Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA 19724 2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16 January 2014	**On 24 January 2014**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

HARINDER KUMAR

Appellant

and

IMMIGRATION OFFICER HEATHROW TERMINAL 4

Respondent

Representation:
For the Appellant: Mr Z Awani, Solicitor instructed by Mayfair Solicitors
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by a citizen of India against a decision of the respondent on 6 June 2013. The appeal was dismissed by the First-tier Tribunal. It comes before me because it was found to be arguably wrong in law.
2. I have considerable sympathy for the Immigration Officer and the First-tier Tribunal Judge because this is a case arises from that potentially confusing part of the rules concerning the cancellation and/or curtailment of leave and reasons for such a decision such as a change of circumstance or behaving in a way not in accordance with the permission granted. I am being deliberately vague because I want to save the precision for when I come to deal with the case actually before me.
3. I have been shown a decision of the Court of Appeal in **Secretary of State for the Home Department and Daniel Owusu Boahen [2010] EWCA Civ 555** where Thomas LJ, as he then was, said, having commented on the

clarity of the judgment of Lord Justice Pitchford in explaining these Rules, that:

> "The complexity of the task that he has undertaken demonstrates, if further demonstration was needed, the urgent need to simplify and write in plain English the relevant Regulations and other provisions. It cannot be right that officials of the UK Border Agency are required to try and understand and make sense of provisions that are so arcane and poorly drafted."

4. Although there have been many changes to the rules since Thomas LJ made this criticism in 2010 but this part of the rule is no clearer. They are confusing. Experienced lawyers approach them carefully and, understandably, Immigration Officers can easily err.

5. I am entirely satisfied having considered the material before me that this is a case where the Immigration Officer did make a mistake and has made a decision under the wrong Rule so that the decision is unlawful.

6. As indicated the decision was made on 6 June 2013 but the notice of refusal of leave to enter does not identify the Rules under which the decision is made. The complaint is clear enough. It is that the appellant was in the United Kingdom as a student under the provisions relating to a Tier 4 (General) Student, and at the material time had no right to work but, it is said, did work. Previously he had leave as a Tier 4 (General) Student and did have a right to work but the rules had changed when the Immigration Officer made his decision. At that time the appellant did not have permission to work. It is also plain that the Immigration Officer decided that the appellant had been working and that conclusion was supported by a particular interpretation of an interview he conducted with the appellant.

7. It was not until the form IS125 was prepared on 1 October 2013 that the regulatory basis of the decision was identified properly, or at least with some clarity. According to that form the decision on 6 June 2013 was under paragraph 321A(2) of HC 395. That is a provision that applies where false representations were made or false documents submitted or material facts not disclosed that justified the cancellation at port of existing leave.

8. Having heard Mr Awani I am quite satisfied that the Rule identified was not the Rule that gave effect to the analysis of the case conducted by the Immigration Officer. This is not a case where leave should have been cancelled because the appellant's purpose in being in the United Kingdom, that is to study, had not altered. Cancellation was not the appropriate response to the finding that the appellant had worked without permission. If some steps were necessary in the mind of the Immigration Officer he should have looked not at Rule 321A but Rule 322 which is appropriate where leave should be curtailed. Curtailment is the proper remedy where, as is alleged here, the person has been doing something during the currency of his leave that he was forbidden to do.

9. This distinction is not pedantry. As Mr Awani pointed out correctly, the application of the two Rules is quite different. Paragraph 322 contains a discretion. It provides circumstances where leave should *normally* be

refused. The discretion under the rules must first be exercised by the Immigration Officer that takes the decision.

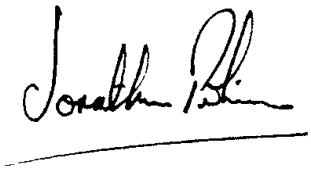
10. It follows that by applying the wrong Rule the Immigration Officer has conducted a wrong function because he has not exercised any discretion that should be exercised under the appropriate rule. I do not want to give any indication at all about how the discretion ought to be exercised. I simply make the point that this case is about a man who has not necessary been earning very much money at all if what he was doing is the kind of work that is of concern to the Immigration Officer. In other words I am satisfied there is something about which discretion ought to be exercised, although I emphasise I am giving no indication of what I think the outcome ought to be. That is not a matter for me.

11. It follows that the decision has been made for an entirely wrong reason and I am satisfied the decision is wrong in law and should go back to the Immigration Officer to be decided in accordance with relevant Rules.

12. There have been many criticisms made of the First-tier Tribunal's decision. These include an incorrect direction about the burden of proof, a failure to consider human rights and also a failure to explain the decision properly. I do not make any findings on these criticisms because they are irrelevant to my primary finding which is that the decision is unlawful because the wrong Rule has been applied.

13. It follows therefore that I have set aside the decision of the First-tier Tribunal and I allow the appeal to the extent that I declare that no lawful decision has been made and that it is for the Immigration Officer to make a proper decision.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 22 January 2014