Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09430/2014

THE IMMIGRATION ACTS

Heard at North Shields
On 6 January 2015
Prepared 7 January 2015

Determination Promulgated
On 14 January 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

JISHO THOMAS

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Kannangara, Counsel, instructed by Legend Solicitors
For the Respondent: Ms Rackstraw, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of India, born on 20 April 1982. He entered the UK on 18 July 2011 as a Tier 1 (Post Study) Migrant, with leave to remain until 10 July 2013.

2. On 10 July 2013 the Appellant applied for a variation to his leave as a Tier 1 (Entrepreneur), which application was refused on 6 February 2014, when the

Respondent also made in consequence a decision to remove him from the UK by reference to s47 of the 2006 Act.

3. The Appellant's appeal against those immigration decisions was heard on 30 September 2014, and dismissed in a Determination promulgated on 8 October 2014 by First Tier Tribunal Judge Sanderson.

4. By a decision of First Tier Tribunal Judge PJG White dated 25 November 2014 the First Tier Tribunal granted the Appellant permission to appeal on the basis it was arguable there was a lack of fairness in the appeal process because the Respondent had not produced a copy of the transcript of the Appellant's interview to the Appellant or in evidence to the Tribunal.

5. The Respondent filed a Rule 24 Notice on 9 December 2014. She points out that the Judge made adverse findings in relation to the Appellant's oral evidence on the issue of whether or not the funds in his bank account were his own. The Judge was entitled to do so, for the reasons that he gave, and there was in these circumstances no unfairness in the approach adopted.

6. Neither party has applied for permission to rely upon further evidence pursuant to Rule 15(2A) of the Upper Tribunal Procedure Rules 2008. Thus the matter comes before me.

Adjournment

7. It is common ground that the Appellant was interviewed by the Respondent on 4 December 2013 in relation to his application for a variation to his leave to remain, and that a full transcript of that interview has never been produced by the Respondent to the Appellant, or by either party in the course of the evidence they have placed before the Tribunal.

8. It is however also common ground that the Appellant did not place before the Judge any correspondence requesting the disclosure of that interview transcript written either before, or after, the decisions under appeal were taken. Mr Kannangara very fairly accepts that no such correspondence exists.

9. Moreover Mr Kannangara accepts that no application for an adjournment of the hearing of the appeal was ever made to the Tribunal on the Appellant's behalf, either in writing in advance of that hearing, or at the hearing itself. He accepts that he was not instructed to make such an application.

10. In the circumstances Mr Kannangara accepts that the Upper Tribunal must proceed on the basis that either those advising the Appellant never saw any need for sight of the transcript of the Appellant's interview, or, that those advisers were nonetheless instructed to proceed with the appeal despite its absence from the evidence before the Tribunal.

The criticism raised in the grounds

11. Mr Kannangara accepts that the grounds are not well drafted. He argues that in truth they raise only one complaint, namely that the Respondent's failure to produce the full transcript of the interview meant that the hearing of the appeal was in some way rendered unfair.

12. Mr Kannangara made no reference to the decision in Miah (interviewer's comments: disclosure: fairness) [2014] UKUT 515 (despite that decision being referred to in the text of the decision to grant permission). Nor did he make reference to the decision in MM (unfairness; E&R) Sudan [2014] UKUT 105. Nor did he seek to argue that the Respondent's own decision making process was itself in any way unfair, and thereby vitiated.

13. The context in which this decision making process was being undertaken was in my judgement significantly different to both that which was discussed in Miah [12-13], and in MM.

14. In Miah the Respondent's decision was that the applicant and a third party had entered into a "marriage of convenience". Thus the context was a decision making process that could taint both the applicant and the other party to the marriage with a decision that was in essence a finding of dishonesty, creating significant damage to the applicant's immigration history and capable of operating to his real detriment in the future. (Indeed, although a finding made on the civil standard of proof, it would nonetheless be a finding that both had conspired to commit a criminal offence.) This context required a decision maker to be afforded all of the relevant material that was available in relation to the marriage, and would allow them to make a fully informed decision. A mere summary of the interview provided by the interviewing officer together with a statement of their opinion of what had occurred was said to be insufficient. Moreover this context required in fairness the applicant to be alerted to the essential elements of the case against him, and thus the evidence upon which the decision maker relied.

