



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/26563/2014

THE IMMIGRATION ACTS

Heard at Field House
On: 17 March 2015

Determination Promulgated
On: 22 April 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

MR ABDUL KAYUME MUMIN
(anonymity direction not made).

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr, M Islam, Legal Representative

For the Respondent: Ms A Brockles-Weller, Senior Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of First-tier Tribunal Judge Horvath who allowed the appellant's appeal in a determination dated 5 December 2014 pursuant paragraph 322 (3) with reference to 245 ZX (a) of the Immigration Rules. However for the sake of convenience I shall refer to Mr Mumin, as the appellant and the Secretary of State as the respondent which are the designations that they had before the First-tier Tribunal.

2. The appellant, born on 21 August 1990, a national of Bangladesh made an application to remain in the United Kingdom as a Tier 4 (General) Student under the Points Based System which the respondent refused on 12 June 2014 stating that the appellant has not complied with the conditions attached to his leave to remain in this country as a student.
3. Permission to appeal was granted by first-tier Tribunal Judge VA Osborne who stated that it is arguable that the Judge made an arguable error of law by reaching findings which would not open to her on the totality of the evidence despite best efforts to do so in light of the complexity of the arguments.

First-tier Tribunal's Findings

4. The appellant failed to meet the requirements of paragraph 245 ZX (a) because he was refused under one of the general grounds for refusal set out in paragraph 322 of the Immigration Rules. The appellant submitted a certificate and transcript dated 25 April 2014 consisting of a course completion letter dated 12 May 2014 from London West Valley College for an EBM a Graduate Integrated Diploma in Business Administration. However, he was granted leave to Study a Diploma in Business Management at London Churchill College commencing on 21 November 2011 until 21 January 2014. The appellant did not submit a fresh application for leave to study an EBMA integrated Diploma in Business Administration. He was therefore in breach of Section 50 of the Borders, Citizenship and Immigration Act 2009 by commencing this study at London West Valley College for which he did not have a CAS. The respondent was therefore not satisfied that the appellant has complied with the conditions attached to his leave to remain in this country. The respondent accordingly refused the appellant's application for leave to remain as a Tier 4 student under paragraph 322 (3) of the Immigration Rules.
5. The appellant contends that he did not breach any Immigration Rule because he did not leave London Churchill College or cease studying with them. He said that he also undertook a supplementary course of study at West Valley College for his EBMA Graduate Integrated Diploma in Business Administration as an extra measure to secure his career. The appellant claims relied on the Tier 4 policy guidance. The appellant also observed that the Home Office frequently revoke Tier 4 sponsor licences and because London Churchill College changed the awarding body after he enrolled with them. Therefore the appellant took an extra measure by launching a supplementary course at London West Valley College. He claimed that the Secretary of State failed to exercise her discretion properly.
6. The Judge noted that he has seen the qualification certificate awarded by EBMA on 25 March 2014 for completion of the course of Graduate Integrated Diploma in Business Administration and this supported by a unit credit certificate issued by EBMA. He has also seen a letter dated 12 May 2014 from London West Valley College which confirmed that the appellant has successfully completed

the course of 240 credits at their educational establishment. He has also seen in the respondent's bundle letter from London Churchill College dated 18 March 2014 which stated that in respect of the diploma in the Management course, the appellant has submitted a number of units assessed in January 2014 but the grades were provisional and there were waiting approval from the awarding body ATHE and the grades were not final and could still change. No completion of the course from London Churchill College or the ATHE qualification certificate was submitted with the appellant's current application on 19 May 2014. The Judge noted that the CAS submitted with the application made reference to London Churchill College in these words "provisional grades issued by the London Churchill College dated 18 March 2014"

