there is nothing to support this ground of challenge which accordingly fails.

76. For all the above reasons, in my judgement, there are no grounds for judicial review of the decision of the Secretary of State and this application is accordingly refused.