UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: IA/13626/2014**

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
On: 29 January 2015	**On: 4 March2015**

Before

Deputy Upper Tribunal Judge Mailer

Between

MR MOMITH AHMED
NO ANONYMITY DIRECTION MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr T Islam, counsel (instructed by Citylink Solicitors)
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals with permission against the determination of First-tier Tribunal Judge Pacey dismissing the appellant's claim against the refusal by the respondent dated 3 March 2014 of the appellant's

application for leave to remain as a Tier 4 (General) student migrant under the immigration rules. The appellant is a citizen of Bangladesh.

2. She found that the appellant did not have leave to study at London East End College - LEEC - and had without good reason failed to notify the Home Office of the change. He must therefore "be deemed to have chosen to study without leave." [17]

3. The appellant's contention that Universal Professional and Vocational College – UBVC - was the same as LEEC had not been supported by any independent evidence that they are the same college. Nor was it clear why a single college would choose to use two different names.

4. She also dismissed his appeal on human rights grounds.

5. On 18 November 2014, Upper Tribunal Judge Southern stated in granting the appellant permission to appeal that it ought not to be difficult to establish whether there was in fact a condition attached to the appellant's leave which his course of studies, following the closure of the initial college, placed him in breach. If the respondent were able to establish that there was indeed a condition that was breached by the appellant when he moved to a different college, such evidence could be submitted. On that basis, permission was granted.

6. Judge Southern stated that given the failure of the appellant to inform the respondent of his change of college, the fairness point raised in the grounds "is hopeless", as was the ground founded upon Article 8 of the Human Rights Convention. Although not limiting the scope of the grant of permission, there is nothing more to be said about those grounds and the appellant can expect them to be rejected summarily.

7. Mr Islam submitted that on proper analysis of s.50 of the Borders, Citizenship and Immigration Act 2009, a condition restricting studies may be imposed, signifying that no mandatory condition was automatically imposed.

8. He further submitted that the decision of the Upper Tribunal in Bhimani (Student: Switching institution: Requirements) [2014] UKUT 00516 (IAC) "was clearly wrongly decided". That was because the Immigration (Leave to Enter and Remain) Order 2000 makes it plain that a condition must be expressly endorsed. The rules are not an express endorsement of the condition on the entry clearance "vignette". There was accordingly no condition restricting studies.

9. Mr Islam accepted that the reported decision in Bhimani was binding.

10. He also submitted that the respondent ought to have given the appellant the 60 days following the revocation of his Tier 4 sponsor licence. Accordingly, the decision was not in accordance with the law, irrespective of whether he may have breached a condition at some other point.

11. Finally, the appellant did not breach any condition or circumstances where he studied at a "sister" or "partner" organisation of the initial sponsor college. He relied on paragraph 245ZW (7) (iv) (1) of the Immigration Rules where it is provided that there is no study except study

at the institution that the Confirmation of Acceptance of Studies Checking Service records as the migrant's sponsor, or where the migrant was awarded points for a visa letter, unless the migrant is studying at an institution which is a partner institution of the migrant's sponsor.

12. Further, or alternatively, he relied on information from his current sponsor college which had been licensed by the UKBA. If he "truly needed to make a new application" then surely his current sponsor college ought to have requested and required him to make one. The blame ultimately lies with the college and the respondent who issued the sponsor licence to the college.

13. He also submitted that the respondent has not considered or exercised discretion under paragraph 322(3) of the rules. Accordingly, the appeal should in any event be remitted to the respondent, and that the appellant awaits a lawful decision relating to the exercise of that discretion.

14. He submitted at paragraph 22 of his skeleton argument that the issue of fairness and the respondent's failure to grant the 60 days following the revocation of the appellant's initial sponsor has an important part to play in terms of the exercise of discretion.

15. Mr Melvin on behalf of the respondent relied on the reasons for refusal and submitted that the First-tier Tribunal Judge made no errors of law. The respondent noted that the appellant had provided documentary evidence showing that he had been studying with sponsors ‘of which he did not have permission to attend’, and the institutes did not meet the exception of being highly trusted sponsors at the time when he was subject to s.50 by virtue of extant leave of the secretary of state.

16. It is common ground that the appellant accepted that he had transferred to two separate colleges and they were not colleges for which he was granted leave to enter. Furthermore, he had not informed the Home Office or made any other applications for leave to study at those colleges.

17. He referred to the grant of permission to the effect that if the respondent was able to establish that there was indeed a condition that was breached by the appellant when he moved to a different college, evidence in that regard could be submitted.

18. He submitted that it is clear that the legislation underpins the immigration rules restricting studies in the UK. As an intelligent person the appellant should have been aware of the conditions attached to his leave, set out in the rules and underlying legislation. If unclear, he should have taken advice at the relevant time.

