



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

Appeal Number: IA/16188/2013

THE IMMIGRATION ACTS

**Heard at : Field House
On : 20th December 2013**

**Determination Promulgated
On : 31st December 2013**

Before

Upper Tribunal Judge McKee

Between

ILESHKUMAR JAGDISHBHAI PATEL

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Zane Malik, instructed by Malik Law Chambers
For the Respondent: Mr T. Wilding of the Specialist Appeals Team

DETERMINATION AND REASONS

1. Having initially arrived in the United Kingdom with entry clearance as a student, the appellant made an in-time application for leave to remain as a Tier 4 Migrant, and on 19th August 2010 the Border Agency sent a letter to his solicitors, Malik Law Chambers, with the news that their client's Biometric Residence Permit was on its way under separate cover. This, it was explained, "*is a residence permit which holds your client's biographic and biometric information and shows their immigration status and entitlements*", replacing the vignette or ink stamps which used to be placed in

migrants' passports to show that they had leave to remain. The letter also informed the representatives that their client had permission to undertake an Advanced Diploma in Business Management at William Shakespeare College.

2. A leaflet was attached to the letter which, it was said, "*explains the conditions of your client's stay whilst in the United Kingdom.*" The Residence Permit itself duly arrived, bearing the same date of issue as the letter (19th August 2010) and valid until 20th August 2012. The size of a credit card, the permit only has limited space for written information to be imprinted upon it. Under the heading 'Type of Permit' we read "T4 GENERAL STUDENT LEAVE TO REMAIN", while under the heading 'Remarks' we read "WORK 20 HRS MAX IN TERM-TIME". There is plainly little room on the card for any further information, and it would be surprising if the card was intended to tell the holder all he needed to know about his leave to remain as a student. Indeed, the information leaflet enclosed with the Border Agency's letter to Malik Law Chambers would have been unnecessary if the card said all there was to say. But as we shall see below, it is now argued that the card was the sole repository of any conditions which could effectively be attached to Mr Patel's leave to remain.
3. Before the expiry of this leave, the appellant applied to vary it, indicating that he had been pursuing studies at Kingston College of IT & Management from June 2010 to July 2012. The application was refused, on the ground that Mr Patel had contravened paragraph 245ZY(c)(iv) of the Immigration Rules, which stipulates "*no study except (1) study at the institution which the Confirmation of Acceptance for Studies Checking Service records as the migrant's Sponsor.*" This was said to trigger one of the General Grounds for Refusal, namely paragraph 322(3), "*failure to comply with any conditions attached to the grant of leave to enter or remain.*" Reference was made to section 50 of the Borders, Citizenship and Immigration Act 2009, which inserted a new s.3(1)(c)(ia) into the Immigration Act 1971, namely "*a condition restricting his studies in the United Kingdom.*"
4. The application was also refused on the ground that Mr Patel had not fulfilled all the requirements for demonstrating that he had attained level B2 in English. This ground of refusal was overturned, however, when the subsequent appeal came before the First-tier Tribunal, and as this outcome has not been challenged, I need say no more about it. A simultaneous decision was taken to remove Mr Patel under section 47 of the 2006 Act, but as the decision was taken before the amendment to section 47 permitted such a course from 8th May 2013, the Presenting Officer withdrew it at the hearing at Hatton Cross on 7th October 2013. Judge Doran did, however, dismiss the appeal on the other ground. Because the appellant had switched to a different college from the one recorded by the CAS Checking Service when he was granted leave to remain in August 2010, he had failed, said the judge, to comply with a condition of his leave "*and therefore did not meet the requirements of paragraph 245ZX(a) [which stipulates that the applicant must not fall for refusal under the General Grounds] and 322(iii) [322(3) is intended].*" Judge Doran also dismissed the appeal on human rights grounds, and although this featured in the grounds for seeking leave to appeal to the Upper Tribunal, leave was not granted on this issue, and it has not been pursued further.
5. The only ground on which Judge Robertson granted leave to appeal was that the First-tier Tribunal had arguably treated a discretionary ground of refusal under Part 8

of the Rules, namely paragraph 322(3), as if it were mandatory. When the appeal came before me, however, Mr Malik ~ relying on *Ferrer (limited appeal grounds; Alvi)* [2012] UKUT 304 (IAC) ~ sought to revive another ground on which leave had not been granted, namely that the appellant was not actually subject to a condition interdicting him from studying with a sponsor other than the one recorded by the CAS Checking Service. I was content to hear argument on this, and Mr Malik did indeed deploy his customary ingenuity in setting out a case which was stoutly resisted by Mr Wilding. At the close of submissions, however, it seemed to me that Judge Robertson had got it right, and that the First-tier determination was open to criticism only on the point about the discretionary nature of rule 322(3).

