Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19525/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decisions and Reasons Promulgated**
On 17th June 2015	**On 26th June 2015**

Before

Mr Justice Green
Upper Tribunal Judge Lindsley

Between

MR ADILET ABDAZOV

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Mold, Counsel instructed by Sterling & Law Association
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DETERMINATION AND REASONS

A. Introduction

1. In this appeal the Appellant challenges the decision of the First-tier Tribunal ("the Tribunal") which held that in accepting an unpaid work placement the Appellant violated the conditions attached to his visa.

2. The facts may be summarised shortly. The Appellant is a student. He arrived in the United Kingdom in June 2009 in order to study. He was granted a series of extensions of his stay as a Tier 4 general student migrant. Until 26th July 2013 his conditions contained a "remark" that he could work a maximum of 20 hours during the academic term. He engaged in employed work with APECS Consult Limited which was within the terms of the conditions attached to the visa.

3. However, a residence permit (referred to by the UKBA as a BRP) granted to him subsequently, on 26th July 2013 which was valid until 19th March 2016, contained a different "remark". It stated: "*No work except work placement*".

4. This particular work permit was provided to him under cover of a standard form letter from the UK Border Agency dated 26th July 2013. The letter contained the following:

> "Permission is given for the course of study detailed below:
>
> Sponsor: London School of Business and Finance
>
> Address: 9 Holborn, London, EC1N 2LL
>
> Course title: CIMA
>
> The attached leaflet explains the conditions of your stay whilst in the United Kingdom".

5. The attached leaflet was entitled "Conditions Leaflet". It is stated to be for information purposes only but it provided that pursuant to the Immigration Rules the individual concerned was entitled to remain in the United Kingdom until the expiry of the grant of leave "…and subject to you complying with the conditions of that leave".

6. Under a heading "Conditions attached to your leave" the following was stated:

> "Remarks on a BRP indicate the conditions attached to a grant of leave. The meaning of these remarks is explained below, please consider these carefully and ensure you understand those printed on your BRP as it is a criminal offence to breach the conditions attached to your leave and may also lead to your removal from the UK and refusal of future applications".

7. The leaflet then identifies five specific variants of BRP "remark". These are: "*Work 20 hours max in term time*"; "*Work 10 hours max in term time*"; "*No work*"; "*Work 10 hours max from 16 only*"; and, "*No public funds*".

8. We observe at the outset that the remark contained upon the Appellant's BRP does not conform in its exact language to any of these remarks which,

according to the Conditions Leaflet, were apparently intended to refer definitively to the remarks that would be found on residence permits.

9. The concept of a "Work placement" is defined in three places within the Conditions Leaflet. In particular, under the BRP remark "Work 20 hours max in term time", and, "Work 10 hours max in term time", the concept of a work placement is defined in the following way:

> "A course-related work placement which constitutes an assessed part of your course and does not exceed half of the total length of the course undertaken in the United Kingdom…".
>
> "…a work placement as part of your course of study if you are studying a course at any level with a sponsor which is a UK Higher Education Institution and/or a Highly Trusted Sponsor, or if you are studying with any sponsor where your course is at NQF6/QCF6/SCQF9 or above. The work placement must constitute an assessed part of your course and not exceed half of the total length of the course undertaken in the United Kingdom…".

10. It is common ground in the present case that the work undertaken by the Appellant did not constitute an *assessed* part of his CIMA course. Accordingly, if the BRP "remark" condition was one or other of the two referred to above then, there can be no doubt, the Appellant was in breach of the conditions attaching to his residence permit.

11. The third type of work placement is that under the BRP remark "No work". This states that:

> "All employment is prohibited, except: A work placement as part of your course of study if you are studying with a Highly Trusted Sponsor".

12. It will be seen from the difference in the description of a "work placement" under the three different BRP remarks, that under the "No work" remark the concept of a work placement omits any requirement that it must constitute an *assessed* part of the course in question. Under this remark it must merely be a work placement "*as part of your course of study".*

13. Upon receipt of his new residence permit subject to the condition referred to above the Appellant immediately ceased his paid employment and thereafter continued to work upon a voluntary basis for APECS Consult Limited in order to obtain work experience, in effect as an intern.

14. For reasons which are not relevant to this judgment the Appellant returned to his home country in order to obtain a replacement passport, his then valid passport having been stolen. He returned to the United Kingdom but was stopped at the border by Home Office staff when he was questioned about his work. He explained that he had worked for APECS Consult Limited as an account manager until his visa requirements

changed. Thereafter in order to continue to gain work experience for his CIMA course he worked upon an unpaid, intern, basis. The evidence, which is unchallenged, is that he discussed this change with a university administrator who informed him that he could undertake work experience whilst remaining within the terms of his visa. This was to enable him to gain an international CIMA qualification which was the next step in his career path.

