



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

Appeal Number: IA/52481/2013

THE IMMIGRATION ACTS

Heard at Birmingham, Sheldon Court

**Determination
Promulgated**

On 13th June 2014

On 22nd July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MR MOHIT KHOSLA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance

For the Respondent: Mr N Smart (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge E M Smith promulgated on 26th February 2014, following a hearing at Nottingham Magistrates' Court on 14th February 2014. In the determination, the judge dismissed the appeal of Mr Mohit Khosla. The Appellant applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of India, who was born on 14th September 1986. He appeals against the decision of the Respondent dated 21st November 2013, refusing his application for leave to remain in the UK as a Tier 4 (General) Student under paragraph 319C(h) of HC 395.

The Appellant's Claim

3. The Appellant's claim is that he entered the UK on 3rd April 2008 as a student to study at Bangor University. In January 2010, he left the UK and returned to India. On 1st November 2011, he was granted leave to enter the UK again until 1st November 2013, as a Tier 1 PSW Migrant.

The Judge's Findings

4. The judge held that the Appellant's application was refused by the Respondent because his previous grant of leave was a Tier 1 PSM and he could not satisfy the provisions of paragraph 319C(h) for this reason. The judge went on to consider Article 8 rights (paragraph 17) and held that the Appellant could not satisfy the requirements of paragraph 276ADE and Appendix FM of the Rules. The judge also considered the fact that the Appellant came to be in a relationship with Ms Parnpreet Virk, a student studying at Aston University in Birmingham, but held that, "I do not have any evidence before me from Ms Virk or indeed any evidence in relation to the Appellant's work whilst in the UK. The most I have is a passing reference in his statement" (paragraph 20). The appeal was dismissed.

Grounds of Application

5. The grounds of application state that the Appellant could not have succeeded under paragraph 319C(h) if his application had been made before 1st October 2013 to vary his leave to that of a family member of a points-based system migrant, such being Ms Parnpreet Virk, because the Rules prior to October 2013 did not allow a person who had been granted leave in any other category, from also then subsequently applying for leave as a family member of a points-based system migrant, with a current Tier 4 (General) Student leave.
6. However, the Appellant had made his application on 1st November 2013. By this time the new Rules coming into effect on 1st October 2013 had taken effect and what was now required was only that an applicant applying for leave "must not have last been granted" leave as a visitor, or on temporary admission, or on temporary release. Any of the grant of leave in any other capacity was permissible.
7. The Appellant applied on 28th October 2013. This is because he already had leave until 1st November 2013. His application was to vary his leave to that of a family member of a points-based system migrant. He met the requirements of paragraph 319C(h).
8. On 14th April 2014, permission to appeal was granted by the Tribunal, on the basis that the judge was "manifestly wrong" in stating (at paragraph

16) that “the Grounds of Appeal appeared not to take issue with paragraph 319C”. In fact, the grounds and the submissions were based on the contention that the Respondent incorrectly took into account the “old” version of 319C.

Submissions

9. At the hearing before me on 13th June 2014, the Appellant appeared in person and submitted that he would rely upon the grounds of application. For his part, Mr Smart, appearing on behalf of the Respondent Secretary of State, stated that new Rules came into effect on 1st October 2013. The Appellant applied on 28th October 2013. He fell to be considered under the new Rules. On 21st November 2013 the decision was made against him. It did very much appear that the Appellant satisfied the new Rules. Mr Smart drew my attention to the “implementation” provisions set out in HC 628, with respect to the latest Rules. These enabled (paragraph 131) a person who had not been granted entry clearance or leave as a visitor, or temporary admission, or temporary release, to apply under the new paragraph 319C(h).

Error of Law and Remaking the Decision

10. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside that decision and remake the decision. There is an error of law because the judge clearly had before him Grounds of Appeal and submissions directed at showing that the Respondent had failed to take into account the new version of paragraph 319C, focussing instead on the old version. This then requires the decision to be remade. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. Prior to 1st October 2013, a Tier 1 (Post-Study) worker could not switch into the category of a family member, of a points-based system migrant. Since 1st October, this is now permitted. The Appellant’s application was made on 28th November 2014. Whereas, as before the original judge, and so also here before me now, “I do not have any evidence from Ms Virk...” (paragraph 20), this is a matter upon which the Appellant has not been cross-examined, and it is a matter upon which no issue has been taken. That being so, since the standard of proof is on a balance of probabilities, I find that the Appellant discharges the burden of proof that is upon him.

Decision

11. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.
12. No anonymity order is made.

Signed

Dated

Deputy Upper Tribunal Judge Juss

21st July 2014