Upper Tribunal
(Immigration and Asylum Chamber)

Bhimani (Student: Switching Institution: Requirements) [2014] UKUT 00516 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 September 2014	.....

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MAYANK VINODCHANDRA BHIMANI

Respondent

Representation:

For the Appellant: Mr P Nath, Senior Home Office Presenting Officer
For the Respondent: Mr Z Malik, instructed by Mayfair Solicitors

Where a student chooses to study at another institution holding a different sponsor licence number from that of the institution where he/she was granted leave to remain to study, he/she is required to make a fresh application for leave to remain.

DETERMINATION AND REASONS

1. For the sake of convenience I shall refer to Mr Bhimani as the appellant, as he was before the First-tier Judge, and the Secretary of State as the respondent.

2. The appellant first entered the United Kingdom on 25 November 2009 with entry clearance as a Tier 4 (General) Student. His leave was subsequently extended until 11 August 2014, but on 13 March 2013 his leave to remain was curtailed so that it would expire on 12 May 2013. On 11 May 2013 he applied for leave to remain in the United Kingdom. He had previously been granted leave to remain in order to study with Access College, London. However in support of his application for further leave to remain he provided an academic transcript from One-Tech Training, showing that he had studied at that establishment for a diploma in business management between 6 June 2011 and 8 January 2013.

3. The relevant statutory and other materials are as follows:

"IMMIGRATION ACT 1971

3. General provisions for regulation and control.

(1) Except as otherwise provided by or under this Act, where a person is not a British citizen—

(a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act;

(b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;

(c) If he is given limited leave to enter or remain in the United Kingdom, it may be given subject to all or any of the following conditions, namely—

(i) a condition restricting his employment or occupation in the United Kingdom;

(ia) a condition restricting his studies in the United Kingdom;

(ii) a condition requiring him to maintain and accommodate himself, and any dependants of his, without recourse to public funds;

(iii) a condition requiring him to register with the police.

(iv) a condition requiring him to report to an immigration officer or the Secretary of State; and

(v) a condition about residence.

(2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances; and section 1(4) above shall not be taken to require uniform provision to be made by the rules as regards admission of persons for a purpose or in a capacity specified in section 1(4) (and in particular, for this as well as other purposes of this Act, account may be taken of citizenship or nationality).

If a statement laid before either House of Parliament under this subsection is disapproved by a resolution of that House passed within the period of forty days beginning with the date of laying (and exclusive of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days), then the Secretary of State shall as soon as may be make such changes or further changes in the rules as appear to him to be required in the circumstances, so that the statement of those changes be laid before Parliament at latest by the end of the period of forty days beginning with the date of the resolution (but exclusive as aforesaid).

(3) In the case of a limited leave to enter or remain in the United Kingdom,—

(a) a person's leave may be varied, whether by restricting, enlarging or removing the limit on its duration, or by adding, varying or revoking conditions, but if the limit on its duration is removed, any conditions attached to the leave shall cease to apply; and

(b) the limitation on and any conditions attached to a person's leave (whether imposed originally or on a variation) shall, if not superseded, apply also to any subsequent leave he may obtain after an absence from the United Kingdom within the period limited for the duration of the earlier leave.

…

4. Administration of control

(1) The power under this Act to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers, and the power to give leave to remain in the United Kingdom, or to vary any leave under section 3(3)(a) (whether as regards duration or conditions), shall be exercised by the Secretary of State; and, unless otherwise allowed by or under this Act, those powers shall be exercised by notice in writing given to the person affected, except that the powers under section 3(3)(a) may be exercised generally in respect of any class of persons by order made by statutory instrument.

(2) The provisions of Schedule 2 to this Act shall have effect with respect to—

(a) the appointment and powers of immigration officers and medical inspectors for purposes of this Act;

(b) the examination of persons arriving in or leaving the United Kingdom by ship or aircraft, and the special powers exercisable in the case of those who arrive as, or with a view to becoming, members of the crews of ships and aircraft; and

(c) the exercise by immigration officers of their powers in relation to entry into the United Kingdom, and the removal from the United Kingdom of persons refused leave to enter or entering or remaining unlawfully; and

(d) the detention of persons pending examination or pending removal from the United Kingdom;

and for other purposes supplementary to the foregoing provisions of this Act.

(3) The Secretary of State may by regulations made by statutory instrument, which shall be subject to annulment in pursuance of a resolution of either House of Parliament, make provision as to the effect of a condition under this Act requiring a person to register with the police; and the regulations may include provision—

(a) as to the officers of police by whom registers are to be maintained, and as to the form and content of the registers;

(b) as to the place and manner in which anyone is to register and as to the documents and information to be furnished by him, whether on registration or on any change of circumstances;

(c) as to the issue of certificates of registration and as to the payment of fees for certificates of registration;

and the regulations may require anyone who is for the time being subject to such a condition to produce a certificate of registration to such persons and in such circumstances as may be prescribed by the regulations.