Assessment

19. I have had regard to the decision of the Upper Tribunal in Bhimani, supra. In an extensive analysis, Upper Tribunal Judge Allen noted that it was clear from s.3(1)(c) of the Immigration Act 1971 that a person given limited leave to enter or remain in the UK may be given that leave subject to

conditions which include the provision inserted by s.50 of the 2009 Act, namely a condition restricting his studies in the UK.

20. He referred to s.3(2) of the 1971 Act which establishes that the Secretary of State shall from time to time lay before Parliament statements of the rules or changes in the rules laid down by her as to the practice to be followed in the administration of the Act for, inter alia, regulating the entry into and stay in the UK of persons required by the 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 [22].

21. It is in this light that paragraph 245ZW (c)(iv)(1) has to be seen. That is a clear example of a provision made in accordance with s.3 (2) of the 1971 Act [24].

22. Although s.4 (1) of the Act requires that powers under the Act giving or refusing leave to enter the UK are to be exercised by notice in writing given to the person, the sub-section goes on to make it clear that the requirement of notice in writing operates “unless otherwise allowed by or under this Act,” which entails, inter alia, that s.4 must be read in conjunction with s.3 (2), itself enabling provisions such as paragraph 245ZW(c)(iv)(1).

23. Accordingly, where a student chooses to study at another institution holding a different sponsor licence number from that of the institution where he was granted leave to remain to study, he is required to make a fresh application for leave to remain.

24. I do not regard the decision and the reasoning in Bhimani to be “clearly wrong” as asserted by Mr Islam. I respectfully find that the reasoning is persuasive and that the decision is correct.

25. I find that the appellant has not produced any evidence that he is studying at an institution which is a partner institution of his sponsor. That submission was considered by First-tier Tribunal Judge Pacey. The appellant provided no independent evidence that UPVC was the same as LEEC. Nor has any evidence been subsequently provided to that effect. The only evidence before the Tribunal was the appellant's assertion that UVPC was the same as LEEC [10].

26. The appellant came to the UK as a student with leave valid from 3 January 2010 to 14 October 2013. The sponsor was Bedfordshire Educational Academy and he planned to study for a diploma in Management from March 2014 to February 2015.

27. The respondent noted that he had last been granted leave to study with Crown International College (CIC). The documents submitted in support of his current application showed that he had studied LEEC between June 2012 and June 2013. He had also submitted certificates showing attendance at UPVC, dated 14 June 2013.

28. As he had provided documentary evidence that he had been studying with the sponsor colleges, at which he did not have permission to attend

and neither institution had Highly Trusted Sponsor status, he had not satisfied the relevant requirements.

29. Mr Islam also sought to contend that the Home Office made changes to the sponsor licence requirements on 21 April 2011. That introduced a requirement for all Tier 4 sponsors to become Highly Trusted Sponsors. If the sponsors had a licence that was granted under the guidance that was in place before 21 April 2011 and they were not highly trusted sponsors or did not meet new educational oversight requirements, or both, they were allowed to stay on the Tier 4 sponsor register, but the Home Office limited the number of CASs they could assign.

30. However, Mr Melvin submitted that the relevant changes relied on had not been produced. Only the Tier 4 policy guidance version at July 2011 was produced. Nor had the facts relating to paragraph 20 of the July guidance been established.

31. Insofar as the ground relating to unfairness is concerned, Judge Pacey dealt with the appellant's contentions from paragraph 6 to 10 of the determination. He claimed that CIC told him that their licence had been suspended and that he would transfer to a college in London. He had not informed the Home Office that he had transferred to a different college as he said he was “new here” and did not know everything, and had been asked to go to LEEC by his previous college.

32. When asked why, after he went to that college, he did not submit another application, he said he waited for the Home Office. When it was pointed out that the Home Office could not contact him if they were unaware that he had moved colleges, he said that it was not his responsibility to do so.

33. Judge Pacey rejected his contention that he was not aware that he needed to tell the Home Office if he changed college. The documentation he was given would have made this clear as would the guidance on the Home Office website. As an intelligent person, it was reasonable to expect him to have realised that he had been granted leave to study at a particular college and therefore when he was no longer able to do so, he should make enquiries as to what he should then do in relation to his immigration status.

34. The remaining issue on the appeal is the exercise of discretion under paragraph 322(3). Both representatives accept that this was not done. Accordingly there has been a failure by the respondent to appreciate that she had a discretion to exercise which she had failed to exercise. It is evident from the refusal decision dated 3 March 2014 that the respondent had failed to exercise discretion.

Notice of Decision

The decision of the First-tier Tribunal Judge is set aside to the limited extent that it remains with the respondent to make a lawful decision under paragraph 322(3) of the Immigration Rules, HC395.

No anonymity direction is made.

Signed Dated: 2/3/2015

Deputy Upper Tribunal Judge Mailer