15. In MM the Respondent's decision concerned an application for asylum by a woman who was accepted to be a citizen of Sudan, but whose claim to be a Coptic Christian who had been persecuted on account of her faith was rejected. It is self evident that such an application warranted the most anxious scrutiny. The Tribunal accepted that the decision maker had not taken into account a letter written on the applicant's behalf immediately after her interview complaining that questions and answers had not been properly translated by the interpreter employed by the Respondent for that purpose. Nor was that letter part of the evidence placed before the Tribunal at first instance. As a result the applicant was cross-examined to demonstrate inconsistencies between the record of her interview and her oral evidence, and it was put to her (and accepted by the Tribunal at first instance) that these inconsistencies were the result of fabrication. The Upper Tribunal found in these circumstances that

there had been procedural unfairness that had not resulted from the actions of either the applicant or the Tribunal, but which vitiated both the decision upon the application, and the decision of the Tribunal at first instance.

16. There is in my judgement no such context to the decision making process that led to the decisions that were under appeal before the Tribunal at first instance in this case. The application did not concern anything so fundamental to the applicant as either their marriage, or their asylum claim, which in my judgement is an important point of distinction in itself. Nor did the decision taint the applicant (or anyone else) with a finding of dishonesty. Moreover the text of the decision does not suggest of itself that the decision maker was denied sight of the transcript of the interview in question, and provided with only a summary. The essential elements and reasons for the decision were set out in the Respondent's letter dated 6 February 2014 which identified in my judgement in clear and unambiguous terms why the Respondent had formed the view that this was not the application of a genuine entrepreneur, and so the applicant knew precisely the case that he faced.

17. Mr Kannangara accepted that he was unable to identify any unfairness in the Tribunal's implicit decision to hear and to dispose of the appeal in the absence of the transcript, given the failure on the part of those advising the Appellant to either seek the disclosure of the transcript, or to seek any adjournment of the hearing of the appeal pending that disclosure. He formally accepted that he did not assert that in the circumstances of this case the Tribunal should have taken the decision to adjourn the hearing of the appeal of its own motion.

18. Even now no steps have been taken on behalf of the Appellant to seek the disclosure of the transcript of the interview.

19. Although he had argued before the Judge that the Tribunal should disregard the fact that the Appellant had been the subject of an interview, and thus disregard the question and answer that was quoted in the reasons for refusal of the application, Mr Kannangara accepted that the Appellant had not disputed in his oral evidence that this was a question he had been asked, and the answer that he had given to it. Indeed, as the Determination record, that same answer was repeated by the Appellant during the course of his oral evidence at the hearing to the same, or a similar question [43]. Thus this was a question and answer that the Judge could not ignore. (The Appellant had claimed at interview (as quoted in the letter of 6.2.14) that the cash standing to the credit of his bank account in India at the date of application was money he had loaned to his parents, and which they had then repaid to him. That was also the oral evidence he gave to the Judge under cross-examination.)

20. Ultimately therefore Mr Kannangara was reduced to the assertion that the Tribunal would have reached different findings of fact on the disputed issue of the source of the funds relied upon by the Appellant, had the full interview transcript been available. Simply put, there is no merit in this assertion. It is

quite plain upon a fair reading of the Determination as a whole that the Judge rejected the Appellant's explanation for the source of the funds in his bank account as inconsistent with the dates and other details of the transactions that were recorded in the statements for that bank account. The Appellant said his parents had repaid a loan that he had made to them in 2011, and that this repayment constituted the funds in his bank account that he relied upon to demonstrate that he genuinely held £50,000 at the date of the application, which he genuinely intended to invest in the proposed business (no such investment having yet taken place). The transactions recorded in the bank statements were however of deposits of funds into his bank account by several different people over a period of three months, and the Judge was perfectly entitled to consider that this was not consistent with the Appellant's oral evidence. It is also important to note that the Judge did not accept as true the Appellant's explanation of how he had come to be in a financial position to lend such a large sum of money to his parents in the first place; savings he claimed to have been made from his salary earned whilst working as a social worker prior to his most recent entry to the UK. Entirely adequate reasons were given for these findings.

Conclusion

21. There was no procedural unfairness in the Respondent's decision making process which vitiates the decisions under appeal. There was no procedural unfairness in the hearing of the Tribunal at first instance. The Appellant did not seek an adjournment of the hearing of his appeal, and does not assert that the Tribunal should have made a decision to adjourn of its own motion. The Determination does not disclose any material error of law in the Judge's approach to the evidence placed before him. The decision that the Appellant had failed to establish that his was a genuine application meeting the requirements of paragraph 245DD(h) was adequately reasoned and well open to the Judge to make upon the evidence. That being so I dismiss the Appellant's appeal.

22. No anonymity order was made by the Tribunal at first instance, none is requested on behalf of the Appellant now, and there is no obvious reason why I should make one of my own motion.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 8 October 2014 did not involve the making of an error of law that requires that decision to be set aside and remade. The decision to dismiss the appeal is accordingly confirmed.

Deputy Upper Tribunal Judge JM Holmes
Dated 7 January 2015