Upper Tribunal
(Immigration and Asylum Chamber)

Khaliq (entry clearance – para 321) Pakistan [2011] UKUT 00350(IAC)

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
On 16 February 2011	**21 July 2011**

Before

Mr C M G Ockelton, Vice President

Immigration Judge Farrelly

Between

ABBAS KHALIQ

Appellant

and

AN IMMIGRATION OFFICER, GATWICK

Respondent

Representation :

For the Appellant: Mr Katani, Katani & Co Solicitors

For the Respondent: Mrs M O'Brien, Home Office Presenting Officer

A person who has entry clearance that, under the provisions of the Immigration (Leave to Enter and Remain) Order 2000, takes effect as leave to enter, does not on arrival in the United Kingdom "seek" leave to enter, and paragraph 321 therefore does not apply to him. Paragraph 321A does, but only if the circumstances set out in that paragraph can be shown to exist in his case.

DETERMINATION AND REASONS

1.
This appeal raises in an acute form the question whether the rules of the Points Based Scheme for the admission of students achieve any useful purpose.

2.
The appellant is a national of Pakistan. He arrived in the United Kingdom on 3 January 2010. He had entry clearance as a student, issued on 25 December 2009. He had obtained that visa on the strength of an acceptance letter from Leeds Professional College, offering him a place on an HND course in Business Management.

3.
On arrival he was examined by the Immigration Officer. The Immigration Officer found he was in difficulties, because the appellant spoke virtually no English. In his baggage was a certificate stating that he had obtained an "A" Grade in English language from the Anglophile English Learning Centre in Karachi. But the appellant admitted that he had bought that certificate from somebody else. The college was consulted, and said that they did provide intensive English language training at the beginning of their courses, but that they would have a problem in dealing with a person who had very little English.

4.
The Immigration Officer decided that the appellant should not be admitted on the strength of his visa. As he put it in his Notice of Decision, "you have no proficiency in the English language" (sic). As the accompanying narrative makes clear, refusal was under paragraph 321A of the Statement of Changes in Immigration Rules, HC395. In full, the reasons are as follows:

"You hold a current visa, but I am satisfied that either false representations were employed or material facts were not disclosed for the purpose of obtaining the visa or a change of circumstances since it was issued has removed the basis of your claim to admission.

The college you say you will study at has a requirement that you have a minimum proficiency of the English language. However you have no proffiiciency in the English language. You have admitted on arrival that you paid a third party for your English learning certificate course, which would lead me to believe that you employed false representations to obtain your visa. Furthermore your brother is an overstayer in the UK and I am satisfied that you did not disclose this fact, which I consider to be material, in your visa application. It is also of concern to me that the course itself is a course you know nothing about and paid someone else to choose it for you. The visa is not, therefore effective. "

5.
The Immigration Officer therefore cancelled the visa and refused the appellant leave to enter. Under the provisions of paragraph 2A(9) of Schedule 2 to the Immigration Act 1971, in these circumstances the appellant has an in-country right of appeal. The date of the respondent's decision was 11 January 2010.

6.
The appellant appealed to the First-tier Tribunal. His appeal was heard by Immigration Judge Agnew in April 2010. Mr Katani, who represented the appellant before the Immigration Judge as he does before us, accepted that, if evidence was going to be taken from the appellant, an interpreter might be necessary "for technical reasons". But the Immigration Judge found that the appellant could not understand her at all. Having heard his evidence through an interpreter, she set out her general conclusion at paragraph 12: "I find that the appellant is not a credible witness and that nothing which he says can be relied upon".

7.
In his submissions before her, Mr Katani sought to draw a distinction between the obtaining of the entry clearance and the process undertaken by the Immigration Officer on the appellant's arrival. Despite the fact that at the latter point the appellant was found to be a person who perhaps could not undertake the course for which he had been admitted, he had a valid visa, which, in Mr Katani's submission, was not tainted by any dishonesty. There simply was, he said, no evidence that the Entry Clearance Officer had sought, or had been shown, evidence relating to the appellant's ability to

understand English. Nor had there been any suggestion that the appellant should make any reference at all to his brother or the latter's immigration status in the United Kingdom.

