



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/24360/2013

THE IMMIGRATION ACTS

Heard at : Field House
On : 5 March 2014

Determination Promulgated
On : 12 March 2014

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HARI SANKAR KURIMINENI

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer

For the Respondent: Mr Z Khan of Universal Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (SSHD) against the decision of First-tier Tribunal Judge Prior allowing Mr Kurimineni's appeal, on limited grounds, against the respondent's decision to refuse leave to remain as a Tier 1 (Entrepreneur) Migrant and to remove him from the United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. For the purposes of this decision, I shall hereafter refer to the Secretary of State as the respondent and Mr Kurimineni as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of India born on 12 June 1983. He first entered the United Kingdom on 17 September 2007 with leave to enter as a student until 31 January 2009 and was subsequently granted further periods of leave as a student, a Tier 4 General Student Migrant and a Tier 1 (Post-Study Work) Migrant until 11 January 2013. On 11 January 2013 he applied for further leave to remain as a Tier 1 (Entrepreneur) Migrant.

4. The appellant's application was refused under paragraph 244DD of the immigration rules on the grounds that he had failed to meet the requirements of paragraphs 245DD(b) and 245DD(d). With regard to the former, he was awarded zero points under Appendix A (Attributes) as he had failed to show that he had access to the required funds. He had failed to provide a suitable bank letter confirming that he had access to third party funds; he had failed to provide any advertising or marketing material to confirm his business activity; and the contract he had supplied as evidence of trading activity lacked specified information and details. With regard to the latter, he was awarded zero points under Appendix C as the documents he had provided did not demonstrate that he had been in possession of £900 for the period specified.

5. The appellant appealed against that decision, submitting grounds of appeal that addressed each issue. With regard to access to third party funds, the business contract and the evidence of maintenance, he asserted that the Secretary of State ought to have written to him requesting the submission of documentation in the required format. With regard to the advertising material, he asserted that he had submitted such evidence with his application and that the Secretary of State had failed to send him a respondent's appeal bundle. He asserted further that the respondent's decision was unlawful as he had provided all the required documents in support of his application. He submitted that the decision to remove him was in breach of his human rights.

6. The appellant's appeal was heard by First-tier Tribunal Judge Prior on 3 January 2014. The judge recorded that no respondent's appeal bundle had been produced. He noted that the appellant had provided, in his appeal bundle, a modified contract of services providing the required details, but he had no evidence before him of the previous version of the contract and thus no evidence to reject the appellant's claim to have provided a contract containing the required details with his application. With regard to the issue of access to funds, he noted that the defects referred to in the refusal letter had been remedied by the evidence since supplied by the appellant and he considered in any event that subsequent amendments to paragraph 245AA(d) allowed for applications to be granted despite such failures. The judge also noted that by the time of the respondent's decision the appellant had provided a bank statement from the State Bank of India as evidence of additional funds, to address the issue of maintenance. He then decided to remit the case to the respondent for reconsideration and concluded further that the section 47 removal was not in accordance with the law.

7. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge had erred by considering that a request for the appeal to be decided on the papers involved the respondent's agreement; that there had been procedural unfairness in the judge accepting assertions made by the appellant in the absence of the respondent's appeal bundle; and that the judge had given inadequate reasons as to how the appellant satisfied the immigration rules.

8. Permission to appeal was granted on 3 February 2014, with the additional observation that the judge's decision in regard to section 47 of the 2006 Act was arguably wrong.

9. The appeal came before me on 5 February 2014. Ms Isherwood advised me that the appellant's business partner's appeal had been dismissed on the same evidence and that an error of law hearing was due to take place on 31 March 2014. I decided, however, that that did not prevent the issue of error of law being decided myself on the appellant's individual case.

10. Ms Isherwood submitted that the judge's determination was confusing and that he appeared to have simply accepted, on the appellant's bare assertion, that documents had been before the Secretary of State when they in fact had not been. It was not for the Secretary of State to approach the appellant for missing documents. The evidence was not available to show that the requirements of the rules were met and the judge ought to have dismissed the appeal.

11. Mr Khan submitted that the judge had not erred in law but had simply recognised that he did not have proper evidence from either party and had not made any decision under the immigration rules.

12. I advised the parties that, in my view, the judge had made an error of law such that his decision ought to be set aside.

13. The judge's findings, if any, are unclear. On the one hand he appears to have accepted the appellant's bare assertions that certain documentation in the required format had been supplied with the application contrary to the terms of the refusal letter. Yet on the other hand he appears to have accepted the inadequacy of other documentation, but to have wrongly applied the terms of paragraph 245AA(d) of the rules and the principles in Rodriguez (Flexibility Policy) [2013] UKUT 42 in the appellant's favour. His comments at paragraph 12 demonstrate a misunderstanding of the terms of the evidential flexibility policy as clarified by the Court of Appeal in Secretary of State for the Home Department v Rodriguez [2014] EWCA Civ 2 and as enshrined in the rules in paragraph 245AA(d).

14. Furthermore the judge's findings at paragraph 13, in regard to documents supplied subsequent to the appellant's application but prior to the respondent's decision, appear to have been made without any reference to the principles in Secretary of State for the Home Department v Raju & Ors [2013] EWCA Civ 754. Mr Khan sought to justify those findings in the light of the Upper Tribunal's findings at paragraph (4) of the head-note to Nasim & Ors (Raju: reasons not to follow? : Pakistan) [2013] UKUT 610, as a departure

from the principles in Raju. However such a submission was clearly misconceived, since that paragraph specifically related to paragraph 34F of the rules concerning variation of applications, which was not relevant to the appellant's circumstances.

15. The judge, in remitting the case to the respondent, gave no reasons for so doing and for concluding that the respondent's decision was not in accordance with the law. He ought, on the evidence before him, to have been able to make a decision in regard to the appellant's ability to meet the immigration rules, yet he declined to do so. His reasons for so doing are unclear. Furthermore, his findings on section 47 of the 2006 Act were also clearly misconceived. In all of the circumstances the judge's decision has to be set aside.

16. There was some discussion as to how the decision was to be re-made. Ms Isherwood submitted that the appellant's appeal should simply be dismissed on the basis that the requirements of the rules had not been met in view of his own admissions on the documentation provided with his application. Mr Khan, however, wished to make further submissions after being given an opportunity to see the respondent's appeal bundle and to take further instructions from the appellant. There was, I consider, some merit in Ms Isherwood's submission and, that being the case, little purpose would appear to be served by remitting the case for a fresh decision to be made. However, in view of the fact that in the absence of the respondent's appeal bundle, there was uncertainty as to the documentation provided with the appellant's application, and that that appeal bundle was now available (and in Ms Isherwood's possession) it seemed to me that it was in the interests of justice for the matter to be reconsidered by the Tribunal with the benefit of the relevant documentation. Indeed Ms Isherwood did not have the appellant's appeal bundle and was therefore in some difficulty herself. In the circumstances I considered that the appropriate course would be for the matter to be remitted to the First-tier Tribunal to be heard afresh.

DECISION

17. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any judge aside from Judge Prior.

Directions

No later than fourteen days from the date of this decision:

1. The respondent is to file with the First-tier Tribunal and serve upon the appellant the respondent's appeal bundle.
2. The appellant is to file with the First-tier Tribunal and serve upon the respondent an appeal bundle containing all documentary evidence relied upon.

Signed
Upper Tribunal Judge Kebede

Date