Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number
OA/00638/2013

THE IMMIGRATION ACTS

Heard at Field House
On 23rd October 2014
Prepared 23rd October 2014

Determination Promulgated
On 31st October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

HAFIZ HUSSAIN AHMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: No appearance
For the Respondent: Mr E Tufan (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The term Appellant refers to the Appellant before the First-tier Tribunal and Respondent refers to the Secretary of State. The Appellant applied to enter the UK as the spouse of a PBS migrant who, at the time of the application and until recently, was in the UK. The application was refused for the reasons set out in the Refusal Notice of the 12th of November 2012, these are referred to below. The Appellant's appeal was heard by First-tier Tribunal Judge Del Fabbro on the 21st of November 2013 and allowed in a determination promulgated on the 24th of December 2013.

2. The Respondent took issue with the determination and the findings of the Judge and sought permission to appeal to the Upper Tribunal. This was granted by Judge Heynes on the 26th of March 2014. The case first came before me on the 7th of May 2014 in Birmingham when I indicated that I was satisfied that there was an error of law in relation to whether the Appellant had sought to frustrate the immigration rules. I also indicated that there was no error in relation to a failure to grant the Respondent's application for an adjournment and that reasons would be given in a later determination.

3. There was a further hearing on the 16th of July 2014. By that time the Respondent had served additional evidence but that was late under the directions that had been given. In the circumstances the case was again adjourned for the Appellant's representative to take instructions on the evidence that had been provided by the Secretary of State.

4. The listing directions for the hearing on the 23rd of October 2014 were sent out on the 10th of September 2014. On the 22nd of October 2014 at 18.05 the Appellant's representatives sent a fax to the Upper Tribunal indicating that they had received a letter from the Appellant, which was attached, indicating that he wished to withdraw his appeal.

5. The Appellant's letter of the 22nd of October 2014 was to the effect that the Sponsor's sponsorship had been cancelled and she was now back in Pakistan, as she had left the UK permanently he did not wish to pursue the appeal. I am satisfied that the Appellant has had sufficient time to instruct his representatives in relation to the matters under appeal and to discuss the merits of continuing with the case and the consequences of the decision not to contest the Secretary of State's appeal.

6. The appeal to the Upper Tribunal is the appeal of the Respondent against the First-tier Tribunal decision. It is not the Appellant's appeal to the Upper Tribunal and the Appellant is not in a position to withdraw the appeal. I take the letters from the Appellant and his representatives as being an indication that he does not wish to contest the Upper Tribunal proceedings and as I have indicated I take it that he is aware of the potential consequences of that decision.

7. At the hearing on the 23rd of October 2014 brief submissions were heard from the Respondent and the determination reserved. The reasons for finding that the First-tier Tribunal erred and consequences are set out below.

8. The application was refused as the Appellant had indicated in his application that there was nothing to indicate he would not be considered as a person of good character. Records indicated that the Appellant had been in adverse contact with the Police 3 times and the application was refused under paragraph 320(7A) of the Immigration Rules.

9. In addition it was noted that the Appellant had previously held a 5 year multi-entry visa that had been issued on the 13th of April 2005. Records indicated that the Appellant had overstayed his visa on the occasions set out in the Refusal Notice on 3 occasions and he had worked as an Imam in a mosque, he had been detained in immigration detention but purchased his own ticket and was removed on an emergency travel document. The application was further refused under paragraph 320(11) on the basis that the Appellant had contrived in a significant way to frustrate the Immigration Rules.

10. Before the Appellant's appeal came before Judge Del Fabbro directions relating to the service of documentation had been made on the 28th of January 2013 and the 22nd of April 2013. The case was first listed on the 29th of July 2013 but adjourned with further directions relating to the service of documents and re-listed, eventually being put back to the 23rd of November 2013. By

that date the Respondent had still failed to supply information relating to the assertions made in the Refusal Notice about the Appellant's contact with the Police, an application was made to adjourn for that information to be obtained.

11. As the ECO had been in possession of the information when the decision to refuse the application was made it cannot be said that it was something that required further investigation. The ECO would have known that the obligation lay on them to prove the assertions made in the Refusal Notice and the directions repeatedly issued would only have reinforced that. There was no explanation for the repeated failure to provide what was, on the basis of the Refusal Notice, clearly relevant information which was already in the possession of the ECO.

12. In my view Judge Del Fabbro was right to refuse the application for an adjournment. The ECO had been given more than sufficient time to provide evidence that was relevant and necessary to support the assertions being made. There was no explanation for the failure to comply with repeated directions and no guarantee that the information would be available within a reasonable time. As if to reinforce this point of view it had not been provided for the first hearing before the Upper Tribunal either.

13. The other matter that the Secretary of State raised was the treatment of the Appellant's behaviour and whether that amounted to frustrating in a significant way the Immigration Rules. It appears from paragraph 13 of the determination that it was not in dispute that the Appellant had stayed at the mosque and that he had led prayers, his case being that he was not employed. In the findings in paragraph 21 the Judge found that the Appellant had overstayed on his last visit by 8 months, the Appellant's explanation was accepted but there were no findings whether he had worked in the UK and no findings on the Respondent's submissions that he had worked as minister of religion.

14. Employment is widely defined in the Immigration Rules in paragraph 6 as follows: "**employment**" unless the contrary intention appears, includes paid and unpaid employment, paid and unpaid work placements undertaken as part of a course or period of study, self employment and engaging in business or any professional activity.

15. In undertaking the role of a prayer leader in a mosque while being accommodated at that mosque I am satisfied that the Appellant can properly be said to have been working. There is also the finding that he had overstayed by about 6 months to the 8th of December 2010 which added to the fact that he was working by leading prayers at the mosque where he was staying aggravates the position.

16. As indicated above the ECO finally provided the information referred to in the Refusal Notice relating to the Appellant's contact with the Police, this had led to an adjournment for the Appellant and his representatives to consider this material. It is clear that the Appellant was removed from the UK as an alternative to criminal proceedings being taken against him and he would have been well aware of that when making the application that forms the basis of his case. It is not an error on the part of the Judge to have decided that this allegation was not made out, it is not an error to not consider evidence not provided despite the many opportunities offered.

17. It is significant that having overstayed by 6 months the Appellant was then able to arrange his departure within 2 weeks suggesting that his delay in leaving was due to his own choice and could not be said to be due to matters beyond his own control.

18. On the evidence that was before the Judge I am satisfied that the Appellant can properly be said to have contrived in a significant way to frustrate the immigration rules and refusal under paragraph 320(11) was justified. The Secretary of State's appeal against the decision of the First-tier Tribunal is allowed, the decision is remade and the Appellant's appeal is dismissed.

CONCLUSIONS

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the decision. I re-make the decision in the appeal dismissing the appeal of H A.

Anonymity and Fee Award

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

In dismissing the appeal I make no fee award.

Signed:

Deputy Judge of the Upper Tribunal (IAC)

Dated: 31st October 2014