



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

Appeal Number: IA/49562/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 11 December 2014**

**Determination Promulgated
On 15 December 2014**

Before

Deputy Upper Tribunal Judge Pickup

Between

**Hemal Arvindbhai Suthar
[No anonymity direction made]**

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr S Karim, instructed by MA Consultants
For the respondent: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Hemal Arvindbhai Suthar, date of birth 14.5.89, is a citizen of India.
2. This is his appeal against the determination of First-tier Tribunal Judge Dean promulgated 2.9.14, dismissing his appeal against the decision of the respondent, dated 6.11.13 to refuse his application for leave to remain as a Tier 4 student. The Judge heard the appeal on 20.8.14.

3. First-tier Tribunal Judge Hollingworth granted permission to appeal on 17.10.14.
4. Thus the matter came before me on 11.12.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Dean should be set aside.
6. The relevant background to the appeal can be summarised as follows. The appellant was last granted leave following his application on 11.1.12 for entry clearance as a Tier 4 (General) Student migrant, with leave to study at South Thames College (STC). His leave was limited to 7.6.13. However, the appellant did not study at STC but on 14.3.12 began a course of study with London College of Business Management (LCBM).
7. His application for further leave to remain drew to the attention of the Secretary of State that he had changed colleges without permission and as of 7.6.13 was studying at LCBM. Section 50 of the Borders Citizenship and Immigration Act 2009 prohibits a student from study other than at the institution that the Confirmation of Acceptance for Studies (CAS) records as his sponsor. If he decides to switch colleges, he is required to make a fresh application for leave to remain. Having failed to do so, the application was refused under paragraph 322(3) with reference to paragraph 245ZW(c)(iv), on the basis of failure to comply with a condition of his leave.
8. Judge Dean found that the appellant had failed to comply with a condition of his leave and dismissed the appeal.
9. In granting permission to appeal, Judge Hollingworth found, "An arguable error of law has arisen in relation to the application of the doctrine of fairness. An arguable error of law also arises in the context of proof of the conditions actually imposed in the light of the Judge's references to the position at paragraphs 11 and 13 of the determination."
10. The grounds of application for permission to appeal assert that section 50 only provides that conditions restricting studies may be imposed and thus it is for the Secretary of State to prove that there was such a condition on the appellant's licence. Given reliance on the discretionary ground under paragraph 322(3) to refuse the application and the assertion that the appellant had breached a condition of his licence, it is for the Secretary of State to demonstrate not only that there was a breach but that the discretion had been exercised to rely on paragraph 322(3). Thus it is submitted that the judge was in error to state that the burden of proof was on the appellant.

11. It is further submitted that the judge was in error to rely on the Tier 4 Guidance, which did not have the force of law, following Alvi and Pankina. Finally, it is asserted that the judge failed to take into account the principle of fairness arising from LCBM allowing him to study at their college when he was in alleged breach of leave, especially when they issued a letter stating that no visa was required.
12. The Rule 24 response, dated 20.11.14, asserts that the refusal was in accordance with the Rules, the appellant having changed colleges without permission and that he should have made a fresh application. The case of Afzaal [2014] EWCH 2215 (Admin), in particular at §40 to §47, makes it clear that such restrictions are routinely and normally imposed.
13. Mr Karim drew my attention to the case of Bhimani (Student: Switching Institution: Requirements) [2014] UKUT 00516 (IAC), where Upper Tribunal Judge Allen held that where a student chooses to study at another institution holding a different sponsor licence number from that of the institution where he was granted leave to remain to study, he is required to make a fresh application.
14. The situation of the appellant in that case was very similar to the appellant. It was when applying for further leave to remain that the appellant provided an academic transcript showing he had been studying at a different college to the one for which he had been granted leave for study. The application in Bhimani was also refused under paragraph 322(3). The First-tier Tribunal Judge in that case found there was no evidence that a condition restricting institution of study had been attached to the appellant's leave and therefore concluded that the decision was not in accordance with the law and had to be set aside. The judge also found, in the alternative, that the language used in the refusal decision did not demonstrate that the decision-maker appreciated that there was a discretion and it had not been shown that the discretion had been exercised. The appeal was allowed.
15. On appeal to the Upper Tribunal, Judge Allen held that when granted leave conditions may be imposed under section 3(3)(a) of the Immigration Act 1971. The effect of paragraph 245ZW(c)(iv)(1) is that leave granted to 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 CAS records as their sponsor. The judge pointed out that the entry clearance reference is the CAS number and this should be read as the endorsement of a condition to which leave is subject, i.e. study at the college in respect of which the CAS is the reference. Judge Allen thus concluded that the Secretary of State made a lawful refusal of the application, subject to the issue of the exercise of discretion under paragraph 322(3). On the facts of that case, Judge Allen concluded that this had not been done, and that there had been a failure by the Secretary of State to appreciate that,

having properly considered that the appellant was in breach of condition, she had a discretion to exercise but failed to exercise it. For the reasons set out below, I reach a different conclusion on that issue on the facts of the appeal before me.

