



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/41452/2014**

THE IMMIGRATION ACTS

**Heard at Bradford
On 27th January 2016**

**Decision & Reasons
Promulgated
On 22nd February 2016**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

And

Appellant

**MASOOM ALI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mrs R Petterson, Home Office Presenting Officer
For the Respondent: Mrs Hussain, Legal Justice Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Caswell made following a hearing at Bradford on 18th May 2015.

Background

2. The claimant is a citizen of Pakistan born on 6th August 1984. He arrived in the UK on 10th January 2010 with leave until 30th April 2013 which was subsequently extended until August 2014 and then curtailed so as to expire on 29th April 2014. He made an in-time application for leave to remain as a Tier 1 Entrepreneur supported by an English language certificate from ETS. On 30th July 2014 he was informed that the certificate from ETS was no longer valid and was invited to take a new test with an approved provider to be submitted by 24th September 2014.
3. The judge accepted the claimant's evidence in its entirety.
4. He told her that when the Home Office wrote to him to request that he provide another test they gave him certified copies of his passport which they said would allow him to sit it. He booked his test for the next available date which was 6th September 2014 but when he arrived he was told that the certified copies would not be accepted as they were not official. The next available date was 11th October 2014 and his test was rescheduled.
5. On 13th September 2014 he attended Sheffield Hallam with his Home Office file and they said that they would accept him for the test on 11th October 2014. Since he knew that 11th October was the date after the date he had been given to submit a test he wrote to the Home Office, on 22nd September 2014, explaining the situation. He provided the Post Office tracking slip recording that it had reached the Home Office but he received no reply to his request for more time.
6. On 9th October 2014 the Respondent refused the application in the following terms;

"On 30th July 2014 we wrote to you providing you with an opportunity to submit an alternative secure English test by 24th September 2014 to meet the English language requirements. As you have not responded to our request your application falls for refusal under paragraph 322(9) of the Immigration Rules.

The Secretary of State is satisfied that you have failed to produce within a reasonable time information, documents or other evidence required to establish your claim out remain under the Immigration Rules."
7. The judge said that the claimant had acted perfectly reasonably in cooperating with the process and the timetable was not under his control. He was entitled to believe that the Home Office would open letters on the date received so that sending his letter by next day delivery on 22nd September 2014 was adequate. He could not have anticipated any delay in their process of opening correspondence.
8. She concluded as follows:

"On the evidence before me I do not find that the Respondent acted fairly and appropriately with regard to the Appellant's request. The

Appellant acted reasonably throughout. The delay was necessitated not by any default of his but by the Home Office furnishing him with certified copies of his passport which contrary to the Home Office assertion were not acceptable to the test provider. Having by his own efforts satisfied the test provider by other means and having obtained the next available test date the Appellant should have been allowed further time to take the test and submit the certificate. There is no dispute that this certificate is valid and he does meet the English language requirement.”

It was held in Naveed [2012] UKUT 14 that general principles of fairness apply in relation to the exercise by the Respondent of her powers under the Rules. In the appeal before me I find that fairness required the Home Office to give the Appellant additional time to take the test on 11th October 2014 and submit the result. If that extra time had been given he would have satisfied the Respondent's request. It follows that the Respondent's decision is not in accordance with the law and the Immigration Rules and I allow the appeal.”

The Grounds of Application

9. The Secretary of State sought permission to appeal on the grounds that the claimant had not been subject to any unfairness. The Tribunal had incorrectly relied on Naveed and had failed to adequately explain the principles of common law fairness applicable. The refusal under paragraph 322(9) was lawful and the exercise of discretion under that paragraph was considered appropriately.
10. Permission to appeal was granted by Judge Woodcraft on 1st September 2015 for the reasons stated in the grounds.

The Hearing

11. Mrs Petterson relied on her grounds somewhat unhappily and said that she was in difficulty because there had been a concession by the Presenting Officer at the hearing that correspondence had been received by the Home Office, establishing that the claimant had asked for more time to submit his test result. She accepted that there was a factual error in the refusal letter when it was said that the claimant had not responded to the request to submit an alternative secure English test.
12. There is no error in the judge's decision. The judge was perfectly entitled to accept claimant's evidence which indeed is unchallenged by the Secretary of State. It is clear that he relied on the Secretary of State's advice that certified copies of the passport would be acceptable and had attempted to obtain another test certificate on 6th September 2014 which was well within the 60 days allocated to him. When he discovered that it was not going to be possible to take the test in time he contacted the Secretary of State, before the expired of the 60 days, to tell her that he was in difficulty and to ask for more time.

13. Plainly the author of the refusal was not aware of the claimant having written to the Home Office. However, once that became apparent it was quite open to the judge to find that decision of 9th October 2014 was not lawful, being based upon a factual mistake, and accordingly to allow the appeal.

Decision

14. The Secretary of State's challenge fails. The claimant's appeal is allowed and the judge's decision stands.

No anonymity direction is made.

Signed

Upper Tribunal Judge Taylor