Upper Tribunal
(Immigration and Asylum Chamber)
IA/27357/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On June 24, 2014	**On July 23. 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SABBIRBHAI NALBANDH SAJID
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms Johnstone (Home Office Presenting Officer)
For the Respondent: Mr Holt, Counsel, instructed by MA Consultants

DETERMINATION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department I will refer below to the parties as they were identified at the First-tier Hearing namely the Secretary of State for the Home Department will from hereon be referred to as the respondent and Mr Sabbirbhai Nalbandh Sajid as the appellant.

2. The appellant, born September 9, 1984, is a citizen of the India. On September 15, 2007 the appellant arrived in the United Kingdom holding a working holidaymaker visa that was valid until September 6, 2009. On August 11, 2009 he applied for further leave to remain as the spouse of a settled person and he was granted a visa until January 5, 2012. On July 27, 2012 he was invited to attend an interview on September 4, 2012 in connection with his application but he failed to attend or provide a reasonable explanation for this.

3. The respondent refused his application on June 17, 2013 and at the same time a decision was taken to remove him by way of directions under section 47 of the Immigration, Asylum and nationality Act 2006.

4. On July 2, 2013 the appellant appealed under section 82(1) of the Nationality, Immigration and Asylum Act 2002.

5. The matter was listed before Judge of the First-tier Tribunal Brunnen (hereinafter referred to as "the FtTJ") on January 13, 2014. Following the hearing he gave directions for service of additional evidence and in a determination promulgated on February 2, 2014 he allowed the appeal under the Immigration Rules.

6. The respondent appealed that decision on April 14, 2014. Permission to appeal was granted by Designated Judge of the First-tier Tribunal Appleyard on May 13, 2014 who found it was arguable the FtTJ may have erred by not engaging with the issue of his non-attendance at his interview.

7. The matter was listed before me on the above date and both the appellant and sponsor were in attendance.

SUBMISSIONS

8. Ms Johnstone relied on the grounds of appeal. She submitted the FtTJ had heard the evidence and then invited written representations from both parties on an outstanding matter. The determination suggested that he had considered the appellant's additional papers but had failed to have regard to the respondent's fax dated January 17, 2014. The FtTJ had accepted the appellant did not have a reasonable excuse and he should therefore not have allowed the appeal and he should have upheld the respondent's decision under paragraph 322(10) HC 395. His findings in paragraph [24] are inconsistent. At paragraph [25] the FtTJ again accepted his explanation was not a reasonable excuse and in

substituting his assessment of the evidence he overlooked the respondent had been denied an opportunity to interview the appellant.

9. Mr Holt accepted the FtTJ had found the appellant's explanation was not a reasonable explanation. In those circumstances it was a red herring to revisit that issue because paragraph 322(10) states leave should normally be refused where there has been a "failure, without providing a reasonable explanation, to comply with a request made on behalf of the Secretary of State to attend for interview". Mr Holt submitted that the FtTJ found there was no reasonable excuse but nevertheless concluded having considered all of the evidence that the appeal should not be refused under that paragraph. He gave his reasons in paragraph [25] of his determination.

10. Both parties agreed that in the event of there being an error in law I would be able to conclude the case without taking any further oral evidence.

ERROR OF LAW ASSESSMENT

11. The FtTJ took oral evidence when he heard the case and subsequently issued directions in relation to evidence that was not before him. I accept Ms Johnstone's submission that he did not appear to have taken into account the respondent's response to the appellant's evidence. However, I also accept Mr Holt's submission that the FtTJ's failure to see that evidence would not have altered the issue that the documents referred to.

12. The appellant's solicitors submitted a letter that they said had been submitted to the respondent's office on the day of the appellant's interview. The respondent's response noted it was sent after the interview time and the letter had not sought an adjournment of the interview. The respondent's letter would not have altered the FtTJ's finding that the appellant did not have a reasonable excuse.

13. The FtTJ found at paragraph [24] that the appellant's explanation was not a reasonable explanation and the fact the appellant had marital difficulties at the time and was uncertain about his future was not a good reason for failing to attend the interview.

14. The FtTJ therefore agreed with the respondent.

15. However, paragraph 322(10) HC 395 is not a mandatory ground of refusal. The Rule makes clear that leave to

remain should normally be refused unless a good explanation has been provided.

16. I take on board Mr Holt's submission and I agree with his submission that unless the appellant provided a good explanation then his application should normally (emphasis added by me) be refused.

17. If the FtTJ had failed to give any reason for departing from this position then Ms Johnstone would have a valid submission.

18. However, the FtTJ did go on to consider whether the normal course of action should follow. In paragraph [25] of his determination he balanced against this starting position the fact he accepted the marriage was subsisting and the couple's intentions. He concluded that refusing the application was only a disciplinary action and would mean the appellant would have to leave and make an entry clearance application. He took on board the fact the respondent had not been able to interview the appellant but concluded as a judge he was able to assess their relationship and intentions. He concluded the discretion in respect of paragraph 322(10) HC 395 should be in the appellant's favour.

19. I am satisfied the FtTJ approached this issue correctly. Paragraph 322(10) is not an absolute bar when someone fails to attend an interview. If an applicant had a good excuse then paragraph 322(10) would not apply, as it would not have been refused under this Rule. This appellant did not have a good reason but the FtTJ was satisfied on the evidence before him that the respondent had wrongly exercised his discretion.

20. I therefore find there has been no error in law.

DECISION

21. There is no material error of law. The original decision shall stand.

22. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I uphold the fee award decision made in the First-tier Tribunal.

Signed: Dated:

Deputy Upper Tribunal Judge Alis