IAC-AH-SP-V1

Upper Tribunal
(Immigration and Asylum Chamber)

OR (Student: ability to follow course) Bangladesh [2011] UKUT 00166 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 October 2010	**On 5 November 2010**

Before

THE PRESIDENT – MR JUSTICE BLAKE

UPPER TRIBUNAL JUDGE MOULDEN

Between

OR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr M M Hossain, a legal representative from Hossain Law Associates

For the Respondent: Mr C Avery, a Senior Home Office Presenting Officer

1. The version of the rules in force on 6 February 2010 contained no general requirement that a student be able to follow the course for which he had been admitted.

2. The burden of proof as to change of circumstances since an entry clearance was granted lies on the respondent, and it is difficult to see that it can be discharged without some evidence of what the original circumstances were.

DETERMINATION AND REASONS

1. The appellant is a citizen of Bangladesh who was born on 19 October 1989. He has been given permission to appeal the determination of Immigration Judge Monro dismissing his appeal against the respondent's decision to cancel his leave to enter the United Kingdom as a Tier 4 (General) Student under the provisions of paragraph 321A of the Immigration Rules because he had made false representations, failed to disclose material facts for the purpose of obtaining leave or there had been such a change of circumstances since the leave was granted that it should be cancelled.

2. The appellant applied for leave to enter the United Kingdom as a Tier 4 (General) Student to study for a certificate in business management (level 3 NQF) at Westminster Academy in London. The

appellant arrived in the United Kingdom on 6 February 2010 with a passport containing the entry clearance. An Immigration Officer attempted to question him in English but he had very limited knowledge of English, difficulty answering the questions and could only say “Westminster Academy” and “diploma in business management”. He showed a letter from Westminster Academy indicating that he had been accepted for a one year course with successful completion leading to a diploma, advanced diploma and, in the final year, an honours degree.

3. The Immigration Officer was not satisfied that the appellant qualified for entry clearance as a student and served Form IS81 suspending his leave and requiring him to submit to further examination. He was invited to take an English test and answered only nine percent of the questions correctly. He was then interviewed in Bengali.

4. The appellant had arrived on a Saturday morning and was granted temporary admission pending further enquiries. The Immigration Officer spoke to a Ms Ferreira at Westminster Academy who said that, if necessary, the appellant would be offered a twelve week pre-session English course.

5. The respondent considered that the appellant had not been granted leave on the basis of undertaking a pre-session English course and that as a result there had been a significant change in circumstances. As a result his entry clearance was cancelled under the provisions of paragraph 321A.

6. The appellant appealed and his appeal was heard by the judge on 10 May 2010. Both parties were represented, the appellant by Mr Hossain, who appeared before us. The appellant attended and gave evidence. He tried to give evidence in English but the judge found that the appellant could not understand the questions and he continued giving evidence through an interpreter.

7. In his evidence the appellant said that he started the business course at Westminster Academy on 15 February 2010 and an English course with the same academy on 12 March 2010. He said that he could understand the lectures, which were given in English. He said that his English was improving. When the judge asked him how he could follow the course he said that he would engage a private tutor to help him.

8. In paragraphs 23 and 24 of the determination the judge said:

“23. It is not satisfactory that there is no record before me of the English test administered to the appellant at the airport and no copy of his application. Despite the inadequacies of the documentation submitted for the respondent, it is plain that the appellant did not understand questions put to him in English at the hearing and I am in no doubt that he is not able to follow a business course taught in English. The contradictions in the documents from Westminster College are such that I cannot rely on them. Although some of them stated that he would be following a pre-sessional English language course, he said in evidence that he started the course before he started the English classes: and in any event the principal stated in her email to Ms Foster that the college does not provide pre-sessional courses. I find that the appellant did not apply to enter the United Kingdom but pursue an English language course prior to commencing a business course.

24. The entry clearance was cancelled under paragraph 321A on the ground that there had been a significant change in circumstances. I find that there has been such a change; in that he had sought entry clearance to study on the business course; by the date of his arrival he was claiming that he was to attend a twelve week course in English prior to commencing this course. This was an entirely different situation from the one presented by him on an application.”

9. The judge went on to consider the Article 8 grounds before dismissing the appeal both under the Immigration Rules and on Article 8 human rights grounds.

10. The appellant sought permission to appeal arguing that the judge erred in finding that the relevant Immigration Rules included a requirement for the appellant's ability to follow the course or to have a particular level of command of the English language. The grounds argue that all the appellant needed to show in order to obtain a visa was that he was entitled to the required points under the points-based scheme. It is argued that the judge's conclusions are insufficiently reasoned, that the respondent had failed to provide any evidence of the English language test taken by the appellant on arrival, that the appellant made no false representations and that he should not be penalised for any inconsistency in the correspondence from Westminster Academy.

