



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/44032/2014
IA/44035/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 14 December 2015**

**Decision Promulgated
On 29 December 2015**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MOHAMMAD SHAHRIAR NIPUN
FARHANAZ DEEBA**

Respondent

Representation:

For the Appellant: Mr S. Whitwell, Home Office Presenting Officer

For the Respondent: Mr M. Iqbal, Counsel instructed by Burney Legal Solicitors

DECISION AND REASONS

Background

1. For the sake of continuity I will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.
2. On 31 March 2011 the first appellant ("the appellant") applied to vary and extend his leave to remain to that of a Tier 1 (General) Migrant with his

wife as his dependent. The respondent did not make a decision in response to the application in good time. The appellant sent a Pre-action Protocol letter to the respondent regarding the delay in decision making. The appellant says that the respondent refused the application in a notice of decision dated 02 January 2013 because it was alleged that he had produced false documents relating to his employment with a company called Awdry Enterprises. He says that the appeal was adjourned on 14 May 2013 because the respondent produced documents at the hearing. At the resumed hearing on 25 July 2013 the respondent withdrew the immigration decision. There does not appear to be anything in the evidence currently before the Tribunal to show why the decision was withdrawn.

3. The appellant says that there was further delay in decision making. A fresh decision was not made until 01 September 2014, when the respondent refused the application in the following terms:

“In your application, you submitted wage slips, P60, P45, HMRC letter and a letter from Awdry Enterprises covering the period of 28 February 2010 to 31 January 2011.

Following HMRC verification, I am satisfied that Awdry Enterprises have not demonstrated that they have participated in any legitimate trade.

As false documents have been submitted in relation to your application, it is refused under paragraph 322(1A), of the Immigration Rules.”

4. The appellant appealed to the First-tier Tribunal and asked for the matter to be dealt with on the papers. In response to directions the respondent submitted a bundle of documents, which included copies of the documents relating to his employment with Awdry Enterprises and two witness statements from an employee of HMRC called Catherine McGovern (18/7/13 & 08/01/14). In the first statement Ms McGovern also referred to an earlier statement made on 11 December 2012, which was not included in the bundle.
5. In response to this evidence the appellant prepared a witness statement, a skeleton argument and a bundle of supporting documents. The skeleton argument expressly dealt with the issues raised in Ms McGovern’s statements.
6. First-tier Tribunal Judge Povey allowed the appeal on the limited ground that the decision was not in accordance with the law. He concluded that the respondent was under a duty to make the appellants aware of Ms McGovern’s evidence before refusing the application, should have afforded them an opportunity to comment and should have taken any comments into account before making a decision. He found that the respondent’s failure to do so rendered the decision unlawful. He went on to consider whether he should consider the evidence but concluded that it was not appropriate to do so.

7. The First-tier Tribunal granted the respondent permission to appeal to the Upper Tribunal on the ground that it was arguable that the First-tier Tribunal Judge should have either adjourned the matter to allow the appellant time to deal with the evidence or should have decided the case on the basis of the available evidence.
8. On 10 December 2015 the respondent applied to adduce further evidence under rule 15(2A) of The Tribunal Procedure (Upper Tribunal) Rules 2008. The evidence consisted of a further statement from an employee of HMRC (Wendy Gilbert) dated 10/12/15 listing the appellant's tax records. Mr Iqbal was not notified of the evidence until the morning of the hearing and initially applied for an adjournment, which was unopposed by Mr Whitwell.
9. After further discussion as to the merits of the grounds of appeal, and after having considered the First-tier Tribunal decision, I suggested that the best way forward would be to find an error of law in the First-tier Tribunal decision and remit the case for a fresh hearing before the First-tier Tribunal so that any further evidence and any evidence produced in response could be considered in full. Both parties agreed to this course of action.
10. It is apparent from the course of events outlined above why the First-tier Tribunal decision contains an error of law. The respondent refused the application in the normal way, albeit only with outline reasons why it was alleged that false documents had been submitted with the application. The evidence relied upon was served in the respondent's bundle in February 2015 and the appellant responded with evidence served in March 2015. At the date when the First-tier Tribunal Judge decided the case the appellant had more than sufficient time to respond to the evidence relied upon by the respondent.
11. The whole purpose of an appeal is for a First-tier Tribunal Judge to make findings of fact in relation to disputed issues. The course of events in this case was no different to any other appeal against refusal of leave to remain. Aside from the evidential flexibility provisions contained in paragraph 245AA of the immigration rules, which do not apply in the circumstances of this particular case, it is unclear how the judge could reasonably have concluded that the decision making process was procedurally unfair (setting aside the obvious and no doubt frustrating delays). The judge should have gone on to consider the evidence and make a decision in relation to the matters in dispute. As such I find that the First-tier Tribunal involved the making of an error on a point of law and I set aside the decision.
12. Mr Iqbal accepted the further evidence produced by the respondent was now served. He noted that the earlier statement made by Ms McGovern on 11 December 2012 was not included in the evidence. On behalf of the respondent Mr Whitwell undertook to serve the statement by 31 January 2016, or at the very least, to notify the appellant if the evidence was not available. Whilst there was some further discussion about further

directions I declined to make directions at this stage because that is a matter for the First-tier Tribunal. It was agreed that it was now appropriate to list the case for an oral hearing.

13. I conclude that the First-tier Tribunal decision involved the making of an error on a point of law. The decision is set aside and the case remitted to the First-tier Tribunal for a fresh hearing.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

I set aside the decision and remit the case for a fresh hearing before the First-tier Tribunal

Signed 

Date 14 December 2015

Upper Tribunal Judge Canavan