



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/32663/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 18 July 2017

Decision & Reasons Promulgated  
On 24 July 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

KIRAN MAGAR  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Smeaton of Counsel instructed by Charles Simmons Solicitors  
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Lagunju promulgated on 23 November 2016 dismissing the Appellant's appeal against a decision of the Respondent dated 7 November 2014 refusing him leave to remain and making a removal decision pursuant to section 47 of Immigration, Asylum and Nationality Act 2006, The appeal before the First-tier Tribunal was decided without a hearing.
2. The Appellant is a citizen of Nepal born on 22 September 1987. On 30 May 2014 he made an application for leave to remain as a Tier 4 (General) Student migrant. On 9 October 2014 the Appellant was interviewed in connection with his application. A record of the interview is to be found at Annex E of the Respondent's bundle before the First-tier Tribunal.

3. In the course of the interview the Appellant was asked about his financial circumstances and indicated, amongst other things, that his parents had paid £3,500 for his current course and that he was also sent £100 - £200 every month by his father. The Appellant was asked if he had undertaken any paid work in the UK since his last grant of leave to which he answered 'yes'. He was then asked about the nature of this work: the full extent of the reply recorded is in these terms, "*I was in charge of my relative's pub in Reading. I did it for one month. He paid me in national insurance*". The interviewing officer in the concluding parts of the interview pro forma was required to indicate an opinion as to whether the Appellant had been credible at interview: the interviewing officer records 'no' by way of answer. Immediately beneath is a heading 'Recommendation summary'. The interviewing officer wrote this:

*"Although he does appear to be a genuine student it is highly probable that he is working more than he has claimed since it would not be possible to live on only £100-£200 per month and an inexperienced person would be unlikely to be able to manage a pub for a full month."*

4. It is to be noted in the latter context that there was no apparent attempt at the interview to explore in any detail with the Appellant what 'being in charge' of his relative's pub had involved and the extent to which he had had any assistance from other members of staff. As regards the Appellant's financial circumstances there was no exploration of his living costs.
5. The Respondent then made a decision on the Appellant's application and refused it for reasons set out in a combined 'reasons for refusal' letter and notice of immigration decision dated 7 November 2014 ('the RFRL'). The Appellant was awarded the requisite points in respect of the Tier 4 points-based system with regard to both 'Attributes' (by reference to a valid Confirmation of Acceptance for Studies), and in respect of 'Maintenance (Funds)'. However, his application was refused with reference in particular to paragraph 245ZX(o) of the Immigration Rules.
6. The Respondent noted the following features of the case in the RFRL. The Appellant had admitted at interview to having worked, and it was noted how much regular income the Appellant had indicated at interview. It was also noted that the Appellant's last grant of leave did not allow him to work in the United Kingdom. It was observed that if the Appellant were to be granted leave to remain in the capacity sought in his application he would be prohibited from taking employment in accordance with the condition that would be imposed on his leave by virtue of paragraph 245ZY(c)(iii).
7. The Respondent expressed the view that she was not satisfied that the Appellant was "*genuinely able to support [him]self without attempting to work in breach of the conditions of [his] leave*", before concluding in these terms: "*The Secretary of State has therefore refused*

*your application because she is not satisfied that you are a genuine student as provided in paragraph 245ZX(o) of the Immigration Rules”.*

8. It is to be emphasised that the basis of the Respondent’s decision was not a past breach of conditions but rather the conclusion that the Appellant was not a genuine student. That conclusion appears to have been reached on the basis of the concerns in respect of the Appellant’s financial circumstances and the admission that he had been working in breach of his conditions.
9. It may readily be appreciated that the conclusion expressed in the RFRL runs contrary to the ‘Recommendations summary’ of the interviewing officer who had expressed the view that the Appellant appeared to be a genuine student. It is of course the case that many students work alongside their studies, and indeed certain categories of students under the Immigration Rules are expressly granted permission to work, albeit for limited hours. It may be thought, therefore, that the mere fact of undertaking employment is not inevitably a reliable indicator of the genuineness or otherwise of an individual’s intentions with regard to their studies.
10. It might also be suggested - as indeed is hinted in the grant of permission to appeal - that there is an element of logical inconsistency between the awarding of points under the ‘Maintenance’ requirement, and the conclusion that the Appellant could not support himself without working. At first blush it seems to me that there was not an inevitable logical inconsistency with the awarding of points and a conclusion that a person could not maintain themselves without taking unauthorised employment: in order to secure points it is only necessary to demonstrate that a certain level of funds is held in a bank account for a certain period of time, and it may well be that the ability to hold such funds is a consequence of unlawful employment. However in this context my attention has been directed by Ms Smeaton to Appendix C of the Immigration Rules at paragraph 1A(d) in respect of evaluating funds under the maintenance requirements: *“if the funds were obtained when the applicant was in the UK the funds must have been obtained while the applicant had valid leave and was not acting in breach of any conditions attached to that leave.”* It follows that there may indeed therefore be some weight to an argument that if the decision-maker had had proper and due regard to the Rules - including paragraph 1A(d) of Appendix C - the awarding of points for ‘Maintenance (Funds)’ was indicative of the decision-maker being satisfied that the Appellant had secured such funds without having boosted them through employment in breach of conditions.
11. Be that as it may, the Appellant pursued an appeal to the Immigration and Asylum Chamber. His appeal was dismissed for reasons set out in the decision of First-tier Tribunal Judge Lagunju.