15. However, this did not satisfy the Home Office. On 1st May 2014 a decision was taken to cancel his leave to remain and his residence permit. The decision was expressed in the following way:

> "You hold a current UK biometric residence permit endorsed T4 General Student which confers leave to enter the United Kingdom between 26th July 2013 and 19th March 2016 but I am satisfied that there has been such a change in your circumstances since this leave was granted that it should be cancelled. The change of circumstances in your case is that by your own admission you have been working for APECS which is in breach of the condition of your leave to enter the United Kingdom. I therefore cancel your residence permit and refuse you leave to enter the United Kingdom under paragraph 2A(8) of the Immigration Act 1971 and paragraph 321(A) of HC395".

16. It is also recorded in the decision that enquiries were made of the London School of Business and Finance as to whether there was a work placement attached to the CIMA course. The decision refers to an email dated 1st May 2014 from a Ms Sue Hoof from the academic institution in the following terms:

> "Following our telephone conversation, this is to confirm that there is no work placement attached to the CIMA course. [The Appellant] commenced his studies here from July 2013 and attended very well. He attempted the three exams but failed them. He registered for this semester but was unable to attend due to having to return home to sort out his lost passport".

17. An appeal was lodged with the Tribunal.

B. The judgment of the Tribunal

18. The Tribunal rejected the appeal. For present purposes the relevant paragraphs of the judgment are [26] – [29]:

> "26. It is clear from the email at Annex J that the work the appellant was carrying out was not a work placement attached to the CIMA course he attended.
>
> 27. Mr Hone was equally correct to say that the appellant is credible and a bona fide student. I am inclined to think that the appellant probably has done the best he can based on the advice he was given and he relinquished his remuneration in order to

benefit from the experience which could be useful to him when entering the employment market. This does not appear to be a student who was participating in some kind of scam using his student status as a front; he appears to be a genuine student who carried out work complementary to his studies for the best motives.

28. If, on the other hand, the appellant was sent the conditions leaflet by the UK Border Agency with the letter enclosing his bio metric residence permit, then the respondent's understanding of work placement ought to have been clear. According to the leaflet it is "part of your course of study". Mr Hone makes the point that the leaflet is not part of the Immigration Rules and the wording on the conditions leaflets is not binding on the Tribunal. I conclude, however, that giving the term "work placement" its plain and ordinary meaning it can only be taken to indicate that any work carried out has to be as part of the course the appellant is undertaking and in this case the work the appellant carried out was not part of his course. Even though he was acting on advice, as he understood it, and working without pay, I do not regard his employment as an accounts manager as a work placement, and I find that he was thus in breach of the condition attaching to his residential permit and his leave to be in the United Kingdom.

29. There was therefore a change in circumstances since the appellant's leave was given. The change of circumstances in the appellant's case being that the respondent became aware that he had not been complying with the condition attaching to his leave. The Rule applied is paragraph 321A which provides grounds for cancellation of a person's leave to enter or remain. There is no discretion in this kind of case, unlike for example paragraph 320(8) which provides grounds on which entry clearance or leave to enter "should normally be refused". In the case of paragraph 321A leave to enter or remain "is to be cancelled". The arguments that discretion should have been exercised differently consequently cannot succeed and the appeal is dismissed".

C. Grounds of appeal

19. Before us two grounds were, in substance, advanced. They may be summarised as follows. First, that the Tribunal erred in concluding that the work performed by the Appellant with APECS was not part of his course of study when that provision was properly and purposively construed. Secondly, that in any event, the Tribunal erred (in paragraph [29]) in concluding that the decision maker applied paragraph 321A of the Immigration Rules and that there was no discretion to be exercised.

D. Discussion

20. We turn now to the two grounds of appeal. We start by summarising the Appellant's submissions. Mr Mold of counsel, who appeared on behalf of the Appellant, in concise and persuasive submissions, argued that the remark which was attached to the Appellant's residence permit was not one which was covered by the Immigration Rules. He pointed out that the Immigration Rules applicable at the time of the Appellant's application provided in the "notes" section of paragraph 245ZY that leave to remain could be granted subject to a condition of no employment which was itself subject to the exception of:

> "…employment as part of a course-related work placement which forms an assessed part of the applicant's course…".

21. He pointed out that the Conditions Leaflet in describing the "No work" remark, quite unambiguously excluded a requirement that a "work placement" constitutes an *assessed* part of the relevant course (see paragraph [11] above). Accordingly, he submitted that the relevant condition in the Appellant's visa operated outside the scope of the Immigration Rules. He also submitted that the purpose behind the restriction on employment was focused essentially upon paid employment, not internships. As such the placement undertaken by the Appellant it did not offend against the purpose of the Conditions Leaflet and the "No work" remark and "work placement" should hence be construed broadly as including unpaid work. As to the requirement that it be "*part of*" the Appellant's course he submitted that this was met in the present case because the work placement was approved of by the Appellants educational establishment, it was beneficial to his CIMA course and amounted to relevant, and valuable, experience in preparation for his proposed course of study in international finance. He further pointed out that he had, in a wholly transparent manner, sought the advice of his educational establishment and, at the very least, it was their view that this placement was helpful and not inconsistent with his studies.

