



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

Appeal Number: IA/51545/2013

THE IMMIGRATION ACTS

Heard at Field House

On 1st May 2014

**Determination
Promulgated**

On 5th September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

**MR MAHMUDUL HASSAN NAIM
(Anonymity direction not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs M Ahammed (Legal Representative)

For the Respondent: Mr L Tarlow (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. On 22nd November 2013, the Secretary of State decided to refuse to vary the appellant's leave and to remove him from the United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006. The basis of the adverse decisions was the appellant's failure to

meet the requirements of the Immigration Rules (“the rules”), following his application on 30th October 2013 for further leave to remain as a Tier 4 (General) Student.

2. The Secretary of State found that the appellant had not shown that he held the required funds in the Maintenance (Funds) category, and so the requirement of paragraph 245ZX(a) of the rules was not met. His application was also refused under paragraph 322(3) of the rules. He was previously given leave following an application in December 2009, to enable him to study at the London College of Accountancy on a course lasting three years and three months. With his present application, he submitted a certificate from St Peter’s College of London (“St Peter’s College”) confirming that he had studied on a BTEC Level 5 HND Course in Business and that he was awarded a pass on 28th September 2013. The Secretary of State noted that the appellant had made no application for leave to study at St Peter’s College and so he was in breach of the conditions attached to his leave. His application fell to be refused under paragraph 322(3) of the rules, in the light of paragraph 245ZY(c)(iv) of the rules.
3. The appellant’s appeal against the adverse decisions was allowed by First-tier Tribunal Judge Parker (“the judge”) in a determination promulgated on 7th March 2014. So far as funds were concerned, the judge took into account a supporting letter from City Bank, finding that this document accompanied the application. The evidence showed that the maintenance requirements of the rules were met. So far as paragraph 322 of the rules was concerned, the judge took into account evidence showing the appellant’s studies at St Peter’s College. He found that the appellant had studied both at the London College of Accountancy and at St Peter’s College and that he was pursuing a course leading to an award from the University of Sunderland. When he made his application, he relied upon a CAS which only mentioned the Level 5 Diploma (at St Peter’s College). The judge found that the appellant had made satisfactory progress and that his appeal should be allowed. Under paragraph 245AA of the rules, the Secretary of State was able to seek evidence of progress relating to a student’s course and she had failed to do so in this case. If an enquiry had been made, the appellant would have been able to provide evidence of his progress. The judge concluded that the adverse decision was not in accordance with the law.

The Application for Permission to Appeal

4. The Secretary of State applied for permission to appeal, contending that the judge failed to properly address the grounds on which the appellant’s application had been refused. The judge did not deal with the Secretary of State’s finding that the appellant had breached the conditions attached to his leave to remain. In a second ground, it was contended that the judge’s reasoning in support of his favourable finding regarding funds was

insufficient. There was no explanation for the finding that the letter from City Bank accompanied the application for leave.

5. Permission to appeal was granted on 25th March 2014 on the basis that it was arguable that the judge erred in not expressly dealing with the Secretary of State's case that the conditions attached to the appellant's leave were breached.
6. In directions sent out by the Upper Tribunal, the parties were advised to prepare for the hearing on the basis that, if the First-tier Tribunal's decision were set aside, any further evidence that the Upper Tribunal might need in remaking the decision could be considered at the hearing.

Submissions on Error of Law

7. Mr Tarlow said that reliance was placed upon the Secretary of State's grounds. It was accepted that the appellant was, in some circumstances, entitled to take additional studies, while pursuing his main course. An example might be evening classes. The appellant was given permission to take a course which he completed in 2011 at Anglia Ruskin University. He then moved to St Peter's College and completed a course there in September 2013. This could not be considered an ancillary course as he studied at St Peter's full-time, for eighteen months. The judge noted the position at paragraphs 15 and 16 in the determination but failed to deal with the fact that the appellant had not applied for permission to study at St Peter's College. The judge also erred in relation to funds, dealt with in the determination at paragraph 14. More was required in support than simply the appellant's claim that the bank letter was sent with the application.
8. Mrs Ahammed said that the appellant came to the United Kingdom in 2009 and took a course in accountancy and management in 2010, at Anglia Ruskin University. He completed seven modules. He had a visa valid for three years and three months. He applied to St Peter's College to take a supplementary course. She said that the appellant "continued with Anglia Ruskin", even after he completed his modules in 2011. She accepted that there was no evidence of this before the First-tier Tribunal or the Upper Tribunal. She also accepted that the appellant had not applied for permission to study at St Peter's College but this was because it was not his main course. This was made clear in the grounds of appeal to the First-tier Tribunal. In those grounds, the course at St Peter's College was described as a "parallel degree". Reliance was also placed on evidential flexibility.
9. Mrs Ahammed said that the appellant was not able to show progress in his studies after 2011, having completed the seven modules. However, in the application cover sheet, the Home Office advised applicants that "We will write to you if any of the required supporting documents are missing or unsuitable". The Home Office could have written asking for clarification.