12. Permission to appeal was sought: in the first instance it was refused by First-tier Tribunal Judge Dineen on 27 April 2017, but was subsequently granted by Upper Tribunal Judge Lindsley on 5 June 2017.
13. In my judgment the First-tier Tribunal Judge erred in that he has failed to identify the basis of the Respondent's decision.
14. The First-tier Tribunal Judge mischaracterises the Respondent's decision at paragraph 2 of his own Decision. The Judge states: "*The respondent refused the application on the basis that the appellant failed to meet the requirements of paragraph 245ZX(c), in that, he engaged in unauthorised employment*". As may be seen from the recitation set out above the basis of the Respondent's decision was not paragraph 245ZX(c) but paragraph 245ZX(o), and the fundamental basis of the decision was not specifically that the Appellant had engaged in unauthorised employment but that the Appellant was considered not to be a genuine student. The Judge has cited the wrong paragraph of the Rules and the wrong basis of the Respondent's decision.
15. There is some further confusion in the First-tier Tribunal Judge's Decision at paragraph 8, wherein the wrong paragraph is cited in respect of the imposition of conditions of leave on the Appellant's past leave and indeed likely future leave were his application to have succeeded. It is also erroneously stated therein that the Appellant had previously had limited permission to work, whereas in reality he had no permission to work at all. Whilst this is not in itself a material error - if anything it is an error in favour of the Appellant - it nonetheless reinforces the notion that the Judge failed properly to understand the basis of the Respondent's decision.
16. The Judge's reasoning essentially comes down to that set out at paragraphs 10-11 of the Decision:
  10. *Given the appellant's admission and the respondent's conclusions taken from the appellant's answers in interview, I find the respondent has shown that the appellant did at some stage work in breach of the terms of his visa and the employment he undertook does not fall within any of the categories outlined in paragraph 245ZY(c).*
  11. *Accordingly I find the appellant fails to meet the requirements of the Immigration Rules."*
17. It is clear that the Judge, having identified at paragraph 2 that he thought the issue was merely in respect of the breach of condition, and having then concluded that

there had been a breach of condition, considered that breach to be determinative of the appeal. This was singularly to fail to address the real basis of the Respondent's decision - the allegation that the Appellant was not a genuine student. Accordingly, the Judge's error in mischaracterising the nature of the Respondent's decision meant that the Judge did not address the issue in the appeal. Manifestly it cannot be said that the mere fact of breach would support a conclusion that the Appellant was not a genuine student, and to that extent this Decision cannot be 'saved' by any sort of inference from the Judge's conclusion. In those circumstances I have little hesitation in concluding that the decision of the First-tier Tribunal Judge is vitiated for error of law and must be set aside.

18. I have discussed with the representatives today the way forward in respect of remaking the decision in the appeal.
19. Ms Smeaton urges me to take note of the inadequacy of the Respondent's reasoning in the RFRL together with the contrasting favourable observation of the interviewing officer in respect of 'genuineness', to note the Appellant's evidence in respect of finances both in his witness statement and the supporting witness statements of his relatives, to take note of what he said in his witness statement with regard to his history of study in the UK and to conclude on a balance of probabilities that the Appellant is a genuine student.
20. Mr Whitwell on behalf of the Respondent suggests that there is in fact only very limited evidence before the Tribunal of the Appellant's history of studies, and indeed it is primarily by way of his own assertions in his witness statement bolstered by the circumstantial fact that he has previously been granted successive periods of leave as a student. It is highlighted, however, that the Appellant has not produced any specific evidence in relation to his studies: I do indeed note that there is an absence of any supporting materials from any of the institutions at which he has previously studied and an absence of materials such as coursework or other documents that one might reasonably expect a genuine student to collect in the course of studies. Whilst I note in this regard it is suggested that a number of the institutions that the Appellant has studied at may have since closed because he has found himself at more than one institution where the Sponsor's licence was revoked by the Respondent, it seems to me that such a circumstance does not mean that the Appellant would not have his own record of his contact with those various institutions during his studies and might reasonably be expected to have retained some of his coursework. Mr Whitwell also notes that the decision of the First-tier Tribunal was made 'on the papers' and that in all of the circumstances the most appropriate way of proceeding is to remit the matter back to the First-tier Tribunal so that there can be a proper adjudication on the key issue in the case which was not at all addressed by the First-tier Tribunal Judge.

21. I am not unsympathetic to Ms Smeaton's position. It does seem to me that there is a lack of rigour in the reasoning of the Respondent in the RFRL. However, it does not follow that the lack of rigour in the Respondent's reasoning means that the Appellant is indeed a genuine student; ultimately the burden to show as much is upon him. The issue has been raised, and it is for the Appellant therefore to satisfy the Tribunal in this regard. I do not consider it would be appropriate to reach a conclusion on the basis simply of the available documentary and written evidence without affording both parties the opportunity of exploring the matter by way of oral hearing. Accordingly, in those circumstances, I have reached the conclusion that the most appropriate way of progressing the Appellant's appeal is that it now be remitted to the First-tier Tribunal to be considered at an oral hearing before any Judge other than First-tier Tribunal Judge Lagunju with all issues at large.
  
22. The Appellant may indeed now wish to file further evidence in respect of his studies that goes beyond the evidence already filed in respect of his finances - and includes materials in relation to his past studies - with a view to establishing his genuineness as a student. I am not going to make any specific directions in this regard, but the Appellant is now on notice of the matter being raised and will be aware that it is open to the First-tier Tribunal to take its own view independently in consequence of any materials that are, or are not, forthcoming - including possibly drawing an adverse inference from the failure to file any supporting evidence that might reasonably be expected to be available to him.

**Notice of Decision**

23. The Decision of the First-tier Tribunal contained a material error of law and is set aside.
  
24. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge Lagunju with all issues at large.
  
25. No anonymity direction is sought or made.

*The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing'.*

Signed:

Date: **22 July 2017**

**Deputy Upper Tribunal Judge I A Lewis**