



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/41576/2013

THE IMMIGRATION ACTS

Heard at Field House
On 26 November 2014

Determination Promulgated
On 26 November 2014

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr BIKRESH SHERSTHA

Respondent

Representation:

For the Appellant: Mr N Bramble, Home Office Presenting Officer

For the Respondent: No appearance

DETERMINATION AND REASONS

1. The Appellant (the Secretary of State) appealed with permission granted by First-tier Tribunal Judge Ford on 27 October 2014 against the determination of First-tier Tribunal Judge Herbert OBE who had allowed (to the limited extent of returning the decision to the Secretary

of State) the Respondent's appeal against the Secretary of State's decision dated 24 September 2013 in a determination promulgated on 15 September 2014.

2. The Respondent is a national of Nepal, who had applied for further leave to remain as a Tier 4 (General) Student Migrant, which was refused on the grounds that although the Appellant had submitted a valid CAS, he had not shown that he satisfied the maintenance requirement. The Appellant had not produced bank statements showing that he was in possession of the required sum of £1600 for the required 28 day period. The application was refused under paragraph 245ZX(d) of the Immigration Rules. The reasons for refusal letter conveying the decision to refuse to vary the Respondent's existing leave incorporated a second decision to remove the Respondent by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.
3. Judge Ford considered it arguable that Judge Herbert OBE should not have returned the decision to the Secretary of State as he had not made a finding that the missing evidence fell with the evidential flexibility policy (paragraph 245AA of the Immigration Rules). It was unclear why the decision had been remitted.
4. The Respondent's solicitors informed the Upper Tribunal in writing prior to the appeal hearing that he was content for his appeal to be determined in his absence on the papers.
5. Mr Bramble for the Appellant relied on the onwards grounds and the grant of permission to appeal. He produced a copy of the relevant Immigration Rules in force at the date of decision, so that the tribunal could see the terms of paragraph 245AA. This was not a situation of a missing page from a sequence of documents, as in paragraph 245AA(b)(i), but rather an additional bank account whose existence had not been notified to the Secretary of State. Paragraph 245AA thus had no application. The judge had not identified the basis on which the Secretary of State's decision was not in accordance with the law.
6. No further submissions had been made on the Respondent's behalf.
7. At the conclusion of submissions the tribunal indicated that it found that the judge had fallen into material error of law, for the reasons identified in the grant of permission to appeal, and as further developed in Mr Bramble's submissions. These need not be repeated

here. The Secretary of State could not consider a bank account, statement(s) from which had not been provided with the application. The judge rightly reminded himself that he could not take into account post application evidence in a Points Based System appeal. No unfairness in the Secretary of State's decision making process was identified.

8. The determination must be and is accordingly set aside. The determination must be remade. The Respondent had not complied with paragraph 245ZX(d) of the Immigration Rules. His appeal must be dismissed. It of course remains open to him to submit a fresh application, as indicated in section E of the reasons for refusal letter, although he may not enjoy a right of appeal in the event that his application is refused.

DECISION

The making of the previous decision involved the making of an error on a point of law. The appeal of the Secretary of State is allowed.

The determination is set aside and remade as follows:

The original Appellant's appeal is DISMISSED

There can be no fee award as the appeal was dismissed

Signed

Dated 26 November 2014

Deputy Upper Tribunal Judge Manuell