



IAC-FH-AR-V1

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

Appeal Number: IA/49487/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 27 November 2015**

**Decision & Reasons Promulgated
On 15 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

**MONOWER HOSSAIN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance

For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Kimnell promulgated on 8 July 2015, permission to appeal having been granted by Designated First-tier Tribunal Judge Zucker on 27 October 2015.
2. The Appellant is a citizen of Bangladesh born on 25 March 1992. He first entered the United Kingdom in October 2009 with entry clearance as a Tier 4 (General) Student valid until 30 June 2011. He obtained a grant of further leave from 2 February 2012 until 27 October 2012, and a yet further grant of leave from 23 February 2013 until 28 February 2015.

However on 13 June 2014 there was a decision to curtail his leave with effect from 17 August 2014. On 15 August 2014 he made an application for leave to remain as a Tier 4 (General) Student. That application was refused on 20 November 2014 and a Section 47 removal decision was also made.

3. The application for further leave to remain was refused with reference to paragraph 245ZX(o) of the Immigration Rules on the basis that the Respondent was not satisfied that the Appellant was a genuine student able to pursue his proposed course. The Reasons for Refusal Letter also made reference to paragraph 322(3) with reference to paragraph 245ZY(c) (iv) of the Immigration Rules - that the Appellant had breached his conditions of leave by pursuing a course that he had not been authorised to pursue.
4. The Appellant did not attend the hearing before the Upper Tribunal today. Although there is on file correspondence from solicitors dated 15 October 2015 indicating that they have been instructed to act on the part of the Appellant in these proceedings and inviting correspondence to their address, no further communication has been received from the Appellant or his representatives by way of documentation in the appeal; nor has any indication been given as to reasons for not attending the hearing today.
5. Mr Walker, however, is able to tell me that the Home Office records in respect of the Appellant reveal that he recently contacted the Respondent indicating that he wished to leave the United Kingdom. Mr Walker has produced the extracts from the Respondent's computerised CID notes which indicate that on 23 November 2015 an email was received from the Appellant saying that he would "*like to withdraw my application*" and that he had "*decided to go back home*". The email otherwise refers to him having identified an available ticket for 2 December and requesting to have his documents including his passport returned to him, and asking if in such circumstances it will be all right for him to go ahead to book the ticket for 2 December.
6. Necessarily the email does not constitute evidence that the Appellant has yet departed from the United Kingdom, and in those circumstances his application and appeal cannot be considered to have lapsed by reason of such departure. Nor is there any express communication from the Appellant to the Tribunal indicating that he wishes his appeal to be considered as withdrawn. In those circumstances I continue to be seized of a valid appeal, and it is necessary therefore to proceed with it.
7. I am prepared to proceed with the appeal in the absence of the Appellant given that he has offered no explanation for his non-attendance and in any event, because it appears likely in light of the communication to the Secretary of State, that he does not wish to participate in the appeal hearing.
8. Notwithstanding the Appellant's non-attendance, I am of the view that the decision of the First-tier Tribunal must be set aside for error of law. As identified above, there were broadly two issues before the First-tier

Tribunal Judge, the first in respect of whether the Appellant was a genuine student and the second in respect of whether the Appellant had been in breach of his conditions of leave such that paragraph 322(3) was engaged.