6. The statutory basis for the disputed condition is s.3(1)(c)(ia) of the 1971 Act, which talks about a condition “*restricting*” a person’s studies in the United Kingdom. That cannot just mean, as argued in the grounds of appeal, restricting the duration of a person’s studies. The plain and natural meaning of the word extends to the course of studies which the person is pursuing, and the institution at which he is pursuing them.
7. Mr Malik sets greater store by the Immigration (Leave to Enter and Remain) Order 2000, which stipulates at Article 3 that, if an entry clearance is to take effect as leave to enter, it “*must specify the purpose for which the holder wishes to enter the United Kingdom*” and “*must be endorsed with (a) the conditions to which it is subject.*” By the same token, contends Mr Malik, the residence permit issued to Mr Patel must have been endorsed on its face with any conditions to which his leave to remain was subject. The only condition appearing on the residence permit is a restriction on working more than 20 hours per week during term-time. No condition was therefore imposed on Mr Patel, which would be breached by his switching to a different sponsor.
8. This contention depends upon reading into the 2000 Order (or into some other document, for the order itself is completely silent on the subject) a requirement that leave to remain, in order to be effective, must be endorsed with the conditions to which it is subject. This argument by analogy is simply not tenable. One cannot define leave to remain by analogy with leave to enter. The two are different. The 2000 Order made a significant change to the nature of entry clearance, expanding it from a travel document valid for six months, to a pre-arrival grant of leave to enter, such as previously could only be given by an immigration officer at the port. The 2000 Order deals with the consequences of this, and the only change it makes in respect of leave to remain is to stipulate that leave of more than six months shall no longer lapse on the holder’s departure from the United Kingdom. Nothing is said about the *grant* of leave to remain.
9. There is accordingly no need to accept Mr Malik’s argument that the Biometric Residence Permit issued to Mr Patel contains all the conditions to which his leave to remain was subject. Its principal purpose, as the letter of 19th August 2010 states, is to show the holder’s immigration status and entitlements. The reader can immediately see that the holder is a student, while a prospective employer can tell whether he can lawfully employ the student during term-time. If Mr Malik is right, and the residence card itself is the only proper source of information about what the holder is entitled to do, then Mr Patel was only allowed to work for 20 hours each term. The card does not say 20 hours *per week* (it does not even say hours, but *hrs*).

What is written under 'Remarks' on the card is a shorthand summary of the condition which is likely to be most important to the student in practical terms. The employer and the student must learn from another source (which is readily available) that degree-level students are allowed to work for 20 hours a week during the term, and full-time during the vacation.

10. The letter sent to Malik Law Chambers was accompanied by a leaflet giving much more information, in a simplified form, about what the grant of leave allowed or forbade Mr Patel to do – information which he could have gleaned, but with more difficulty, from the Immigration Rules governing his leave. For example, he is told that he cannot claim public funds. That is not endorsed on his residence permit, but it has not been suggested that, because of this omission, Mr Patel was entitled to have recourse to public funds. In the same vein, Mr Patel is told that he is restricted to studying at the institution which issued his CAS, and that if he wants to change to a different sponsor, he should make a fresh application. The leaflet makes it clear that it is for information only and does not convey the grant of leave, but the information does convey in simple form the requirements of the Rules for students, which were binding on Mr Patel. The fact that those requirements could not all be squeezed onto the residence card does not mean that they were of no effect. What was mentioned on the residence card under the heading 'Remarks' cannot sensibly be taken to specify all the conditions to which the holder was subject.
11. It follows that the unauthorised switch by Mr Patel from William Shakespeare College to Kingston College was indeed a breach of one of the conditions of his leave. He had enrolled with William Shakespeare College in April 2010, and the CAS issued to him by that college enabled him to win a pending appeal in June 2010. There followed in August, as we have seen above, the grant of leave to remain in order to study at William Shakespeare College. But Mr Patel had already moved to Kingston College, having become dissatisfied with William Shakespeare College. In his Witness Statement of 2nd October 2013, Mr Patel says that, having previously switched sponsors twice without getting into any trouble over it, he was unaware of the need to apply to the UKBA for a change of sponsor, and that Kingston College did not advise him to do so. Nevertheless, the requirement is there at Part 6A of the Immigration Rules.
12. What was clearly not appreciated by Judge Doran when dismissing the appeal was that breach of such a rule does not automatically lead to the refusal of further leave. As Part 9 of HC 395 makes plain, that is the normal consequence. But the decision-maker has a discretion to waive the breach, while a First-tier judge must allow an appeal under s.86(3)(b) of the 2002 Act if he thinks that a discretion under the Rules should have been exercised differently. In a Rule 24 Response to the grant of permission in the present case, the Specialist Appeals Team invited the Upper Tribunal to remit the matter back to Judge Doran "*to rectify her (sic) decision by considering whether the respondent should have exercised her discretion differently in respect of the general ground for refusal under paragraph 322(3).*" This invitation was discussed by the representatives before me, and in the end we reached the following position.
13. As explained in *Ukus (discretion: when reviewable)* [2012] UKUT 307 (IAC), helpfully handed up by Mr Malik, there has to be an exercise of discretion by the respondent

before a First-tier judge can consider whether to exercise the discretion differently. It is clear from the decision letter in the instant case that it simply did not occur to the decision-maker that there was a discretion to be exercised. There had been a contravention of rule 245ZY(c)(iv), and that was that. So the appropriate course must be to remit the matter, not to the First-tier Tribunal, but to the Secretary of State, for her to consider whether the appellant's breach of condition merits the refusal of his application for further leave to remain as a Tier 4 Migrant. It will be open to Mr Patel to supplement his explanation for not applying to the Home Office for approval of his change of sponsor, summarised at paragraph 11 above, and to draw to the attention of the Secretary of State any further information which might assist her in exercising her discretion.

DECISION

There has been an error of law on one aspect of the First-tier determination, and to that extent the decision on the appeal is re-made by the Upper Tribunal. The appeal is allowed to the limited extent that the decision to refuse to vary the appellant's leave was not in accordance with the law, such that the application for further leave is outstanding before the Secretary of State, and awaits the exercise of her discretion under the Immigration Rules.

Richard McKee
Judge of the Upper Tribunal

29th December 2013