



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/15944/2013

THE IMMIGRATION ACTS

Heard at Manchester
On 11th December, 2013

Determination Promulgated
On 6th January 2014

Before

Upper Tribunal Judge Chalkley

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

Appellant

**SIVA MAHENDRA KOSANA
(No anonymity order made)**

Respondent

Representation:

For the Appellant:

Ms C Johnson, Senior Home Office Presenting Officer

For the Respondent:

Mr J Middleton, Counsel, instructed by Leigh Bailey Solicitors

DETERMINATION AND REASONS

1. The appellant in this appeal is the Secretary of State for the Home Department to whom I shall refer in this determination as the “claimant”. The respondent is a citizen of India, who was born on 14th February, 1986. On 30th January, 2013 he made application to the claimant for leave to remain as a Tier 1 (Entrepreneur) and for a

biometric residence permit. The respondent's immigration history is that he first entered the United Kingdom on 25th August, 2009, with leave as a student until 31st January, 2011. On 18th February, 2011, he was granted further leave to remain as a Tier 1 (Post-Study) Worker with leave granted until 18th February, 2013. His application, which is dated 30th January, was actually submitted to the claimant on 15th February, 2013.

2. The claimant refused the respondent's application, because she was not satisfied that the respondent met the requirements of the Rules (Statement of Changes in Immigration Rules, HC 395, as amended ("the Rules")) as they relate to Appendix A. No issue was taken with the respondent's ability to satisfy Appendices B and C.
3. The respondent appealed and his appeal was heard by First-tier Tribunal Judge Simon Batiste at Bradford on 8th October, 2013.
4. At paragraphs 11 and 12 of his determination, the judge identified the claimant's criticism of the respondent's application. The judge said this:

"11. Firstly it is claimed that the respondent has failed to demonstrate that he has access to £50,000 in accordance with table A of Appendix A. He claimed to have approximately £12,500 in a United Kingdom bank account for which there was no problem and a further £40,000 in a joint bank account that he held with his father at the State Bank of India. The reason for the refusal is that a third party letter that he relies upon does not demonstrate that he has access to their funds. I do not accept this. The documents at pages 30-32 include a letter from the bank holding the relevant funds indicating that the respondent and his father hold the funds in that account jointly. Furthermore, at page 31 there is a letter from the father indicating that the funds are available to the respondent, and at 32 there is a letter from a lawyer confirming that he has witnessed the signature and verified the father's identity. Having considered these documents, that I accept were submitted with the application, I am satisfied that the respondent met the requirements with regard to these monies according to the Rule as was in existence at the date of application, as were kindly provided by Mr Paramore. **I therefore find that the respondent does meet this requirement and did produce satisfactory documentation at the date of application.**

12. The second issue related to the requirement within the Rule that the respondent provide one or more contracts showing trading. It is conceded by the respondent that he did not provide any such certificates with the application. In fact, he indicated at G23 of the application in reply to the question 'you must provide one or more contracts for work demonstrating trading' that no contracts had been supplied. The respondent has subsequently supplied a contract for a later period than this, but given the restrictions under the Rule I can take no account of this. I was told that his main contract at the time was with the Cumbria and Lancashire Commissioning Service of the NHS. However, since the changes made to the NHS that body has now been abolished and replaced by others. As a result he is no longer able to obtain a contract relating to an organisation that no longer exists. He accepts, however, that he failed to provide the contract as he did not realise that it was necessary under the Rules despite the clear indication in the application form that such document was required." [My emphasis]

5. The judge went on to note that there was an acceptance that the respondent could not comply with the Rules. He quite properly went on to consider the respondent's human rights appeal and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. First Tier Tribunal Judge Batiste concluded that the claimant's decision did form a disproportionate breach of the respondent's Article 8 rights and he allowed the respondent's appeal.

6. The claimant, being dissatisfied with the judge's decision, challenged it and permission was granted by First-tier Tribunal Judge Osborne. The grounds of application relied on by the claimant suggested that, having allowed the respondent's appeal on human rights grounds, after having dismissed it under the Immigration Rules, First Tier Tribunal Judge Batiste misdirected itself in law as to what amounted to a proportionate interference with private life. It is suggested in the grounds that the Tribunal in effect found that the criteria in the points-based system Rules impose a higher test than the proportionality test in Article 8. Reference was also made to the judgment of Burton LJ in *Miah* [2012] EWCA Civ 261.
7. Addressing me today on behalf of the claimant, Ms Johnson told me that she relied on the grounds and suggested that when the judge looked at the question of private life, he found that the respondent could have succeeded under the Rules now and allowed the appeal on that basis. In doing so he misdirected himself. I clarified with the Presenting Officer whether the judge was entitled to find any interference with the respondent's private life and she accepted that the judge was entitled, as he had done at paragraph 15, to find that the claimant's decision amounted to an interference and that it would also have consequences of such gravity as potential to engage Article 8. At paragraph 16 of the determination the judge said:

"There are points that do suggest that the decision was proportionate. Firstly, the [respondent] has only been in the United Kingdom for a relatively short period. Secondly, he has failed to comply with the requirements of the Immigration Rules. Thirdly, he has skills that would inevitably enable him to re-integrate back into Indian society."

Ms Johnson confirmed that there were no other factors weighing against the respondent that the judge should have considered but had failed to do so.

8. At paragraph 17 of the determination, the judge said:

"However, there are points that suggest that the decision is not proportionate. Firstly, the [respondent], while failing to provide the documentation necessary to satisfy the Immigration Rules, did in fact have the necessary skills, finance and contracts that would have enabled him to satisfy the Rules if he had properly provided all the information."

Ms Johnson confirmed that that was a factually correct statement.

9. At paragraph 17 of the determination, the judge went on to say:

"Secondly, he is clearly bringing entrepreneurial spirit with him to the United Kingdom and has the potential to earn significant amounts of money. Thirdly, he clearly now does have contracts such that he would lose if the decision was found to be proportionate."

Again, Ms Johnson, fairly and in my view entirely properly, accepted that they were findings that the judge was entitled to make in the circumstances.

10. At paragraph 18 the judge went on to say:

“Having considered all the factors I do not consider the decision to be proportionate. The prime factor in this decision is that the [respondent] would have been able to satisfy the Rules and is making a meaningful contribution to British society. Given that this is the case I find that the weight that can be attached to any legitimate aim of protecting the economic wellbeing of the United Kingdom is very limited in this case. The [respondent] is not a burden on the public funds. In fact, he will be contributing valuable tax revenue such that he is likely to be making a positive economic contribution to the United Kingdom. As such I find that the decision does breach his Article 8 rights.”

Ms Johnson suggested that that was where the judge had misdirected himself. I am afraid I disagree.

11. This is not a near-miss case of the type referred to by Burton LJ in *Miah*. This is a case where someone, because of changes made by his potential customers within the NHS, was not in a position to provide evidence to show that he had the contracts and so was simply not in a position to supply them with his application. But that did not mean that he did not have those contracts. The bodies with whom he had contracts had disappeared with the changes within the NHS which had been going on at the time and it would have been impossible for him in the circumstances to have provided evidence now, of the existence of those contracts at the date of the respondent’s application. The judge was entitled to take that into account. He did not, as the Home Office Presenting Officer put it, allow the respondent’s appeal because the respondent could not demonstrate that he met the requirement of the Rules. I do not believe that there is anything perverse about the judge’s decision. It may not have been a decision that I would have reached, but that is not the test. The judge has reached a decision that was open to him to make on the evidence before him. I find that there is no error in his determination, which will stand.



Upper Tribunal Judge Richard Chalkley