Mrs Ahammed said that the evidence showed that the appellant was a full-time student at Anglia Ruskin all the way through his period of studies. The judge found that he had completed an “access certificate”. The appellant provided a CAS and did not need to submit any certificates from Anglia Ruskin. The judge was entitled to find, at paragraph 17 of the determination, that the Secretary of State could have asked for evidence of progress relating to his course.

10. So far as bank statements were concerned, the appellant was able to show that he had more than the minimum funds required, between 22nd August and 30th September in the relevant year and the judge was entitled to make favourable findings of fact. Reliance was also placed on a “brief submission note” prepared on the appellant’s behalf, in which it was submitted that the judge gave adequate reasons for his decision to allow the appeal.
11. Mr Tarlow said that he had nothing to add.

Conclusion on Error of Law

12. In the light of the evidence before the First-tier Tribunal and the submissions made by the representatives, I find that the determination contains a clear error of law. The appellant’s case was advanced before me on the basis that his main course continued at Anglia Ruskin University from 2011 to 2013, when he made his application for further leave. This is simply not so. The appellant was a full-time student at St Peter’s College from 2011 until September 2013. The evidence before the judge, at page 23 of the appellant’s bundle, shows clearly that the date of the award from Anglia Ruskin was 13th September 2012. There was simply no evidence before the First-tier Tribunal or before me showing that the appellant was a student at Anglia Ruskin University thereafter.
13. It follows that the error of law identified in the first of the Secretary of State’s grounds is made out. The judge erred in failing to properly engage with the Secretary of State’s finding that the appellant had breached the conditions attached to his leave by studying at St Peter’s College, without any permission or application for leave to do so. There is no merit at all in the contention made on the appellant’s behalf that he was not required to seek permission because he remained a student at Anglia Ruskin throughout the duration of his studies.
14. So far as the Maintenance (Funds) requirements of the rules are concerned, I conclude that the Secretary of State’s case is not made out. The judge’s reasoning appears at paragraph 11 of the determination and he was entitled to find as a fact that the letter from City Bank dated 21st October 2013 accompanied the appellant’s application.
15. Nonetheless, the decision of the First-tier Tribunal is set aside and must be remade.

Remaking the Decision

16. Mrs Ahammed said that she would need a short conference with her client because she believed that more evidence might be available from Anglia Ruskin University, showing that the appellant was a full-time student there beyond September 2012. The appellant might be in some difficulty because if he made a fresh application for leave, which was refused by the Secretary of State, he might have to return to Bangladesh without completing his course.
17. Mrs Ahammed then took instructions from her client and, shortly thereafter, she said that no evidence from Anglia Ruskin University would, after all, be forthcoming. The appellant's current course would finish in about three months' time.
18. I decided that no further adjournment was necessary. Mr Tarlow said that the Upper Tribunal should simply remake the decision and Mrs Ahammed gave no reason why that course should not be followed.
19. The appellant was called. He adopted the witness statement which appeared at pages 12 to 14 of his bundle. In that statement, he set out his immigration history. He began his studies at the London College of Accountancy and at the end of 2010 he began a BTEC Level 5 HND in Business at St Peter's College. He claimed in his statement that his studies continued "as a parallel degree". He obtained an "access certificate in accounting and management" and some modules at Level 7. He also completed the BTEC course. He now wished to pursue studies at the London Campus of the University of Sunderland. He provided a CAS with his application for further leave. This mentioned the level 5 HND course. That was why he did not submit evidence of his earlier progress at the London College of Accountancy. He described himself as a genuine student, in the middle of his studies.
20. Mrs Ahammed had no questions she wished to put. In cross-examination by Mr Tarlow, the appellant said that he first began studying on 13th January 2010 at the London College of Accountancy. The course was a BA (Honours) in Applied Accountancy and it was due to finish in October 2013. Mr Tarlow asked the appellant whether he completed that course. He replied that he did not. He studied at St Peter's College as well as at Anglia Ruskin University. He became more interested in business studies, at St Peter's College. This course started in January 2011 and led to a level 5 HND.
21. Mr Tarlow asked whether the course at St Peter's College was full-time. The appellant replied that it was a supplementary course and he went there for two days. He began studying at Anglia Ruskin in January 2010. This was at the London Bridge Campus. He was unable to pass all the

subjects but used to go to the college and was studying at St Peter's College at the same time.