7. On the assumption as claimed by the appellant that the London Churchill College had decided to transfer all level 6 students to the ATHE level 6 diploma in Management Program, however Churchill College subsequently decided to reassess all ATHE level 6 would this work through EMBA level 6 Graduate Diploma in Business Administration and the award body changes made by Churchill College had put the appellant in a difficult position so he had to stay with Churchill College to finishes course albeit under a different awarding body which apparently was completed on 31 January 2014 but the appellant states that he did not cease his studies with them. Nevertheless the Judge noted that the appellant has not provided to the respondent or for the hearing, a qualification certificate in respect of the ATHE diploma in Management or a qualification certificate in respect of the EBMA graduate diploma in Business Administration. The appellant was however able to provide a qualification certificate from London West Valley College dated 25 April 2014 which was submitted with his application along with a letter dated 12 May 2014 from London West Valley College stating that he has successfully completed his course there.
8. The judge was satisfied that the appellant was awarded the qualification certificate by EMBA dated 25 April 2014 and the marked transcript strongly indicates that although the appellant might well have continued to follow the course at Churchill College and that he might well have stayed with that college, the focus of his studies had shifted from London Churchill College to London West Valley College such that the EBMA course at London West Valley, which he might well have originally intended as a supplementary course had taken precedence and had become the main course. The appellant's failure to produce a qualification certificate for the ATHE diploma or the EBM a graduate diploma which he pursued at London Churchill College strongly indicates that he had not taken the appropriate examinations or that he had failed them. These factors led to the Judge to conclude that the London West Valley course had become his main course which hindered his progress on the London Churchill College.
9. The appellant's course and educational establishments are subject to Section 50 of the Borders, Citizenship and Immigration Act 2009 by virtue of section 3C

of the Immigration Act 1971. It was the respondent's case that the appellant has not complied with the conditions attached to his leave and therefore he failed to meet the requirements of paragraph 322 with reference to paragraph 245 ZY (c) which provides that an applicant must fall for refusal under the general grounds of refusal and must not be an illegal entrant.

10. The Tier 4 policy guidance at page 57 of version 11/2014 states the following. "You are allowed to do a supplementary course, for example, an evening class, as well as your main course of study. This supplementary course can be in any subject, and 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. However, you must make sure that your supplementary course does not in any way hinder your progress on your main course of study".
11. The Judge accepted that as provided in subparagraph (c) (vi) (3) of the Immigration Rules, supplementary study is an exception and that supplementary study must be undertaken by a student in addition to his/her main course, so long as it does not hinder progress on the main course of study. Given his findings of fact, the judge was satisfied that the appellant falls foul of the Immigration Rules.

Grounds of Appeal

12. The respondent in his grounds of appeal states the following which I summarise. The Judge has totally misunderstood the appellant's case and diverted from the original issue of the appeal. The only issue should have been determined by the Judge should have been whether the appellant breached Section 50 of the Border's Citizenship and Immigration Act 2009 by studying at London West Valley College. However Section 50 does not prohibit but only restricts the student, so paragraph 322 (3) is not applicable because the appellant has complied with all the Rules. The appellant did not leave London Churchill College or cease studying with them. He undertook a supplementary course of study at London West Valley College as an additional course and to take an extra measure to secure his career. The course completion letter from the London Churchill College dated 26 August 2014 establishes the truth.
13. The appellant's course completion letter from the London Churchill College dated 26 August 2014 and 18 March 2014 submitted with the notice of appeal in respect of the appellant's provisional grades establish that the appellant never ceased studying with the London Churchill College and therefore the London West Valley College had not become the appellant's main course. The appellant submitted evidence which demonstrates that the appellant has passed all requirements of the courses. The Judge did not take into account that it is not obligatory for a Tier 4 sponsor to notify the Home Office as he had not ceased studying with London Churchill College. The respondent has never claimed

that the London Churchill College has communicated with them and therefore there is nothing to suggest that the appellant has breached the law.

