



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/23733/2014

THE IMMIGRATION ACTS

Heard at: Field House
On: 17th April 2015

Decision and Reasons Promulgated
On: 02nd June 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Muhammad Noman Khanzada
(no anonymity direction made)

Respondent

For the Appellant: Mr Avery, Senior Home Office Presenting Officer
For the Respondent: Mr Burrett, Counsel instructed by Woodford Wise Solicitors

DETERMINATION AND REASONS

1. The Respondent is a national of Pakistan date of birth 10th January 1980. On the 18th December 2014 the First-tier Tribunal (Judge Morgan) allowed his appeal against a decision to refuse to vary his leave to remain and to remove him from the United Kingdom pursuant to s47 of the Immigration Asylum and Nationality Act 2006. The Secretary of State now has permission¹ to appeal.

¹ Permission was granted by First-tier Tribunal Judge PJM Hollingworth on the 6th February 2015

Background

2. Mr Khanzada came to the United Kingdom in September 2009 with leave to enter as a student, which was subsequently varied as he became a Tier 1 (Post Study Work) Migrant. The application giving rise to the presently appealed decision was a further application to vary, this time in the capacity of a Tier 2 (General) Migrant. The Secretary of State refused leave with reference to Appendix A and J of the Immigration Rules. Mr Khanzada had submitted a Certificate of Sponsorship from his employer, but the occupation code shown did not correlate to his salary. He therefore failed to attract the requisite points under the heading 'Appropriate Salary'. The application was further refused with reference to Appendix C because Mr Khanzada had failed to supply the specified documents demonstrating that he was in possession of sufficient funds.
3. The First-tier Tribunal accepted that before the decision had been taken on the on the 20th May 2014 Mr Khanzada had submitted a further letter from his employer clarifying that they had written the wrong code on the original certificate. His salary did correspond to the correct code and he should therefore have been awarded his points under Appendix A. The First-tier Tribunal made no finding in respect of Appendix C but instead allowed the appeal on the grounds that the decision was "not in accordance with the law" because the Secretary of State had failed to consider this correspondence: "fairness dictates that the respondent be given the opportunity to properly consider this application".
4. The Secretary of State appeals on the ground that the First-tier Tribunal erred in the following material respects:
 - i) The late evidence should have been excluded under s85A of the Nationality, Immigration and Asylum Act 2002 unless certain circumstances applied; the determination contains no finding about whether such circumstances did apply, nor any reasons why it had been accepted that this letter had in fact been sent prior to the decision being made.
 - ii) The refusal notice contained two grounds for refusal. Even if the decision in respect of Appendix A could be shown to be flawed, the application still fell to be refused under Appendix C so it should never have been 'remitted' to the Secretary of State.

Error of Law

5. Before me Mr Burrett relied on Nasim and Ors (Raju: reasons not to follow?) [2013] UKUT 00610(IAC) and in particular the dicta summarised at (4) of the headnote:

(4) As held in Khatel and others (s85A; effect of continuing application) [2013] UKUT 00044 (IAC), section 85A of the Nationality, Immigration

and Asylum Act 2002 precludes a tribunal, in a points-based appeal, from considering evidence as to compliance with points-based Rules, where that evidence was not before the Secretary of State when she took her decision; but the section does not prevent a tribunal from considering evidence that was before the Secretary of State when she took the decision, whether or not that evidence reached her only after the date of application for the purposes of paragraph 34F of the Immigration Rules.

