



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

Appeal Number: IA/36817/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 2 February 2015**

**Decision & Reasons Promulgated  
On 2 March 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**MUHAMMAD HASEEB ANWAR  
(ANONYMITY DIRECTION NOT MADE)**

**Appellant**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the Appellant: Mr Z Malik Counsel instructed by Mayfair Solicitors  
For the Respondent: Ms A Holmes, Home Office Presenting Officer

**DECISION AND REASONS**

**The Appellant**

1. The appellant is a citizen of Pakistan born on 11 August 1990 and on 12 June 2013 he applied for leave to remain in the UK as a Tier 4 (General) Student further to Paragraph 245 of the Immigration Rules HC 395, as amended.

2. He was first granted leave to enter the United Kingdom on 29 October 2009 as a student with a visa valid to 31 January 2011 and on 17 February 2011 he was granted further leave as a student until 23 May 2013.
3. He now applied for a visa to study at the European College for Higher Education for an extended Diploma in Management and Organisational Strategy. That application was refused on 31 July 2013.
4. The respondent stated that although his last successful visa application had been to study at Grafton College of Management Sciences he had supplied documents in support of his application from DVC College confirming that he had studied for a Diploma in Business Management from 14 March 2011 to 4 March 2013. As he was subject to Section 50 of the Borders, Citizenship and Immigration Act 2009 this prohibited him from studying at any other institution that the CAS checking service records as his sponsor. He had not complied with the conditions attached to his leave to remain and his present application was refused further to paragraph 322(3) of the Immigration Rules. He had not met the requirements of paragraph 245ZX(a).
5. Further, he had failed to provide Pearson website access to the UKBA to view his English test score and it was not accepted he had provided the specified documents under Appendix A. Although he had provided an immigration language test certificate from an approved English language test provider he had not provided the Pearson website access to verify the score and this document could not be accepted as evidence further to paragraph 245ZX(c).
6. In addition it was not accepted the appellant had established presence and he required to show he had the funds of £1,000 per month for nine months for himself. He had failed to provide this contrary to paragraph 245ZX(d) with reference to paragraphs 1A and 11 of Appendix C.
7. First-tier Tribunal Judge Mr K.St.J. Wiseman dismissed the appellant's appeal both under the Immigration Rules and on human rights grounds. He found at paragraph 35 the respondent offered no explanation for the refusal on the basis of funds as to why the appellant was being treated as a person without an established presence. He appeared to have finished a single course of at least six months' long within his last period of entry clearance and nothing else appeared to be required.
8. There was no challenge to the Judge's findings by the respondent in a Rule 24 response.
9. Further, the judge found that in relation to the respondent having access to the Pearson test results the appropriate reference was not given in the refusal letter or even mentioned in the skeleton argument. It was the appellant's case that the respondent should have been able to gain access to the appropriate information. The judge accepted that there was no evidence at all that anyone on behalf of the respondent even looked appropriately for the relevant information other than the assertion in the refusal letter. The judge accepted this was insufficient and that he would not have dismissed the appeal on this ground alone [38].

10. The judge turned to the submissions made in relation to Section 50 of the Borders, Citizenship and Immigration Act 2009 and at paragraph 245ZW(c)(iv)(1) of the Immigration Rules.
11. The judge recorded at paragraph 41 that the appellant told him that he studied for three days a week at the college in respect of which he was provided a CAS and for two days a week at another college altogether following an entirely different course; he may have had the best intentions in seeking some kind of double qualification but "I am afraid that this process failed utterly to produce the right result" [41].
12. At paragraph 42 the judge rejected the notion that the appellant had undertaken supplementary study and did not consider that:
 

"Studying for three days in one college and two days in another can possibly lead to the latter being described as 'supplementary' only; it is a virtually equal division of time. In addition, the guidance makes clear that the supplementary course should not interfere with the studies at the primary college and here the appellant in this case falls down completely; he failed his studies at his main college to the extent of not emerging with any qualification at all and somewhat bizarrely has only the qualification from is suggested supplementary college. All of this shows very clearly is that his studies at the supplementary college for two days must by definition have significantly interfered with his results at his primary college. He clearly needed to be spending all his time studying his main course to succeed."
13. As such the judge found the appellant clearly breached the terms of his visa and the refusal under paragraph 322(3).
14. In the application for permission to appeal it was argued that the judge at paragraph 43 of his determination construed the term supplementary studies erroneously. Applicants are not bound by mandatory requirements not set out in the Immigration Rules. It was argued that further to the Immigration (Leave to enter and remain) Order 2000 a condition should be endorsed on the appellant's passport. The entry clearance must be endorsed with (a) the conditions to which it is subject; or (b) a statement that it is to have effect as indefinite leave to enter the UK. It was argued that it was evident from the vignette endorsed on the appellant's passport there was no explicit requirement for him to study at a particular institute.
15. The requirement to study at a specific institute as at paragraph 245ZW(iv) did not mean that the condition was attached to the appellant's leave automatically.
16. Further, on a third and fourth ground, the judge failed to engage with the argument on behalf of the appellant as to paragraph 322(3) being of a discretionary nature where the respondent had failed to exercise discretion in this case Further to **Ukus (discretion when reviewable) [2012] UKUT 00307 (IAC)**.
17. A fifth ground challenged the approach to Article 8
18. At the hearing Mr Malik concentrated his argument on grounds three and four of the application for permission and requested to reserve his position in relation to Section

50. He accepted that I would follow the decision in **Bhimani (Student: Switching Institution: Requirements) [2014] UKUT 00516 (IAC)**. In effect where a student chooses to study at another institution holding a different sponsor licence number from that of the institution where he or she was granted leave to remain to study, he is required to make a fresh application for leave to remain. Judge Allen accepted that it was clear from Section 3(1)(c) of the Immigration Act 1971 that a person given limited leave to enter or remain in the UK may be given that leave subject to conditions which include the provisions inserted by Section 50 of the Borders, Citizenship and Immigration Act 2009, that is a condition restricting his studies in the UK and in effect that entry clearance in the case of a Tier 4 (General) Student will be granted subject to conditions including the requirement that the student is not allowed to study except at the institution which the Confirmation of Acceptance for Studies checking record service records as their sponsor.

19. However I also intend to follow paragraph 29 of Judge Allen's decision, that is the exercise of the discretion by the Secretary of State in relation to paragraph 322(3). As was the case in **Bhimani** it is clear that from a reading of the decision letter in this particular instance that it was the exercise of discretion was not undertaken and in accordance with the guidance in **Ukus**, in particular paragraphs 22(1) of that decision there is a failure by the Secretary of State having properly concluded that the appellant was in breach of the conditions of his leave to appreciate that she had a discretion to exercise and having so failed, failed to exercise it.
20. In the circumstance I do not address the challenge with reference to Article 8.
21. The judge's decision allowing the appeal in full is set aside and the decision is remade by a decision allowing it to the extent that it remains with the respondent to make a decision in accordance with the proper exercise of a discretion under paragraph 322(3) of HC 395.
22. Ms Holmes agreed with this course of action.

### **Notice of Decision**

23. The First-tier Tribunal made an error of law and his decision is set aside. I remake the decision and allow the appeal to the extent that it awaits a lawful decision from the Secretary of State.

No anonymity direction is made.

Signed

Date 27<sup>th</sup> February 2015

Deputy Upper Tribunal Judge Rimington