14. The Judge's consideration at paragraph 16 of the determination is totally misconceived. She acted on the assumption from the evidence at page 13 and 14 of the appellant's bundle for the notification of the change of the awarding body. She also concluded on the assumption that the London West Valley College had become the appellant's main course which hindered his progress at London Churchill College. The evidence submitted by the appellant does not sustain that conclusion.
15. The Judge misapplied section 85 A of the 2002 Act at paragraph 6 of the determination which he stated that the evidence submitted by the appellant was "additionally evidence which was not submitted with the original application and therefore cannot be considered. The Judge has not taken into account the provision of section 85 A. The Judge has failed to take into account that the appellant's application was not about the attainment of points under the points-based system Immigration Rule so there is nothing to restrict the appellant from adducing evidence to corroborate his claim. Section 80 5A (4) (d) clearly states that the Tribunal may consider evidence adduced by the appellant where it is "adduced in connection with the Secretary of State's reliance on the discretion under the Immigration Rules, or compliance with the requirement of the Immigration Rules and to refuse an application on grounds not related to the acquisition of points under the points based system."
16. Paragraph 322 (3) of the immigration rules sets out discretionary general grounds of refusal and there is no framework or guidance or criteria as to how the respondent should exercise this discretionary power. The respondent without stating any reason exercised her discretionary power against the appellant and this is not in accordance with the law or the Immigration Rules or any published guidelines and policies.
17. The appellant has been granted leave to study at London Churchill College and he was allowed to continue with more than one College provided he did not cease studying at the institution for which permission was given. Hence this is not a case of chopping and changing the course provider which was the mischief intended to be prevented by the Rules.

Rule 24 response

18. The respondent in their rule 24 response dated 6 February 2015 stated that the first-tier Tribunal directed himself appropriately. The upper Tribunal may benefit from considering the case of **Bihimani (student switching institution: requirements) [2014] UKUT516** when assessing whether there is an error of law in the determination.

The hearing.

19. At the hearing I heard submissions from both parties, the full notes of which are in my Record of Proceedings.

Is there a material error of law in the determination of the First-tier Tribunal?

20. First-tier Tribunal Judge dismissed the appellant's appeal and stated that the appellant was given a CAS to study at London Churchill College and yet at the same time he undertook was a course at London West Valley College for which he did not have a CAS. The Judge found that his studies at London West Valley College hindered his course of study at London Churchill College. The appellant's position is that he was entitled to undertake a supplementary course with his main course of study and that his studies at London West Valley College were supplementary to his studies at London Churchill College as he did not cease studying at that college but did both courses at the same time. He relies on the respondent's policy guidance that students are entitled to undertake supplementary studies and they do not have to inform the Home Office or their college of their supplementary course.
21. The Judge at paragraph 20 of his determination stated that a supplementary course is an exception and may be undertaken by a student in addition to his/her main cause, so long as it does not hinder progress on the main course of study. The Judge found that the appellant therefore falls to be refused under the general grounds of refusal in paragraph 322 of the Immigration Rules. The Judge concluded that although the appellant did not switch courses, as he continued to study at London Churchill College but found that as the appellant has not provided a certificate from the London Churchill College which states that the appellant has completed the course, and this demonstrates that the appellant's main course of study became his studies at London West Valley College, for which he did provide a course completion letter, and thereby this hindered his studies at London Churchill College and was not able to provide a completion letter for this course.
22. The appellant's approved sponsor for his studies in the United Kingdom was London Churchill College to study for a Diploma in Business Management. He provided a transcript dated 18 March 2014 from London Churchill College which states that he has passed all his examinations and his grades are provisional awaiting approval from the awarding body, ATHE and the grades are not final and could change.
23. The appellant to support his application for further leave to remain as a student, submitted certificates and transcripts dated 25 April 2014 and a course completion letter dated 12 May 2014 from London West Valley College to show that he has completed his EBMA Graduate Integrated Diploma in Business Administration. He was unable to provide a Diploma in Business Management from London Churchill College which was his main course of study.
24. Therefore the course of studies that the appellant was relying on for further leave to remain in the United Kingdom as a student was not from London

Churchill College, for which he had been granted permission and who his sponsor was, but from London West Valley College for which he did not have a CAS.

