Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02763/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 October 2013	**On 4 December 2013**
Prepared on 14 November 2013	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MR DANAVDEEP

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Bajwa, Legal Representative, of A Bajwa & Co Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who was born on 2 May 1989, is a citizen of India. He applied for further leave to remain in this country as a Tier 4 (General) Student Migrant under the points-based system and for a biometric

immigration document, but his application was refused by the respondent on 7 January 2013. The refusal letter is dated the same date.

2. The appellant appealed against this decision and his appeal was heard before First-tier Tribunal Judge Walker, sitting at Hatton Cross on 13 May 2013. In a determination promulgated on 4 June 2013, Judge Walker dismissed the appellant's appeal.

3. The appellant appealed against this decision, and was granted permission to appeal by First-tier Tribunal Judge Frankish. Following the grant of permission to appeal, this appeal was listed before me on 30 July 2013.

4. As I recorded in my Note of Hearing and Directions following that hearing, a key issue in this appeal is whether or not Section 50 of the Borders, Citizenship and Immigration Act 2009, to which the appellant was not entitled to study at any other institution than that which was his sponsor, applied. The basis of Judge Walker's decision was that Section 50 did apply, as he made clear at paragraph 22 of his determination. Accordingly, Judge Walker found at paragraph 23 that the appellant, by undertaking a course of study at a different college, had not complied with the conditions attached to his leave to enter.

5. It was submitted in the grounds in support of the application for permission to appeal that the respondent's case-worker had written "SECTION 50 does not apply" [to the appellant] in her notes. When granting permission to appeal, First-tier Tribunal Judge Frankish stated as follows:

> "…
>
> 2. The application for permission to appeal asserts that the appellant was ruled against for switching without permission on the basis that Section 50… applied when the respondent's own file is endorsed in large letters that it does not.
>
> 3. The finding against the appellant is indeed on the basis of S50 (para 22). The appellant is effectively stating that the respondent has conceded that it does not apply. If so, an arguable error of law has arisen. The appellant should not take too much comfort from this, however, as it is for him to demonstrate the concession and it is certainly not what the refusal letter says (final paragraph page one)."

6. As I recorded following the hearing on 30 July before me, at that hearing Mr Bajwa had referred me first to the refusal letter, where it was stated that Section 50 applies, but then to the case notes, contained within the respondent's bundle at page D4, where it was said in terms under "Minute/Case Notes", that "Section 50 does not apply". It was also then further stated, at the bottom of the page under "ELIGIBILITY", "Able to

switch? Yes". Mr Bajwa submitted that if this had been communicated to the appellant, it would not be fair now for the appellant to rely upon Section 50.

7. At that hearing, Mr Walker, who was then representing the respondent, asked for an adjournment in order to obtain a full statement from the caseworker in this appeal, a Ms J Fowler, as to how the document at D4 came to be compiled. Mr Bajwa agreed that such a statement should be obtained.

8. I accordingly gave directions that the respondent must before Friday 23 August 2013, file with the Tribunal and serve on the appellant, a statement from Ms Fowler, as to how the document at D4 of the respondent's bundle, referred to above, came to be compiled, which statement should exhibit all the correspondence with the appellant and should also set out any instructions which the appellant was given with regard to the conditions of his visa. Mr Bajwa informed the Tribunal that he would not wish to make any response to this statement and I directed further that I would give further directions as appropriate in light of whatever evidence was received on behalf of the respondent.

9. The respondent not having served any further evidence, notwithstanding my directions, on 4 September 2013 I gave further directions that the appeal would be re-listed for hearing on 10 October 2013, but that the respondent may serve further evidence provided that this was filed with the Tribunal and served on the appellant's solicitors by no later than Friday 27 September 2013. No such further evidence was filed.

10. The appeal then was re-listed for hearing before me on 10 October 2013, at which hearing I heard submissions on behalf of both parties. As I recorded these submissions contemporaneously and they are contained in my Record of Proceedings, I shall not set out below everything which was said to me during the course of the hearing. However, I have had regard to everything which was said, and to all the documents contained within the file, whether or not the same is specifically referred to below.

11. On behalf of the respondent, Mr Jarvis informed the Tribunal that he had spoken to the caseworker, who was unable to recall how the record sheet came into being. She had only worked in this department briefly, before moving on to another team. However, this record was a complete red herring. The record, which should not have been made, was not relevant, because the appellant had no right to switch colleges unless he made an application to do so. At the worst, a caseworker had made a mistake, but this caseworker did not even recollect what Section 50 was. That was why no evidence had been put before the Tribunal.

