**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/25695/2014

**THE IMMIGRATION ACTS**

| **Heard at : IAC Birmingham** | **Determination Promulgated** |
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| **On : 20 July 2015** | **On: 27 July 2015** |

**Before**

**UPPER TRIBUNAL JUDGE KEBEDE**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**FARINDE MUKAILA BABATUNDE**

Respondent

**Representation:**

For the Appellant: Mr N Smart, Senior Home Office Presenting Officer
For the Respondents: Mr A Pipe, instructed by Khan & Co Solicitors

**DETERMINATION AND REASONS**

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Babatunde's appeal against the respondent's decision to refuse his application for leave to remain in the United Kingdom as a Tier 2 (General) Migrant.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Babatunde as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Nigeria born on 10 February 1975. He came to the United Kingdom in September 2008 as a student and was subsequently granted leave to remain as a Tier 1 (Post-Study Work) Migrant in February 2010. In January 2012 he was granted leave to remain as a Tier 2 (General) Migrant until 25 May 2014. On 6 May 2014 he applied for further leave to remain as a Tier 2 (General) Migrant.

4. The appellant's application was refused on 3 June 2014 on the basis that the salary included in his Certificate of Sponsorship was not at or above the appropriate rate for the job, as specified under Appendix A of the Immigration Rules and the Codes of Practice at Appendix J. His certificate of Sponsorship stated that his prospective employment most closely corresponded to occupation code 2123. The minimum acceptable rate of pay for a 39 hour working week for that employment was £32,500 per annum, whereas his Certificate of Sponsorship stated that his salary would be £28,000 per annum for a 40 hour week which equated to £27,300 for a 39 hour week.

5. The appellant appealed against that decision. In his grounds of appeal to the First-tier Tribunal he stated that his employer had made a clerical error in selecting the code and that the correct code matching his job description for a Network Engineer should have been 2139, for which he was receiving the appropriate salary. He stated that he was enclosing a letter from his employer to that effect. He asserted further that the Home Office caseworker should have applied discretion under the immigration rules by contacting his employer to verify the information or by taking his employment offer letter and payslip as proof.

6. The appeal came before First-tier Tribunal Judge Ghaffar on 27 August 2014. The judge heard oral evidence from the appellant and from the director of the company for which he worked. He found that the appellant's employer had made a genuine error. The appellant had previously declared a salary of £28,000 and remained in the same role and on the same salary and the accompanying documents evidenced that he was not applying to remain to work in an upgraded role within the company. The caseworker ought to have contacted the appellant in line with the Guidance.

7. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge had failed to apply section 85A of the Nationality, Immigration and Asylum Act 2002 and had considered evidence not adduced in support of the appellant's application contrary to that provision; and that he had failed to apply binding caselaw in Rahman v Secretary of State for the Home Department [2014] EWCA Civ 11.

8. Permission to appeal was granted on 27 October 2014.

## Appeal Hearing

9. The appeal came before me on 20 July 2015. I heard submissions from both parties.

10. Mr Smart produced a note taken by the presenting officer at the hearing before Judge Ghaffar in which she recorded that the judge had indicated as a preliminary issue that the respondent's decision was correct on the basis of the application made and that he needed to make a new application. He said that he was producing the note as a response to the allegation made in the appellant's Rule 24 reply that the presenting officer did not challenge the appellant's evidence relating to the correction of a mistake and submitted that that explained the lack of detailed submissions. He submitted that section 85A of the 2002 Act prevented the judge from considering the evidence referring to the error and that the judge's decision was inconsistent with the findings in Rahman and Kaur v The Secretary of State for the Home Department [2015] EWCA Civ 13. The appellant should have made a fresh application and his email to the Home Office of 5 June 2014 suggested that that was what he had intended to do.

11. Mr Pipe, in his submissions, relied upon the letter of 16 June 2014 from the appellant's employer referring to advice given to him by the Home Office that the appellant should appeal the decision. The appellant had therefore followed the instructions of the Home Office. The judge was entitled to conclude that this was a matter of a clerical error. The exceptions to section 85A allowed for corrections of errors, albeit in respect to refusals under the general grounds for refusal and it was important to have regard to the mischief the exceptions were meant to address. The description of the appellant's job, network engineer, clearly met the correct code. The appellant's circumstances were different to those in Rahman, in particular as the appellant was encouraged by the Home Office to appeal.

