



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

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 18 July 2013**

**Determination  
Promulgated  
On 19 July 2013**

**Before**

**UPPER TRIBUNAL JUDGE WARR**

**Between**

**NASIR AHMED**

**and**

**SECRETARY OF STATE**

Appellant

Respondent

**Representation:**

For the Appellant: Mr F Ahmed (Universal Solicitors)  
For the Respondent: Mr P Deller, Senior Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a citizen of Bangladesh born on 1 September, 1988. He was granted leave to enter the United Kingdom as a Tier 4 student until 30 April, 2012. He was admitted to study at Bedfordshire College and it

was confirmed that he was enrolled on a full-time administrative management program which commenced on 11 March, 2011. However the appellant did not find the teaching quality to be satisfactory and commenced studies at the London Guildhall College on 5 September, 2011 where he successfully completed all the academic requirements leading to the award of a level 5 diploma in Business Management Studies. The appellant applied for further leave to remain but this application was refused on 15 November, 2012. The appellant was studying at a different college and needed to make a fresh application for leave to remain. There was an exception for sponsors who held a highly trusted status but London Guildhall College did not hold highly trusted status.

2. Accordingly the respondent was not satisfied that the appellant had complied with the conditions attached to his leave to enter and accordingly refused the application under paragraph 322 (3) HC 395. The application was also refused on maintenance grounds. The appellant had not supplied his birth certificate showing the name of the parent who was providing his funding.
3. The appellant appealed and his appeal came before a First-tier Judge on 27 February, 2013. The judge accepted that the appellant had been studying at both Bedfordshire College and London Guildhall College. She accepted that the appellant had gained a diploma in management studies at London Guildhall College.
4. It was submitted that the appellant by maintaining his attendance at two colleges was fulfilling the requirements of policy guidance which permitted extra studies. However the judge considered that this was subject to the qualification that the extra course did not get in the way of the course for which the appellant had permission to study. The course at the London Guildhall College had interfered with the appellant studies at Bedfordshire College leading him to fail the assignments and exam at Bedfordshire College.
5. In respect of maintenance the judge noted that the only issue was the provision of the original birth certificate and the judge found no merit in the reasons for refusal and the issue of the birth certificate could and should have been raised by the respondent in the light of the evidential flexibility policy. The appellant's father clearly had the requisite sums in his account and had supplied a letter to the court stating that they were available for the appellant's education. There has been no appeal from this aspect of the judge's decision by the respondent.
6. The appellant, however, could not succeed under the immigration rules "because he simply has not passed the course which he entered to study."

7. The respondent had also made a decision under section 47 of the Immigration, Asylum and Nationality Act 2006 and the judge found that to be not in accordance with the law.
8. The appellant appealed against the decision on the basis that it was not a requirement of the rules that the appellant pass each exam. Furthermore the appellant had not breached the rules by undertaking additional studies. The rules permitted the undertaking of supplementary studies and the guidance could not have done what was permitted by the rules.
9. In any event there was a discretion to be exercised under paragraph 322 (3) and the judge had not considered the exercise of discretion.
10. The appellant had started his course at Bedfordshire College of 11 March, 2011 and had not started his course at London Guildhall College until 5 September, 2011 after some six months attendance in his main course. His unchallenged evidence for undertaking a course at London Guildhall College was the poor quality teaching at Bedfordshire College. He had not allowed the course at Guildhall College to interfere with his studies, he had sought to circumvent the difficulties which he faced in his main course by undertaking an additional course. He had continued to study at both institutions.
11. Mr Deller accepted that it was not a requirement of the rules that an applicant pass the exams at the course for which the CAS had been provided.
12. He also accepted that the respondent had not considered the exercise of discretion under paragraph 322 (3) - it was not an automatic refusal, refusal should be the normal course. He further acknowledged that supplementary studies in the rules had not been defined and the policy guidance was loosely phrased. If the original course had been abandoned then there would have been a breach but this had not been the position. The two courses ran side-by-side on the judge's findings. He had not succeeded in the primary course.
13. The underlying decision was defective in that the respondent had not exercised discretion, had not followed the guidance in failing to apply evidential flexibility and there was a problem with the decision to issue removal directions under section 47. The appeal should be sent back to the Secretary of State to exercise discretion and to consider matters in the light of the current situation. The application would remain outstanding as the Secretary of State had not reached a lawful decision.
14. Mr Ahmed was concerned that it should be clarified that the appellant had not studied in breach of the rules. Mr Deller referred to the loose nature of the supplementary policy and he would undertake that the issue was given sympathetic consideration by the case worker.

15. It is accepted in this case and that the respondent's decision was flawed. Mr Deller acknowledged three separate failings. Two were corrected by the judge. However the significant failure to deal with the exercise of discretion clearly requires the matter to be revisited. The judge also failed to exercise discretion. Where the respondent has not exercised discretion the normal course is for the case to be returned so that a lawful decision can be reached. Where a discretion has been exercised then the Tribunal may consider the issue and reach a decision of its own.

16. The decision of the First-tier Judge was flawed in law as was the decision of the Secretary of State. I remake the decision. In the particular circumstances of this case the appropriate course is to allow the appeal to the extent of remitting it for reconsideration by the Secretary of State as Mr Deller suggests. I have no doubt that the matter will be given sympathetic consideration.

17. Appeal allowed to the extent indicated.

Signed

Upper Tribunal Judge Warr  
18 July 2013