8.
It is convenient at this point to set out the relevant law. Under amendments to the Immigration Act 1971 introduced by the Immigration and Asylum Act 1999, there may be regulations prescribing that entry clearance (that is to say, a visa, granted to a person who is outside the United Kingdom) takes effect as leave to enter. The regulations are the Immigration (Leave to Enter and Remain) Order 2000 (SI 1161/2000). Regulation 4 (3) applies to the appellant's entry clearance, and reads as follows:

"(3) In the case of any form of entry clearance to which this paragraph applies, it shall have effect as leave to enter the United Kingdom on one occasion during its period or validity; and, on arrival in the United Kingdom, the holder shall be treated for the purposes of the Immigration Acts as having been granted, before arrival, leave to enter the United Kingdom:

(a)…

(b) in the case of an entry clearance which is endorsed with conditions, for a limited period, being the period beginning the period beginning on the date on which the holder arrives in the United Kingdom and ending on the date of expiry of the entry clearance".

9.
Paragraph 2A of Schedule 2 to the 1971 Act, to which we have already made reference, applies, as sub-paragraph (1) makes clear, "to a person who has arrived in the United Kingdom with leave to enter which is in force but which was given to him before his arrival". The other sub-paragraphs relevant to this appeal are as follows:-

"2A(2) He may be examined by an immigration officer for the purpose of establishing

(a) whether there has been such a change in the circumstances of his case, since that leave was given, that it should be cancelled;

(b) whether that leave was obtained as a result of false information given by him or his failure to disclose material facts; or

(c) whether there are medical grounds on which that leave should be cancelled.

…

(8) An immigration officer may, on the completion of any examination of a person under this paragraph, cancel his leave to enter."

10.
Those provisions are reflected in the Immigration Rules in paragraphs 321 and 321A, which we set out with their titles:

"321. Refusal of leave to enter in relation to a person in possession of an entry clearance

A person seeking leave to enter the United Kingdom who holds an entry clearance which was duly issued to him and is still current may be refused leave to enter only where the Immigration Officer is satisfied that:

(i) false representations were made or false documents or information were submitted (whether or not material to the application, and whether or not to the holder's knowledge), or material facts were not disclosed, in relation to the application for entry clearance; or:

(ii) a change of circumstances since it was issued has removed the basis of the holder's claim to admission, except where the change of circumstances amounts solely to the person becoming over age for entry in one of the categories contained in paragraphs 296-316 of these Rules since the issue of the entry clearance; or:

(iii) refusal is justified on grounds of restricted returnability; on medical grounds; on grounds of criminal record; because the person seeking leave to enter is the subject of a deportation order or because exclusion would be conducive to the public good.

321A. Grounds on which leave to enter or remain which is in force is to be cancelled at port or while the holder is outside the United Kingdom

The following grounds for the cancellation of a person's leave to enter or remain which is in force on his arrival in, or whilst he is outside, the United Kingdom apply:

(1) there has been such a change in the circumstances of that person's case, since the leave was given, that it should be cancelled; or

(2) false representations were made or false documents were submitted (whether or not material to the application, and whether or not to the holder's knowledge), or material facts were not disclosed, in relation to the application for leave;

…."

11.
Although the Immigration Judge clearly had the foregoing provisions in mind, she did not set them out in her determination, to which we now return. She examined the evidence before her. She noted that the respondent had produced a copy of the college's website which imposed a minimum English language requirement, and she accepted that that was the college's requirement. She continued:

"In that case, unless the College is not genuine and providing education as they claim, and whether or not they referred in their letter to the "Anglophile" document as one they relied upon, it is to be expected, given they have stipulated it as a requirement, that they would ask prospective students, including the appellant, to supply the evidence of their ability to speak the language to the required standard. I do not accept as credible that the college would not have requested evidence of this appellant's ability to speak English, given the level and type of course the appellant claimed he planned to study. He therefore supplied them with what I find on all the evidence before me was a forged document claiming that he had obtained an "A" Grade in a four month course in 2007 when he had not."

The Immigration Judge went on to make further comments about the appellant's credibility and intentions. The final substantive paragraphs of her determination are as follows:

"I turn now to consider Mr Katani's submission that there was no evidence before me that the appellant had employed false representations to obtain his visa. I agree with him that there is nothing before me lodged by the respondent to show that the appellant had failed to disclose information on his application form about his brothers in the United Kingdom, or that he submitted evidence with regard to his English qualification to the respondent.