(4) The Secretary of State may by order made by statutory instrument, which shall be subject to annulment in pursuance of a resolution of either House of Parliament, make such provision as appears to him to be expedient in connection with this Act for records to be made and kept of persons staying at hotels and other premises where lodging or sleeping accommodation is provided, and for persons (whether British citizens or not) who stay at any such premises to supply the necessary information.

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IMMIGRATION (LEAVE TO ENTER AND REMAIN) ORDER 2000

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PART II

ENTRY CLEARANCE AS LEAVE TO ENTER

Entry clearance as Leave to Enter

2. Subject to article 6(3), an entry clearance which complies with the requirements of article 3 shall have effect as leave to enter the United Kingdom to the extent specified in article 4, but subject to the conditions referred to in article 5.

Requirements

3. (1) An entry clearance shall not have effect as leave to enter unless it complies with the requirements of this article.

(2) The entry clearance must specify the purpose for which the holder wishes to enter the United Kingdom.

(3) The entry clearance must be endorsed with:

(a) the conditions to which it is subject; or

(b) a statement that it is to have effect as indefinite leave to enter the United Kingdom.

...

HC 395

245ZW Period and conditions of grant

(a) Subject to paragraph (b), entry clearance will be granted for the duration of the course.

(b) In addition to the period of entry clearance granted in accordance with paragraph (a), entry clearance will also be granted for the periods set out in the following table.

Notes to accompany the table appear below the table.

Type of Course	**Period of leave to remain to be granted before the course starts**	**Period of leave to remain to be granted after the course ends**
12 months or more	1 month	4 months
6 months or more but less than 12 months	1 month	2 months
Pre-sessional course of less than 6 months	1 month	1 month
Course of less than 6 months that is not a pre-sessional course	7 days	7 days
Postgraduate doctor or	1 month	1 month

dentist		

Notes

(i) If the grant of entry clearance is made less than 1 month or, in the case of a course of less than 6 months that is not a pre-sessional course, less than 7 days before the start of the course, entry clearance will be granted with immediate effect.

(ii) A pre-sessional course is a course which prepares a student for the student's main course of study in the UK.

(iii) The additional periods of entry clearance granted further to the table above will be disregarded for the purposes of calculating whether a migrant has exceeded the limits specified at 245ZV(g) to 245ZV(gb).

(c) Entry clearance will be granted subject to the following conditions:

(i) no recourse to public funds;

(ii) registration with the police, if this is required by paragraph 326 of these Rules;

(iii) no employment except:

(1) employment during term time of no more than 20 hours per week and employment (of any duration) during vacations, where the student is following a course of degree level study and is either:

(a) sponsored by a Sponsor that is a Recognised Body or a body in receipt of public funding as a higher education institution from the Department of Employment and Learning in Northern Ireland, the Higher Education Funding Council for England, the Higher Education Funding Council for Wales or the Scottish Funding Council; or

(b) sponsored by an overseas higher education institution to undertake a short-term Study Abroad Programme in the United Kingdom.

(2) employment during term time of no more than 10 hours per week and employment (of any duration) during vacations, where the student is following a course of below degree level study and is sponsored by a Sponsor that is a Recognised Body or a body in receipt of public funding as a higher education institution from the Department of Employment and Learning in Northern Ireland, the Higher Education Funding Council for England, the Higher Education Funding Council for Wales or the Scottish Funding Council,

(3) employment during term time of no more than 10 hours per week and employment (of any duration) during vacations,

where the student is following a course of study at any academic level and is sponsored by a Sponsor that is a publicly funded further education college,

(4) employment as part of a course-related work placement which forms an assessed part of the applicant's course and provided that any period that the applicant spends on that placement does not exceed one-third of the total length of the course undertaken in the UK except

(i) where it is a United Kingdom statutory requirement that the placement should exceed one third of the total length of the course; or

(ii) where the placement does not exceed one half of the total length of the course undertaken in the UK and the student is following a course of degree level study and is either:

(a) sponsored by a Sponsor that is a Recognised Body or a body in receipt of public funding as a higher education institution from the Department of Employment and Learning in Northern Ireland, the Higher Education Funding Council for England, the Higher Education Funding Council for Wales or the Scottish Funding Council; or

(b) sponsored by an overseas higher education institution to undertake a short-term Study Abroad Programme in the United Kingdom.