## Consideration and Findings

12. Whilst the circumstances in this case are unfortunate and I am sympathetic to the appellant, the fact remains that section 85A of the 2002 Act prevented the judge from considering evidence other than that adduced at the time of making his application. The letter from the appellant's employer and the email sent to the Home Office are all in response to the refusal decision and thus were by their very nature not submitted to the respondent together with the appellant's application. The respondent made a decision on the evidence before her and that evidence demonstrated that the appellant could not meet the requirements of the immigration rules. There was nothing unlawful about that decision.

13. There is no provision within section 85A for the correction of what is said to be an error, in the circumstances arising in this case. I do not agree with Mr Pipe that the appellant's circumstances can be distinguished from those in Rahman and Kaur. It is clear from both cases that the question of unfairness was found to arise only in cases where there was some fault on the part of the Home Office or where the appellant could not be considered to bear any responsibility in relation to omissions or errors in the application. There was no obligation on the respondent to give the appellant an opportunity to seek an

amendment to the CoS before a decision was taken on the application. Such findings are made clear at paragraph 32 of Rahman, as follows:

> "I am not sure whether the appellant had an opportunity to check the CAS following its completion by the sponsor, and I note that part of the argument for the appellant is that he should not be penalised for the shortcomings of an institution of study over which he had no control. Nevertheless I agree with the tribunal that the situation here is very different from that in *Naved* and that fairness did not require the Secretary of State to give the appellant an opportunity to address any deficiency in the CAS. There was no question in this case of the Secretary of State obtaining additional information without reference to the applicant and relying on it to refuse the application. The Secretary of State simply applied the terms of the Immigration Rules themselves. Under the Rules it was the appellant who had the responsibility of ensuring that his application was supported by a CAS that met the requirements laid down. If the CAS did not meet those requirements, it could not earn him an entitlement to points. If the deficiency in the CAS was the result of a mistake on the part of the sponsor (a point which, as I have said, was not even raised by the appellant in the tribunals below), it was a matter to be pursued between the appellant and the sponsor. There was no obligation on the Secretary of State to give the appellant an opportunity to seek an amendment to the CAS before a decision was taken on the application."

14. Such an approach was endorsed in Kaur. It is asserted that the appellant's case is distinguishable on the grounds that the appellant's employer, Mr Peel, was advised by the Home Office to appeal the decision. However, it is clear from Mr Peel's letter of 16 June 2014 that the advice was made by an advisor with little knowledge or understanding of the appellant's situation and cannot be said to give rise to any expectation on the part of the appellant that he would be able to circumvent the requirements of the rules or the provisions of section 85A of the 2002 Act.

15. Accordingly the judge was wrong to accept the explanation given by the appellant's employer as a means by which to find that the appellant was able to meet the requirements of the immigration rules. Furthermore, there was no basis upon which the judge could, as an alternative, have found the respondent's decision not to be in accordance with the law. There was simply no unfairness, in legal terms, in the respondent's decision. It was not for the judge to interfere with the respondent's exercise of discretion and there was no evidence before the judge to show that the respondent had acted in breach of the terms of a policy. The guidance referred to at paragraph 6 of the judge's decision has not been clarified and does not appear to have been produced.

16. Accordingly, the judge's decision is not a sustainable one and has to be set aside and re-made by dismissing the appeal under the immigration rules. It is open to the appellant to make a fresh application and it is to be hoped, given the circumstances, that the respondent will not penalise him in such an application for it being made outside the period of his leave. That is, however, a matter for the discretion of the Secretary of State.

17. Mr Pipe accepted that Article 8 was not pleaded before the judge and accordingly there is nothing further for me to consider.

## DECISION

18. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed and the decision of the First-tier Tribunal is set aside. I re-make the decision by dismissing Mr Babatunde's appeal.

Signed: Dated:
Upper Tribunal Judge Kebede