



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/25526/2012
IA/25532/2012
IA/25533/2012

THE IMMIGRATION ACTS

**Heard at Field House
On 19 August 2013**

**Determination Promulgated
On 27 August 2013**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

**MRS JASPREET KAUR
MR JASVIR SINGH THIND
MR PRABHNEER SINGH (A MINOR)**

(NO ANONYMITY ORDER)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Rahman, with Mayfair Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are a wife, her husband, and their four-year old son. They appeal with permission against the determination of First-tier Tribunal Judge Symes on 20th January 2013 dismissing their appeals against the Secretary of State's refusal pursuant to paragraph 245ZW and 322(3) of the Immigration Rules HC 395 (as amended), to vary the principal appellant's leave to remain to enable her to study for a postgraduate diploma in Hospitality and Tourism Management (Level 7), and to refuse the second and third appellants leave to remain pursuant to paragraphs 319C and 319H respectively. The outcome of their appeals depends on that for the principal appellant.
2. The first and second appellants have had a further child while in the United Kingdom, who is not an appellant in these proceedings but whose status depends on that of his parents. He is Jasneer Singh Thind, date of birth 20th December 2012.
3. The course the principal appellant now wishes to pursue is provided by West City College Limited, and runs from 16th July 2012 until 13th December 2013. She produced a CAS in relation to that course, about which there is no dispute.
4. This appeal was previously heard before another Upper Tribunal Judge but it has been necessary for there to be a transfer order and for it to be heard again before me.

Background

5. These appellants came to the United Kingdom on 5 October 2010 with entry clearance giving them leave to remain until 22 July 2012. The principal appellant had leave to study at the London School of Management Studies (LSMS) and the First-tier Tribunal judge found that she had done so until its closure by the UKBA in June 2012.
6. At paragraph [21], the First-tier Tribunal Judge noted that the appellant had studied at a second college, The Lord's College 'at least in parallel' to the course for which she had leave to enter, during the period for which she had leave to enter for the LSMS course; the appellant's case is that those were supplementary studies as permitted in paragraph 246ZW(7C)(iii) of the Rules.
7. The appellant obtained no qualification from the London School of Management Studies because of its closure. When closing the school, the Secretary of State did not write to the principal appellant giving her the usual 60 days within which to find an alternate course. The appellant did find an alternate course at West City College and made the present application within the 60-day period.

The paragraph 322(3) issue

8. The condition attached to the grant of leave to enter or remain at 245ZW(7C)(iv), so far as relevant, says as follows:

"245ZW(c) entry clearance will be granted subject to the following conditions: ... no study except:

- (i) Study at the institution that the Confirmation of Acceptance for Studies checking service records as the migrant sponsor. ...
- (ii) Until such time as a decision is received from the UK Border Agency on an application which is supported by a Confirmation of Acceptance for Studies signed by a highly trusted sponsor and which is made while the applicant has extant leave and any appeal against that decision has been determined, study at the highly trusted sponsor institution which the Confirmation of Acceptance for Studies checking service records as having signed the Confirmation of Acceptance for Studies to the Tier 4 Migrant; and
- (iii) Supplementary study."

9. It is clear therefore that there is a condition attached to the grant of entry clearance, requiring the appellant to study only at the Highly Trusted sponsor college, or to undertake 'supplementary study'.
10. The appellant's case has always been that her study at The Lord's College was parallel or supplementary study and was not alternative study which she had entered into at an institution which was not a Highly Trusted sponsor and for which she had not sought permission. It remains unclear how that study is supplementary to the course she undertook and for which she was granted leave to enter.
11. I have been directed to the guidance given by the Upper Tribunal in *UKUS (Discretion: when reviewable)* [2012] UKUT 00307 (IAC) which directs the Tribunal as follows:
 - "2. *Where the decision maker has failed to exercise a discretion vested in him the Tribunal's jurisdiction on appeal is limited to a decision that the failure renders the decision 'not in accordance with the law' (Section 86(3A)). Because the discretion is vested in the executive the appropriate course will be for the Tribunal to require the decision maker to complete his task by reaching a lawful decision on the outstanding application along the lines set out in SSHD and Abdi [1996] ImmAR 148.*"
12. The respondent refused the variation application under paragraph 322(3) of the Rules, 'failure to comply with any conditions attached to the grant of leave to enter or remain', which is a discretionary provision for which leave to remain and variation of leave to enter or remain in the United Kingdom 'should normally be refused', based on the appellant's study at The Lord's College, which, it is accepted, is not a Highly Trusted Tier 4 sponsor. The provision is not mandatory: the Secretary of State has a discretion under paragraph 322(3) which Mr Tufan accepts has not been exercised in the present case. The Secretary of State's present decision therefore is not in accordance with the law.
13. In the light of the *UKUS* decision, it remains for the Secretary of State to exercise her discretion and the First-tier Tribunal erred in law in not so finding. Accordingly I set aside the First-tier Tribunal's decision in this appeal and substitute a decision

allowing the appeal to the extent that the Secretary of State is required to complete her task by reaching a lawful decision on the outstanding application for variation of her leave to enter.

Conclusions

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision.

I re-make the decision in the appeal by allowing it to the extent that the application remains before the Secretary of State for a lawful decision.

Anonymity

The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. There is nothing in the materials before me to suggest that such an order is appropriate here.

Signed

Date

Judith Gleeson
Judge of the Upper Tribunal