



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/01484/2014

THE IMMIGRATION ACTS

Heard at Field House

**On 17th September, 2014
Signed 10th October, 2014**

**Determination
Promulgated
On 10th October 2014**

Before

Upper Tribunal Judge Chalkley

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD SOHAG BHUIYAN

Respondent

Representation:

For the Appellant: Mr P Deller, Senior Home Office Presenting Officer
For the Respondent: Ms M Ahmed

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department to whom in this determination I shall refer as “the Claimant”.

2. The respondent was born on 16th October, 1987 and is a citizen of Bangladesh. He appealed to the First-tier Tribunal against the appellant's decision, taken on 10th December, 2013, to seek the removal of the respondent from the United Kingdom by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006, following the refusal of the respondent's application to vary his leave to remain in the United Kingdom.
3. In her letter of 10th December, 2013, the Claimant explained that the respondent's application for leave to remain as a Tier 4 (General) Student Migrant had been considered in accordance with the provisions of paragraph 245ZX of Statement of Changes in Immigration Rules, HC 395, as amended ("the Rules"). The Claimant believed that the provisions of paragraph 245ZX(c) had not been met because the respondent had failed to provide specified documents confirming that he held the necessary English language proficiency to a minimum level of B2 of the Common European Framework of Reference (CEFR). As a result, the respondent was not entitled to claim the 30 points for attributes under Appendix A of the Rules.
4. The respondent's appeal was heard by First-tier Tribunal Judge Traynor at Hatton Cross on 16th June, 2014, and in a determination promulgated on 20th June, 2014, the judge allowed the respondent's appeal, asserting that the Claimant's decision was not in accordance with the law.
5. After the submission of the respondent's application, which failed to provide the documents specified confirming that he held the necessary English language proficiency to the minimum level of B2 of the CEFR, the respondent's representative sent further evidence to the Claimant's office by special delivery post on 9th December, 2013. The judge was satisfied that the respondent's representatives were able to produce proof of posting confirming despatch of their letter and the documents on that date. A "track and trace" receipt from Royal Mail showed that these documents had been received by the Claimant on the morning of 11th October, 2013, the day following the date of the decision. The respondent's representative explained that the letter to the Claimant specifically requested the appellant to defer her decision until the evidence enclosed with the letter had been considered and where the Claimant had failed to implement the provisions of paragraph 245AA prior to reaching the decision, the First-tier Tribunal were invited to take note of this and rule accordingly.
6. The respondent's original application had been submitted in July 2013, and the judge found that the Claimant's caseworker could not have been aware of the correspondence at the date of decision on 10th December, 2012, because the correspondence was not received by the Claimant until the following day, the 11th December, 2012. Nevertheless it was accepted that a single document was apparently missing from the application and the Claimant had not sought to contact the respondent prior to refusing

the application, in order to establish whether the absence of that document was due to an administrative oversight on the part of the respondent or his representatives.

7. The judge noted that the Claimant's decision was made in ignorance of the fact that the respondent had provided a valid English language certificate confirming his proficiency and that the Claimant, in failing to apply the provisions of paragraph 245AA, had denied the respondent the opportunity of considering his application under discretionary powers vested in the Claimant. The judge concluded that she would allow the appeal to the extent that she purported to "quash the respondent's decision of 10th December, 2013".
8. The Claimant appealed the judge's decision and First-tier Tribunal Judge Colyer believed that it was arguable that the judge had made a material error of law.
9. At the hearing before me, Mr Deller asked me to note that when the respondent made his application, he was awaiting the results of English language testing. He had been provided with a conditional offer as a result. While the application was with the Claimant, the respondent received the results of two disciplines which he required to satisfy the English language test requirement. These were sent by the respondent's representatives and were not received by the Claimant until 11th December, 2013, one day after her decision to refuse the application.
10. Mr Deller pointed out that paragraph 245AA refers to the fact that where specified documents must be provided, only those documents which have been submitted with the application will be considered and that documents submitted after the application will be considered where some of the documents in a sequence have been omitted, if a document is in the wrong format, if a document is a copy and not an original, or if a document does not contain all the specified information.
11. The Entry Clearance Officer, Immigration Officer or Secretary of State may contact the appellant or his representatives in writing and request the correct documents and they are required to be delivered within seven working days of the date of request. Sub-paragraph (c) of the Rule specifically refers to the fact that where a specified document has not been submitted (for example an English language certificate is missing), or where the Entry Clearance Officer, Immigration Officer of the Secretary of State does not anticipate that addressing the omission or error referred to in sub-paragraph (b) will lead to a grant because the application will be refused for other reasons. It was not incumbent on the Claimant to look for a certificate. The Rules required that it be submitted with the application and it was not, Mr Deller told me.
12. Ms Ahmed referred me to the refusal letter of 10th December, 2013, written by the Claimant to the respondent. There, the Claimant notes that