25. The appellant claims that his studies at West Valley College was supplementary to his studies at London Churchill College. He claims that he studied at both colleges at the same time.
26. The evidence before the Judge was that initially, the appellant applied to study at Blake Hall College but the appellant as he stated to the Judge, that the licence of this college had been revoked by the Home Office about a month ago and he now intended to study at University of Greenwich who had agreed to accept him and that the tuition fees of £3700, he had paid to Blake Hall University had been transferred to University of Greenwich. The Judge noted that Blake Hall College stated in a letter dated 22 October 2014 that "the progression and award board for BAH business studies (stage 3 entry)-Blake all met on 16 October 2014 to consider your results profile for the academic year. I am writing to inform you that based on the profile presented to it, the board has agreed you have not passed your program of study but have successfully completed 60 credits".
27. This letter from Blake Hall College demonstrated to the Judge that this college did not consider that the appellant had completed his studies at London Churchill College and stated that all he had proved was that he had attained 60 credits. The Judge also considered a letter dated 18 March 2014 from London Churchill College which that the appellant has passed nine examinations but his grades are provisional awaiting approval from the awarding body ATHE. This demonstrated to the Judge that the appellant has not completed his course at London Churchill College because he was unable to provide a diploma or a letter of completion of course from this college to state that the appellant had completed his course of studies at this college.
28. The Judge accepted that London Churchill College had problems with the awarding body and were going to change to a new award body, the ATHE, but the fact remains that the appellant has not provided to the Home Office or for the hearing, a qualification certificate in respect of the ATH diploma in management or a qualification certificate in respect of the EBM is graduate diploma in business administration from London Churchill College. The Judge did not consider the appellant's study at London West Valley College was supplementary to his studies at London Churchill College and stated that this course of study did hinder his progress of his main course of study at London Churchill College.
29. The Judge found at paragraph 16, the appellant provided a qualification certificate from London West Valley College dated 25 April 2014 which were submitted with this application along with a letter dated 12 May 2014 from London West Valley College stating that he has successfully completed his course there. His failure to produce a qualification certificate for the ATHE

diploma or the EBMA graduate diploma, (pursued at Churchill) strongly indicates that he had not taken the appropriate examinations or that he had failed them. These factors have led me to conclude that the West Valley course had become his main course which hindered his progress on the Churchill course”.

30. The Judge stated that the qualification certificate by the MBA dated 25 April 2014 and the transcript page from London Churchill College, “strongly indicates that although the appellant might well have continued to follow the course at Churchill, and that he might well have stayed with that college, the focus on his studies had shifted from Churchill to West Valley, such that the EBMA course at London West Valley College which he might well have originally intended as a supplementary course had taken precedence and had become the main course.
31. On the evidence the Judge was entitled to find that the appellant’s main focus was on his course at London West Valley College which became his main course and not at London Churchill College even if he attended both colleges at the same time. The Judge was entitled to find that the appellant studies at London West Valley College could not be categorised as supplementary course as permitted under the Tier 4 Policy Guidance of the respondent.
32. The Judge also made an error of law when he said that the appellant is not entitled to provide documents at the hearing because his is a points-based system appeal and only material before the respondent can be considered. However the Judge failed to consider that the respondent’s refusal was on discretionary general grounds of refusal under paragraph 322 of the Immigration Rules. The appellant was therefore entitled to provide evidence after the application.
33. Although the Judge fell into material error by stating that he was not entitled to consider the documents provided at the hearing and which were not before the respondent with their application, the judge at paragraph 23 and 24 did consider the documents and concluded that they do not advance the appellant’s case in any material way given his factual findings.
34. The judge found that the letter dated 26 August 2014 from London Churchill College confirmed that the appellant was a student at their college and that he had successfully completed the EBMA graduate Diploma in Business Administration, QC F level 6 the course starting on 9 September 2013 and ended on 31 January 2014. He also produced two further new letters from London Churchill College dated 2 September 2014 and 8 May 2014. The first letter stated that the college had decided to transfer all AA BPS level 6 students to ATHE level 6 diploma in Management program. The second letter confirmed that the appellant was studying at their college under the previous awarding body ATHE, that the course was expected to finish on 31 January 2014 and that due to unforeseen circumstances the ATHE award would be delayed, so after