9. The First-tier Tribunal Judge found in favour of the Appellant in respect of the first issue but found against him in respect of the second issue. However, what the First-tier Tribunal Judge appears to have overlooked is that paragraph 322(3) of the Immigration Rules does not provide for a mandatory basis of refusal but only a discretionary basis of refusal. There has been no consideration of that discretion. It is perhaps understandable that the Respondent's decision maker did not give any specific consideration to the discretionary nature of that paragraph in circumstances where it was then considered that the Appellant failed under the Rules in any event. However, once the Judge had rejected the Respondent's premise that the Appellant failed under the Tier 4 Rules, the discretion under paragraph 333(3) was not only at large but vital to the outcome of the Appellant's appeal. It is also the case that necessarily such discretion required to be looked at by the First-tier Tribunal on the premise that the Appellant had been found to be a genuine student.
10. In those circumstances it seems to me that the First-tier Tribunal Judge has erred in law and that the decision in the appeal must therefore be set aside and remade to the extent that the decision is remitted to the Secretary of State to consider the discretion under paragraph 322(3), the decision otherwise not being in accordance with the law.
11. There is a further matter that has caused me some hesitation today in the best way of dealing with the appeal in the unfortunate circumstance of the Appellant not seeming to wish to participate. The issue in respect of the breach of condition related to the Appellant having pursued a course at Opal College in circumstances where he was present in the UK pursuant to leave granted on the basis of a CAS in respect of West End College. It was the Appellant's case before the First-tier Tribunal that the course at Opal College was a supplementary course and thereby permitted pursuant to paragraph 245ZY(c)(iv) of the Immigration Rules. The Judge concluded that it was not a supplementary course, and that the Appellant had in fact pursued the course at Opal College *instead* of the course at West End College.
12. On the face of it that is a finding of fact properly within the jurisdiction of the Judge on all of the available evidence. The finding that the Appellant pursued the one course "*instead of*" the other course is not expressly a finding of fact challenged in the grounds in support of the permission to appeal, rather the challenge is based upon the definition of 'supplementary course'.
13. To that extent there is no direct challenge validly before me in respect of that finding. I cannot help observe, however, that the Appellant had not only previously secured a CAS in respect of a course at West City College, such CAS being assigned on 24 October 2012 on the basis in part of a course completion letter from West End College (see Respondent's bundle

at Annex E2), but that such a document appeared to have been before the First-tier Tribunal in the Appellant's bundle at page 15. At page 15 there is a course completion letter dated 3 August 2012 confirming that the Appellant had completed the course at West End College.

14. In the absence of an express rejection of that letter as in some way being untruthful, it is not clear on what basis the First-tier Tribunal Judge was able to reach the conclusion that the Appellant had not pursued the course at Opal College (which culminated in a diploma award in August 2012) in parallel with the course at West End College, rather than instead of. Such a possible error of fact might be germane to the issue of whether or not the course at Opal College was indeed supplementary to the course at West End College rather than being pursued instead of it.
15. Be that as it may, it seems to me that I do not have an express challenge in this regard, and in the absence of the Appellant's attendance I am not minded, as it were, to 'make the case' for him. It seems to me that these are matters that may properly be looked at again in the event that the Appellant decides that, notwithstanding his indication to the Secretary of State that he wishes to leave the United Kingdom, he nonetheless now wants to remain in the United Kingdom to pursue further matters.
16. In those circumstances I am content to determine the appeal on this basis: the decision of the First-tier Tribunal Judge is set aside for error of law in respect of paragraph 322(3); the decision in the appeal is remade; the Respondent's decision was not in accordance with the law for a failure properly to consider the discretionary nature of paragraph 322(3), and accordingly the appeal is allowed to the extent that it is remitted to the Secretary of State.
17. Of course if the Appellant departs the United Kingdom in the next few days then his application will lapse. If he does not and the Secretary of State goes through the process of looking at the case again in respect of paragraph 322(3), necessarily the Secretary of State will take as a premise that the First-tier Tribunal Judge found that the Appellant was a genuine and capable student and the Secretary of State may wish to look again at the issue of breach of conditions in light of the observations that I have made herein.

Notice of Decision

18. The decision of the First-tier Tribunal Judge contained a material for error of law and is set aside.
19. I remake the decision in the appeal. The Respondent's decision was not in accordance with the law for a failure properly to consider the discretionary nature of paragraph 322(3). The appeal is allowed to the extent that it is remitted to the Respondent who must now determine the Appellant's application in accordance with the law.
20. No anonymity direction is sought or made.

The above represents a corrected transcript of an ex tempore decision given at the conclusion of the hearing.

Signed

Date: 14 January 2016

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

I have allowed the appeal. However, I make no fee award because the basis upon which the appeal has been allowed is limited and does not reflect the basis of the Appellant's case as advanced before either the First-tier Tribunal or the Upper Tribunal. Moreover the Appellant's interest in pursuing the appeal is unclear.

Signed

Date: 14 January 2016

Deputy Upper Tribunal Judge I A Lewis