IAC-BH-PMP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/49691/2013

THE IMMIGRATION ACTS

Heard at Field House
On 5th November 2014

Decision & Reasons Promulgated
On 10th February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

SUNNY JANARDAN INDULKAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Iqbal of Counsel instructed by ABS Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. At the time of the hearing before me in the Upper Tribunal the appellant was represented by Counsel, Mr Iqbal, instructed by ABS Solicitors. I should point out that, subsequently, the appellant has appointed new representatives, Rainbow Solicitors. The letter from Rainbow Solicitors dated 30th December 2014 requests that my decision should be sent to them and not previous representatives.

2. On 29th September 2014 Judge of the First-tier Tribunal Lever gave permission to the appellant to appeal against the decision of Judge of the First-tier Tribunal Scobbie who dismissed the appeal against the decision of the respondent taken on 5th

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November 2013 to refuse leave to remain for the appellant as a Tier 1 (Post-Study Work) Migrant under the points-based system.

3. The grounds of application contended that the judge erred because his decision was based on "complete speculation" as to what the relevant Rule in force on 5th April 2012 was. It was argued that the respondent should have produced a copy of the relevant Rules and any policy guidance for the judge to study. Judge Lever thought it arguable that the judge had to be satisfied as to the exact requirements in the Rules as a matter of fairness bearing in mind the lengthy delay in the respondent reaching a conclusion on the appellant's application.

4. At the hearing before me Mr Iqbal submitted additional grounds. He argued that, as the respondent had entered a response under Rule 24 on 14th October 2014 (which asserted that the judge had not made a material error) he was able to vary the grounds. Mr Tufan did not object to the fresh arguments put forward by Mr Iqbal and so I proceeded on the basis that I could consider them having in mind that they might be regarded as *Robinson* obvious albeit that, for the reasons which I set out, below, I do not accept that they can lead to a re-hearing of this appeal.

Submissions

5. Mr Iqbal acknowledged that, if the matter were as simple as giving consideration to the financial information provided by the appellant at the date of his application on 5th April 2012, then the judge's failure to have the relevant Rules before him when hearing and deciding the appeal might not be material. That was because the judge evidently had in mind the correct version of the Rules in force by reference to the terms of the respondent's refusal which summarised them. However, he submitted that the sequence of events leading up to the hearing before Judge Scobbie on 5th August 2014 should have led the judge to conclude that the appellant had varied his original leave application before the respondent had made a substantive decision upon it on 5th November 2013.

6. In order to understand Mr Iqbal's argument it is necessary for me to set out the relevant background. The appellant came to the United Kingdom with a Tier 4 (General) Student Migrant visa on 27th February 2009. That was valid until 31st January 2011 and was subsequently extended to 28th June 2012. He then made the Tier 1 (Post-Study Work) Migrant application on 5th April 2012 which forms the subject of this appeal. That application was initially refused by the respondent on 1st October 2012. The appellant appealed that decision and a hearing was due on 13th December 2012. However, the respondent withdrew the refusal decision on 10th December 2012 "having reviewed the evidence available ...". At that time the appellant had a different representative, LaWise. In February and March 2013 LaWise wrote to the respondent requesting to know when the appellant would receive a new visa as a post-study work migrant. It appears that, in May 2013, the appellant received an email from the respondent declaring him to be an overstayer so LaWise wrote to the respondent again and threatened judicial review. Eventually, the refusal decision of 5th December 2013 was sent. In essence this has the same reasons for refusal as the earlier letter namely that the appellant had provided bank statements which did not cover the full 90 day period required by the Rules from 6th January 2012 to 4th April 2012. It was pointed out that the statements submitted with

the application did not cover the period from 6th January to 9th January 2012 and, in any event, on 9th January 2012, the level of available funds fell below £800.

7. In summary, Mr Iqbal's argument is that, in the appellant's bundle submitted for the hearing which was due to take place on 13th December 2012, the appellant had submitted not only his original bank statements from 9th January 2012 but also statements of his mother's account with ICICI Bank covering the period from 1st November 2011 to 30th April 2012 containing funds which his mother had confirmed could be available to her son during the relevant period. As this bundle had been served on the respondent, it should have been taken as an application to vary the application (which was outstanding because of the withdrawal) and thus to show that the appellant could comply with the financial requirements of the Rule in force on 5th April 2012. In support of this argument Mr Iqbal relies upon the Upper Tribunal decision in *Qureshi (Tier 4 – effect of variation – App C) Pakistan* [2011] UKUT 00412 (IAC). In that case the appellant had varied her application by sending to the respondent a new CAS and a fresh bank statement which was accepted by the Upper Tribunal as variation of the application and enabled them to allow the appeal. Mr Iqbal also relies upon the Court of Appeal decision in *Ali* [2013] EWCA Civ 1198 as further support for the argument that Section 85A of the 2002 Act does not preclude the Tribunal from taking into account post-application evidence (in that case an award of degree) if adduced before the decision was made.

