IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/03750/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 18 February 2015	**On 23 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

MR MD SHORIFUL ISLAM
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms B Smith of Counsel, instructed by SEB Solicitors
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Napthine promulgated on 29 July 2014 dismissing the appeal of Mr Shoriful Islam against a decision of the Secretary of State for the Home Department dated 2 January 2014 to refuse variation of leave to remain and to issue removal directions pursuant to Section 47 of the Immigration, Asylum and Nationality Act 2006.

Background

2. The Appellant is a national of Bangladesh born on 21 October 1990. He was granted leave to enter the United Kingdom based on a successful application for entry clearance made on 19 June 2011 as a Tier 4 (General) Student Migrant to study with the City of London Business College. He entered the United Kingdom pursuant to that entry clearance on 12 July 2011 with leave valid until 30 September 2013.

3. On 30 September 2013 he made an application for further leave to remain as a Tier 4 (General) Student Migrant. That application was refused for reasons set out in the combined 'reasons for refusal' letter and Notice of Immigration Decision of 2 January 2014 with reference to in particular paragraph 245ZW(c)(iv) and paragraph 322(3) of the Immigration Rules.

4. The Appellant appealed to the IAC. The First-tier Tribunal Judge dismissed the Appellant's appeal for reasons set out in his decision.

5. The Appellant sought permission to appeal which was initially refused by First-tier Tribunal Judge Chambers on 18 September 2014, but subsequently granted by Upper Tribunal Judge Allen on 18 December 2014.

6. The Respondent has filed a Rule 24 response dated 9 January 2015.

Consideration

7. The basis of the Respondent's refusal of the Appellant's application was that the Appellant was considered to be in breach of the conditions of his leave in that he had pursued studies for which he was not duly authorised and were otherwise not permitted. This, it was said, was a breach of the condition imposed pursuant to Rule 245ZW(c)(iv) of the Immigration Rules. The Respondent otherwise awarded the Appellant the points that he claimed both in respect of 'Attributes' and 'Maintenance' under the Points-Based System. However, the Respondent relied upon the perceived breach of condition in invoking paragraph 322(3) of the Rules.

8. The relevant parts of paragraph 322 are as follows:

> "322. In addition to the grounds for refusal of extension of stay set out in Parts 2-8 of these Rules, the following provisions apply in relation to the refusal of an application for leave to remain, variation of leave to enter or remain or, where appropriate, the curtailment of leave."
>
> There is then a subheading "Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom are to be refused" and there then follow a number of subparagraphs which are not applicable in this case. There is then a further subheading "Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused" under which subparagraph (3) appears in the following terms:

"(3) failure to comply with any conditions attached to the grant of leave to enter or remain".

9. It may be seen, therefore, that paragraph 322(3) provides a discretionary basis for refusal as opposed to a mandatory basis.

10. The Respondent's concerns in this particular case arose by reason of the Appellant providing documents in support of his application for variation of leave to remain which indicated that in addition to completing three units from the City of London Business College at a level 5 HND Diploma in Business Management, the Appellant had also secured a level 5 Diploma in Management from the London Guildhall College. It is in respect of the studies at the London Guildhall College that the Respondent asserted that the Appellant was in breach of the conditions of his leave.

11. On appeal to the First-tier Tribunal the Appellant essentially argued that this was a supplementary course and was thereby permitted under paragraph 245ZW(c)(iv)(3) and not a breach. The relevant Rules are a matter of public record and it is unnecessary for me to set them out in any further detail here save to quote the terms of sub-sub-subparagraph (3) which comprises the words "supplementary study".

12. In my judgment it is clear that the First-tier Tribunal Judge made a number of material errors in his consideration of the Appellant's appeal. The following matters are fundamental.

