



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/21991/2013

THE IMMIGRATION ACTS

Heard at: Manchester
On: 18th June 2014

Determination Promulgated
On 11th August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

And

**Mr Ali Reza Shafiei
(no anonymity order made)**

Respondent

For the Appellant: Ms Johnstone, Senior Home Office Presenting Officer
For the Respondent: -

DETERMINATION AND REASONS

1. The Respondent is a national of Iran. On the 22nd January 2014 First-tier Tribunal Judge Shamash allowed his appeal against the Secretary of State's decision to refuse to vary his leave to remain in the UK and to remove him from the UK pursuant to s47 of the Immigration, Asylum and Nationality Act 2006. The Secretary of State now her permission to appeal against that decision.
2. The Respondent was not represented before me but I received a letter dated 16th June 2014 from his representatives, the contents of which I have noted and taken into consideration.

Background and Matters in Issue

3. The Respondent came to the UK in 2004 as a student, that status being renewed on four further occasions before he was granted leave as a Tier 1 (Post

Study Work) Migrant. The Respondent has used his time in the UK very effectively. He began by taking an English language course and ended by taking an MPhil in Paper and Cellulose Science. The research he undertook during that degree and since, concerns the manufacture of an innovative "woodflake" board that is manufactured entirely from the waste produced by the wood industry and others. He has established his own company, Sash Trade Limited, with a view to patenting and marketing what could be a revolutionary new alternative to hardboard. He has invested substantial time and money into the research and development of this product. It was against this background that he applied, in May 2013, for further leave to remain as a Tier 1 (Entrepreneur) Migrant.

4. His application was refused. He did not have any advertisements to show that he was promoting his product. He did not have any contracts to show that he was selling it. There was no evidence to show that his business is actively trading. Since it is still at the research and development stage this is hardly surprising. On the 29th October 2013 Dr Vince Cable MP was moved to personally intervene by writing to the Home Secretary pointing out that the Respondent is exactly the sort of entrepreneur that the UK should be encouraging to live here. Dr Cable had been shown a powerpoint presentation about the Respondent's work and had been shown the outstanding references that he had been given by his Professors at the University of Manchester. He called upon the Home Secretary to review the case, and the Tier 1 scheme, in order to ensure that such applicants, with "great scientific ability" who had invested their own capital in research in the UK, could be accommodated with the Rules.
5. Dr Cable had received no response by the time the matter was listed before the First-tier Tribunal. Judge Shamash clearly shared Dr Cable's enormous sympathy for the Respondent. She noted that the Secretary of State does not appear to have engaged at all with the nature of the Respondent's business; there had been a failure to contact him during the application process and if the case-owner had not understood the nature of the application he should have contacted the Respondent; there was an unfairness in that the Secretary of State had not exercised her discretion. The appeal was allowed as 'not in accordance with the law' and Judge Shamash purported to 'remit' the matter back to the Secretary of State so that the application could be looked at again.
6. The Secretary of State now appeals that decision. The Respondent's representatives have conceded that the determination contains at least two errors. At paragraph 30 the determination describes some of the requirements of the rules as "in essence a guide". It is conceded that the requirements of the Rules relating to what evidence must be produced are mandatory. It has always been agreed that the Respondent cannot, at this stage, produce an advert for a product that is not yet ready for market; similarly he cannot produce contracts for sale. It is therefore conceded that the requirements of the rules as to specified evidence cannot be met. This leads to the second error that is agreed to be in the determination. The Judge appears to have placed reliance

on the 'evidential flexibility' policy to impute some unfairness into the assessment of this application; it is conceded that insofar as this is pertinent to the outcome of the appeal this is an error, since the Respondent would not have been able to produce this evidence if he had been asked.

7. Beyond that the Respondent's representatives submitted that Judge Shamash was being entirely reasonable and pragmatic in suggesting that the Secretary of State look at this matter again. I could not agree more. Unfortunately the First-tier Tribunal has no power to "remit" the matter to the Secretary of State. The First-tier Tribunal's power is restricted to allowing or dismissing the appeal. The option taken by Judge Shamash, allowing the appeal on the basis that the decision is "not in accordance with the law" was not, on the facts, open to her, since there is nothing in law wrong with the decision. It follows that the decision must be set aside.
8. Neither the Secretary of State nor Judge Shamash conducted any analysis of whether this decision is a disproportionate interference with the Respondent's private life as protected by Article 8. He plainly has a private life. He has been studying and working in the UK for some ten years. The decision is lawful in that the Secretary of State has the power to take it. I presume that it is justified on the grounds of "protecting the economy". I am not satisfied that this decision can be said to be rationally connected to that aim. Unlike the situation in the vast majority of immigration appeals where it can be inferred that the presence of a migrant will have some detrimental impact on the economy, this is a man who has invested over £50,000 of his own money to add to the many thousands he has already spent on his tertiary education here. I am not satisfied that this decision would protect the economy. On the contrary I think it likely that it would damage the economy. If I am wrong in that I nevertheless find that the decision is disproportionate. The decision would have a hugely detrimental impact on the Respondent. His plans and business ideas would have to be moved elsewhere and I accept that this would be unjustifiably harsh when all he has ever done is comply with the rules, work hard and invest substantially in the UK economy. I therefore allow the appeal under Article 8.
9. If the Secretary of State is in any way dissatisfied with my conclusion she will no doubt consider the views expressed about this case by Vince Cable, by Judge Shamash and now myself before considering any onward appeal.

Decisions

10. The decision of the First-tier Tribunal contains an error of law and it is set aside.
11. The decision is re-made as follows:

"the appeal is allowed on human rights grounds."

Deputy Upper Tribunal Judge Bruce
18th July 2014