



**Upper Tribunal  
(Immigration and Asylum Chamber)  
Numbers: IA/15175/2015**

**Appeal**

**IA/15176/2015**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision & Reasons  
Promulgated  
On 19 February 2018**

**On 22 January 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ESHUN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**and**

Appellant

**MRS MARIA MAZHAR  
DR BASHIR AHMED CHAUDHRY  
(ANONYMITY DIRECTION NOT MADE)**

Respondents

**Representation:**

For the Appellant: Ms A Holmes, Home Office Presenting Officer

For the Respondents: Mr P Skinner Counsel

**DECISION AND REASONS**

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Hussain to allow the appeals of the respondents.
2. The respondents are nationals of Pakistan born on 11 March 1985 and 1 December 1976 respectively. On 21 July 2014, they made applications for leave to remain. The first respondent, Mrs Mazhar, applied for leave as a

Tier 4 Migrant and the second respondent, Dr Chaudhry, applied as her dependant.

3. The judge recorded the decision and reasons of the Secretary of State at paragraphs 2, 3 and 4. The judge said that the Secretary of State's grounds and reasons for refusing the first respondent's application was that she failed to meet the requirements of paragraph 245ZX(a) because she had been refused under one of the general grounds for refusal. The first respondent was previously granted leave based on a successful application made on 1 April 2011 for leave as a Tier 4 (General) Student to study ACCA at UK College of Business and Computing Ltd between 27 July 2011 and 23 March 2014. With her application, she submitted a certificate and transcript from the London College of Computing and Management Sciences (using the Centre ID on the certificate) confirming that she studied an AAPPS Graduate Diploma in Business Management awarded on 28 March 2014.
4. The Secretary of State states that the first respondent did not submit a fresh application for leave to study at London College of Computing and Management Studies. She was therefore in breach of Section 50 by commencing this study. The Secretary of State was therefore not satisfied that she has complied with the conditions attached to her leave to remain. Therefore, she does not satisfy the requirements for this category and it has been decided to refuse her application for leave to remain as a Tier 4 (Student) under Regulation 322(3) with reference to paragraph 245ZY(c) (iv) of the Immigration Rules.
5. The first respondent brought an appeal against the refusal, as did her husband. The appeal was first heard by First-tier Tribunal Judge S J Pacey who in a determination, dated 20 July 2015, dismissed the appeal. He did so without an oral hearing. The respondent subsequently appealed that decision which was successful in that in a notice of decision dated 9 November 2015, Upper Tribunal Judge Deans found that the determination of Judge Pacey should be set aside under Rule 32 of the Tribunal Procedure (First-tier Tribunal) Rules 2014 because despite requesting an oral hearing, the matter was determined on the papers.
6. The judge noted at paragraph 5 that although, pursuant to the setting aside as referred to above, the matter was listed for an oral hearing before her, neither of the respondents attended the hearing nor was there an explanation for their absence. In those circumstances, she resolved to determine this appeal on the evidence before her.
7. The judge held as follows:
  - “7. I have to confess that I have no idea whatsoever as to the reference to Section 50 in the refusal letter. I just cannot understand how a decision maker could refer to a provision of an Act of Parliament without specifying the name of that Act and the year in which it was enacted.

8. *The substance of the allegation appears to be that by undertaking studies at the London College of Computing and Management Sciences, the first appellant has breached a condition of her leave.*
9. *I remind myself that the burden of proof is on the respondent to show that the appellant has indeed breached a condition.*
10. *I further direct myself that for the respondent to discharge the burden which I find to be on her, she has to firstly demonstrate that the appellant was subject to an explicit condition as part of her leave that either prevented her from studying at the institution mentioned or under a general prohibition on undertaking studies other than the place where she was enrolled as far as the Secretary of State is concerned. Secondly, she has to adduce cogent evidence to demonstrate that the appellant has breached that condition.*
11. *Having perused carefully the respondent's bundle, I have not found a shred of evidence to suggest that the appellant's leave was subject to any of the restrictions/prohibitions to which I have referred above.*
12. *In consequence of this finding, I conclude that the respondent has not discharged a burden of proof on her. Accordingly, the first appellant's appeal falls to be allowed. As indicated earlier, since the first appellant's appeal is being allowed, it follows that the second appellant's appeal must be allowed also."*