6. He submitted that the Judge had been entitled on the evidence before him to find that the letter amending the occupation code had been before the Secretary of State prior to the 20th May 2014 when the decision had been taken. It is clear from paragraph 4 of the determination that he had applied the appropriate standard of proof and that he had accepted Mr Khanzada's evidence.
7. Mr Khanzada's evidence is set out in his witness statement dated 26th November 2014. He refers to the employer's letter dated 6th May 2014, also produced in the bundle, and attests that this was sent to the Home Office that day.
8. I agree with Mr Burrett that the Judge was entitled to accept that evidence and find that the document was before the Secretary of State on the date of decision. It is not an error of law to accept the evidence of a witness.
9. Where I part company with Mr Burrett is about the significance of that matter. It was his case that having identified that the decision was otherwise than in accordance with the law, the Tribunal was entitled, in fact obliged, to send it back to the Secretary of State for her consideration. It mattered not whether the appellant had established his case with reference to Appendix C. If the Secretary of State wished to maintain the refusal on that ground, that was up to her and she could do so as part of her reconsideration. I cannot agree. Nasim is authority for the proposition that the Tribunal is entitled to have regard to material that was before the decision maker at the date of decision, in order to resolve a matter in issue between the parties. It is not authority for the Tribunal to remit cases to the Secretary of State that have no hope of success. The Tribunal may have considered that the Secretary of State had acted unfairly in ignoring the employer's second letter, but that did not assist Mr Khanzada in dealing with the second ground of refusal. If he could not discharge the burden in respect of Appendix C, there was no point in his case going back to the Secretary of State. Accordingly I find that the First-tier Tribunal erred in its approach and the decision is set aside. I preserve the findings of fact about the employer's letter.
10. In re-making the decision I gave Mr Khanzada an opportunity to produce evidence and make submissions about whether he had met the requirements of Appendix C at the date of decision.

The Re-Made Decision

11. The parties agreed that Appendix C required Mr Khanzada to provide specified evidence with his application that he had held the requisite funds (said to be £900) for a

continuous period of 90 days, that period ending within the month preceding the application. The application was lodged on the 17th April 2014.

12. The Secretary of State's bundle contains those documents which the Secretary of State contends were submitted with the application. There is a single Barclays Bank statement covering the period 8th March 2014 to the 8th April 2014.
13. Mr Khanzada's bundle contains more Barclays statements. There is one covering the period 7th December 2013 to 8th January 2014, another dated 9th January to 7th February, and one from the 8th February to 7th March. The balance is consistently higher than £900 in credit.
14. The question before me is whether I can be satisfied, on a balance of probabilities, that these bank statements were all submitted with the application as is now claimed, or whether, as Mr Avery contends, the only statement submitted was the single month shown in the Secretary of State's bundle.
15. Mr Khanzada gave oral evidence. He told me that on the 17th April 2014 he had submitted the statements covering January, February and March 2014. I bear in mind that Mr Khanzada has already been found to be credible by the First-tier Tribunal and that since these documents do exist it is of course possible that they were indeed before the Secretary of State when she took her decision.
16. However on balance, I am not satisfied that it has been demonstrated that this was in fact the case. That is because all of the rest of the evidence indicates that there was only one statement submitted with the application on the 17th April 2014. The last page of the application form contains a 'checklist' for applicants to complete showing what documents they are submitting with their applications. Mr Khanzada has indicated that he is submitting '01' bank statement. The grounds of appeal to the First-tier Tribunal refers to a "bank statement" in the singular. It would appear from the determination that this claim formed no part of Mr Khanzada's case before the First-tier Tribunal; had it been his case that the Secretary of State had simply failed to reproduce all of the relevant evidence of funds in her bundle, I would have expected that to be argued before the Tribunal. That it was not is demonstrated by the witness statement, which nowhere asserts that the statements were sent in with the application. I note that by contrast that statement deals extensively with the Secretary of State's failure to take the employer's letter into account.
17. I cannot be satisfied on the balance of probabilities that Mr Khanzada provided with his application bank statements showing the requisite 90 days of funds. Although he has now produced such evidence, I am precluded from having regard to it by s85A. He has therefore failed to show that he should have been awarded 10 points under Appendix C and the appeal must be dismissed under the Rules.

Decision

18. The determination contains an error of law and it is set aside.
19. I re-make the decision in the appeal by dismissing it under the Immigration Rules.
20. I make no direction for anonymity.

Deputy Upper Tribunal Judge Bruce
25th May 2015