Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31751/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17th September 2014	**On 13th October 2014**
Prepared 25th September 2014	

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR FARHAN KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K. Khan, Solicitor
For the Respondent: Ms S. Vidyadharan, Home Office Presenting Officer

DETERMINATION AND REASONS

The Proceedings

1. The Appellant is a citizen of Pakistan born on 14th October 1986. He appealed against decisions of the Respondent dated 22nd August 2013 to refuse his application

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for leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant pursuant to paragraphs 245ZX and 322(3) and to make removal directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. Paragraph 322(3) of the Immigration Rules provides that leave to remain or variation of leave to remain should normally be refused where there has been a failure to comply with any conditions attached to the grant of leave to enter or remain. The paragraph is thus not mandatory but rather discretionary. First-tier Tribunal Judge Cameron, sitting at Taylor House on 27th May 2014, dismissed the Appellant's appeal against the Respondent's decision and the Appellant appeals with leave against that decision of the First-tier. The matter comes before me to determine whether there is an error of law in the First-tier Tribunal's decision such that it falls to be set aside and the matter re-heard. If there is not then the decision will stand.

2. The Appellant entered the United Kingdom on 27th June 2010 with entry clearance valid until 30th September 2012 as a Tier 4 Student. On 22nd September 2012 shortly before that leave was due to expire he applied for further leave to remain, stating that he wished to study for a Higher National Diploma in Business Management NQF level 5 at Global School of Management based at Marsh Way, Rainham, Essex.

The Explanation for Refusal

3. The Respondent refused this application because the Appellant was said to have studied at an institution which was not the one he was given permission to attend at a time when he was subject to Section 50 of the Borders, Citizenship and Immigration Act 2009 by virtue of extant leave. Section 50 permits the Respondent to impose conditions on a person's leave, in this case to prohibit a student from study other than at the institution that the Confirmation of Acceptance for Studies (CAS) checking service records as the student's Sponsor.

4. The Appellant's leave from 6th May 2010 was for entry clearance as a Tier 4 (General) Student to study with the Finance and Management Business School. Notification was received by the Respondent from that institution on 12th April 2011 stating that the Appellant had discontinued his studies. To support the application he made on 22nd September 2012, shortly before his leave was due to expire, the Appellant relied on a document from the Learning and Skills Academy showing that he had studied with them from 14th July 2010 until 31st July 2012. The Learning and Skills Academy was not the institution which he had been given permission to study at when initially granted entry clearance and therefore the Appellant was caught by the restrictions imposed by the Respondent pursuant to the general power contained in Section 50.

5. The Respondent was not prepared to grant the Appellant 30 points under Appendix A of the Immigration Rules for the CAS issued by Global School of Management because when she checked the Tier 4 Sponsor Register on 22nd August 2013 Global School of Management was not listed at that date. The Respondent also refused the application under Appendix C for maintenance funds because of the failure to provide a valid CAS as a result of which the Respondent was unable to assess the

amount of funds which the Appellant would otherwise be required to show in support of his application.

6. Section A of the refusal letter concluded with the following:

> "In making the decision to refuse your application, careful consideration has been given to the following:
>
> On 9th June 2010 you were granted leave to enter the United Kingdom as a Tier 4 (General) Student until 30th September 2012."

The Proceedings at First Instance

7. At the hearing before Judge Cameron the Appellant gave oral evidence to the effect that he had attended the Finance Business Management School in Birmingham for a Higher National Diploma in Business Studies until March 2011 when he refused to pay their fees and the college terminated his enrolment. From there the Appellant went to the Learning and Skills Academy in April 2011. The academic transcript he provided for his time at that institution gave a starting date of his course (Diploma in Business Management level 5) of July 2010 whereas his evidence to the Judge was that he did not start at Learning and Skills Academy until April 2011. The Judge recorded at paragraph 29 of the determination that the Appellant was unable to explain that inconsistency. The Appellant acknowledged during oral evidence that he was aware he had to apply for permission to switch to another Sponsor but had not done that when he had gone to Learning and Skills Academy. The Judge acknowledged that the Appellant had existing leave at the time he switched from Finance Business Management School to Learning and Skills Academy but he could not provide a valid CAS for the course at Learning and Skills Academy.

8. The Judge was satisfied that the Respondent had shown on a balance of probabilities that the Appellant had switched courses without obtaining proper permission and that there was therefore a failure to comply with the condition of the Appellant's leave. The Judge did not consider that the Respondent's "60 day policy" applied in this case. That policy would apply where a student was part way through a course and the sponsoring college lost their licence through no fault of an Appellant. In that situation the Appellant would be given 60 days by the Respondent to find another college. That policy did not apply in this case because the Appellant "had completed the previous course without obtaining the relevant leave for that institution" (paragraph 38 of the determination) He was not therefore part way through a course.

