Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37676/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21 May 2015	**On 9 June 2015**
Prepared 21 May 2015	

Before

LORD MATTHEWS, SITTING AS AN UPPER TRIBUNAL JUDGE
DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant
and

MR NISHITH SURESHCHANDRA PATEL
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:
For the Appellant: Ms G Brocklesby-Weller, Senior Presenting Officer
For the Respondent: Ms A Jones, Counsel instructed by Deccan Prime Solicitors

DECISION AND REASONS

1. In this decision the Appellant is referred to as the Secretary of State and the Respondent is referred to as the Claimant.

2. The Claimant, a national of India, date of birth 28 August 1982, made an application on 10 June 2013 for leave to remain as a partner of a Tier 1

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Migrant under the points-based system. The application was refused by the Secretary of State on 2 September 2013 and a decision was made to issue removal directions under Section 47 of the IANA 2006.

3. The basis of the Secretary of State's decision was that the Claimant had failed to make proper disclosure and thus the non-disclosure engaged paragraph 322(1A) of the Immigration Rules HC 395 (as amended). The Secretary of State had refused the application with reference to paragraph 245(b) of the Rules but it is accepted that no-one can find such a Rule in existence even as set out or indeed as pertinent to such an application.

4. The matter came before First-tier Tribunal Judge Fletcher-Hill, who on 15 January 2015, allowed the appeal under the Immigration Rules with particular reference to non-existent paragraph 245(b) of the Rules and also under Article 8 of the ECHR.

5. There are three principal criticisms, the first being that the judge did not properly assess the evidence concerning the misinformation that had been provided by the Claimant in an application form completed by his wife and an unknown third party.

6. These were issues raised at the hearing and in part cited in the judge's decision but ultimately, whilst the judge heard evidence from the Claimant and found him to be a credible witness of fact and accepted that evidence, he nevertheless never addressed, as he should have done, the issue of the Claimant's wife's intentions and motives in completing an application form in which there was a material non-disclosure of a previous criminal conviction.

7. In the circumstances, whilst the judge was satisfied as to what the Claimant had said of the matter, he made no findings (and acknowledged he could not because he did not have the evidence) on the wife's actions. Accordingly in the light of the case of **AA (Nigeria) [2010] EWCA Civ**

773,in particular paragraphs 76 to 81, the judge made a material error of law in failing properly to assess the evidence as to whether or not the Claimant had properly faced refusal under the general grounds with reference to paragraph 322(1A).

8. The second criticism was that the judge, at paragraph 50 of the decision, noted what he believed to be evidence upon which he concluded the Claimant had not been acting to conceal the criminal conviction in 2011. The judge said, “I find that in view of this, he would not have regarded the offence of 2011 to be a material fact”. This was all based on what was said to be a passage in a statement by the Claimant but no such passage in fact exists. A finding on the basis of evidence which did not exist cannot be sustained. Paragraph 43 narrates a submission based on this phantom passage and the judge, in reaching this view on the actions of the Claimant and his intentions, was plainly misled into making an error of fact which made a material difference to his reasoning in decision; as such that was a material error of law.

10. The third criticism is that the judge, having wrongly recited paragraph 245(b) of the Immigration Rules, went on to allow the appeal under the very same paragraph. It may be that the considerations did fall under paragraph 319C of the Immigration Rules in relation to requirements for entry clearance or leave to remain as a partner of a relevant points-based person. However, the fact is the Secretary of State, as can be gathered from the Reasons for Refusal Letter, had not undertaken the exercise. It is certainly arguable that before the judge went on to consider whether the appeal could be allowed it was going to be necessary for the matter to be remitted to the Secretary of State to provide reasons with reference to whatever was the Rule upon which the application had been made and entertained. Even if that were not correct, it is plain from the decision that the judge did not carry out the exercise of looking at paragraph 319C and/or any equivalent paragraph of the Immigration Rules to make a decision on material issues that arose.

11. Accordingly the judge's decision to allow the appeal under the Immigration Rules was flawed and cannot stand.

12. Finally, a further criticism was that in relation to Article 8 ECHR the judge's decision in five lines was simply absent of reasons. There is a finding that the Secretary of State's decision is disproportionate but no more than that. There was no reference to material factors taken into consideration and no analysis in the balancing exercise with reference to the public interest-a matter that should have been given weight.

13. For these reasons we are satisfied that the original Tribunal made material errors of law and its decision cannot stand.

14. The matter should be remitted to the First-tier Tribunal to be decided again and before such rehearing takes place the Secretary of State should serve a supplementary Reasons for Refusal Letter setting out with reference to the correct Immigration Rule what other considerations have been addressed and whether there was any other basis to refuse leave to remain other than by reference to the misrepresentation issue that has previously been raised.

LISTING

(1) Listed in the First-tier Tribunal.

(2) Hearing time estimate one and a half hours.

(3) No interpreter required.

(4) Any further documents relied upon other than the supplementary Reasons for Refusal Letter to be served not less than ten working days before the further hearing.

(5) The matter is not to be relisted before First-tier Tribunal Judge Fletcher-Hill.

NOTICE OF DECISION

The Secretary of State's appeal is allowed to the extent that the matter is remitted to the First-tier Tribunal to be re-made

Signed Date 28 May 2015

Deputy Upper Tribunal Judge Davey