16. In Afzaal R (on the application of) v SSHD [2014] EWHC 2215 (Admin), the High Court in Judicial Review Proceedings considered the issues raised there that there was no valid condition imposed on the leave to enter so as to prevent study at a different institution, and that the Secretary of State had failed to exercise her discretion when refusing the application. Paragraph 245ZW sets out that entry clearance will be granted subject to a series of listed conditions, one of which is in effect a restriction on study other than at the institution named in the CAS. The court concluded that the vignette included a condition restricting study to the particular sponsor listed in the CAS and thus the appellant was in breach of condition. The court, as did Judge Dean, also pointed out the requirement to make a fresh application is set out in the Tier 4 Guidance.
17. In Afzaal, the court rejected the argument that the decision was unfair because the breach was not brought to the attention of the appellant before concluding to refuse the application. The court found that the requirements were clearly set out in both the rules and the guidance. The court found it wholly unsurprising that where clearance is granted to an applicant to study at a particular college for a specific period of time, that clearance does not permit the applicant to study elsewhere, or not to study at all. The court found nothing in that ground of appeal.
18. In Afzaal, the final ground of appeal was that the refusal decision did not expressly refer to the exercise of the Secretary of State's discretion whether or not to refuse further leave to remain. The guidance makes it clear that discretion should be considered in every case. "In my judgement in the present case, there is nothing to suggest that a discretion was not considered. The absence of specific reference in the decision letter is consistent with the fact that no grounds were advanced in support of a grant of further leave as a matter of discretion. In my judgement, accordingly, there is nothing to support this ground of challenge which accordingly fails." The application for judicial review was refused.
19. The vignette for the appellant in the present appeal also contains a reference number of the CAS. It follows that there was a condition prohibiting study elsewhere than the sponsor issuing the CAS on which entry clearance was granted. It is obvious that the appellant was in breach of condition by studying with a different sponsor. He should have made a fresh application. He did not do so. There is nothing unfair about applying the clear rules, especially when it is clearly explained in the Guidance.

20. Having read the refusal decision, whilst it makes no mention of the exercise of discretion in refusing the application under paragraph 322(3), it was in virtually identical terms to that in Afzaal. The appellant had put forward no particular reason why his application should be considered exceptionally, or put another way why the Secretary of State should exercise discretion in his favour. He cannot complain to have been taken by surprise that he was in breach of his leave, merely on the basis that he claims to have been ignorant of the requirement of the Rules and explained in the Guidance. There is nothing to suggest that the Secretary of State did not exercise discretion. Indeed, it might well be considered that the discretion was exercised by refusing the application instead of granting it. That appears to be consistent with the Guidance that discretion should be considered in every case. If the Secretary of State had set out that she had decided to exercise her discretion in the circumstances to refuse the application, there would be no difference in the outcome just because of that wording. But a moment's thought would conclude that if the Secretary of State had properly exercised her discretion, there was no reason before her not to refuse the application, and every reason to do so, because the appellant was in breach of condition. Put another way, nothing in the facts before the Secretary of State would have justified exercising the discretion to allow the appeal.
21. As did Judge Dean, one might well question whether LCBM was a competent sponsoring institution and must have known that a fresh application is necessary and that they had not issued the appellant's CAS for entry clearance. In the circumstances, there is no unfairness on the part of the Secretary of State. If the appellant has a complaint, it is against LCBM and not the Secretary of State who cannot be held responsible for the apparently incompetent advice given to the appellant. At §18 Judge Dean noted that there was no evidence from LCBM to confirm the advice given to the appellant.
22. I also note that in this case there were other reasons for refusal by the Secretary of State, set out in the letter of 6.11.13.

Conclusion & Decision:

23. Although the path may be somewhat different to that taken by Judge Dean, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.



Signed:

Date: 12 December 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.



Signed:

Date: 12 December 2014

Deputy Upper Tribunal Judge Pickup