9. Global School of Management had lost their licence by the time of the decision and therefore no issue of fairness arose in this case. The Appellant did not apply for a variation of his leave to attend a different college. He was applying for fresh leave to attend a different college. His previous leave had expired by the time the Respondent considered the application and made her decision. The Judge went on to dismiss the appeal under Article 8.

The Onward Appeal

10. The Appellant appealed against that decision arguing that the Respondent had not exercised her discretion in the case of the Appellant and the Judge had erred by endorsing that failure to exercise discretion. The grounds of appeal referred to the Tier 4 Policy Guidance issued by the Respondent version 04/2012. This stated that if the Tier 4 Sponsor's licence was revoked a CAS would become invalid (as had happened in this case) and the application would be refused. However if the student was not involved in the reasons why the Tier 4 Sponsor had their licence revoked the Respondent agreed to delay the refusal of a student's application for 60 days to allow the student to regularise their stay or leave in the United Kingdom depending on what leave they had. If, as in the Appellant's case, the student's leave to remain had expired whilst they were awaiting a decision on the current outstanding application they would delay the refusal of the application for 60 days to allow the student to obtain a new CAS from a different Sponsor and vary the application.

11. The CAS issued by Global School of Management had become invalid as their Sponsor's licence was revoked. As the Appellant was not involved in what had led to that the Appellant should have been granted a further 60 days to find another Tier 4 Sponsor to make a fresh application.

12. The application for permission to appeal came on the papers before First-tier Tribunal Judge Nicholson on 29th July 2014. In granting permission to appeal he wrote:

> "The Judge dismissed the appeal under paragraph 322(3) of the Immigration Rules because the Appellant had failed to comply with a condition attached to his previous grant of leave to remain by switching to another college without obtaining the necessary leave to do so.
>
> Ground 2 contends that the Judge erred in this respect because the Respondent had not used her discretion and the Judge simply endorsed the act of the Respondent. It does appear that the Judge seemed unaware of the fact the refusal under paragraph 322(3) was discretionary. At paragraph 25 the Judge incorrectly asserted that entry clearance was to be refused if there was a failure to comply with any conditions attached to a grant of leave to enter or remain – even though entry clearance was not actually being applied for and the Rules stated that it was normally to be refused which imports a discretion.
>
> The Judge then went on to dismiss the appeal under paragraph 245ZX of the Immigration Rules. It appears from paragraphs 37 and 38 of the decision that the Judge accepted that after the Appellant applied for further leave to remain at Global Business Management that Sponsor's licence was revoked. The Judge acknowledged that in the normal course under the terms of the Respondent's policy the Appellant should have been given 60 days to obtain a CAS from another college but concluded that the Appellant could not meet the Rules anyway because of the breach of his original leave.

It is correct that under paragraph 245ZX an application must not 'fall for refusal under the general grounds for refusal'. However since there was an arguable error of law in respect of that part of the Judge's decision it is also arguable as the remaining grounds contend that the Judge should have found that there was a failure to apply the policy.

As and when a discretion under paragraph 322(3) of the Rules is properly exercised that discretion may very well be exercised against the Appellant – not least because in switching without permission the Appellant was arguably committing a criminal offence under Section 24 of the 1971 Act. Nonetheless it is not for a Tribunal at the application stage to pre-judge the exercise of a discretion which should have been exercised but arguably was not and conclude in so doing that an appeal has no arguable merit. Permission therefore has to be granted".

13. Responding to that grant of permission the Respondent wrote to the Tribunal on 11th August 2014 under Rule 24 stating that she opposed the Appellant's appeal and that the Judge of the First-tier Tribunal had directed himself appropriately. The Rule 24 response repeated the refusal specifically in relation to the fact that the reason why the Appellant had been refused was because he had switched from Finance and Management Business School to the Learning and Skills Academy without permission. That was the reason why the application was refused under paragraph 322(3). The Respondent's refusal to award the Appellant 30 points under Appendix A because the CAS issued by Global School of Management was not valid was a secondary reason for the refusal.

The Hearing Before Me

14. At the hearing before me Mr Khan who had represented the Appellant at first instance argued that there were two points to be decided. The first was whether there was any discretion to be exercised by the Respondent and the second was whether the Respondent should have allowed the Appellant a further 60 days to provide a fresh CAS. Taking the first issue (which related to the Appellant's switch from Finance Business Management School to Learning Skills Academy, reliance was placed on the fact that paragraph 322(3) imported a discretion. The Judge had recorded at paragraph 20 of the determination that the Appellant felt he had no choice but to switch from Finance Business Management School to Learning Skills Academy because Finance Business Management School were not providing classes and he had refused to pay the remainder of the college fees. The Appellant was a genuine student who had completed a Diploma in Business and wished to study here. He had not done so exactly in accordance with the Immigration Rules but they were not statute. The purpose of the Rules had to be considered.