11. Mr Hossain's submissions added little to the grounds. He argued that, even though the appellant's application was to study for a certificate in business management at Westminster Academy, he did not need permission to switch to another course, for example an English course. There was no power for the Home Office to reconsider the basis of his application on arrival. In reply to our questions, Mr Hossain withdraw this submission and accepted that there was power in law for the Immigration Officer to make a decision of this type in some circumstances, although he continued to argue that it was not appropriate for him to do so in this case. Mr Hossain also accepted that an Immigration Officer had power to carry out investigations to discover whether such a decision should be made. However, he argued that the Immigration Officer had no power to carry out an assessment of the appellant's command of the English language because, under the points-based system, this task had been delegated to authorised institutions, such as Westminster Academy, who were trusted to make appropriate decisions.

12. Mr Hossain submitted, on instructions, that the appellant was continuing with his studies at Westminster Academy both in English and for the certificate in business management. Since the hearing we have received a letter from Mr Hossain in which he argues that if the power of Immigration Officers to examine an individual with entry clearance on arrival in the UK is not limited "to see whether the appellant still meets the rule or conclude on any material change in circumstances" there will be a possibility of abuse of power.

13. Mr Avery submitted that there was no error of law in the judge's reasoning and that she reached conclusions open to her on all the evidence. He asked us to uphold the determination.

14. Before the points-based system came into force and before the appellant made his application, paragraph 57 of the Immigration Rules included the provision that an applicant needed to show not only that he intended to follow an approved course but also that he was able to do so. This might well include demonstrating a sufficient command of the English language. It may be that this was what the judge had in mind when she said, in paragraph 17 of her determination; "the appeal turns on the appellant's ability to follow the course on which he enrolled and the requirements of the college in relation to additional language classes." We find that, to the extent that the judge applied a test of the appellant's ability to follow the proposed course, she erred in law because this was not a requirement for entry clearance under the points-based system. We also find that the judge erred in law in reaching the conclusion that there had been a significant change in the appellant's circumstances which justified refusal under paragraph 321A. On the evidence this was not a conclusion open to her.

15. The burden of proving the facts for the purpose of paragraph 321A falls on the respondent. It is self-evident that in order to show a change in circumstances, the starting point or original circumstances needa to be established. The respondent has failed to produce either a copy of the

appellant’s application form or the decision to grant him a visa. We do not know what questions the appellant was asked or how he answered them. Whilst we accept that he probably said that he wished to attend Westminster Academy in London to study for a certificate in business management, we do not know what else might have been asked, or said, which might have qualified or shed further light on this. We are not persuaded, and Mr Avery has not argued otherwise, that there was anything in the application form which bore on the appellant’s command of the English language nor has it been suggested that at the time of the appellant’s application the Immigration Rules included any such provision as were formerly in paragraph 57.

15. Although the original immigration decision made reference to them the respondent has not since then argued that false documents were submitted or false representations made. It would have been difficult to establish that false representations were made where the respondent has been unable to produce a copy of the application form. At no time has there been any allegation that the appellant submitted a false document.

16. The same considerations apply to the case based on a material change of circumstances. Unless the respondent can establish that the appellant had said expressly or otherwise that he has sufficient English to be able to follow a business course straight away, we cannot conclude that the discovery in interview on arrival that he did not, was a material charge of circumstance. Whilst we agree with the judge that there are conflicting elements in the evidence from Westminster Academy, we find that neither this nor the rest of the evidence enables the respondent to establish that there has been such a change in circumstances since the issue of the visa that it should have been cancelled.

17. It was open to the Immigration Officer to question the appellant on arrival. Had there been such a change of circumstances since the visa was issued which had removed the basis of the applicant’s claim to admission then it would have been open to the Immigration Officer to refuse him leave to enter and cancel his visa. This was not such a case.

18. It may be that the absence of an appropriate English language test was a lacuna in the points-based system at the time of the appellant’s application. The subsequent changes in the Immigration Rules taking effect from 23 July 2010 which now require an applicant to demonstrate knowledge of English equivalent to level B1 of the Council of Europe’s Common European Framework for Language Learning indicate that this is likely to have been thought to be the case.

19. Having found that the judge erred in law, we substitute our determination allowing the appellant’s appeal under the Immigration Rules.

Signed Date

Upper Tribunal Judge Moulden