Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/24626/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 January 2020	**On 4 February 2020**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MUHAMMAD ARFAN ARFAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr P Nath, Counsel, instructed by Hubers Law

DECISION AND REASONS

1. This is an appeal against the decision issued on 22 July 2019 of First-tier Tribunal Judge Iqbal which allowed Mr Arfan's Article 8 ECHR claim.

2. For the purposes of this decision I refer to the Secretary of State for the Home Department as the respondent and to Mr Arfan as the appellant, reflecting their positions before the First-tier Tribunal.

3. Mr Arfan is a citizen of Pakistan born on 17 March 1986.

4. This appeal concerns a relatively narrow point as to whether the appellant undertook lawful "supplementary studies". The respondent maintains that he did not, finding that the appellant's studies at the London School of Marketing were not lawful and breached a condition, leading to the decision dated 27 November 2018 under challenge in these proceedings which refusing the appellant's application for indefinite leave to remain (ILR) under paragraph 322(3) of the Immigration Rules.

5. In order to find an answer to this issue, it is necessary to look at the appellant's immigration history. The history set out below is not in dispute. I was grateful to Ms Everett and Mr Nath for the clarity they provided where the papers provided were not of the clearest.

6. The appellant came to the UK in 2008 with leave as a student and obtained further grants of leave until 28 February 2014. On 28 February 2014 the appellant applied in-time for an extension of leave as a Tier 4 Migrant.

7. I should indicate in passing that there is a mistake about the type of application he made at that time in the Home Office decision letter under challenge here dated 27 November 2018. On page 2 of 9 this letter refers to the appellant making to an application as a Tier 1 dependent partner. He did not. He made an application for an extension of leave as a Tier 4 student. This mistake is repeated by the First-tier Tribunal Judge in paragraph 2 of the decision under challenge here. Mr Nath, on behalf of the appellant, confirmed this mistake and the correct basis on which the appellant applied for further leave in February 2014, referring me to paragraph 5 of the appellant's witness statement dated 28 June 2019. Ms Everett agreed with that position, referring me to a letter from the respondent to the appellant dated 26 October 2016 at page 79 of the appellant's bundle which refers, correctly, to his Tier 4 (General) Migrant application on 28 February 2014.

8. The appellant's application for further leave as a student made on 28 February 2014, included a Confirmation of Acceptance for Studies (CAS) with the reference number E4G6JQ7D15NOL7 accepting him on a BTEC extended diploma in strategic management and leadership (level 7) at the City of London Academy. That document is on pages 86 and 87 of the appellant's bundle.

9. The application for further leave was refused on 8 May 2014. The appellant appealed to the First-tier Tribunal. Before his appeal was heard, the respondent revoked the licence of the London City Academy on 29 September 2014.

10. The appellant's appeal remained outstanding, however, and it was allowed in a decision issued on 14 October 2014 by First-tier Tribunal Judge Mensah. The appeal was decided on the papers. The appeal was allowed on the basis that the appellant had asked for an extension of time prior to the decision being made in order to allow him to submit financial evidence

but the respondent had not considered that request and had proceeded to make the decision without the additional material.

11. Following the decision of the First-tier Tribunal, in line with what has become standard practice, on 26 October 2016, the respondent issued the appellant with a period of 60 days' leave in order to enrol on a new course and obtain a valid CAS. The appellant is concerned at the delay in issuing him with further leave some two years after the decision of the First-tier Tribunal and the CAS from London City Academy becoming invalid. He could not obtain a CAS within the 60 days afforded to him and so he applied for further time and was granted a further period of leave until 31 January 2017.

12. The appellant was still unable to obtain a valid CAS by 31 January 2017. In correspondence with the respondent on 31 January 2017 and 1 February 2017 he informed the respondent that he had not been able to find an educational sponsor as he could not show the required academic progression. He also informed the respondent that he had commenced studying at the London School of Marketing and expected to receive an MBA from the University of Northampton in March 2017. As the appellant set out in paragraph 11 of his witness statement on page 12 of his bundle:

> "Even though my Section 3C leave had been continuing, I could no (sic) enrol on a course of study during this time and most universities required Academic Progression from me. I therefore decided to enrol on a course which did not require me to obtain a CAS, with London School of Marketing which was due to finish in April 2017 and I would have been in a position to obtain a CAS by showing academic progression".

13. On 21 February 2017 the respondent refused the application for further leave (made on 28 February 2014); see pages 60-65 of the appellant's bundle.

14. The application was refused, firstly, on the basis that the appellant had not provided a valid CAS. The respondent maintained that this meant that paragraph 322(9) of the Immigration Rules was not met as the appellant had not provided a document requested by the respondent within a reasonable time.