15. In relation to the second point the Respondent ought to have granted 60 days to obtain another valid CAS but that had not happened in this case. The Judge had erred in not assessing the failure to apply discretion. The general ground for refusal under paragraph 322(3) should not be upheld. Section 50 did not specify what the

conditions imposed were but the fact that those conditions had been imposed was not in dispute. In reply the Presenting Officer stated that the Judge had agreed that the Respondent had exercised her discretion in refusing leave but the Judge found against the Appellant and there was thus no error in the determination. Finally in response the Appellant's solicitor stated that there were two bases. No exercise of discretion was an alternative to an assessment of the CAS letter.

Findings

16. The Appellant was refused leave to remain on two grounds. The first was because he had breached conditions imposed pursuant to the general authority contained in Section 50 of the 2009 Act and the second was that the CAS he had produced in support of his application was rendered invalid by reason of the fact that the college's sponsorship licence was revoked by the Respondent.

17. Paragraph 322(3) which was the authority for the refusal on the first ground imported a discretion that permission should *normally* be refused. The argument in the case was whether the Respondent had exercised her discretion before refusing under paragraph 322(3). If she had not then her decision would be not in accordance with the law and would remain outstanding for the Respondent to take and the Judge should have allowed the Appellant's appeal to that extent. On the other hand if the Respondent had exercised her discretion reasonably then the decision would be unimpeachable and the Appellant's appeal would necessarily fail. If that were the case then the second ground of refusal would become irrelevant and the allegation that the Respondent failed to follow her own policy in relation to the revocation of Global Management and Business Management's licence would become superfluous.

18. In granting permission to appeal Judge Nicholson was primarily concerned with the argument that the Respondent had failed to exercise discretion under paragraph 322(3). However a careful reading of the refusal letter shows that the Respondent was aware she had a discretion by the use of the words at the end of the decision "careful consideration has been given to the following". The Respondent was indicating that she was aware of the Appellant's immigration history, that he had leave as a Tier 4 (General) Student. The length of time the Appellant had been in the United Kingdom, studying, was a factor to be weighed in the balance in the exercise of her discretion. The Respondent was aware that the Appellant was in breach of his conditions of leave because he had discontinued his studies at the institution for which he had been given entry clearance to the United Kingdom.

19. The argument is whether the Judge understood that the Respondent had a discretion but even if he did not whether that makes any difference given that the wording of the refusal letter indicates that the Respondent was aware she had a discretion and exercised that discretion against the Appellant. The Judge did not accept the argument put forward on the Appellant's behalf that there had been a breach of the common law duty of fairness which the Respondent owed to the Appellant. The Appellant had not applied for a variation of his leave which was to enable him to

study at Finance Business Management School to enable him to attend Learning and Skills Academy.

20. Given the breach of immigration control and the circumstances surrounding that breach as found by the Judge, that the Appellant had had his enrolment terminated because he had refused to pay the fees for Finance and Business Management School it is difficult to see what factors weighed in the Appellant's favour such that discretion should have been exercised differently by the Respondent. The argument put forward on the Appellant's behalf as cited by the Judge at paragraph 23 of his determination was that Section 50 should not be held strictly against the Appellant as the Appellant was said to be naïve and did not understand the provisions. The Judge specifically rejected the argument that the Appellant could not be taken to know the Rules stating that "the conditions of leave are clear as is the policy guidance which was available to the Appellant at all times".

21. The Judge thus rejected the argument that discretion should have been exercised differently in the Appellant's favour for the reasons the Appellant put forward, that the Appellant was said to be naïve and ignorant of the Rules. In short the Judge found no reason why discretion should have been exercised differently and came to the conclusion that he did. That in my view was an entirely sustainable conclusion.

22. There may be force in the argument that in refusing an application because the CAS was no longer valid due to the revocation of the Sponsor's licence the Respondent should have delayed a refusal on that ground until the Appellant had been another 60 days to find another Sponsor. However given that the Appellant fell for refusal under 322(3) no purpose would be served by delaying a decision on the Appellant's application while he found another college. The Respondent's policy in such circumstances was irrelevant in this case because of the failure of the Appellant to satisfy paragraph 322(3). The grant of permission to appeal is predicated on the assumption that the Judge made an arguable error in dealing with paragraph 322(3) and should therefore have gone on to consider the Respondent's failure to apply her own policy in relation to the revocation of the Appellant's CAS.

23. I find that the case does not get that far. Whether the Judge was right to say (at paragraph 39) that the fact that Global Business Management were no longer on the register by the time the Respondent took her decision to refuse the Appellant's application for variation of leave did not raise an issue of fairness in the Appellant's favour matters not given that the Appellant could not satisfy 322(3). The Judge was well aware and appears to have accepted that there was a policy to give a further 60 days where a sponsorship licence was revoked but in my view quite rightly, directed himself that he did not need to consider that point given his finding that 322(3) applied against the Appellant. There was therefore no error of law in the Judge's determination in this case and I uphold his decision to dismiss the Appellant's appeal against the Respondent's decision.

Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal.

Appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

The First-tier Tribunal dismissed the appeal and therefore there can be no fee award.

Signed this 10th day of October 2014

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Deputy Upper Tribunal Judge Woodcraft