Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18352/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21 January 2015	**On 22 January 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Milind Mayankumar Vyas
[No anonymity direction made]

Claimant

Representation:
For the claimant: Mr A Khushi, instructed by UK Immigration Legal Service
For the respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimant, Milind Mayankumar Vyas, date of birth 24.10.81, is a citizen of India.

2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Thanki promulgated 9.10.14, allowing the claimant's appeal against the decision of the respondent, dated 28.3.14, to curtail his leave to remain and to remove him from the UK by way of directions under section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 19.9.14.

3. First-tier Tribunal Judge TRP Hollingworth granted permission to appeal on 25.11.14.

4. Thus the matter came before me on 21.1.15 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Thanki should be set aside.

6. In granting permission to appeal, Judge Hollingworth considered that the Secretary of State's decision to curtail leave was sustainable and commensurate with the information then in her possession. "In other words, the respondent can only make decisions based on the information supplied by the appellant. It appears at no time did the appellant inform the respondent of compassionate circumstances. So that on the face of the appeal there is no manifestation of unfairness."

7. The ground of appeal point out that curtailment of leave is mandatory as expressed in Rule 323A(a)(ii), if the migrant fails to commence studying with the sponsor. There can be no dispute that the claimant failed to commence studying with the sponsor. The Home Office guidance is to the same effect, that leave must be curtailed "unless one of the exceptions below applies, in which case curtailment is discretionary." None of the exceptions under Rule 323A(b)(iv) apply to the claimant.

8. In the circumstances, curtailment of the claimant's leave was not only inevitable but there was no option to do anything other than to curtail it; it being a mandatory requirement. In the circumstances, it can hardly be unfair for the Secretary of State to apply the requirements of the Rules to the claimant's circumstances. In Marghia (procedural fairness) [2014] UKUT 366 (IAC), the Upper Tribunal noted that the common law duty of fairness is essentially about procedural fairness. There is no absolute duty at common law to make decisions which are substantively 'fair.' The court will not interfere with decisions which are objected to as being substantively unfair, except the decision in question falls foul of the Wednesbury test, i.e. that no reasonable decision-maker or public body could have arrived at such a decision.

9. In the circumstances, the decision of the First-tier Tribunal is unsustainable and based on a false premise. It cannot stand and must be set aside and remade.

10. On the facts of this case I can see no alternative but to a dismissal of the appeal. It was doomed to failure from the outset. It is not disputed that the claimant failed to commence studying. He told the college about his circumstances, which are not in dispute. However, the college very properly notified the Home Office and the Secretary of State took the

required and mandatory action to curtail leave. To do so cannot be regarded as unfair, as it is entirely in accordance with the Rules.

11. As cases such as Nasim and Patel have explained, the private life of a student to study in the UK does not engage article 8 ECHR, which is intended to protect the moral and physical integrity of the individual. There are no particular circumstances of the claimant that could justify allowing him to remain under article 8 when his leave has been very properly curtailed in accordance with the Rules. In the circumstances, I find that article 8 is not engaged in this case and thus the decision cannot be regarded as disproportionate or otherwise unjustifiably harsh so as to require the decision of the Secretary of State to be set aside.

12. It remains open to the claimant to make a further application for leave, explaining the circumstances leading to curtailment, but that is a matter for the claimant and the Home Office and in which the Tribunal has no role to play.

Conclusions:

13. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside and remade.

I set aside the decision.

I re-make the decision in the appeal by dismissing it.

Signed: Date: 21 January 2015

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration

Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed: Date: 21 January 2015

Deputy Upper Tribunal Judge Pickup