    (1) He misdirected himself on the burden of proof in respect of paragraph 322(3). At paragraph 4 of the determination the Judge states "The burden of proof is on the Appellant to show on the balance of probabilities that all the requirements laid down for a Tier 4 (General) Student Migrant in the Immigration Rules are fulfilled. Those requirements are set out in the 'Decision and Reasons'." That, as a simple statement, is accurate. However, the Appellant had demonstrated, and it had been accepted by the Respondent that he had demonstrated, that he did meet the requirements under the Rules for a Tier 4 Student Migrant – which was recognised in that he was awarded the points that he had claimed. Paragraph 4 in which the judge is setting out his self-direction as to the burden of proof disregards paragraph 322(3), and thereby fails to identify that the burden in that regard was on the Secretary of State. In my judgment this is reinforced by what is said at paragraph 18 of the Judge's decision, where he states: "On the totality of the evidence before me I find that the Appellant has not discharged the burden of proof…".

    (2) The Judge erred in failing to recognise that paragraph 322(3) was discretionary and that the Respondent had not exercised such discretion. No reference is made to the discretion at all in the body of the Judge's decision, and insofar as paragraph 322(3) is referred to it is set out incompletely at paragraph 7 of the decision.

(3) The Judge misdirected himself as to the admissibility of evidence. At paragraph 8 of the decision the Judge had regard to section 85A(4) of the Nationality, Immigration and Asylum Act 2002. He set out subSection A:

> "The Tribunal may consider evidence adduced by the appellant only if it –
>
> (a) was submitted in support of and at the time of making the application to which the immigration decision related."

This was to disregard the provision of section 85A(4)(d) which makes an exception in the following terms:

> "The Tribunal may consider evidence adduced by the appellant only if it –
>
> (d) is adduced in connection with the Secretary of State's reliance on a discretion under Immigration Rules, or compliance with a requirement of Immigration Rules, to refuse an application on grounds not related to the acquisition of points under the points-based system."

That provision was applicable in the circumstances of the Appellant's case. The Secretary of State's invocation of paragraph 322(3) was not a matter that related to the acquisition of points, the Appellant having in fact been successful in securing the points claimed.

13. It is clear that this latter error was a material error in that it led to the Judge failing to have regard to documents presented by the Appellant in support of his appeal - in particular at pages 15 and 16 of the Appellant's First-tier Tribunal bundle. These were letters from each of the institutions at which the Appellant had been studying. In respect of the City of London Business College (which had in the course of the the Appellant's studies become merged with another college and changed its name to Blake Hall College with no material difference in terms of the issues in this appeal), in a letter dated 28 January 2014 that institution indicated that the Appellant had continued with his course "without interruption" and had been "a full-time student". The other letter, a letter from the London Guildhall College dated 13 February 2014, refers to the Appellant being enrolled at the college "on a part-time basis". It is also stated in that letter that the Appellant "completed his studies on a supplementary basis with us".

14. Ms Smith underscores the significance of this latter observation in the context of the London Guildhall College being a 'highly trusted sponsor', and so to be presumed to be aware of the restrictions under the Rules in respect of the conditions imposed on the grant of leave of a Tier 4 Student holding a CAS from a particular institution. Whether or not that point is sound is perhaps not the issue. The real issue here is that the Judge did not give any consideration to these matters because he had wrongly excluded from consideration the letters to which I have just referred.

15. In my judgment the First-tier Tribunal Judge also misdirected himself in failing to have regard to or otherwise obviously apply the language of paragraph 245ZW(c)(iv)(3). As already indicated the relevant phrase there is 'supplementary study'. The Judge, however, repeatedly refers to 'subsidiary' study, and indeed at paragraph 14 it is apparent that the Judge considered this to be material in that he had regard to the different levels, at least in his perception, of the qualifications obtained by the Appellant from the two institutions at which he had been studying.

16. There is no basis to consider that the phrase 'supplementary' would prevent some form of study at a similar or higher level from the principal study. Such a conclusion could not to be derived from the normal meaning of the words used, or indeed from anything in the IDIs - the relevant extracts of which were before the First-tier Tribunal.