12. The relevant Rule was 245ZW, which was cited in the refusal letter and it is clear from subparagraph (iv) that an applicant is not permitted to study except at the institution recorded in the CAS as the sponsor. This appellant entered, stating that it was his intention to study at the College

of Technology, London (as recorded at paragraph 7 of Judge Walker's determination) but then moved to another college, the Kingston College, starting there on 22 July 2010. He had not applied to the respondent to change colleges, and accordingly Section 50 of the 2009 Act, which amended Section 3(1)(c)(i)(a) of the Immigration and Asylum Act 1971, which allows the respondent to impose restrictions relating to an applicant's studies, applied. This provision commenced on 21 July 2009 and accordingly the appellant was in breach of a condition of his entry. There is no suggestion in the Rules that there is any exception.

13. Whatever was recorded in the respondent's case notes, this cannot be seen as a concession, first because it would be unlawful but secondly because the application was actually refused, so there was no decision to grant permission. The only way in which this could be seen as relevant is through a combination of Article 8 and legitimate expectation, but that could only get off the ground if the appellant was able to show that when he switched colleges in 2010 he thought that the respondent would not apply the law to him in the future when she became aware that he had switched colleges. In this case, there happened to be a case record sheet, disclosed after the time he had actually switched colleges. His claim could not now succeed because he has never suggested, by way of evidence, that he was told by the respondent's caseworker at the material time when he switched colleges in 2010 or before he made the application to extend time to remain, that he had been contacted or told that the Rule would not apply to him. So his argument could not succeed. While Mr Jarvis on behalf of the respondent apologised for the administrative error, and also that the respondent had not complied with the direction originally made by the Tribunal, nonetheless this appeal must fail. As it had never been suggested that the appellant ever received a communication from the caseworker to the effect that Section 50 did not apply to his case, there was no basis for arguing that there was any error of law in Judge Walker's determination.

14. For the sake of completeness, Mr Jarvis referred the Tribunal to the Court of Appeal decisions in *Naik* [2011] EWCA Civ 1546 and *Rahman & Others* [2011] EWCA Civ 814. It was the respondent's case that while there might be an error in the case record, this had no bearing on this appeal, because this appellant did not come within the Rules. at paragraph 19 of *Naik*, the court set out the principles governing reliance on legitimate expectation as follows:

> "The general principle, as the judge said… is not in doubt. He referred to the leading case, *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213, where this court accepted that, where a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, the court will consider whether to frustrate the expectation is so unfair that to take a new and different course would amount to an abuse of power, and in so doing will draw a balance between the

interests of a person with a legitimate expectation and the interests that weigh against fulfilling it".

15. What was necessary was first that there was a communication of the promise to the appellant and second it must be a lawful promise.

16. The respondent also relied on the statement of the Court of Appeal in *Rahman*, at paragraph 42, that "I remain of the view, shared by Professor Christopher Forsyth that the concept of legitimate expectation is normally otiose in cases where there has been no representation, by words or conduct, by the public authority in question to the claimant seeking to rely on it". At paragraph 43 of that judgment, it was made clear that in those cases, none of the appellants knew about the policy being relied on and so could not draw any legitimate expectation from it.

17. In this case it could not be right for this appellant to be granted leave when everyone else would have to be refused, especially in circumstances where he had not been told that he would be allowed to switch colleges. What has happened in this case is that the appellant's advisers had seen the documents and then tried to rely on it.

18. In answer to a question from the Tribunal as to whether it was correct that this appellant had not given evidence that he had been told he could switch colleges, (that is that Section 50 would not be relied upon) Mr Bajwa confirmed that that was correct. The appellant had not given evidence to this effect.

19. When asked by the Tribunal what Mr Bajwa now said, on behalf of the appellant, the error of law had been in Judge Walker's determination, Mr Bajwa said that initially, the respondent's previous representative (this is a reference to Mr Walker at the hearing before me on 30 July 2013) had assured the Tribunal that he would provide some evidence from the caseworker, but this evidence had not been provided.

20. In answer to another question from the Tribunal as to how something written on a piece of paper which was never shown to the appellant and which was in fact wrong could give the appellant any legitimate expectation that the Rule would not be applied in his case, Mr Bajwa said that no reason had been given by the caseworker as to why this would not apply. In answer to an observation from the Tribunal that a concession would not apply because it was the law that it would not, Mr Bajwa again relied on the fact that the respondent had not complied with directions which had been given. As to the error of law, the caseworker was saying that it had been noted that the discretion would be exercised in favour of the appellant. All caseworkers had a discretion in Tier 4 cases. In this case the caseworker was able to say that Section 50 would not apply.

21. In any event Section 50 should not apply anyway, so long as the appellant has a CAS letter and funds, he could apply. The respondent had

given no reason why the caseworker had said that Section 50 would not apply.

22. At the end of the day all the appellant was doing was applying to study at another college. By the time he applied Section 50 was irrelevant because all he needed to show was that he had funds and a CAS letter.