the respondent has claimed 30 points for his Confirmation of Acceptance for Studies, but the Secretary of State is not satisfied that his Tier 4 sponsor has ensured that he is either competent in the English language at a minimum level of B2 of the Common European Framework of Reference for Languages, or that he is a person who meets an alternative requirement. It is now being suggested, however, that the respondent had failed to submit his evidence with his application and was being refused for that reason. If that is the case, then the Home Office should have said that the application was being refused because he had not provided evidence that he fulfils the English language requirement suggested Mr Ahmed.

13. I have concluded that I must allow the Claimant's appeal since the decision of the First-tier Tribunal Judge does contain a material error of law.

14. Paragraph 245AA provides as follows:-

"245AA. Documents not submitted with applications

(a) Where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the Entry Clearance Officer, Immigration Officer or the Secretary of State will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with subparagraph (b).

(b) If the applicant has submitted specified documents in which:

(i) Some of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing);

(ii) A document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or

(iii) A document is a copy and not an original document; or

(iv) A document does not contain all of the specified information;

the Entry Clearance Officer, Immigration Officer or the Secretary of State may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received at the address specified in the request within 7 working days of the date of the request.

(c) Documents will not be requested where a specified document has not been submitted (for example an English language certificate is missing), or where the Entry Clearance Officer, Immigration Officer or the Secretary of State does not anticipate that addressing the omission or error referred to in subparagraph (b) will lead to a grant because the application will be refused for other reasons.

(d) If the applicant has submitted a specified document:

(i) in the wrong format; or

(ii) which is a copy and not an original document; or

(iii) which does not contain all of the specified information, but the missing information is verifiable from:

- (1) other documents submitted with the application,
- (2) the website of the organisation which issued the document, or
- (3) the website of the appropriate regulatory body;

the application may be granted exceptionally, providing the Entry Clearance Officer, Immigration Officer or the Secretary of State is satisfied that the specified documents are genuine and the applicant meets all the other requirements. The Entry Clearance Officer, Immigration Officer or the Secretary of State reserves the right to request the specified original documents in the correct format in all cases where (b) applies, and to refuse applications if these documents are not provided as set out in (b). "

15. It is clear from paragraph 245AA, that any documents submitted with the application will be considered where they are specified documents and other documents will be considered only where they are submitted in accordance with sub-paragraph (b).
16. At the time the respondent submitted his application to the Claimant, he did not have the necessary English language qualification. It was submitted to the Claimant and received by her the day *after* she had made her decision.
17. There was no requirement by the Secretary of State to call for missing evidence. The evidence that was missing were specified documents that were *required to be submitted with the application*. The Claimant was entitled to assume that since the respondent had not submitted the specified documents, he did not have them. Paragraph 245AA is not intended to remedy a situation where an appellant, or his representatives, fail to supply specified documents.
18. First-tier Tribunal Judge Traynor erred where she said at paragraph 9 of her determination that the Claimant's decision was made in ignorance of the fact that the respondent had provided a valid TOEIC certificate confirming his proficiency in the English language, so as to satisfy the requirements of the Rules. He had not. He did not provide such evidence until the day *after* the Secretary of State made her decision. The judge further erred by failing to examine the provisions of paragraph 245AA and to recognise that they do not apply to documents specifically required to be submitted with an application.
19. I set aside the decision of Immigration Judge Traynor. The respondent's appeal against the decision of the Claimant is dismissed.

Richard Chalkley
Upper Tribunal Judge Chalkley