Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/21868/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 5th August 2015	**On 13th August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

Mr SUKWINDER SINGH

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim (counsel) instructed by Uzma Law Ltd.
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the appellant against a decision of First Tier Tribunal Judge Woolley promulgated on 20 January 2015 which dismissed the appellant's appeal on all grounds.

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Background

3 The appellant is a citizen of India, born on 4 December 1981. On 16 April 2014, the respondent refused the appellant's application for variation of leave to remain on the basis of 10 years' continuous lawful residence in the UK.

The Judge's Decision

4 The appellant appealed to the First Tier Tribunal. First Tier Tribunal Judge Woolley ("the judge") dismissed the appeal against the respondent's decision. The judge found that the appellant had worked in breach of the terms of his conditions of leave to remain in the UK and so found that Paragraphs 322(3) and 276B of HC395 operated against the appellant.

5 Grounds of appeal were lodged and on 17 March 2015, First Tier Tribunal Judge Levin gave permission to appeal, stating "…*that the judge erred by considering the case on the basis that Para. 322(3) provided a mandatory ground of refusal and his decision under Para. 276B of the Rules in Para. 22 of his decision was also affected by this error. It is arguable that the judge's decision as a whole is tainted by this error of law*".

The Hearing

6 Mr Karim, Counsel for the appellant, noted that the respondent in the Rule 24 response concedes that the judge erred in law by regarding Paragraph 322(3) as a "*mandatory refusal*" so that this appeal focuses on whether or not that error is a material error. In addition, Mr Karim argued that consideration of the respondent's decision demonstrates that the decision maker did not exercise the discretion afforded by Paragraph 322(3) so that the only correct course is to find that the decision has not been made in accordance with the law so that the matter will rest with the Secretary of State to make a lawful decision with a proper exercise of discretion under Paragraph 322(3). Mr Karim argued that the judge erred in considering Paragraph 276B of the Rules because the respondent's decision was not a decision made by reference to Paragraph 276B(iii) and the appellant has not had fair notice of the case against him.

7 Mr Avery, for the respondent, conceded that Paragraph 322(3) is not a mandatory ground of refusal and to that extent, the judge has made an error but argued that it is not a material error of law and that the same decision would have been reached had the judge placed emphasis on the wording of Paragraph 322(3), "…*would normally fall for refusal".*

Analysis

8 It is a matter of concession that the decision contains an error of law. Paragraph 322 is in discretionary terms. At [3] of the decision, the

judge incorrectly quotes Paragraph 322 and specifies that it forms part of the grounds on which leave to remain in the UK "…*are to be refused...*" That error is compounded when at [22], the judge states that Paragraph 322(3) "…*entails a mandatory refusal of the application*".

9 I find that the error is a material error in law because it is clear when reading the judge's determination as a whole, that his failure to appreciate that Paragraph 322(3) calls for the exercise of discretion prevented the judge from reviewing whether or not that discretion had been exercised appropriately. The error in law has therefore infected the judge's decision as a whole.

10 I was invited by Mr Karim to look to the terms of the respondent's decision. He referred specifically to the second page of the reasons for refusal letter and argued that the fourth paragraph from the bottom of that page demonstrated that the respondent has not exercised discretion.

11 I cannot accept Mr Karim's submission in this regard because the paragraph immediately above the paragraph that Mr Karim drew my attention to clearly and correctly narrates the terms of Paragraph 322(3) and is an acknowledgement by the respondent of the discretion to be exercised. The paragraph that Mr Karim referred me to was, in fact, the respondent's summary of the exercise of discretion.

12 I therefore find that there is no merit in Mr Karim's submission that the decision is manifestly unlawful because discretion has not been exercised.

13 A material error of law has been made, so that the decision must be set aside. I find that the facts in this case are clearly established so that I can remake the decision.

The Facts

14 The appellant was granted leave to enter the UK on 18 October 2003. His leave to enter was extended by the respondent on a number of occasions until 14 July 2008 when the application that he made on 26 March 2008 for leave to remain as a student was refused with no right of appeal.

15 The appellant applied for a reconsideration of that decision and on 29 August 2008, the respondent adhered to the decision of 14 July 2008 but the appellant then had a right of appeal. The appellant exercised his right of appeal and, on 9 December 2008, his appeal was allowed. On 25 February 2009, his application for leave to remain as a student was reconsidered and he was granted leave until 31 May 2009.

16 The appellant then made a number of further applications for leave to remain as a student and the respondent extended leave until 9 June 2010. On 27 May 2010, the appellant applied for leave to remain as a Tier 4 student. His application was refused by the respondent on 22 June 2010.