The appellant was granted entry clearance as a Tier 4 (General) Student. The relevant rule applicable at the time of application was rule 245X. Sub-paragraph (a) notes that the applicant must not fall for refusal under the general grounds for refusal. The respondent has not shown that the appellant failed to meet any of the other sub-paragraphs. Part 9 of the Immigration Rules sets out the general grounds of refusal and the respondent has relied on paragraph 321 A, sub-paragraph (2). Mr Katani points out that the false representations have to have been made, if the respondent wants to rely on this ground for cancellation, "In relation to the application for leave". He submits because there was no evidence that the appellant relied on the document from 'Anglophile' at the time of the application for a visa, then this ground does not apply to him. However, having read the wording of the relevant sub-paragraph carefully, I take the view that application for leave includes leave to enter the United Kingdom at port, not simply at the time the application for a visa is made, if it did not, I consider that it would have been clearly stated in the rule that the application for leave was confined to the appellant's home country and not also at the port of entry when he does, again, make an application for leave to enter. At that time the appellant did seek leave to enter the United Kingdom having disembarked from the aeroplane, I have found that the appellant did make false representations to the respondent during interview.

On this basis I find that the respondent has, on the balance of probabilities, shown that the appellant should have been refused leave to enter under paragraph 321 A. I find that the decision of the respondent appealed against is in accordance with the law and the applicable immigration rules."

12.
She accordingly dismissed the appeal. In applying for permission to appeal to this Tribunal, the appellant's principal ground is that the Immigration Judge erred in making assumptions about what had happened at the time the appellant attained entry clearance, and in transferring backwards to that stage any dishonesty that there might have been at the point of entry, or attempted entry, to the United Kingdom. Permission to appeal was refused by the First-tier Tribunal, but granted by Senior Immigration Judge Allen, who observed that "there may be an issue in respect of the timing of the misrepresentation for the purposes of 321 A of HC395".

13.
Before us, Mr Katani offered what may be seen as essentially the same submissions as he made to the Immigration Judge. Mrs O'Brien said that she recognised that she was in some difficulties. The Leeds Professional College is classified by the Secretary of State as a "Highly Trusted Sponsor". Entry clearance is granted on the basis of the college's admission letter. The examination of whether a particular applicant is suitable for a course is left to the college: the Entry Clearance Officer makes no independent investigation. It did appear, she said, that the facts of the present case demonstrated that the Leeds Professional College had not made any adequate investigation either. She was unable to say whether, as a result of what had transpired in the Immigration Officer's examination of this appellant, any steps were being taken in respect of the college. She came close to accepting that there was no evidence upon which the Immigration Judge could properly find that, in this case, the college had required the appellant to establish his proficiency in English, or that the appellant had done so by producing the false certificate.

14.
She referred us to a computer printout showing the various enquiries made by the Entry Clearance Officer, which was before the Immigration Judge as well. That printout showed that, because of a delay in dealing with the appellant's application, the Entry Clearance Officer had made enquiries of the college to ensure that the letter of acceptance was still valid. There was no suggestion that the

Entry Clearance Office had made any enquiry as to the appellant's ability to take the course or his competence in English.

15.
We must begin by examining the Immigration Judge's reasons for her decision. Was she right to conclude that "application for leave includes leave to enter the United Kingdom at port, not simply at the time the application for a visa is made"? We have reached the clear conclusion that she was not.

16.
Before the amendments to the 1971 Act made by the 1999 Act, it was clear that a person who was outside the United Kingdom could have no leave. On arrival with Entry Clearance it was necessary to seek leave to enter, on the strength of the Entry Clearance which had been granted. Thus, there were two separate processes, the applying for Entry Clearance, and the applying for leave to enter, each of which might result in refusal; and there might have been refusal at the second stage, even if not at the first. But following the amendments made by the 1999 Act, that is no longer the case. Entry clearance, in the words of article 4(3) of the Immigration (Leave to Enter and Remain) Order, "shall have effect as leave to enter", that has "been granted, before arrival". That effect is clearly envisaged by section 3A of the 1971 Act. It is also clearly reflected in paragraph 2A of Schedule 2, with its reference to a person who has "leave to enter which is in force but which was given to him before his arrival". There can be no doubt that a person like the appellant, who arrives in the United Kingdom with entry clearance effective for the purposes of article 4 of the Immigration (Leave to Enter and Remain) Order, does not on arrival apply for leave to enter: he already has it. Again as paragraph 2A of Schedule 2 to the 1971 Act makes clear, the examination is an examination of a person who has leave, not an examination of a person who seeks leave. In this context it appears to us that there is simply no scope for saying that anything the appellant did on his arrival in the United Kingdom amounted to an "application for leave" within the meaning of paragraph 321A.