(5) Employment as a Student Union Sabbatical Officer, for up to 2 years, provided the post is elective and is at the institution which is the applicant’s sponsor.

(6) Employment as a postgraduate doctor or dentist on a recognised Foundation Programme, and

(7) until such time as a decision is received from the UK Border Agency on an application which is supported by a Certificate of Sponsorship assigned by a licensed Tier 2 Sponsor and which is made following successful completion of course at degree level or above at a Sponsor that is a Recognised Body or a body in receipt of public funding as a higher education institution from the Department of Employment and Learning in Northern Ireland, the Higher Education Funding Council for England, the Higher Education Funding Council for Wales or the Scottish Funding Council and while the applicant has extant leave, and any appeal against that decision has been determined, employment with the Tier 2 Sponsor, in the role for which they assigned the Certificate of Sponsorship to the Tier 4 migrant.

Provided that the migrant is not self employed, or employed as a Doctor or Dentist in Training unless the course that the migrant is being sponsored to do (as recorded by the Confirmation of acceptance for Studies Checking Service) is a recognised Foundation Programme or professional sportsperson (including a sports coach) or an entertainer, and provided that the migrant's employment would not fill a permanent full time vacancy other than under the conditions of (7) above, a vacancy on a recognised Foundation Programme or as a sabbatical officer; and

(iv) no study except:

(1) study at the institution that the Confirmation of acceptance for Studies Checking Service records as the migrant's Sponsor, or where the migrant was awarded points for a visa letter unless the migrant is studying at an institution which is a partner institution of the migrant's Sponsor, study at the institution which issued that visa letter;

(2) until such time as a decision is received from the UK Border Agency on an application which is supported by a Confirmation of Acceptance for Studies assigned by a Highly Trusted Sponsor and which is made while the applicant has extant leave, and any appeal against that decision has been determined, study at the Highly Trusted sponsor institution which the Confirmation of acceptance for Studies Checking Service records as having assigned a Confirmation of Acceptance for Studies to the Tier 4 migrant; and

(3) supplementary study."

4. In the decision letter of 19 September 2013 the respondent stated that where a Tier 4 (General) Student Migrant makes a successful application for leave to remain on or after 5 October 2009, s.50 of the Borders, Citizenship and Immigration Act 2009 prohibits that student from study other than at the institution that the Confirmation of Acceptance for Studies Checking Service records as the student's sponsor. It was said that if a student chose to study at another institution holding a different sponsor licence number from that of the institution where they were granted leave to remain to study, they were required to make a fresh application for leave to remain. It was noted that the appellant had last been granted leave to remain based on a successful application made on 23 March 2011 for leave to remain to study with Access College in London but in view of the fact that the transcript showed that he had studied at One-Tech Training, at a time when he was subject to s.50 by virtue of extant leave, the Secretary of State was not satisfied that he had complied with the conditions attached to his leave to remain. It was said that

therefore he did not satisfy the requirements of this category and it had been decided to refuse the application for leave to remain as a Tier 4 (General) Student Migrant under paragraph 322(3) with reference to paragraph 245ZY(c)(iv) of HC 395.

5. The judge at paragraph 8 of his determination described the key issue as being whether s.50 (which inserted s.3(1)(c)(ia) into the Immigration Act 1971) attached to the leave of all students a condition that they must not switch from the institutions that issued them with a CAS. A secondary issue was whether the Secretary of State had indeed exercised a discretion under paragraph 322(3). The judge noted the terms of s.3(3)(a) and s.4(1) of the Immigration Act 1971, and concluded that the effect of these provisions was that the Secretary of State could not make a general variation of the terms of leave in relation to any class of person (including students) through other means such as the Immigration Rules which of course were not a form of subsidiary legislation. The judge considered that it was clear from the relevant provisions that a formal notice of any change of conditions was required, whether that change was notified to the individual or class of persons by statutory instrument. It followed that s.50(2) of the 2009 Act which permitted a condition under s.3(1)(c)(ia) of the 1971 Act to be added to leave given before the passing of the 2009 Act, merely clarified that the power under s.3(3)(a) of the 1971 Act could be exercised in relation to extant leave, whereas ordinarily, additional conditions would be added at the point at which the duration of the leave was being extended. The judge considered that s.50(2) was not intended and did not purport to amend s.3(3)(a), which remained the principal source of power to impose, change and revoke conditions attaching to a person's leave and certainly s.50(2) did not replace s.4(1) of the 1971 Act which provided for the modality for imposing conditions on a class of persons. He commented that it was also significant that paragraph 245ZT(c)(iv) did not even purport to refer to itself as a condition but although the Rule was not a condition it was drafted in language that indicated that it introduced a requirement. The judge went on to say that he had seen no evidence that a condition was in fact attached to the appellant's leave, whether individually or as part of a class of persons with respect to whose leave to remain the Secretary of State had by an order attached a restriction as to study. He therefore concluded that the decision under paragraph 322(3) was not in accordance with the law and required to be set aside.