Careful consideration Churchill has decided to reassess all ATHE level 6 students work through EMBA level 6 graduate diploma in business Administration program.

35. The Judge was entitled to find that these documents do not take the appellant's case any further. He stated that the appellant has not, for whatever reason, provide his diploma from the London Churchill College for further leave to remain in the United Kingdom as a student. He provided his certificate from London West Valley College as proof that he has completed a course of study in the United Kingdom. The appellant based his further leave to remain as a student application on the basis that he has graduated from London West Valley College which was his claimed supplementary course. He did not provide a diploma from London Churchill College which was his main course of study to support his application for further leave to remain. Therefore the supplementary course became his main course and this suggests he switched colleges without informing the Home Office and gaining permission to do so.
36. The Judge came to his sustainable conclusion, after considering all the evidence in the appeal that the appellant's studies at London West Valley College were not supplementary to his studies at London Churchill College for which he had been given permission to study by the respondent. The appellant is relying on his supplementary course for further leave to remain in this country as a student. A supplementary course is defined as a course that is supplementary to his main course which was at London Churchill College. I find that the Judge was entitled to find that the appellant's studies at London West Valley College hindered his progress at London Churchill College. He was also entitled to find that the appellant's main studies switched to London West Valley College and they were not supplementary to his studies at London Churchill College.
37. Although I find that there is an error in the determination of the first-tier Tribunal Judge by his statement that he cannot consider further documents at the hearing, it is not a material error because his conclusions on the evidence are sustainable and a differently constituted Tribunal would not find differently on the evidence in this appeal. The Judge was entitled to find that the appellant has breached the conditions attached to his study in the United Kingdom and that his application was correctly refused under paragraph 322 of the Immigration Rules.
38. I take into account fairness to the appellant. The case of **Thakur (PBS decision-common law fairness) Bangladesh [2011] UKUT 151 (IAC)** was relied on, where reference is made to earlier guidance by Lord Mustill: "(1) where an act of parliament confers an administrative power there is a presumption that it would be exercised in a manner which is fair in all the circumstances. (ii) The standards of fairness are not immutable. They may change with the passage of time bought in the general and in their application to decisions of a particular type. (iii) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the

decision and this is to be taken into account in all its aspects. (iv) an essential feature of the context is the statute which creates the discretion, as regards to both its language and the shape of the legal and administrative system within which the decision is made. (v) Fairness will often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken with a view to procuring its modification, or both. (vi) since the person affected cannot usually make worthwhile representations without knowing what factors may weigh against his interests, fairness will often require that he is informed of the gist of the case which he has to answer”.

39. The appellant has attempted to circumvent the requirements of the Immigration Rules by embarking on a course of study at London West Valley College on which he seeks to rely for his application for further leave to remain as a student when he only had permission to study at London Churchill College. He did not apply for permission to study at London West Valley College and therefore he was in breach of the conditions of his leave to remain as a student. In the circumstances I find that the respondent’s decision is not unfair to the appellant in any way.
40. I therefore uphold the determination of First-tier Tribunal Judge as not being materially erroneous in law. As such the Secretary of State’s appeal must be allowed.

DECISION

Appeal allowed

Signed by

Mrs S Chana
A Deputy Judge of the Upper Tribunal

Dated this 22nd day of March 2015