Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/50282/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 4th July 2014	**On 21st July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

SAMEER DODEKAR
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Malik of Counsel instructed by Malik Law Chambers Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant appeals against a determination of Judge of the First-tier Tribunal Blake promulgated on 24th February 2014.

2. The Appellant is an Indian citizen born 26th July 1986 who applied for leave to remain in the United Kingdom as a Tier 1 (General) Migrant under the Points Based System (PBS).

3. The application was refused on 15th November 2013, the Respondent making a combined decision to refuse to vary leave to remain, and to remove the Appellant from the United Kingdom. The application for leave to remain was refused with reference to paragraph 245CA(c) of the Immigration Rules. The Appellant had claimed 20 points for previous earnings, but no points were awarded by the Respondent, who contended that the required evidence to prove previous earnings had not been submitted.

4. The Appellant appealed to the First-tier Tribunal, contending that he should have been awarded the 20 points claimed and therefore he satisfied the requirements of the Immigration Rules, and he contended that the decision breached Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).

5. The appeal was heard by Judge Blake (the judge) on 17th February 2014. The Appellant was legally represented, and the judge heard evidence from the Appellant. The judge found that the Respondent was correct to refuse the application under the Immigration Rules as documentary evidence to prove previous earnings had not been submitted with the application.

6. The judge found that paragraph 245AA of the Immigration Rules had been correctly considered by the Respondent, who had not requested any further information from the Appellant before making the decision, and that the documentary evidence submitted after the application was not admissible by reason of section 85A of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). The judge did not consider Article 8 of the 1950 Convention but dismissed the appeal under the Immigration Rules.

7. The judge also found that the Respondent's decision to remove the Appellant from the United Kingdom pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006 was unlawful as it had been made at the same time as the decision to refuse to vary leave.

8. The Appellant applied for permission to appeal to the Upper Tribunal on two grounds. Firstly it was contended that the judge had materially erred in law by failing to consider Article 8. Secondly it was contended that the judge had materially erred in law by failing to admit documentary evidence that had been submitted after the application for leave to remain had been made. It was contended that the judge had erred in his consideration of section 85A of the 2002 Act.

9. Permission to appeal was granted by Judge of the First-tier Tribunal Cox who found the second ground to be misconceived in relation to the meaning and effect of section 85A of the 2002 Act. However Judge Cox

found arguable merit in the first ground, as the judge had not considered Article 8, which had been raised as a ground of appeal. Judge Cox noted that the judge had found the section 47 removal decision to be unlawful, but he had erred on that, as the decision was made after 8th May 2013 and was therefore lawful.

10. Following the grant of permission the Respondent lodged a response pursuant to Rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 accepting that the judge had erred in failing to consider Article 8. It was not accepted that the judge had erred in excluding evidence pursuant to section 85A of the 2002 Act. There was no reference to the section 47 removal decision.

11. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside.

12. At the hearing before me Mr Malik accepted that the judge had not erred in law in his consideration of section 85A of the 2002 Act, and did not pursue that ground.

13. Mr Malik submitted that it was clear that the judge had erred in not considering Article 8, and Mr Whitwell agreed.

14. I indicated that the decision of the First-tier Tribunal was set aside as the judge had erred in failing to consider Article 8, as section 86(2) of the 2002 Act indicates that the Tribunal must determine any matter raised as a ground of appeal.

15. As there was no challenge to the findings made in relation to paragraph 245 CA, those findings are preserved.

16. In relation to re-making the decision, Mr Malik submitted that it was appropriate to remit this appeal to the First-tier Tribunal. Mr Whitwell adopted a neutral stance.

17. I considered the Senior President's Practice Statement 7.2 which states;

> "7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:
>
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal."

18. I accepted Mr Malik's submission that the Appellant's Article 8 case had not been put to and considered by the First-tier Tribunal, and therefore it was appropriate for the appeal to be remitted to the First-tier Tribunal.

19. I observe that Judge Cox was correct to point out that the Respondent's removal decision is lawful as it was made after 8th May 2013 when section 51 of the Crime and Courts Act 2013 made it lawful to make such a decision at the same time as a decision refusing to vary leave. However, this was not before me in the Upper Tribunal, as it was not raised by either party.

Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the First-tier Tribunal.

Directions

The appeal will be heard at the Taylor House Hearing Centre by a First-tier Tribunal Judge other than Judge Blake. The purpose of the hearing is limited to consideration of Article 8 of the 1950 Convention only. The findings already made by the First-tier Tribunal in relation to paragraph 245CA are preserved.

The hearing will take place on a date to be advised. If either party seeks to rely on documentary evidence that has not already been served, such documentary evidence must be served upon the Tribunal and other party no later than fourteen clear days before the hearing.

It is understood that no interpreter is required.

Anonymity

There has been no request for anonymity and no anonymity order is made.

Fee Award

No fee award is made by the Upper Tribunal. This must be considered by the First-tier Tribunal.

Signed Date 14th July 2014

Deputy Upper Tribunal Judge M A Hall