The appellant exercised his right of appeal and his appeal was allowed on 24 September 2010.

17 On 1 December 2010, the appellant was granted leave to remain as a Tier 4 student until 1 March 2011. The appellant was then granted extensions of leave to remain as a Tier 4 student until 27 September 2011. On 22 September 2011, the appellant applied for leave to remain as a Tier 1 highly skilled migrant. Leave was granted until 8 December 2013.

18 On 16 October 2013, the appellant applied for indefinite leave to remain on the grounds of 10 years' long residence in the UK. The respondent refused that application on 2 May 2014. It is against that decision that the appellant appeals.

19 Between 23 October 2009 and 17 June 2011, the appellant worked in excess of 20 hours per week. He was employed by Whitbread Group plc. Throughout that period, although the appellant had leave to remain, he did not have the right to work more than 20 hours each week. One of the conditions attached to the grant of leave to remain as a student was that the appellant was not allowed to take employment of more than 20 hours per week during term time.

20 The appellant therefore failed to comply with the conditions attached to the grant of leave to remain as a student.

Analysis

21 Paragraph 276B(iii) requires that the appellant's application should not fall for refusal under the general grounds for refusal. The general grounds for refusal relevant to this case are contained in Paragraph 322(3) of the Immigration Rules which provide that an application for variation of leave to remain in the UK should normally be refused if the applicant has failed to comply with any conditions attached to the grant to enter or remain.

22 The decision dated 2 May 2014 was accompanied by a reasons for refusal letter. The reasons for refusal letter sets out the appellant's immigration history and the reason why the respondent found that the appellant had breached a condition attached to the grant of leave to remain in the UK. The respondent considered that there is nothing unusual about the appellant's case so that he falls into the category of those cases which should normally be refused.

23 In **R(app Ali) 2004 EHC 3117 it was** noted that, in contrast to the words in the Rule, there was a policy set out in the IDIs which stated that refusal under this paragraph should normally only be appropriate where a person has shown by his conduct that he has deliberately and consistently breached his conditions of stay and it is not intended that this paragraph should be used indiscriminately where, for example, a person has overstayed his leave unintentionally or his applications was submitted a few days late.

24 In **Ukus (discretion: when reviewable) [2012] UKUT 00307(IAC)** the Tribunal held that (i) If a decision maker in the purported exercise of a discretion vested in him noted his function and what was required to be done when fulfilling it and then proceeded to reach a decision on that basis, the decision is a lawful one and the Tribunal cannot intervene in the absence of a statutory power to decide that the discretion should have been exercised differently (see s 86(3)(b) of the Nationality, Immigration and Asylum Act 2002); (ii) Where the decision maker has failed to exercise a discretion vested in him, the Tribunal's jurisdiction on appeal is limited to a decision that the failure renders the decision 'not in accordance with the law' (s 86(3)(a)). Because the discretion is vested in the Executive, the appropriate course will be for the Tribunal to require the decision maker to complete his task by reaching a lawful decision on the outstanding application, along the lines set out in SSHD v Abdi [1996] Imm AR 148**.** In such a case, it makes no difference whether there is such a statutory power as is mentioned in paragraph 1 above; and (ii) If the decision maker has lawfully exercised his discretion and the Tribunal has such a statutory power, the Tribunal must either (a) uphold the decision maker's decision (if the Tribunal is unpersuaded that the decision maker's discretion should have been exercised differently); or (b) reach a different decision in the exercise of its own discretion.

25 The appellant's breach of his conditions of leave to remain in the UK is significant. The payslips produced by the appellant demonstrate that he embarked on a course of conduct stretching over a number of years in which he regularly worked in excess of the hours permitted by the grant of leave to remain. Paragraph 322(3) provides that in circumstances where the appellant has failed to comply with a condition attached to the grant of leave to remain, his application to vary leave to remain should normally be refused. The decision indicates that the respondent was aware of the discretion contained in Paragraph 322(3) and exercised that discretion. The respondent's decision was made under Paragraph 276D with reference to Paragraph 276B(iii) and Paragraph 322(3) of HC395. The decision was made in accordance with the law. It is a decision supported by the facts as I find them to be.

26 No challenge is taken to the judge's decision in terms of Article 8 ECHR.

Decision

27 The decision promulgated on 20 January 2015 contains a material error of law. I therefore set it aside.

28 I remake the decision and substitute the following decision.

29 The appellant's appeal against the respondent's decision dated 2 May 2014 is dismissed.

Signed Date 7 August 2015

Deputy Upper Tribunal Judge Doyle