



The Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number: IA/44384/2014

THE IMMIGRATION ACTS

Heard at Field House
On February 17, 2016

Decision & Reasons Promulgated
On April 19, 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR MUHAMMAD TANVEER
(NO ANONYMITY DIRECTION)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant

Mr Richardson, Counsel, instructed by Nasim and Co

Respondent

Mr Tarlow (Home Office Presenting Officer)

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan. The appellant entered the United Kingdom on October 7, 2017 having been given leave to enter the United Kingdom as a Tier 4 student until January 17, 2011. His visa was extended in the same category until August 28, 2013 when he was granted leave to remain as a Tier 1 (Post study work) Migrant.
2. On August 20, 2014 he submitted an application to vary his leave to enable him to remain as a Tier 1 (Entrepreneur) Migrant. This was refused by the respondent on

October 16, 2014 because the respondent was not satisfied the appellant had provided the required documents under Appendix A Paragraph 41-SD of the Immigration Rules.

3. The appellant appealed this decision on November 4, 2014, under Section 82(1) of the Nationality, Immigration and Asylum Act 2002.
4. The appeal came before Judge of the First-tier Tribunal Plumptre on July 6, 2015 and in a decision promulgated on July 22, 2015 she refused the application having regard to the Immigration Rules.
5. The appellant lodged grounds of appeal on August 5, 2015 submitting Judge of the First-tier Tribunal Plumptre had erred but permission to appeal was refused by Judge of the First-tier Tribunal Astle on November 16, 2015 on the grounds there was no error in law. Those grounds were renewed to the Upper Tribunal on December 1, 2015. Upper Tribunal Judge Taylor found on December 9, 2015 it was arguable there had been an error in law because it was arguable the decision was not in accordance with the Rules because the respondent may have considered the application with reference to the wrong Rule. In a rule 24 response dated December 22, 2015 the respondent argued that it mattered not if the right Rule had been considered because Judge of the First-tier Tribunal Plumptre had found the offer of funds was not genuine.
6. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 I extend that Order.
7. The matter came before me on the above date.

SUBMISSIONS

8. Mr Richardson referred back to the application form and original decision and submitted that the First-tier Judge had erred because she failed to engage with the crucial point that the respondent had firstly, considered the application under the wrong provisions and secondly, had considered an issue that the respondent had not raised or considered in the refusal letter. He submitted the application made on August 20, 2014 and it had been made on the basis the appellant has access to £200,000 (See Section G 3A of the application form) and the appellant ticked the appropriate box indicating this. However, the respondent considered his application on different basis namely post study worker and access to £50,000. The main differences were that such an application brings with it additional documentary requirements (see table 4D of Appendix A) over and above those set out in Table 4A of Appendix A. These requirements are contained in paragraph 41-SD(e) of Appendix A. At the original hearing this was pointed out to Judge of the First-tier Tribunal Plumptre but she did not deal with it because on the face of it she did not understand the point counsel was making. Her options, if she had accepted this point would have been to either send it back to the respondent for decision in accordance with the law or consider it under the correct Rule herself. The first error of law therefore related to the failure by the Judge to consider this under the correct Rule.

9. Mr Richardson went onto submit that her second error was to then consider a refusal under paragraph 245DD despite the fact the respondent had deferred any consideration of this due to her incorrect application of the Rules. At the hearing the representatives were content to deal with the case on submissions but the Judge decided, during submissions, that she wanted to hear some oral evidence. Mr Richardson submitted this was the Judge's second error as it was not her role to make a primary decision on genuineness in circumstances when the respondent had not raised it. The third error was that the Judge's approach breached the Rules of common law fairness. Judge rejected counsel's claim that this was a new matter at paragraph [23] but it had never been raised in the refusal letter. He submitted there was a material error in law.
10. Mr Tarlow relied on the Rule 24 letter dated December 22, 2015. After a brief discussion concerning the original decision he accepted the original decision had been taken under the wrong Rule. He accepted many of the points made by Mr Richardson but submitted that as the Judge was not satisfied about the genuineness of the funds it mattered little which Rule was applied.

DISCUSSION AND FINDINGS

11. Mr Tarlow agreed with me that the application had been considered under the wrong Rule. He further agreed that in her refusal letter the Secretary of State had not considered any issues under paragraph 245DD HC 395. I pointed out to him that the Secretary of State had specifically reserved the right to request independent third party verification under paragraph 245DD HC 395.
12. I posed the question to him that if the respondent had considered the application under the wrong Rules and had not considered independent third party verification then how could he argue that the decision was in accordance with the Rules when the Judge's reason for refusing the application was based on both those points.
13. Mr Tarlow indicated that if I felt the decision was not in accordance with the law then he would tend to agree with me and that the matter should be referred back to the respondent for a fresh decision.
14. I was satisfied that was the appropriate course of action. The judge had struggled to come to terms with which Rule should be applied and has of her own volition called for evidence to be given during submissions. Mr Tarlow accepted the wrong Rule had been applied and it seems that if the Judge wanted to consider paragraph 245DD HC 395 then she should have clarified whether that was the respondent's position and then considered whether the respondent, as primary decision maker, should have been given the opportunity to deal with the issue.
15. By failing to deal with these two issues I am satisfied there was an error in law. The Judge may well be correct that genuineness is a matter to be considered but the third party should be given an opportunity to address the concerns now raised by the Judge and this can best be achieved by asking the Secretary of State to make a fresh decision having regard to the correct Rules.

16. Both representatives invited me to remit this matter back to the Secretary of State on the basis the original decision was not in accordance with the law.
17. In the circumstances I find the decision is not in accordance with the law because it suffered from a defect in procedure. The effect of this determination is the October 16, 2014 decision is quashed and that the application remains outstanding awaiting a lawful decision.

DECISION

18. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I have set aside the decision. The matter is remitted back to the Secretary of State for the reasons set out above.

Signed:

Dated:



Deputy Upper Tribunal Judge Alis

FEE AWARD

I make a fee award because the respondent's whole decision was flawed.

Signed:

Dated:



Deputy Upper Tribunal Judge Alis