



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/48626/2014

THE IMMIGRATION ACTS

Heard at Field House
On 21 December 2015

Decision & Reasons Promulgated
On 05 January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SELVARAJ PARIMANAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Bazini, Counsel, instructed by KTS Legal
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Rose (Judge Rose), promulgated on 25 June 2015, in which he dismissed the appeal. That appeal was against the Respondent's decision of 20 November 2014, refusing to vary leave to remain and to remove the Appellant from the United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. Permission to appeal was granted by Designated First-tier Tribunal Judge Garratt on 23 September 2015.

The decision of Judge Rose

3. The Appellant had sought further leave to remain under the Tier 2 (Intra-Company Transfer: Long Term Staff) provisions of the Immigration Rules (the Rules), in particular paragraph 245GD. The Respondent had awarded the Appellant 30 points for Sponsorship under Appendix A to the Rules, and 10 points for Maintenance under Appendix C. However, no points had been awarded for Appropriate Salary because the Certificate of Sponsorship (CoS), when accessed at the time of the decision, stated the Appellant's salary to be £40,000, and not the minimum of £41,000.
4. On appeal to Judge Rose, the Appellant had contended that his employers (the sponsor) had sought to access the Respondent's Sponsor Management System (SMS) prior to the decision being made in order to rectify the salary issue. However, it was said that the SMS was not working properly at the time. In addition, those representing the Appellant had written to the Respondent on 5 November 2014 explaining the position regarding the SMS and the correct salary.
5. At paragraph 12 of his decision Judge Rose cited section 85A of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) and concluded that he was precluded from considering any evidence which had not in fact been submitted at the precise time the application was sent to the Respondent. Therefore, he went on to conclude that it was not open to him to have regard to attempts by the Appellant's employers to make changes to the CoS. He duly dismissed the appeal under the Rules. Article 8 was dealt with briefly.

The grounds of appeal

6. The grounds assert that the Respondent had failed to have regard to the letter from the representatives, and that either Rules did not preclude changes being made to the CoS, or that discretion for such changes to be made is routinely exercised in appellants' favour. It is said that Judge Rose erred in not allowing the appeal outright, or at least to the extent that the Respondent's decision was not otherwise in accordance with the law.
7. Judge Roses' conclusion on Article 8 was not challenged.

The hearing before me

8. Mr Bazini submitted that section 85A of the 2002 Act did not apply to this scenario at all because the attempted changes to the CoS emanated from the employers, not the Appellant. In any event, if section 85A did apply, evidence provided prior to the decision being made could be considered by the Respondent and, in turn, the Tribunal. Mr Bazini relied on Nasim and others (Raju: reasons not to follow?) [2013] UKUT 00610 (IAC). The judge had therefore wrongly restricted himself in respect of

the evidence. There were no findings of fact in respect of the letter and the attempt by the sponsor to access the SMS prior to the Respondent's decision.

9. Mr Clarke submitted that Judge Rose was right to have relied on section 85A. This was an absolute answer to the Appellant's challenge. When asked about the effect of Nasim, Mr Clarke said that it must be wrong, and the decision in Raju and Others [2013] EWCA Civ 754 was binding on me, as it was on Judge Rose.

Decision on error of law

10. I conclude that Judge Rose did materially err in law.
11. Although I see some merit in Mr Bazini's first point, I am not persuaded that section 85A has no application whatsoever in this case. The evidence of the representative's letter and that from the employers (such as it was) is in my view caught by section 85A(4) of the 2002 Act. It is in effect evidence adduced by to the Appellant in support of his case.
12. However, I conclude that Judge Rose was wrong to find that the effect of section 85A was, in the context of this case, to preclude the admissibility of any evidence not sent in with the original application (as opposed to being sent into the Respondent before the decision was made). Clearly, Raju was binding on Judge Rose. That decision concerned the construction of the Rules as they related to the requirement to provide specific qualifications before necessary points could be awarded (the particular provisions were contained in the fourth part of Table 10 of Appendix A to the Rules). The wording of these provisions was construed as precluding the ability of applicants from relying on qualifications obtained only after their application had been sent in, notwithstanding that the qualification was obtained and evidence thereof submitted prior to the decision being made.
13. The particular provisions of the Rules with which Judge Rose was concerned did not contain such a temporal restriction. Importantly, I find that the decision in Nasim specifically says, albeit on an *obiter* basis, that in appropriate cases (of which the present is one), evidence submitted after the application is made but before a decision is made can be considered by the Respondent. Paragraphs 72-7 of Nasim state:

"72. At [18] and [19] above, we have recorded how the respondent's stance before the Upper Tribunal in Khatel relied upon section 85A of the 2002 Act, in which Exception 2 was said to have the effect of restricting the Tribunal to the consideration of evidence, which was submitted in support of, and at the time of making, the application concerned. We have also seen that, before the Court of Appeal in Raju, the respondent put her case on the substantive requirements of the Rules. In the present cases, much of Mr Iqbal's skeleton argument was taken up with an analysis of section 85A. In the event, like the Court of Appeal, we have resolved the issues before us without reference to the meaning or effect of section 85A. Nevertheless, we agree with Counsel for the appellants that, in the circumstances, it would be helpful to explain why this is so, and in particular, to set out the stance of the respondent, both in Raju and before us.

