



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/14594/2013

THE IMMIGRATION ACTS

Heard at Field House
On 10 February 2014

Determination Promulgated
On 26 February 2014
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Before

UPPER TRIBUNAL JUDGE CRAIG

Between

GAURAV ARORA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Rahman, Counsel, instructed by Mayfair Solicitors
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a national of India who was born on 1 October 1990, appeals with leave against a decision of First-tier Tribunal Judge Bryant, who had dismissed his appeal against the respondent's decision refusing his application for leave to remain

in the United Kingdom as a Tier 4 (General) Student Migrant under the points-based system. The application was refused under paragraph 322(3) on the basis that the appellant had failed to comply with a condition attached to his previous grant of leave to enter or remain. It was the respondent's case that the appellant's previous leave had been subject to a condition that he was not allowed to study at any institution other than South London College, but that he had breached this condition by studying at another college, Lord College, without the respondent's consent. It was for this reason that his application was refused under paragraph 322(3).

2. Paragraph 322(3) of the Rules provides that leave should **normally** [my emphasis] be refused in such circumstances; in other words, the respondent must exercise a discretion as to whether or not in such circumstances an application should be refused. It was the appellant's case that the respondent had not exercised the discretion which he had under the Rules, and that accordingly her decision was not in accordance with the law. His appeal before the Upper Tribunal against Judge Bryant's decision was founded upon a submission that Judge Bryant had failed to appreciate that there was insufficient evidence on which he could properly find that the discretion had been exercised.
3. Before me, on behalf of the respondent, Mr Wilding conceded that he had to accept that there had been no evidence before Judge Bryant that the respondent had in fact exercised the discretion which she had under the Rules, and that accordingly he could not challenge a finding that the decision had not been in accordance with the law.
4. I agree and so find. It follows that I must set aside Judge Bryant's determination as containing an error of law, and re-make the decision allowing the appellant's appeal to the limited extent that the decision was not in accordance with the law. It was agreed on behalf of both parties that following the decision of this Tribunal in *Ukus (discretion: when reviewable)* [2012] UKUT 00307, the discretion not having been exercised, the Tribunal's jurisdiction on appeal was limited to a decision that the respondent's decision was not in accordance with the law, and in those circumstances it was not open to the Tribunal to exercise this discretion itself.

Discretion

I set aside the decision of the First-tier Tribunal as containing an error of law and substitute the following decision:

The appellant's appeal is allowed to the limited extent that this decision was not in accordance with the law.

Signed:

Dated: 15 February 2014

Upper Tribunal Judge Craig