8. Mr Iqbal contends, in the light of the above, that, as the original refusal was withdrawn, the appellant's application remained outstanding and so the respondent should have regarded it as varied by the additional information provided in support of the appeal which did not proceed.

9. Mr Iqbal's arguments are now set out in a skeleton argument which was sent to the Upper Tribunal on 18th November 2014. A copy of this skeleton argument was not, so far as I am aware, sent to the respondent although it repeats those arguments put before me at the hearing and which were responded to by Mr Tufan as follows.

10. Mr Tufan (who coincidentally was the Presenting Officer in *Qureshi*) thought that the Upper Tribunal decision in *Qureshi* could be distinguished from the present case as it related to a change of college whereas, in this case, the application was simply being revised by fresh financial information. He emphasised that it was the date of application which was relevant and thus the appellant could not succeed. He also submitted that, although Judge Scobbie did not have a copy of the relevant Rule in front of him, the right decision had been reached as the appellant had not shown that he had the relevant amount of £800 for a continuous 90 day period. This was the requirement of the Rule in force at the time of the application which was made one day before the Tier 1 scheme was withdrawn.

11. Mr Iqbal concluded his submissions by requesting that the matter should go forward to a re-hearing before the First-tier Tribunal on the issues he had raised.

Conclusions

12. If it were not for the argument put forward by Mr Iqbal at the hearing I would have had little hesitation in concluding that the decision of the First-tier Tribunal Judge does not show a material error on a point of law. That is because, although the judge

did not have the full text of the relevant Rule when he came to hear and to decide the appeal, his application of the restrictions on evidence to be produced set out in Section 85A of the Nationality, Immigration and Asylum Act 2002 was, nevertheless, correct and meant that the appellant had not shown that he had the required funds for the relevant period on the basis set out in the refusal letter of 5th November 2013.

13. Mr Iqbal's arguments appear attractive because the original refusal of the appellant's application was withdrawn by the respondent just before the appeal hearing was due to take place at which the appellant was to submit information to fill the gaps in the 90 day period not covered by the appellant's own bank statements and to provide proof of the additional funds needed to make up any deficiency in the £800 required throughout that period. A copy of the original bundle submitted is included in the bundle used at the hearing before Judge Scobbie and contains a letter of support from the appellant's mother with bank statements covering the period from 1st November 2011 to 30th April 2012. No conversion of the amounts in the account has been provided however. Mr Iqbal asks that the submission of the mother's bank account as evidence of third party support should be seen as a variation to the appellant's application.

14. I do not agree with Mr Iqbal's contention. The submission of evidence for a hearing is one thing but the variation of a formal application cannot, I conclude, be inferred from the production of those documents. It is certainly arguable that if those additional bank documents had been put before the Tribunal on the basis of the first refusal, they would not have been admissible as they were submitted after the application. When the appellant was notified of the withdrawal his application again became open before the respondent and so, on the basis set out in *Qureshi*, the respondent might have accepted a variation although that is by no means certain particularly bearing mind that the circumstances in *Qureshi* are significantly different to those in this appeal. In that case the appellant varied an application to extend leave as a student on the basis of a change of college. In this appeal it is said that the provision of additional financial information can be regarded as a variation. But the application itself remains the same, it is only the supporting evidence which is changed. That is not, I conclude, a "variation".

15. It is also my conclusion that, if the appellant wanted to make a formal request for variation of his application he should have written to the respondent with the additional information and made a formal request that his application be varied to take account of the funds available to him through his mother. It has to be borne in mind that, as the respondent had withdrawn the original decision, she had no reason to consider the documents submitted for the appeal which, consequent upon the withdrawal, was not to proceed. Only a subsequent, formal, application to vary would have put the matter before her for consideration. This did not happen and, in any event, I have already indicated that the supply of additional evidence does not amount to a variation of the application.

16. Additionally, for the reasons already given, it cannot be said that the respondent acted with any unfairness. Thus, my conclusion is that, although the Judge of the First-tier Tribunal did not consider any variation argument nor did the judge have a copy of the relevant Rule before him, there is no material error in the decision to dismiss the appeal. There could have been no other result for the reasons I have given and so the decision shall stand.

Notice of Decision

The decision of the First-tier Tribunal does not show an error on a point of law and shall stand.

Anonymity

Anonymity was not requested before the Upper Tribunal nor do I consider it appropriate.

Signed Date **10th February 2015**

Deputy Upper Tribunal Judge Garratt