73. Paragraph 29 of Mr Gullick's skeleton argument for the respondent in Raju reads as follows:-

"29. Whilst the SSHD accepts, having further considered the position in the light of the Upper Tribunal's judgment, that following the coming into force of section 85A of the 2002 Act, an application is to be treated as continuing for evidential purposes after it is initially submitted to the SSHD (and so an applicant can provide further evidence, in addition to that initially submitted, prior to the SSHD's decision), the question of where the cut-off point in the 'fixed historic timeline' for the award of points should fall is a somewhat different one." (original emphases)

74. Mr Gullick's skeleton argument in the present contains this paragraph:-

"41. It is clear ... that the SSHD has never suggested in this appeal that the SSHD is not entitled to consider post-submission but pre-decision evidence. The SSHD has also made it clear that, in any event, the Tribunal is entitled to consider the evidence that the decision maker considered. Such evidence was considered in these cases (and in the Raju cases), but did not result in the award of 15 points for the reasons given in Raju." (original emphasis)

75. In the light of the respondent's position, there is a considerable amount of agreement between Mr Gullick and Mr Iqbal. In particular, they agree on what is meant by the expression "the application" in section 85A. They disagree, however, about whether section 85A imposes any substantive restriction on the ability of the respondent to consider evidence submitted after the date on which the application is made for the purposes of the Rules (pursuant to paragraph 34G). We agree with the respondent that section 85A imposes no such restriction.

76. Accordingly, the respondent's position, in cases such as the present, is that (as held in Khatel) section 85A 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 respondent when she took her decision; but the section does not prevent a tribunal from considering evidence that was before the respondent when she took the decision, whether or not that evidence reached the respondent only after the date of application for the purposes of paragraph 34F. Although our view of the matter is obiter, we concur."

14. I read Nasim as being consistent with Raju. It is clear from the passages cited above that the Respondent herself adopted a stance which allows for the submissions of post-application evidence. There is no indication that in the time since its promulgation, the position adopted in Nasim has been shown to be wrong. Given the importance of section 85A and the admissibility of evidence, it would be very surprising if a wholly erroneous view of the law by the Upper Tribunal has been permitted to persist for so long.
15. In light of the above, I reject Mr Clarke's submission that Nasim must be wrong, and I conclude that Judge Rose misdirected himself in law as to the effect of section 85A on the appeal before him.

16. This misdirection was material because it had the effect (intentional or otherwise) of him failing to make any findings of fact in relation to the sponsor's attempts to access the SMS and/or the representative's letter, both of which were relevant matters. Indeed, there are not even any findings as to the existence and operation of the SMS, or the practice adopted by the Respondent thereto.
17. All of this in turn had the additional effect of Judge Rose failing to consider the argument that the Respondent's decision may not have been in accordance with the law.
18. For all the reasons set out above, I set aside the decision of Judge Rose.

Disposal

19. I have carefully considered what should happen to this appeal now. Of course, in the normal run of things, the case would remain in the Upper Tribunal and the decision would be remade at this level.
20. However, having taken account of paragraph 7.2(b) of the Practice Statements, and the particular circumstances of this case, I conclude that remittal to the First-tier Tribunal is the appropriate course of action. There are no findings of fact at all on several material issues, and it is likely that a significant amount of further evidence relating to the SMS will need to be adduced and considered in due course.
21. I therefore remit the appeal back to the First-tier Tribunal, with Directions (see below).

Anonymity

22. There is no direction in place and I do not make one at this stage.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I remit the case to the First-tier Tribunal.

Directions to the parties

1. **The issues in the remitted appeal are: first, whether the Appellant can satisfy the relevant Immigration Rules; second, if not, whether the Respondent's decision was not otherwise in accordance with the law;**
2. **The conclusion of the original First-tier Tribunal on Article 8 has not been challenged, and it is preserved.**

Procedural Directions

- 1. The appeal is remitted to the Hatton Cross hearing centre, to be re-listed on a date to be fixed;**
- 2. The remitted appeal shall not be heard by First-tier Tribunal Judge Rose.**

Signed

Date: 22 December 2015

H B Norton-Taylor
Deputy Judge of the Upper Tribunal