17. In any event in this regard it seems that the Judge may have proceeded under a factual misconception in that at paragraph 14 in referring to a higher level of qualification at the Guildhall, and in paragraph 11 referring to a level 4 BTEC from the City of London Business College, the Judge appears to have disregarded the evidence that demonstrates that the Appellant's study at the City of London Business College was in respect of a level 5 qualification.

18. In all those circumstances there are significant material errors such that in my judgment the decision of the First-tier Tribunal must be set aside.

Re-making the decision

19. I turn then to a consideration of remaking the decision in the appeal. As already observed, paragraph 322(3) if applicable is discretionary and in those circumstances I have given some thought to remitting this appeal to the Respondent simply on the basis that the Respondent's decision was not in accordance with the law because no reference is made in the decision letter to the element of discretion.

20. However, as also observed above, the burden is on the Secretary of State to establish the due engagement of paragraph 322(3) in the first place. In this regard there is no particularisation or even recognition of subparagraph 245ZW(c)(iv)(3) in the decision letter of 2 January 2014. To that end there is no engagement by the Secretary of State with the issue of whether or not studies at the London Guildhall College could be considered to be supplementary study or not.

21. As the evidence emerged before the First-tier Tribunal and during the course of the discussions today it seems that the only possible basis upon which it might be said that the Appellant's studies were not 'supplementary' was if they had hindered his progress. In this context I have in mind the provisions of the IDIs - the Tier 4 policy guidance version 03/2013 was before the First-tier Tribunal and states the following at paragraph 308:

> "You are allowed to do a supplementary course, for example an evening class, as well as your main course of study. This supplementary course can be in any subject and does not have to relate to your main course of study. You do not need permission from us to undertake a supplementary course and you are not required to tell your Tier 4 sponsor. However, you must make sure that your supplementary course does not in any way hinder your progress on your main course of studies."

22. The question of hindrance potentially arises in circumstances where in the event the Appellant completed three units of his level 5 diploma at the City of London Business College, yet completed in its entirety the level 5 diploma at the London Guildhall. This potentially points raises an issue as to whether the Appellant failed to complete all of the requisite units at the City of London Business College because he was distracted by his studies elsewhere.

23. However, this is not a matter to which the Respondent's decision-maker had any regard. As I have already observed, the decision-maker has not averted to subparagraph 245ZW(c)(iv)(3) at all. It seems to me that it would be inappropriate for the appeal process to be used, as it were, for a 'fishing expedition' into the Appellant's studies to see whether that provision might be engaged. It is for the Respondent in the decision to make it clear as to the basis of the decision. On the facts here, the Respondent has not made it clear on what basis the Appellant's additional study ran contrary to the restrictions imposed on his leave, and has not otherwise in any event made it clear why, even if there were a relevant breach of conditions, the discretion under 322(3) should have been exercised against the Appellant.

24. In all those circumstances in my judgment the Secretary of State has failed to discharge the burden of proof both to show that 322(3) is engaged or, if it is, why the discretion therein should have been exercised against the Appellant, who otherwise scored sufficient points to support his Tier 4 application. The Secretary of State's decision was not in accordance with the Rules and the appeal is to be allowed accordingly.

Notice of Decision

25. The decision of the First-tier Tribunal Judge contained material errors of law and is set aside.

26. I remake the decision in the appeal. The appeal is allowed.

27. No anonymity direction is made.

The above represents a corrected transcript of an ex-tempore decision given at the hearing on 18 February 2015.

Signed Date: **21 February 2015**

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid, I have considered making a fee award. Mr Nath has not sought to advance any submission as to why a full fee award should not be made given the basis of the decision on the appeal now made. Accordingly I make a full award of the fee paid by the Appellant.

Signed Date: **21 February 2015**

Deputy Upper Tribunal Judge I A Lewis