22. The appellant said that he did not pass any exams or modules after September 2012, recorded in the document at page 23 of his bundle. This showed that he received a "credit" in that month. He did not receive a degree because he could not pass all parts of the course and did not complete it.
23. Mr Tarlow asked whether the qualification he was given permission to study for was the original qualification available from the London College of Accountancy. The appellant replied that this was so. Anglia Ruskin and the London College of Accountancy were the same body.
24. In brief re-examination, the appellant said that he studied at the London College of Accountancy and was awarded the certificate by Anglia Ruskin University, the awarding body.
25. In submissions, Mr Tarlow said that reliance was placed upon the adverse decision and reasons, dated 22nd November 2013. The appellant was given permission to take a course lasting for three years, at the London College of Accountancy. He subsequently changed his studies, without permission, taking a place at St Peter's College. This was in breach of a condition attached to his leave, in accordance with section 50 of the Borders, Citizenship and Immigration Act 2009. The Secretary of State was entitled to refuse the application for further leave as no permission was sought and the appellant had breached the conditions attached to his leave. The application was properly refused under paragraph 322(3) of the rules.
26. So far as Article 8 was concerned, mentioned briefly in the grounds of appeal to the First-tier Tribunal, the appellant arrived in the United Kingdom as a student with no intention of doing more than studying. He may have made friendships. The decision to refuse to vary his leave and to remove him was a proportionate response.
27. Mrs Ahammed said that the appellant began his studies at the London College of Accountancy in 2010. He then pursued parallel studies at St Peter's College. He finished parts of the former course but not the rest. The accountancy course had been due to end in September 2013. In the meantime, the appellant studied at St Peter's College and obtained his BTEC Diploma. He obtained a CAS from the University of Sunderland and told that body that he had successfully completed seven modules in the London College of Accountancy Course. He also told the University of Sunderland that he completed his Level 5 Diploma. Only that qualification was mentioned in his CAS. The Home Office had written advising the appellant that if they needed more documents, they would write to him. They made no further contact with him, as they could have done under paragraph 245AA of the rules. The Secretary of State had not acted fairly

as she did not write to the appellant asking for more information from him. He could have submitted the document from Anglia Ruskin University recording his credit, as evidence of progress.

28. So far as Article 8 was concerned, the appellant wished to finish his current course at the University of Sunderland, London Campus. He had taken admission and had only three months left to complete. This was apparent from the CAS at page 21 of his bundle. This was the course in relation to which he applied for further leave. If the appellant returned to Bangladesh now, he would not have completed the course, a BA Management “top-up” course running from October 2013 to August 2014. The appellant had to succeed in his last semester and so the appeal should be allowed on Article 8 grounds as he was now in the middle of his studies and had paid fees.

Findings and Conclusions

29. The appellant’s application for further leave was refused under paragraph 322(3) of the rules. This is a discretionary ground of refusal. The respondent has the burden of showing that the ground is made out, as a precedent fact. The burden then passes to the appellant to show that discretion should be exercised in his favour: JC (China) [2007] UKAIT 00027. So far as Article 8 of the Human Rights Convention is concerned, the burden of proof lies with the appellant and the standard of proof is that of a balance of probabilities: EH (Iraq) [2005] UKIAT 00065.
30. I have little hesitation in finding that the Secretary of State has indeed made out the ground of refusal. The notice of decision is clear and the evidence before me shows that the Secretary of State was entitled to find that the appellant had breached a condition attached to his student leave. He began a course at the London College of Accountancy, leading to a degree from Anglia Ruskin University, in January 2010. On 12th November 2012, he was issued with a certificate showing that he had managed to pass some papers, but not others, in the academic years 2010 to 2011 and 2011 to 2012. He received a “credit” in September 2012. The appellant did not receive any award from Anglia Ruskin University after that.
31. Without seeking permission, he began a course at a different college, St Peter’s College London. The nature of the course was also different, leading to a level 5 HND Diploma in Business, below degree level. In September 2013, he was awarded a certificate showing completion of the programme.
32. There was an attempt to put the appellant’s case on the basis that he retained student status of some sort at the London College of Accountancy or Anglia Ruskin University and so was not required to seek permission to change his course of studies and his college. There was no reliable evidence before me supporting this case. On the contrary, it is apparent

from the appellant's own evidence that his status as a student at the London College of Accountancy (or at Anglia Ruskin) came to an end in the autumn of 2012. The course he took at St Peter's College was not a supplementary course at all. It wholly replaced the studies in accountancy.