23. In answer to a question from the Tribunal as to why paragraph 322(3) of the Rules (which provided that where a condition attached to leave to enter had not been complied with, leave should normally be refused) Mr Bajwa replied that this was discretionary. On his passport, there was no restriction on his switching colleges. In evidence the appellant had said that he had been asked for a higher fee, although Mr Bajwa conceded that his evidence had not been accepted.

24. However, at the end of the day the respondent was not able to say why the caseworker had written that the record of the case notes were "not for disclosure outside UKBA". The caseworker had said he was able to switch, Section 245ZW was discretionary and but for paragraph 322(3) of the Rules, the application would have succeeded.

25. On behalf of the respondent, Mr Jarvis accepted that the sole basis of refusal was paragraph 322(3). The appellant had been awarded the points as claimed. However, the Rules provided that this appellant had not been allowed to switch, that had been a condition of his permission previously given. Although there was a discretion in the Rules, it was virtually inevitable that this application would be refused because of the previous breach of the condition. It was also important to note that Judge Walker had not accepted the reasons given by the appellant, so could not find any basis upon which discretion should have been exercised in the appellant's favour. It had also been accepted that no one knew of the error on the respondent's file until it was seen, which was after the date of refusal in any event.

Discussion

26. In my judgment, there is no arguable error of law in Judge Walker's determination. It is clear from paragraph 245ZW(iv) that it was a condition of the appellant's previous leave that he was not allowed to switch colleges without permission. It is not suggested that he either applied for or was granted permission to switch colleges, and so he was clearly in breach of that condition.

27. It is also clear that the appellant in this case cannot rely upon the principle of "legitimate expectation", because at no time was he made aware of what was (clearly wrongly) contained within the respondent's record. What seems to have happened in this case is that an inexperienced caseworker made a mistake on the record she made, but

that mistake was never communicated to the appellant until it was inadvertently disclosed in the course of these proceedings. Not unreasonably, the appellant's representatives then sought to take advantage of this, but, in my judgment, without making out any sustainable argument that there had been any error in the decision which had been made.

28. Paragraph 322(3) of the Rules is clear. It provides as follows:

> "**Refusal of leave to remain, variation of leave to enter or remain or curtailment of leave**
>
> 322. In addition to the grounds for refusal of extension of stay set out in parts 2-8 of these Rules, the following provisions apply in relation to the refusal of an application for … variation of leave to… remain…
>
> **Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused**…
>
> (3) Failure to comply with any condition attached to the grant of leave to enter or remain…".

29. In other words, where, as in this case, an applicant has failed to comply with a condition attached to a previous grant of leave to enter or remain, an application for further leave to remain or variation of leave to remain should normally be refused. It is in this context that consideration must be given to paragraph 23 of Judge Walker's determination, in which he found as follows:

> "23. As the appellant undertook a course of study at Kingston College of IT and Management he has not complied with the conditions attached to his leave to enter. Following from this it is clear that paragraph 322(3) of the Immigration Rules apply. This is one of the Grounds on which leave to remain should normally be refused. The appellant has not provided any evidence or provided any special or compassionate circumstances to show why his situation should be an exception to the normality of this particular Rule. Indeed he was asked by Ms Leyshon [who represented the respondent before him] whether there was any reason why he could not go back to India now and he accepted that there was no reason. The appellant has achieved a qualification. The course he is intending to take is not one at a higher level; it is the same level as his existing qualification. He has not offered any explanation as to why he is wishing to take this particular course."

30. Then at paragraph 24, Judge Walker went on to find as follows:

> "24. I therefore find that there are no special or other circumstances which would lead to paragraph 322(3) not being applied."

31. Mr Bajwa has not suggested before me that Judge Walker did not consider properly whether or not discretion should be exercised in the appellant's favour, and it is clear that he applied the correct test. He understood that paragraph 322(3) is not a mandatory ground of refusal, and considered whether there were any factors in this case which would allow him to depart from the normal consequences which would follow where an applicant has failed to comply with a condition attached to a previous grant of leave to enter or remain. Having considered the circumstances of this case, Judge Walker found that there were not, and gave proper reasons for so finding.

32. In my judgment, that finding was clearly open to him on the evidence before him and indeed, it would be arguable that any other finding would, in the circumstances of this case, have been perverse. The only reason put forward by Mr Bajwa on the appellant's behalf is that a caseworker had marked her file that Section 50 would not apply, but as this was clearly an error and as it cannot be suggested that the appellant even knew of this, this cannot be a reason why the normal consequences should not follow.

33. Accordingly, there being no material error of law in Judge Walker's determination, this appeal must be dismissed and I will so order.

Decision

There being no error of law in the determination of the First-tier Tribunal, the appellant's appeal is dismissed.

Signed: Dated: 22 November 2013

Upper Tribunal Judge Craig