6. In the alternative he considered whether or not any discretion was in fact exercised, and concluded that the language employed by the decision maker suggested that it was not appreciated that paragraph 322(3) came under the section of the Rules where leave "should normally be refused". It had not been shown that the discretion was in fact exercised. The appellant met and had been granted points towards the substance of the Rules in relation to the CAS and Maintenance, Funds. There was nothing the judge could see from the Reasons for Refusal preventing the grant to the appellant of further leave to remain. The appeal was allowed.

7. The Secretary of State sought and was granted permission to appeal against this decision on the basis that the appellant's leave within the United Kingdom had always been subject to the condition that he could not change his sponsoring organisation without notifying the Secretary of State. The refusal had not sought to impose a new condition as the judge appeared to suggest at paragraph 18 of the determination, and there had not been a change in the conditions attached to the appellant's leave in the United Kingdom.

8. Mr Nath said that it was common ground that the appellant had changed sponsors without the Secretary of State's knowledge. He was required to inform the Secretary of State of this and that was the condition that he was required to abide by. There were no new conditions and the judge was wrong at paragraph 18 of the determination. There were existing conditions, and that was a requirement.

9. In his submissions Mr Malik agreed that the appellant had changed sponsors without the Secretary of State's knowledge, but argued that the judge was correct to find there had been no breach of any immigration conditions. He referred first of all to the decision of the Court of Appeal in GO-O [2008] EWCA Civ 747, noting what was said at the end of paragraph 4 that :

> "A rule preventing students from making such a change might well be arbitrary or unnecessary in the absence of case-specific reasons."

10. Subsequently s.3(1) of the 1971 Immigration Act had been amended by s.50 of the 2009 Act and the relevant provision was s.3(1)(c)(ia), the effect of which was that if a person was given limited leave to enter or remain in the United Kingdom, it might be given subject to all or any of the following conditions, namely a condition restricting his studies in the United Kingdom. This was therefore a discretion. It was clear from s.4(1) that the power under the Act to give or refuse leave to enter the United Kingdom or to vary leave under s.3(3)(a) was to be exercised by notice in writing given to the person affected. Therefore, when the Secretary of State imposed a condition on leave she was required to give written notice under this provision. Therefore, unless a written notice imposed conditions on leave to remain there were no valid conditions.

11. Mr Malik referred next to the Immigration (Leave to Enter and Remain) Order 2000 at paragraph 3(3)(a) which said in effect that an entry clearance shall not have effect as leave to enter unless it complies with the requirements of this Article including being required to be endorsed with the conditions to which it is subject. This was a strict requirement. Reference was also made to paragraph 5 of the Order which stated that an entry clearance will have effect as leave to enter subject to any conditions, being conditions of a kind that may be imposed on leave to enter given

under s.3 of the Act, to which the entry clearance is subject and which are endorsed on it. This reinforced the point.

12. Therefore, based on the 2000 Order, any condition was required to be endorsed on the entry clearance. In any event a written notice was required to be given for the imposition of a valid condition.

13. Mr Malik referred to section C of the Home Office bundle, which was the appellant's passport. There was no reference on the endorsement there to him being required to study at a particular institution. It simply said there was to be no recourse to public funds and he was able to do work/business as in the Tier 4 Rules. There was also section D which was the appellant's residence permit that referred to him working twenty hours maximum in term time and gave a reference number which was the CAS number but was not a condition. Therefore there were no conditions on entry clearance or leave to remain. No condition had been imposed on the residence permit or the entry clearance for him to study at a particular institution.

14. In any event there was no evidence before the judge or the Tribunal that a written notice had ever been issued to the appellant stating that he had been given leave to remain subject to a condition restricting his studies. When there was a refusal under Part 1X of the Immigration Rules the burden was on the Secretary of State to show that the person had been in breach of a requirement. The judge had been entitled to conclude as he did as the leave to remain was granted without conditions.

15. With regard to paragraph 245ZW(c)(iv), it seemed that although any imposition of conditions under the 1971 Act was discretionary, it did not mean that under this Rule the Secretary of State had granted entry clearance subject to a condition in this case and there was no evidence of a condition being imposed. With regard to the requirement at paragraph 245ZW(c)(iv)(1), this was not mandatory as could be seen from sub-paragraph (c)(i) and (iii), as if conditions were imposed automatically, why was it necessary to mention public funds and work in the endorsements? The Secretary of State was required to act in accordance with the Rules, but she had a discretion to depart from them and it was open to her not to impose the conditions and where she imposed the conditions they must be in accordance with the Order and the Act.