15. The application was also refused under paragraph 322(3) of the Immigration Rules where the applicant was considered to have breached a condition of his leave by studying at the London School of Marketing. The respondent set out that the appellant had never had permission to study at either the London School of Marketing or the University of Northampton. He had never obtained a CAS from the London School of Marketing and could not have done so where this organisation was not authorised to issue a CAS to foreign students. He was not studying directly with the University of Northampton and, if that had been the case, he could be expected to have obtained a CAS from the university.

16. The respondent considered whether to exercise discretion concerning the application of both paragraph 322(9) and 322(3) but declined to do so.

17. The appellant appealed again to the First-tier Tribunal, on human rights grounds. In a decision dated 16 May 2018, First-tier Tribunal Judge Telford refused the appeal. The First-tier Tribunal found that the appellant's studies at the London School of Marketing amounted to a breach of his leave and that paragraph 322(3) had been applied correctly. Although he did not require permission to study online at the college without a CAS this did not put him in the position of remaining within the terms of his leave which had been issued to study elsewhere or mean that he did not require permission or a valid CAS to comply with the conditions of his leave. The judge also found the appellant to lack credibility and did not consider that discretion as to the application of the general grounds of refusal should be exercised in his favour.

18. On 30 May 2018 the appellant applied for indefinite leave to remain (ILR) on the basis of 10 years' continuous lawful residence. That led to the decision currently under challenge dated 27 November 2018. The current decision takes the same position as the refusal of leave dated 21 February 2017, applying paragraph 322(9) of the Immigration Rules as the applicant had not provided a document when required to do so and paragraph 322(3) where he had breached the conditions of his leave by studying at the London School of Marketing.

19. Before the First-tier Tribunal the appellant sought to argue as follows, set out in paragraphs 24 to 26 of the witness statement on pages 14 and 15 of his bundle:

> "24. With regards to the Home Office's allegation under paragraph 322(3) of the Immigration Rules, I would respectfully submit that the Home Office is somewhat misguided as to the nature of my studies and course at London School of Marketing.
>
> 25. Firstly, and I would emphasise on this point, that my course was not one where I was required to attend any university or college for attendance. I was not required to obtain any CAS from a licensed sponsor and that this course can be studied by anyone regardless of where they are resident given that they meet the requirements (academic) to enrol for the course. Home Office had requested a valid CAS to determine my application and university required me to show progression. I was in a limbo not being able to satisfy either side and therefore decided to enrol for a distance learning course to fulfil the university and Home Office requirements of a CAS letter. I did not seek to obtain a CAS letter from the University of Northampton as they were not even licensed sponsors. My course was merely an attempt to supplement my studies in my spare time and to show academic progression.
>
> 26. Even the Honourable Judge of the First-tier Tribunal in its determination of 01 May 2018, at paragraph 13, acknowledged the fact that my course at London School of Marketing was a 'distance learning' course which did not require me to obtain a CAS before commencement and

hence it was a 'non-CAS place of study'. The Honourable Judge further stated at paragraph 14 of the determination that 'Tier 4 is simply not comparable with non-CAS distance learning. Distance learning can be done from any venue around the world', and my understanding was the same at the time I enrolled for the course that this is a distance learning course, where rather spending time socialising online, I would rather spend my time in a productive manner and instead I perused (sic) my primary goal of being in the UK which was to study and better my future prospects. I paid over 6,000 GBP to enrol for this progression course so that I could continue studying in a licensed university through production of a valid CAS".

20. The appeal came before Judge Iqbal on 24 June 2019. She considered the question of the appellant studying at the London School of Marketing for an MBA awarded by the University of Northampton in paragraphs 28 to 31 of the decision:

> "28. With reference to paragraph 322(3) the terms of the Immigration Rules require *'a failure to comply with the condition attached to the current or previous grant of leave to enter or remain unless leave had been granted in the knowledge of previous breach'*. I have been referred to paragraph 245ZY(c)(iv) which provides '*(iv) no study at the institution that the Confirmation of Acceptance for Studies, Checking Services records as a migrant sponsor, unless ... (c) the study is a supplemental study'*.
>
> 29. In addition, in relation to the supplementary courses, I have been referred to the Tier 4 points-based system policy guidance for applications made on or after 11 January 2019 in particular *'Can students do extra studies whilst in the UK? 334. You are allowed to do a supplementary course for example an evening class as well as your main course of study. The supplementary course can be in any subject, does not have to relate to your main course of study. You do not need permission from us to undertake a supplementary course and you are not required to tell your Tier 4 sponsor. You can undertake supplementary study at any time during the period of leave granted for your main course of study. However you must make sure that your supplementary course of study does not in any way hinder your progress or on your main course of studies'*.
>
> 30. I note when considering this issue that on 18 April 2013, the Appellant was last granted leave to remain as a Tier 4 (General) Student Migrant at a named college until 28 February 2014 and this leave was subsequently extended by virtue of Section 3C subject to the same conditions. I have been provided with evidence to demonstrate that he was studying at the time at the London College of Computing and Management Sciences. The Appellant states that it is during this period that he commenced an online distance learning course with the University of Northampton for an MBA with the London School of Marketing.
>
> 31. Therefore, I find that as long as the Appellant studied during a period of time when he was considered to have leave as a student for a different named college (even if extended by virtue of 3C, then I am satisfied on balance his online studies for his MBA was

> indeed a supplementary course for which the Appellant did not require permission and certainly therefore no CAS. For these reasons I am satisfied that paragraph 322(3) does not apply to the Appellant as he was not in breach of the conditions of his previously granted leave".

21. Judge Iqbal also found the respondent was incorrect in applying paragraph 322(9); see paragraph 33. She concluded that the appellant had shown that he met the requirements of paragraph 276B and that the decision refusing ILR was disproportionate where that was so and allowed the appeal.

22. It is my view that the reasoning of the First-tier Tribunal on paragraph 322(3) discloses an error on a point of law. As the judge identified, the appellant had been studying at the London College of Computing and Management Sciences when he applied for further leave on 28 February 2014. The CAS he used to support the application made on 28 February 2014 was issued by the City of London Academy. From 29 September 2014 onwards and at the time that the appellant commenced his studies at the London School of Marketing in 2016, he did not have a valid CAS to study at either of these institutions. He did not have permission or a valid CAS to study anywhere. Permission to study and a valid CAS were conditions of his leave. He did not have either from 29 September 2014 onwards. That is so even if his appeals and applications thereafter extended his leave under s.3C leave from 28 February 2014 onwards. The respondent was correct to find that his studies at the London School of Marketing amounted to a breach of a condition of his leave. He was not entitled to follow "supplementary study" when there were no underlying lawful studies to supplement. It is not relevant that online studies at the London School of Marketing did not require him to have a CAS. He did not meet the prerequisite requirement to have leave supported by a valid CAS and permission to study.

23. For these reasons I am satisfied that the decision of the First-tier Tribunal discloses a material error on a point of law such that the decision regarding paragraph 322(3) of the Immigration Rules must be re-made. Having found an error on this basis, it is not necessary to consider the respondent's challenge to the decision of Judge Iqbal on paragraph 322(9) and I proceed to re-make the appeal on the basis that this paragraph did not stand to be applied.

24. The re-making of the appeal is relatively straightforward as it follows from the reasoning above that the appellant did breach the conditions of his leave by studying at the London School of Marketing. The course that he took could not be "supplementary" where there was no underlying leave with permission to study and a valid CAS. The respondent was entitled to apply paragraph 322(3) and find that paragraph 276B(iii) of the Immigration Rules was not met as a result.

25. Where that is so I see nothing further here showing that the decision of the respondent is disproportionate. He cannot meet the provisions of the Immigration Rules. He has been in the UK for nearly 12 years but has only ever had limited leave as a student. His private life attracts little weight where that is so. He seeks to argue unfairness where he found difficulty in obtaining a new CAS from 2014 onwards but it is my judgment that those arguments do not attract sufficient weight. As well as the respondent affording him two periods leave to obtain a CAS, he had a great deal of time to regularise his position from 2014 onwards and could have corresponded with the respondent if there were difficulties at that time in obtaining a CAS. I was not taken to any evidence showing that he attempted to find an educational sponsor and obtain a valid CAS prior to commencing his studies at the London School of Marketing in 2016. The documents at pages 17 -21 of the appellant's bundle at best show that he made preliminary enquiries to four educational institutions but nothing beyond that. It was also open to him to leave the UK to pursue studies in Pakistan or to apply from Pakistan to return to the UK with a valid CAS in order to recommence his studies here and that was a proportionate course of action to expect him to follow where he could not meet the Immigration Rules.

26. It is therefore my conclusion the respondent was entitled to refuse the appellant's indefinite leave to remain application on the basis of paragraph 322(3) of the Immigration Rules and that the circumstances here do not show anything that is capable of outweighing the public interest the maintenance of effective immigration controls.

Notice of Decision

27. The decision of the First-tier Tribunal discloses an error of law and is set aside to be re-made.

28. The appeal on Article 8 ECHR grounds is refused.

Signed:  Date: 31 January 2020

Upper Tribunal Judge Pitt