8. The Secretary of State's grounds of appeal were as follow:

*"The First-tier Tribunal Judge Hussain in drafting the determination has allowed the appeals on the basis that the Secretary of State has failed to adequately discharge the burden of proof as she failed to outline the statutory provision she relied upon in full.*

*It is accepted that the decision maker in this appeal could have been clearer in reference to the provision relied upon however Judge Hussain did have at his disposal a Home Office Presenting Officer to assist with any queries as to the provisions relied upon.*

*For a reason unknown to the Secretary of State the First-tier Judge has stated in the determination that the Secretary of State was unrepresented, however the Secretary of State was indeed represented by R Archie, who as stated above was present to assist the Tribunal with such oversight that the appeal has been allowed on."*

9. In granting permission to appeal, First-tier Tribunal Judge Lever said that he had found in the file a blank Record of Proceedings which has the name Mr Archie handwritten on the respondent's representation. Further he had seen letters from the representatives and a file note indicating that the respondents wished the case to be heard on the papers which rendered inaccurate the judge's comments at paragraph 5. He also said it is arguable that the judge failed to note a Presenting Officer was present who may have assisted. He further noted that the earlier judge had referred to the refusal letter as being clear. Therefore, this case has sufficient uncertainty and potential inaccuracy in what has been asserted that it is arguable that an error of procedure and/or law has occurred.

10. Ms Holmes submitted a note from Mr Archie dated 28 March 2017 which I took to be his attendance notes. Mr Archie said as follows:

*"The appellant did not come to court to give evidence, I relied on the RFRL and asked the IJ to draw an adverse credibility inference. The appeal should be dismissed. An allowed appeal would constitute an error of law because the burden and standard of proof would have to me misapplied."*

11. In the light of this evidence Mr Skinner accepted that Mr Archie was present at the hearing before First-tier Tribunal Judge Hussain.

12. Ms Holmes submitted that Section 50 was in reference to the Borders, Citizenship and Immigration Act 2009.

13. Paragraph 50(2) states "A condition under section 3(1)(c)(ia) of that Act may be added as a condition to leave given before the passing of this Act (as well as to leave given on or after its passing)."

**"NOTE:** Commenced 21 July 2009 (s58). Sub-section (1) amends sections 3(1)(c) of the Immigration Act 1971."

14. Ms Holmes submitted that the judge should have been aware that Section 50 referred to the 2009 Act. If a judge had a problem with this, he should have asked the HOPO to help sort it out. She relied on paragraph 25 of the Tribunal Procedure Rules 2014 which says

*"(1) the Tribunal must hold a hearing before making a decision which disposes of proceedings except where*

*(a) each party has consented to, or has not objected to the matter being decided without a hearing."*

15. Ms Holmes submitted that the judge acted unfairly in not making clear in the determination that Mr Archie was present. This was a material error of law.

16. As already stated above, Mr Skinner accepted in the light of the attendance notes that Mr Archie was present at the hearing.
17. As far as I was concerned that did not mean that the issues the judge said he had to consider at paragraph 10 were resolved by the fact that we now know that Mr Archie was present at the hearing.
18. Ms Holmes submitted a letter dated 19 July 2011 to Mrs Mazhar, the first respondent. The letter stated that permission had been given for the course of study detailed at the bottom of the letter. It also stated that there was an attached leaflet which explains the conditions of her stay whilst in the United Kingdom. There was no evidence that this letter was produced by Mr Archie to the judge or that independently this letter was before the judge. I accept Mr Skinner's submission that the Secretary of State had twice been given an opportunity to clarify the issues raised by her and had failed to do so. Indeed, it was clear from Mr Archie's attendance notes that he did not address the issues which the judge had to consider. There was no evidence before the judge to demonstrate that the first respondent was subject to an explicit condition as part of her leave that either prevented her from studying at the institution mentioned or under a general prohibition on undertaking studies other than the place where she was enrolled as far as the Secretary of State was concerned.
19. There was no evidence put forward by Mr Archie to demonstrate that the first respondent had breached any condition imposed on her by the Secretary of State.
20. Consequently, in light of the evidence that was before the judge, I find that his decision does not disclose an error of law.
21. The judge's decision allowing the respondents' appeal shall stand.

No anonymity direction is made.

Signed

Date: 14 February 2018

Deputy Upper Tribunal Judge Eshun

