



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

Appeal Number: IA/52728/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 16th January 2015**

**Decision & Reasons
Promulgated
On 27th January 2015**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

**TUFAYEL AHMED
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Haque, Legal Representative, Imperial Law Partners

For the Respondent: Miss A Everest, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal with permission by the Appellant who is a citizen of Bangladesh. The original appeal came before First-tier Tribunal Judge R G Walters at Taylor House on 18th September 2014. The appeal was against the Secretary of State's refusal to grant the Appellant leave to remain.
2. The Appellant had applied for leave to remain as a Tier 4 (General) Student Migrant and the reason for the Secretary of State's decision, taken

on 22nd November 2013, was that she claimed he had been in breach of his previous conditions of leave; he had been found to be working at a restaurant. The circumstances of that are allegedly that an Immigration Officer carried out a raid at a restaurant, the Balaka Restaurant at 104 High Street, Horsell in Woking, on 21st August 2013 and it is alleged that the Appellant was found there working which was prohibited under the terms of his visa.

3. The Appellant says that, on the contrary he was not working, he had gone there to discuss work experience. That may or may not be the truth. He may or may not be lying. However, before the First-tier Tribunal there was absolutely no evidence provided by or on behalf of the Immigration Officer as to what took place and what was found. Knowing this to be the case, at the outset of the hearing before the First-tier Tribunal Judge, the Presenting Officer requested an adjournment to obtain that evidence. That application was opposed by the Appellant's representative, understandably because they were now some twelve months on from the date of decision and ample time had been given to the Secretary of State to put her "ducks in a row" for the purpose of the appeal.
4. However, having refused the adjournment request the judge then noted in the determination that both representatives said that the appeal should be allowed. The Appellant's representative argued that it should be an allowed outright and the Respondent's representative that it should be allowed to the extent that the original decision was not in accordance with the law, based as it was on an absence of evidence and should be remitted back to the Secretary of State for a fresh decision.
5. For some reason known only to him, the Judge ignored both of those and proceeded to deal with the substantive appeal. In other words he went behind the concession by the Secretary of State that the appeal should be allowed.
6. He then heard oral evidence from the Appellant and cross-examination and decided he did not believe what the Appellant was telling him and he dismissed the appeal. However in so doing he had found as a fact something about which there was absolutely no evidence from the Secretary of State and if the Secretary of State is alleging some kind of wrong doing in the same way as with an allegation of false documents, there is a burden upon her to prove that fact to the appropriate standard and in this case she had produced no evidence whatsoever. There was thus nothing for the Appellant to rebut.
7. I find therefore in this case that the Judge made several errors of law. In refusing the adjournment he may well have erred because clearly it was crucial evidence that was being asked for. Secondly, in ignoring submissions from both sides that the appeal should be allowed he erred, and thirdly, in making findings based on an absence of evidence he also erred.

8. Those go to the heart of the appeal and for that reason nothing in the decision can stand and it is right that it is set aside in its entirety to be reheard in the First-tier Tribunal. Accordingly, the appeal to the Upper Tribunal is allowed and it is remitted to the First-tier Tribunal for a fresh hearing. The appropriate hearing centre is Taylor House.

Signed

Date 26th January 2015

Upper Tribunal Judge Martin