



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

Appeal Number: IA/41914/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 26 February 2015**

**Decision & Reasons
Promulgated
On 3 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

**MD LUTFUR RAHAMAN CHOWDHURY
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim of Counsel instructed by A1 Law Chambers
Respondent: Mr S Walker of the Specialist Appeals Team

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Bangladesh born on 10 November 1983. He entered after the grant of entry clearance as a student from 25 December 2007. Further leave as a student was granted on two subsequent occasions expiring on 6 July 2013. On 3 July 2013 he applied for further leave in the same capacity as a Tier 4 (General) Student Migrant.

The Respondent's Decision

2. By a decision of 17 September 2013 the Respondent refused the Appellant further leave as a Tier 4 (General) Student Migrant under the Points Based System by way of reference to paragraphs 245ZX(a) and 322 of the Immigration Rules (the Rules) because his leave had been subject to the provisions of Section 50 of the Borders, Citizenship and Immigration Act 2009 (the 2009 Act) which prevented him from studying at any educational institution other than a named institution. The Respondent also made a decision to remove him under Section 47 of the Immigration, Asylum and Nationality Act 2006.
3. On 10 October 2013 the Appellant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds are either formulaic or assert the Appellant's application was made during the subsistence of his previous leave and that he had successfully completed previous courses and had been awarded the requisite points under the Rules for the grant of further leave.

The First-tier Tribunal Determination

4. By a determination promulgated on 19 August 2014 Judge of the First-tier Tribunal Herlihy dismissed the Appellant's appeal. She found that he had switched colleges, moving from Grafton College where he had commenced studies leading to a BTEC Level 7 to a course at ISBS leading to an Advanced Diploma in Strategic Management. She found that switching to ISBS had meant the Appellant had failed to comply with the conditions attached to his grant of leaving limiting his place of study to Grafton College.
5. She went on to dismiss the appeal by way of reference to paragraph 245ZY(c)(iv) of the Rules. This was a provision that came into effect subsequent to the grant of the previous leave to the Appellant on 13 April 2011.
6. On 29 September 2014 Judge of the First-tier Tribunal Lever refused the Appellant permission to appeal.
7. The Appellant renewed the application to the Upper Tribunal and on 12 January 2014 Upper Tribunal Judge Warr granted permission to appeal on the basis that the Respondent had relied on general grounds of refusal and it was arguable the burden of proof was on the Respondent to make good the allegations about the alleged breach of condition. The Judge had stated the burden of proof was on the Appellant and the grounds for appeal were all arguable.

The Upper Tribunal Hearing

8. Both parties agreed that the sole issue was the imposition of a condition under Section 50 of the 2009 Act. It was accepted that the power imposed by Section 50 of the 2009 Act was permissive. This 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).

9. Before the grant on 19 May 2011 to the Appellant of a residence permit there was a restriction in force which made the grant of entry clearance subject to restriction to studies identified by the Confirmation of Acceptance for Studies Checking Service records as an applicant's Sponsor. The provisions in the Rules extending this to study permitted by the grant of further leave came into effect subsequent to the grant of the last residence permit to the Appellant.
10. Mr Walker accepted that the burden of proof was on the Respondent to show that a condition in this particular case had been imposed on the Appellant. The Respondent produced no evidence that such a restriction had been imposed.

Findings and Consideration

11. I found that the determination of the First-tier Tribunal contained a material error of law in that the burden of proof that a restriction of the Appellant to studies at a named institution was on the Respondent. The general restriction imposed by paragraph 245ZY(c)(iv) came into effect after the grant of the Appellant's last leave. It was therefore on the Respondent to prove that such a specific restriction on the Appellant had been imposed. Consequently, the determination of the First-tier Tribunal contained a material error of law such that it should be set aside.
12. With the agreement of the parties I proceeded to a consideration of the substantive appeal. Neither party had any further submissions to make. For the reasons already given, I find the decision of the Respondent was not in accordance with the law and the Appellant has shown that he satisfies the relevant requirements of the Rules. The appeal is allowed.

Anonymity

13. There was no request for an anonymity order and having considered the appeal I find none is warranted.

NOTICE OF DECISION

The determination of the First-tier Tribunal contained a material error of law and is set aside. The following decision is substituted:-

The appeal is allowed under the Immigration Rules.

Signed/Official Crest

Date 02. iii. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

TO THE RESPONDENT: FEE AWARD

The appeal has been allowed and so I have considered whether a fee award should be made. The basis on which the appeal has been allowed was one that was not raised in the original grounds of appeal or subsequently for the Appellant who simply challenged the issue of the burden of proof. In all the circumstances I do not consider it appropriate to make any fee award.

Signed/Official Crest
2015

Date 02. iii.

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal