



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

Appeal Number: IA/21076/2013

THE IMMIGRATION ACTS

Heard at Field House

On 30 April 2014

Oral determination given following the hearing

Determination

Promulgated

On 30 May 2014

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SYED MUHAMMAD KASHIF

Respondent

Representation:

For the Appellant (Secretary of State): Mr P Deller, Home Office Presenting Officer

For the Respondent: Mrs J Desouza, Counsel, instructed by Malik Law Chambers (Bethnal Green Road)

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against a decision of First-tier Tribunal Judge A J Parker which was promulgated on 7 March 2014 following a hearing at Taylor House on 20 February 2014. For ease of reference I shall refer throughout this determination to the Secretary of State who was the original respondent as "the Secretary of State" and to Mr Kashif who was the original appellant as "the claimant".
2. The claimant, who was born on 4 June 1980, is a citizen of Pakistan. He applied to vary his leave to remain as a Tier 1 (Entrepreneur) Migrant having initially been here as a student and then as a Tier 1 (Post-Study) Migrant. The application was refused by the Secretary of State on 15 May 2013.
3. The basis of the Secretary of State's decision as set out in the refusal letter is that the technical requirements which are set out within the Immigration Rules were not satisfied. In particular, he had not signed the third party declaration with which he had been provided and also he had not provided a separate letter from a legal representative.
4. The claimant appealed against this decision. In his witness statement in support of his appeal he claimed to have been called in for interview by the Secretary of State and that at that interview, at which he says he was asked about 80 questions, the representative of the Secretary of State had told him at the conclusion that the Home Office was satisfied that the claimant had complied with the Rules and that no further documents were required.
5. The claimant then did not hear again from the Secretary of State until he received the refusal letter in which it was claimed (it would appear correctly) that the requirements under the Rules had not been satisfied.
6. Before the hearing before Judge Parker directions had been given by First-tier Tribunal Judge Denson on 14 November 2013 to the effect that the Secretary of State must produce a copy of the record of interview but the Secretary of State did not comply with that direction. Moreover the Secretary of State was not represented at the hearing.
7. Accordingly, following consideration of the evidence which was before him and in light also of the submissions which were made on behalf of the claimant at the hearing, Judge Parker found as a fact that the claimant's account was credible and that his version of what occurred at the interview was accurate. It is not now suggested on behalf of the Secretary of State that in the circumstances of this appeal that was a finding which was not open to Judge Parker. In my judgement clearly it was, because that was the only evidence which was before him.
8. In Judge Parker's determination he purported to allow the appeal even though he apparently found that the requirements under the Rules had not in fact been complied with. As the Secretary of State had claimed in the refusal letter, it appears (as the judge accepts at paragraph 14) that

the full details of the third party required under the rules had not been provided and also a letter from the legal representative was required but had not been provided. It has not been argued before me on behalf of the claimant that in those circumstances it was properly open to the judge to allow this appeal under the Rules but following discussion it certainly is the claimant's case that for reasons which I will set out below, the Secretary of State's decision was nonetheless not in accordance with the law.

Discussion

9. Before giving this determination I discussed with both parties the decision which provisionally I proposed to make and it is right to say that both parties considered that this decision was a fair one which deals justly with the issues in this appeal in light of the history of this case and the evidence which was before the Tribunal. Accordingly I can summarise my reasons for making the decision I shall make shortly.
10. I start by accepting (on the basis that there was no effective challenge to the evidence of the claimant before the First-tier Tribunal) that the claimant was indeed called in for interview as he says he was and that at the conclusion of the interview he was told that certainly at that stage the Secretary of State did not wish to raise any further matters concerning the application but was satisfied then that no further documents were required. I also have to find on the basis of what is set out in Judge Parker's determination that even though at that time the Secretary of State or those representing her were satisfied that no further documents were required, that was in fact incorrect because it is clear from what is said elsewhere within the determination as referred to above, that in fact some of the specified documents had not been provided. It is for that reason that I have to find that the determination of the First-tier Tribunal has to be set aside and the decision remade although I preserve the finding as I have already noted, that the claimant's evidence is credible and is to be accepted.
11. Although the judge appeared to consider at paragraph 16 that the Secretary of State's "flexibility policy" (presumably a reference to her "evidential flexibility" policy) required her to request the claimant to provide further evidence if this was missing, in my judgement this is in fact not strictly correct because had the Secretary of State just dealt with the application on the papers there would have been no requirement to ask for any further information. However, the Secretary of State did not do so but chose to invite the claimant in for interview and in those circumstances I consider that to the extent that there were gaps which could have been filled, the Secretary of State as a matter of fairness, was obliged then to give this claimant an opportunity of dealing with any oversights that might have been made.

12. As Mr Deller accepted during the course of his commendably concise submissions, it would seem very odd if having called the claimant in for interview, the representative of the Secretary of State did not put to the claimant such concerns as he may have had. He also accepted that it was probably correct to state that as a matter of fairness if the Secretary of State subsequently appreciated that some of the paperwork had not been completed, in those circumstances this claimant should have been given an opportunity of correcting those deficiencies if he could .
13. I have regard when considering this aspect of this appeal to the decision of this Tribunal in *Thakur (PBS decision - common-law fairness) Bangladesh* [2011] UKUT 00151 and it is sufficient for these purposes if I set out the conclusions of the Tribunal with regard to fairness contained at paragraph 2 of the head note as follows:
 - “2. The principles of fairness are not to be applied by rote: what fairness demands is dependent on the context of the decision and the particular circumstances of the applicant.”
14. In my judgement, in light of the statement by the representative of the Secretary of State to the claimant at the end of the interview that his application was in order, thereby creating an expectation that his application would be granted, the principles of fairness required him to be given at least an opportunity of putting right such deficiencies as the Secretary of State may subsequently have realised there were in his application.
15. Accordingly, although I have found an error of law such that the judge’s determination must be set aside, I shall remake the decision by allowing the appeal to the extent that the Secretary of State's decision was not in accordance with the law. I shall also make a direction that the Secretary of State must when reconsidering this application take account of such evidence as the claimant provides within the next 21 days. This gives the claimant an opportunity to the extent that he is able of complying with the requirements of the Rules. If he does so, then there is no reason why this application should not be granted. The only detriment to the Secretary of State is that the claimant would not be obliged to pay another fee. On the other hand, if it turns out that the claimant is unable to comply with any of the requirements under the rules, then in those circumstances there is no proper reason why ultimately his appeal should succeed.

Decision

I set aside the determination of First-tier Tribunal Judge A J Parker as containing a material error of law and substitute the following decision:

The claimant's appeal is allowed to the limited extent that the decision of the Secretary of State is not in accordance with the law.

I direct that when considering the claimant's application the Secretary of State must take account of such further evidence as may be provided on behalf of the claimant within 21 days of today's date.

Signed:

Date: 27 May 2014

Upper Tribunal Judge Craig