



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01971/2013

THE IMMIGRATION ACTS

Heard at Field House
On 26th July 2013

Determination Promulgated
On 12th August 2013

Before

UPPER TRIBUNAL JUDGE RENTON

Between

ADIL SHAHID
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Nasim, Counsel instructed by Maliks & Khan Solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

The Appellant is a male citizen of Pakistan born on 24th January 1990. The Appellant arrived in the UK on 19th April 2011 when he was given leave to enter as a Tier 4 (General) Student Migrant in order to study at Hammersmith Management College. The Appellant

did not follow that course, but instead studied at the Kingston College of IT and Management between June 2011 and July 2012. The Appellant did not notify the UKBA of his change of course. On 31st July 2012 the Appellant applied for leave to remain in the same capacity. That application was refused eventually for the reasons set out in a Notice of Decision dated 21st December 2012. The Appellant appealed, and his appeal was heard by Judge of the First-tier Tribunal Seelhoff (the Judge) sitting at Hatton Cross on 8th April 2013. He decided to dismiss the appeal for the reasons given in his Determination promulgated on 18th April 2013. The Appellant sought leave to appeal that decision and on 25th June 2013 such permission was granted.

Error of Law

I must first decide if the decision of the Judge contained an error on a point of law so that it should be set aside.

The Judge dismissed the appeal because he was satisfied that in studying at the Kingston College of IT and Management instead of Hammersmith Management College without permission the Appellant was in breach of the provisions of Section 50 Borders, Citizenship and Immigration Act 2009. Therefore the Appellant's application for leave to remain fell to be refused under the provisions of paragraph 322(3) of the Statement of Changes in Immigration Rules HC 395.

At the hearing Mr Nasim argued that the Judge had erred in law in coming to this conclusion because paragraph 322(3) of HC 395 was a discretionary remedy, and there was nothing to indicate that in refusing the Appellant's application under that provision the Respondent had exercised a discretion. In response, Mr Tufan indicated that he was sympathetic to that argument.

I find that the Judge did err in law in the way argued by Mr Nasim. It is not in dispute that the Appellant changed courses without notification or permission in breach of Section 50 of the 2009 Act. Therefore the Appellant had failed to comply with any conditions attached to the original grant of leave to enter which he was seeking to extend. However, paragraph 322(3) is one of those grounds on which leave to remain should normally be refused. Refusal therefore is a matter of the discretion of the Secretary of State. Reading the Notice of Decision dated 21st December 2012 and the explanatory letter of the same date there is no indication that the Secretary of State considered her discretion in coming to her decision. This is an error of law in accordance with the decision in **Ukus (Discretion: when reviewable) [2012] UKUT 00307 (IAC)**. This decision establishes that where the decision maker has failed to exercise a discretion in him, the failure renders the decision not in accordance with the law. I therefore set aside the decision of the Judge and remake the decision by allowing the appeal to the extent of finding the decision of the Secretary of State not to be in accordance with the law.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I remake the decision in the appeal by allowing it to the extent of finding that the decision of the Secretary of State was not in accordance with the law.

Anonymity

The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I find no reason to do so.

Signed

Date

Upper Tribunal Judge Renton