AZ (rule 57(iv):"external student" – overseas degree) Pakistan [2010] UKAIT 00001

ASYLUM AND IMMIGRATION TRIBUNAL

Heard at: Procession House
On: 18th December 2009
Date Promulgated: 31/12/2009

Before:

Senior Immigration Judge Freeman
Senior Immigration Judge McKee

Between:

AZ

Appellant

and

Entry Clearance Officer, Islamabad

Respondent

Representation:

For the appellant: Mr A Rehman of Mayfair Solicitors

For the respondent: Miss Z Kiss, Senior Presenting Officer

Although the IDIs are not themselves a guide to the interpretation of the Rules, a construction of rule 57(iv) alternative to that adopted in YS (India) [2009] UKAIT 15 is suggested by them, and of the definition of 'external student' at rule 6, is possible, and, as it both agrees with the Home Office view and avoids the unfortunate effect of the construction in YS (India), it is to be preferred.

DETERMINATION AND REASONS

1. On 6th August 2008 the appellant was refused entry clearance to undertake an 18-month course at Essex College (situated, surprisingly perhaps, in Wembley) leading to a Master's degree to be awarded by Barbican University. This university is based in the United States of America, but that is not why the application was refused. Rather, the sole ground of refusal was that Essex College was not itself a degree-awarding body, while the appellant was not enrolled as an external student at Barbican University. It would seem that the ECO either did not realize that Barbican University is not a British university, or did not think that this was relevant. At any rate, the immigration rule cited

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in the Notice of Refusal was paragraph 57(iv), and it is the correct interpretation of that rule which is the only issue in the present appeal. Rule 57(iv), which in its present form was introduced on 19th April 2007, makes it a requirement for someone seeking leave to enter as a student that "*if he has been accepted to study externally for a degree at a private education institution, he is also registered as an external student with the UK degree awarding body*."

2. When the appeal came before Immigration Judge Ruth on 26th March 2009, the case of *YS (paragraph 57(iv) : "external student") India* [2009] UKAIT 15 had only just been reported, and Mr Rehman, who also represented the appellant before us, very properly handed a copy of that determination to the judge, who was not familiar with it. Both Mr Rehman and Mr Harold, the Presenting Officer, took the position that, because Barbican University is not a UK degree awarding body, rule 57(iv) did not apply to the appellant at all. Reference was made to Chapter 3, Section 3 of the Immigration Directorates' Instructions ('IDIs'), which deals at 13.5 with the topic of 'External Students'. After noting that from 19th April 2007 a new category of 'external student' was introduced into paragraph 57 of the Immigration Rules (and defined at paragraph 6, the Interpretation Section), the guidance goes on to explain that if a student is enrolled at a private college (which is not itself a 'listed body') and is aiming for a degree awarded by a recognized UK university, he must be registered as an external student with that university. The example is given of London University, which has long issued degrees to students who have studied for them at private educational institutions. The crucial passage for our purposes is this:

> "It [i.e. the new requirement] does not apply to those external students at a private education institution in the United Kingdom who are studying for a degree awarded by an overseas university."

3. Initially, IJ Ruth agreed with the joint position adopted by both parties, and indicated that, as the ECO was satisfied about all the other requirements of rule 57, he would allow the appeal. After the hearing, however, a closer reading of *YS (India)* induced the judge to change his mind. The Deputy Presidential panel in that case had compared the wording of rule 57(iv) with the definition of 'external student' at rule 6 ~ "*a student studying for a degree from a UK degree awarding body without any requirement to attend the UK degree awarding body's premises or a UK Listed Body's premises for lectures and tutorials*" ~ and concluded that a person intending to study at a private institution for a degree awarded by another body could only satisfy the requirements of rule 57(iv) by registering with a UK degree awarding body.

4. The judge acknowledged that the IDIs said the opposite, but he observed (rightly) that the IDIs are not conclusive as to the correct interpretation of the Immigration Rules. In the instant case, the Tribunal had adopted a different interpretation, and that was the one which he felt bound to follow. The appeal therefore fell to be dismissed.

5. A review was sought, arguing essentially that the guidance given to Home Office caseworkers was right, and the Tribunal wrong, in the interpretation of rule 57(iv). Senior Immigration Judge Goldstein, however, reiterated the point that the IDIs are no more than internal guidance for Home Office officials and can in no sense bind the Tribunal in the matter of the correct interpretation of the Rules. The application for a review was then renewed to the High Court, and on 8th October 2009 Christopher Symons QC, sitting as a deputy judge of the High Court, ordered reconsideration on the basis that the appellant's submissions may have been right. Thus it is that the matter comes before us.

6. At the 'first stage' of the reconsideration, both representatives again adopted the joint position that rule 57(iv) does not apply to students at private institutions studying for overseas degrees. They invited us to depart from the 'reported' decision in *YS (India)* and, although it is only with great hesitation that we would venture to hold that that case was wrongly decided, we have come to the conclusion that it was. We give our reasons briefly below.

7. Like Immigration Ruth before them, the Deputy Presidential panel in *YS* initially thought that, on its face, rule 57(iv) was apt to exclude from its ambit those students studying for an overseas degree. They did not accept a submission from the Presenting Officer that the phrase "the UK degree awarding body" was to be read as "<u>a</u> UK degree awarding body", which might have yielded the meaning for which the Presenting Officer was arguing. Ironically, as Miss Kiss pointed out to us, the HOPO seems to have been unaware that, by submitting that rule 57(iv) catches students studying for overseas degrees, he was arguing against the Secretary of State's own view of what rule 57(iv) means. This, we remark, is not an unprecedented phenomenon. The upshot was that, as he was evidently unaware that the IDIs had something to say on the topic, the HOPO did not draw the Tribunal's attention to Chapter 3, Section 3, paragraph 13.5 of the IDIs, which we have set out above. The appellant's representative also neglected to check up on the IDIs.

8. What prompted the panel to change their minds was the discovery of another relevant passage which was not brought to their attention at the hearing. This was the definition of 'external student' at paragraph 6 of the Immigration Rules, which we have also reproduced above. In the light of paragraph 6, the panel thought that rule 57(iv) must apply to <u>any</u> student studying externally for a degree, which would mean that one could only be an 'external student' if one was studying for a <u>UK</u> degree. The effect of that was that overseas students would be prohibited from studying at private education institutions in the United Kingdom if they were studying for overseas degrees. The panel could not see the point of that, as overseas

students can study at private colleges for other qualifications – diplomas, certificates, or whatever – awarded by overseas bodies. What purpose would be served by preventing them from studying for overseas degrees?

9. The misgivings plainly felt by the Deputy Presidential panel indicate to us that a different reading of rule 57(iv) may be possible. What clinches it is that the panel's interpretation of the rule was reached in ignorance of the relevant IDI. It is, of course, trite that the IDIs are not to be taken as giving the authoritative construction of the Rules. But as Lord Justice Sedley pointed out in *ZH (Bangladesh)* [2009] EWCA Civ 8, while the IDIs are not to be treated as an aid to the construction of the Rules, they have "*a legitimate bearing*" on the Rules, and judges should not "*adjudicate in ignorance*" of them. If we take the IDIs into account when looking at rule 57(iv) and the definition of 'external student' in rule 6, we can reach an interpretation which avoids the odd result deprecated by the panel in *YS (India)*.

10. The definition of 'external student' in paragraph 6 makes him a student studying for a degree from "<u>a</u> UK degree awarding body". The indefinite article in that phrase, in contrast to the definite article used in rule 57(iv), prompted the panel in *YS* to conclude that one could *only* be an external student if one's degree was to come from a UK university. But in our view, the centrality of that phrase allows the definition to be construed in the opposite way. A student is only an 'external student' if he is studying for a degree from a UK degree-awarding body. If he is <u>not</u> studying for a degree from a UK degree awarding body, he is <u>not</u> an external student. For the purposes of the Immigration Rules, 'external student' is a term of art, embracing a smaller class of students than all those studying externally for something.

11. That construction, we think, both accords with the meaning which the Home Office evidently intended the new rule to have when paragraph 57(iv) was introduced, and avoids the bizarre effect of the reading which the panel in *YS (India)* felt compelled to adopt. This being the only issue in the present appeal, it follows that the appellant succeeds.

<u>DECISION</u>

A fresh decision is substituted, to allow the appeal.

Richard McKee