



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA 28892 2013

THE IMMIGRATION ACTS

Heard at Field House

On 27 May 2014

Determination

Promulgated

On 18 June 2014

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANEESH BABU SURESH BABU

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent: Mr A Khan, legal representative from Bukahari Chambers,
Solicitors

DETERMINATION AND REASONS

1. This is a rather unhappy case in which I, like the First-tier Tribunal Judge, have considerable sympathy with the respondent. However, and with every respect to Mr Khan's realistic and measured submissions, I have to conclude that the First-tier Tribunal Judge, although acting in a kindly way, was wrong and I must set aside his decision.
2. Let me explain the case as I see it. The respondent, hereinafter, "the claimant", is a citizen of India, He was born in 1985 and came to the United Kingdom to study in October 2010 for the degree Master in Business Administration. He is a serious student and passed his examinations. He was going to stay longer to take a further course and had permission to be in the United Kingdom to study. He did not start the intended course and the college, as it thought that it was obliged to do, brought to the attention of the Secretary of State the claimant's absence. The Secretary of State then applied the necessary Immigration Rules and curtailed the claimant's leave.

3. The claimant did not start the course for the entirely understandable reason that he was ill. He had chickenpox as did the people with whom he lived. Happily the claimant has made a full recovery but when he was ill he was too poorly to attend to his personal affairs.
4. The First-tier Tribunal Judge analysed the Rules very carefully and concluded correctly that the Secretary of State did everything that was required. The Rules were applied impartially and fairly on the information that was available. Maybe the claimant's college could have made some elementary inquiries before reporting the claimant's absence, although the fact of his absence was not disputed. Maybe the claimant could have informed the college, informed the Secretary of State or even applied to vary his leave but the fact is that the claimant was feeling very poorly but reasonably expected and early recovery.
5. The First-tier Tribunal Judge then decided that requiring the claimant to leave was a disproportionate interference with his private and family life. The judge said at paragraph 19:

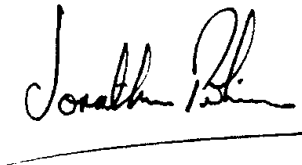
"The result of allowing this appeal under Article 8 is that it is for the respondent to allow a sufficient period of time for the appellant to get his affairs in order, whether in relation to the Access College or by an application to another college."
6. In short, the judge saw the remedy to the situation in which the claimant found himself was a short period of leave in which he could get all his affairs in order. The difficulty is that this is not what the Rules contemplate. The claimant should have left the United Kingdom and then make further arrangements to return if he wanted to when he was in better health.
7. The judge intended to make a very humane decision but there was not justification for it. He did not identify any factors that made removal disproportionate and there are none.
8. By inventing or devising this route the judge has effectively materially changed the Immigration Rules and has introduced a discretionary or delaying element into the mandatory requirements of paragraph 323A to curtail the leave of a person who fails to commence studying. This is effectively a rewriting of the Rules, and it has not been done to prevent any gross injustice or deep unfairness to the claimant but simply to make things more convenient for him because he was not able to start his course.
9. Although I have considerable sympathy for the First-tier Tribunal Judge I have to conclude that the judge, rather than upholding the law, decided to rewrite it. He was wrong in law and I must allow the Secretary of State's appeal and substitute a decision dismissing the claimant's appeal against the decision of the Secretary of State.
10. I do not know the claimant's intentions. No doubt he will take advice about the lawfulness of my decision but if the decision stands he may want on some future occasion to be readmitted to the United Kingdom.

11. I put on the face of this determination so it will be there for everyone to see that there has been no finding in these proceedings that is in any way to this claimant's discredit beyond not taking the course of action which with the benefit of hindsight was the most appropriate. The core cause of his difficulties was ill health at an inconvenient time, and that should be remembered if he seeks to return to the United Kingdom.
12. I am satisfied that the First-tier Tribunal Judge's decision was not open to him in law and it is my duty to correct it.

Decision

The Secretary of State's appeal is allowed.

Signed
Jonathan Perkins
Judge of the Upper Tribunal

A handwritten signature in black ink, appearing to read 'Jonathan Perkins', written over a horizontal line.

Dated 13 June 2014