17.
Because, under the structure of section 3A of the 1971 Act, and article 4 of the Immigration (Leave to Enter and Remain) Order, entry clearance takes effect as leave to enter, the application for entry clearance is the application for leave to enter. That is apparent not merely from the wording of paragraphs 321 and 321A of the Immigration Rules, including their titles, but also from that of paragraph 2A of Schedule 2 to the 1971 Act. The relevant provisions are set out above. It will be seen that sub-paragraph 2 relates to all those to whom the paragraph applies, that is to say those who have leave to enter which is in force but which was granted before arrival in the United Kingdom: sub-paragraph 2A treats those whose leave derives from entry clearance simply as a subset, as the use of the word "also" in that paragraph demonstrates.

18.
It follows that, where a person's leave derives from an entry clearance, sub-paragraphs (2) and (2A) apply to him; but that does not mean that his application for leave is made at the point of entry. What it does mean is that, in such a case, the additional question under sub-paragraph (2A) calls for consideration; that question is specifically directed to a difference between the basis of the grant of entry clearance and the basis upon which the person seeks to use it.

19.
The respondent's decision in the present case was clearly based on his examination of the appellant at Gatwick. As that was not an application for leave to enter, the facts he discovered could not of themselves justify refusal under paragraph 321A(2). But the question nevertheless arises whether that

paragraph applied to the appellant's application for entry clearance, which was in his case his application for leave to enter.

20.
If the appellant could be shown to have produced to the Entry Clearance Officer a false document in connection with his application for entry clearance, there might be little doubt that paragraph 321A applied. But, as the printout of the Entry Clearance Officer's log shows, the English certificate was not produced to the Entry Clearance Officer: indeed, the Entry Clearance Officer apparently had no interest in it. It might be that, if it could be shown that the appellant produced a false document to the college in order to obtain the college's admission letter, that also would fall within paragraph 321A: because obtaining the admission letter is an essential step in obtaining entry clearance in the relevant category, but there is no evidence that the appellant produced his certificate to the Leeds Professional College. The Immigration Judge concluded that he must have done, but there is simply no evidential basis for that. Although the Leeds Professional College is a Highly Trusted Sponsor, neither we nor the Immigration Judge have any information about the process by which they decide to admit any individual student.

21.
It follows that it is simply impossible to say that the appellant made a false representation or submitted a false document in relation to his application for leave.

22.
In the Notice of Decision, the respondent referred also to the appellant's failure to disclose that his brother was in the United Kingdom as an overstayer. It does not appear that that aspect of the case has been relied on in these appeals. Certainly Mrs O'Brien did not seek to rely on it before us. It is very difficult to see that the status of the appellant's brother in the United Kingdom is in any sense "material" to his own compliance with the Immigration Rules; and we are inclined to agree with Mr Katani that, in any event, the appellant was not given any opportunity to indicate his brother's immigration status: and, indeed, the absence of any such opportunity might well reinforce the view that the matter was not material to the appellant's own application.

23.
Our conclusion is, therefore, that paragraph 321A has no application in this case. The result is that the appellant's entry clearance is valid and has effect as leave to enter from the date of his arrival until its expiry, subject to the conditions endorsed on it.

24.
We reach that conclusion with no enthusiasm. The appellant has been judicially assessed as untruthful. He has been prepared to deceive others as to the level of his competence in English. He has arrived to undertake a course that his Highly Trusted Sponsor college admitted him for, but says that it would have difficulty in delivering to him. But the UKBA's decision to allow colleges, rather than Entry Clearance Officers, to assess whether students should be admitted, and to remove from both Entry Clearance Officers and Immigration Officers the power to reach any view independent of the colleges (most of which have a clear financial motive to admit as many students as possible) forces us to the conclusion we have reached. It is one which demonstrates that the Immigration Rules, as in force at the relevant time, provide little security against the admission of what may be described as bogus students. Changes have since been made, but they do not affect this appeal.

25.
For the reasons we have given the appellant's appeal is allowed.

C M G OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER