



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

Appeal Number: IA/13554/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 9 July 2014**

**Decision & Reasons
Promulgated
On 22 December 2014**

Before

**THE HONOURABLE MR JUSTICE HADDON-CAVE
UPPER TRIBUNAL JUDGE CLIVE LANE**

Between

MR NIKHILKUMAR PRAVINCHANDRA PATEL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Badar, Counsel instructed by Farani Javid Taylor
Solicitors

For the Respondent: Mr Saunders, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Mr Nikhilkumar Patel, appeals against the decision of First-tier Tribunal Judge Abebrese promulgated on 17 April 2014 in which he dismissed the appellant's appeal against the Secretary of State's decision dated 15 April 2013 to refuse to vary the appellant's leave to remain as a Tier 1 (General) Migrant under the PBS and to remove him by way of Section 41 directions.

2. Mr Badar, Counsel for the appellant today, puts his appeal on two grounds. The first is that the judge had failed to apply the correct burden of proof. The second is that the Secretary of State had failed properly to exercise her discretion.
3. As regards the first point, the problem for Mr Badar is that he has failed with respect to grapple with the decision in **NA [2009] UKAIT 00031**. In that case, the court found as a fact that the Cambridge College of Learning had never offered certain postgraduate courses including a postgraduate diploma in information technology. The Cambridge College of Learning test case **NA** was heard in June 2009 and the decision was promulgated in August 2009.
4. Mr Badar's case on behalf of his client, the appellant, is that there is no evidence that the appellant was dishonest or misleading when he applied for leave to remain. As was pointed out to Mr Badar, and as he fairly accepted in argument, the problem on this ground of appeal is that if the Cambridge College of Learning never offered a postgraduate diploma in information technology how was it that the appellant obtained such a certificate and relied on it?
5. The judge correctly directed himself in paragraph 5 of his Determination and Reasons that the burden of proof is on the appellant in the appeal but the general burden is on the Secretary of State. In this case, however, it is clear that the evidential burden shifts to the appellant to persuade the court as to why it is that he had in his possession a false certificate and was relying on it. As Mr Badar reluctantly accepted, there is no material before the court from the appellant which could begin to explain that issue, so the appellant fails on his first ground.

Discretion

6. Mr Badar argued, secondly, that the Secretary of State has failed properly to exercise her discretion under Rule 322(2). There are a number of answers to this point. The first is as Mr Saunders for the Secretary of State pointed out, the Secretary of State did exercise her discretion and said as much in the letter of 15 April 2013:

“The Secretary of State is not prepared to exercise discretion in your favour and your application is therefore refused under paragraph 322(2) of the Immigration Rules.”

7. Mr Badar criticised the judge for indicating that there was to be a mandatory refusal but the judge was in a sense right to do so because a careful examination of the Rules shows that Rule 322(1A) comes into operation “where false representations have been made or false documents or information have been submitted”. This, too, was addressed by the Secretary of State in her letter dated 15 April 2013. Following the passage quoted above, in which the Secretary of State had exercised her discretion under paragraph 322(2), the letter continued:

“In addition, in this application, you stated in answer to question D11 that you have never used deception when seeking leave to enter or remain. I am satisfied that the statement was false because for the reasons stated previously you have used deception when seeking leave as a Tier 1 (Post-Study Work) Migrant. As false representations have been made in relation to your application, it is refused under paragraph 322(1A), of the Immigration Rules.”

8. Accordingly Mr Badar’s second ground is also hopeless and dismissed.
9. There is no substance in either of Mr Badar’s grounds of appeal. We are bound to observe that it is surprising that any appeal was brought in this case.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed

Date 9th July 2014

Mr Justice Haddon-Cave