22. We have considerable sympathy with the position of the Appellant. However, we have come to the conclusion that the Tribunal did not err in its analysis of a work placement. We can express our conclusions shortly.

23. First, the remark in the Appellant's BRP was clearly intended to refer to the "No work" remark in the Conditions Leaflet. The inclusion of the additional words "*except work placement*" is a clear indication that it is the "No work" remark in the Conditions Leaflet which applies. In our view, the expression "No work except work placement" is an accurate description of the substance of the "No work" remark in the Conditions Leaflet. Indeed, we can see the sense behind the inclusion of the three additional words; in their absence the BRP could be misleading in that, on its face, it prohibited employment whereas, in actual fact, employment is prohibited but subject to the exception of work placements. As such the wording in the Appellants visa accurately reflects the "No work" remark in the Conditions Leaflet.

24. Secondly, we agree with the Judge, in paragraph [28] of his judgment cited above. The critical words are "*as part of your course of study*". In our view this indicates that the internship or work placement in question must constitute a formal part of the course of study in the sense that it must be integrated into the curriculum in some appropriate way. In contrast to the other references to work placement in the Conditions Leaflet, it need not be an assessed part of the course. But it must form a part of the course. It is, in our judgment, not enough for the placement to be one that the educational establishment informally approves on an *ad hoc* basis as not being inconsistent with the student's course of study or even as generally beneficial. Were this to be otherwise, then every, *ad hoc*, extra-curricula internship would fall to be permitted within the scope of a "No work" remark attached to a BRP. In our view, if this had been the intended result, it would have been set out explicitly, but it has not been. There is in our view a real and substantial difference between a non-assessed placement which is an integral part of a course of study, and an extra-curricular internship or placement.

25. For these reasons we conclude that the work placement engaged in by the Appellant was in breach of the conditions attached to the BRP.

26. We turn now to the Appellant's second ground which challenges the conclusion of the Tribunal in paragraph [29]. There the Tribunal stated that the rule applied by the decision maker was that at paragraph 321A which, the Tribunal concluded, contains no discretion. With regard to this it is clear from the terms of the decision recited in paragraph [15] above that in addition to paragraph 321A the decision maker also exercised a power under "*paragraph 2A(8) of the Immigration Act 1971*". We accept Mr Mold's submission that this is a reference to Schedule 2 to the 1971 Act. That provision states:

> "(8) An immigration officer ***may***, on the completion of any examination of a person under this paragraph, cancel his leave to enter".
>
> (Emphasis added)

27. The use of the expression "*may*" indicates the existence of a power. However, on the face of the impugned decision there is no acknowledgment of the existence of this power or its exercise and the conclusion to be drawn is that the decision maker failed to address the discretion; but rather treated the breach of the visa as leading inevitably to a negative decision. In this the respondent erred.

28. It follows also that the Tribunal erred in concluding that simply paragraph 321A of the Immigration Rules was applied because on the face of the decision paragraph 2A(8) of Schedule 2 to the Immigration Act 1971 was also applied.

29. Accordingly, even if, for the sake of argument, no discretion exists under paragraph 321A of the Immigration Rules then a discretion does arise under paragraph 2A (8) of Schedule 2 to the Immigration Act 1971 and the

decision maker erred in failing to consider whether that discretion should be exercised on the facts of the case. It is a trite principle of administrative law that a policy that is so rigid as to amount to a fetter on discretion is unlawful: see by way of example *R(Lumba) v SSHD* [2011] UK SC 12 at paragraph [21]; *Secretary of State for the Home Department v R(S)* [2007] EWCA Civ 546 at paragraph [50]; and see also *R(Thebo) v ECO Islamabad (Pakistan)* [2013] EWHC 146 (Admin) at paragraph [30].

30. In view of the facts and matters referred to and in particular those we have summarised at paragraph [21] above it was submitted to us that in the circumstances of the case the decision maker should have exercised her discretion to refrain from cancelling leave notwithstanding the breach of the conditions. We have concluded that the appropriate course given the error of law is to remit this case to the Secretary of State for reconsideration.

31. To this extent, the appeal is allowed and the matter is remitted accordingly to the Secretary of State in order to consider the exercise of her discretion under paragraph 2A (8) of Schedule 2 of the Immigration Act 1971.

Signed Date 22nd June 2015

Mr Justice Green