16. GO-O was a judicial recognition that a Rule of this kind might be arbitrary and unnecessary. Even if there were ambiguity in the order, it was necessary to construe it as narrowly as possible as there would be very serious consequences to appellants. It was a criminal offence to breach immigration conditions, as set out at s.24 of the 2002 Act. The general conditions were required to be taken into account and it was necessary to tell appellants of their limits in the clearest possible terms. This had been recognised by Parliament in s.4 and in the 2000 Order there must be notice in writing with regard to conditions and endorse accordingly.

17. If the Tribunal were not with Mr Malik, then there was the point about the discretion that was required to be exercised, and reference was made to the decision of the Upper Tribunal in Ukus [2012] UKUT 00307 (IAC). Paragraphs 11 and 22 in particular were of relevance. If there was a failure to exercise a discretion in such circumstances this would render the decision as being not in accordance with the law.

18. By way of reply Mr Nath argued that under s.50 there was a need for written notice and conditions but these were the conditions of the 2009 Act and had been sent to his particular sponsor. This was in accordance with paragraph 245ZW(c)(iv) and also addressed the paragraph 322(3) discretion point as well as the requirements and the conditions imposed on the appellant.

19. Mr Malik argued that this was a new point and what was said about s.50 in the decision was, with respect, nonsense. Section 50 simply amended s.3(c)(i) to insert the reference to conditions on study and what was said in the decision letter about s.50 did not reflect what the provision actually stated. It empowered the Secretary of State to impose a condition.

20. Mr Nath had no further points to make.

21. I reserved my determination.

Discussion

22. It is clear from s.3(1)(c) of the Immigration Act 1971 that a person given limited leave to enter or remain in the United Kingdom may be given that leave subject to conditions which include the provision inserted by s.50 of the Borders, Citizenship and Immigration Act 2009: a condition restricting his studies in the United Kingdom.

23. It is important also to bear in mind the terms of s.3(2) which, as set out above, establishes that the Secretary of State shall from time to time lay before Parliament statements of the rules or changes in the rules laid down by her as to the practice to be followed in the administration of the Act for, inter alia, regulating the entry into and stay in the United Kingdom of persons required by the Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances.

24. It is in this light that paragraph 245ZW(c)(iv)(1) has to be seen. The effect of this provision is that entry clearance in the case of 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 Confirmation of Acceptance for Studies Checking Service records as their sponsor. That is a clear example of a provision made in accordance with s.3(2) of the 1971 Act.

25. As regards s.4(1) of the Act, the effect of this is to require that powers under the Act giving or refusing leave to enter the United Kingdom are to be exercised by notice in writing given to the person. But the subsection goes on to make it clear that the requirement of notice in writing operates "unless otherwise allowed by or under this Act", which in my view entails, inter alia, that s.4 must be read in conjunction with s.3(2), itself enabling provisions such as paragraph 245ZW(c)(iv)(1).

26. As regards the Immigration (Leave to Enter and Remain) Order 2000, Mr Malik drew my attention to the specific provision set out at paragraph 3(3)(a) which requires the entry clearance to be endorsed with the conditions to which it is subject.

27. However I interpret the biometric and residence permit, a copy which is at Annex D to the explanatory statement, as doing precisely that. As Mr Malik accepted, the reference number is the CAS number of Access College, London, and I think it is not straining a proper interpretation of the requirements of paragraph 3(3)(a) of the Order to read this as an endorsement of a condition to which the leave is subject, i.e. study at the college in respect of which that CAS is the reference.

28. Accordingly I consider that the judge erred in his interpretation of the relevant provisions in this case. The decision to refuse the application was a lawful one, subject to what I have to say below.

29. The remaining issue is that of the exercise of discretion under paragraph 322(3). It seems to me sufficiently clear from reading the decision letter that this was not done, and in accordance with the guidance in Ukus, in particular paragraph 22(i) of that decision, there has been a failure by the Secretary of State, having properly concluded that the appellant was in breach of the conditions of his leave, to appreciate that she had a discretion to exercise and having so failed, failed to exercise it. The judge's decision allowing the appeal in full is therefore set aside and the decision in the appeal is re-made by a decision allowing it to the extent that it remains with the respondent to make a decision in accordance with a proper exercise of the discretion under paragraph 322(3) of HC 395.

Signed Date

Upper Tribunal Judge Allen