33. In commencing his course at St Peter's College, unrelated to his earlier studies, the appellant breached a condition which was attached to his leave in accordance with section 50 of the 2009 Act. The Secretary of State was entitled to find that the application he made for further leave, to pursue studies at the London Campus of the University of Sunderland, fell to be refused under paragraph 322(3) of the rules. So far as discretion is concerned, the appellant has simply failed to show why the discretion available under the rules should be exercised in his favour. There has been no substantial case put or explanation offered for the failure to seek permission from the respondent, save for the unsustainable argument that the St Peter's College studies were, in some way, parallel to the earlier studies. In the grounds of appeal to the First-tier Tribunal, reliance was placed upon evidential flexibility, paragraph 245AA of the rules and the decision of the Upper Tribunal (but not the judgment of the Court of Appeal) in Rodriguez. It was also asserted in the grounds that the adverse decision by the Secretary of State failed to meet common law requirements of fairness. Mrs Ahammed developed this aspect, saying that the Secretary of State ought to have written to the appellant to give him an opportunity to provide further evidence of progress in his studies. These arguments have no merit at all. They fail to engage with the particular finding made by the Secretary of State that the appellant breached a condition attached to his leave. The provision of further evidence of such progress as he made at the London College of Accountancy (which was, in any event, very modest progress) would have made no difference. There is no evidence in this case that the Secretary of State acted unfairly in receiving the application for leave, making enquiries and then concluding that it fell to be refused.
34. The Secretary of State properly refused the application under paragraph 322(3) of the rules and the appellant has not shown that discretion should be exercised in his favour.
35. So far as Article 8 of the Human Rights Convention is concerned, important guidance has been given by the Supreme Court in Patel and Others [2013] UKSC 72 and by the Upper Tribunal in Nasim and Others [2014] UKUT 00025. The appellant has failed to show that the requirements of the rules were met in his application for further leave. That application was based upon a qualification, his level 5 diploma, which he obtained without seeking permission and in breach of a condition attached to his student leave. The appellant has been present here for only a short period of time, beginning his studies in January 2010. In the grounds of appeal, there is an assertion that he has established a private life here "for few years respectively". He is described as wishing to pursue a course which "may

lead either to qualification or some other benefit in the United Kingdom may well develop a private life during such a stay which should not be arbitrarily interfered with and requires justification (sic)" and as being in the middle of his studies and so not removable at present. Mrs Ahammed said that the extent of the appellant's ambition is to remain for three months after the hearing in May 2014, so that he can complete his NQF level 6 course, in August 2014. He does not wish to return to Bangladesh without completing this course. As a matter of practical fact, he may well be able to achieve this limited aim. The grounds of appeal to the First-tier Tribunal contain no detail at all regarding any private life ties and, as noted earlier in this determination, the appellant has failed to show any unfairness on the part of the Secretary of State in dealing with his application. The witness statement he adopted before me also contains nothing of any substance regarding private life ties. Overall, any such ties will have been established during periods of limited leave. The appellant's breach of a condition is an adverse factor of some weight. The evidence does not show that he would have any difficulty re-establishing himself in Bangladesh or in maintaining any friendships or associations made here from abroad. There is really very little of substance to place in the scales against the Secretary of State's case that the public interest requires the appellant's removal.

36. I find that Article 8 is engaged in the private life context (the threshold of engagement being not particularly high). The adverse decisions were made in accordance with the law and in pursuit of a legitimate aim, the maintenance of immigration control in the interest of the economic wellbeing of the United Kingdom. Weighing the competing interests, noting the paucity of evidence of any substantial ties here, the breach of condition and the limited success achieved by the appellant in his studies while here, I conclude that the balance falls clearly on the Secretary of State's side. The decision to refuse to vary leave and the decision to remove the appellant manifestly amount to a proportionate response.

37. In summary, the grounds of appeal have not been made out and the appeal is dismissed.

There has been no application for anonymity in these proceedings and I make no direction on this occasion.

DECISION

The decision of the First-tier Tribunal to allow the appeal is set aside. The following decision is substituted: appeal dismissed.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell