



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

Appeal Numbers: IA/37032/2013
IA/41212/2013

THE IMMIGRATION ACTS

Heard at Field House

On 12 June 2014

Determination

Promulgated

On 17th July 2014

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellants

And

**RAJ ANILKUMAR PATEL
KRUTIBEN RAJ PATEL**

Respondent

Representation:

For the Appellants: Mr G Jack, Home Office Presenting Officer

For the Respondent: Miss C Litchfield, Counsel, instructed by Khans Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the appeals of two citizens of India (hereinafter “the claimants”) against decisions of the Secretary of State to remove them from the United Kingdom having declined to extend their leave as Tier 1 (Entrepreneur) and partner.
2. I have to say that this appropriately short determination by the First-tier Tribunal and clear grounds of appeal by the Secretary of State have proved to be a disguise for a surprisingly taxing case and I do not think there is any entirely satisfactory answer. For the reasons that I will explain below I decided that I must dismiss the Secretary of State’s appeal.

3. The First-tier Tribunal Judge allowed the appeal against the removal decision apparently in the belief that the removal decision ought not to have been made at the same time as the other immigration decision. In so doing he clearly overlooked a change in the law in 2013. Both parties agree that the removal decision was made appropriately if the decision to refuse the application was an appropriate decision.
4. Before me the Secretary of State appeared to be in a strong position because it seems that the claimants had failed to disclose contractual documents that were required to be disclosed when the application was made and, according to the Secretary of State, the documents have never been disclosed.
5. The claimants' present representatives argued contrarily. They said that the necessary contractual documents were not sent with the application but were sent very soon afterwards and ought to have been considered. It is common ground that if the documents were received before a decision was made then under principles of common law fairness they ought to have been considered.
6. The Secretary of State has an understandable sense of vexation. She has been accused of being unfair because she has not considered documents that she has never found and from her perspective it is hard to see what more she should have done.
7. The first point taken in the grounds of appeal is that the judge did not make any decision about whether the documents had actually been sent, and "sent" in this context must mean "arrived". In a sense that is correct. There is no sentence in the determination that spells out in terms a finding by the judge that the documents were sent or that they arrived. However I do not think that is a fair way of reading the determination and I remind myself that it is trite law that I should, if I can, read the determination in a way that makes sense of the findings and sense of the decision.
8. Paragraph 13 is crucial. There the judge said:

"However, I remind myself of the case of **Thakur (PBS decision - common law fairness) Bangladesh [2011] UKUT 151 (IAC)** which says that the respondent must act fairly. If the appellant sent the document, and he says he did and there is no evidence that he did not, the respondent should have referred to it and considered it, albeit it was not necessarily going to make any difference. To not do so would not be to act fairly or take into account all relevant matters. Because of those factors and because of the consequences for the appellants I allow the appeal to the very limited extent of remitting the decision to the respondent to look at the material that the first appellant said he submitted before the date of decision."
9. It seems to me that although the judge can be criticised fairly for omitting to tie down his findings behind all possible argument by making an extra finding, it is much more likely that he meant in paragraph 13 that he was satisfied that the document was sent than it is to think that, having directed himself of the need for it to be sent and then decided to remit the appeal to the respondent, he was undecided if it had been sent or

not. That would require something close to perversity and I am not satisfied at all that that is what happened.

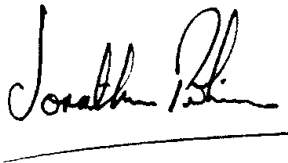
10. Although the judge directed himself firmly about whether the document had been sent it is much more important to consider whether or not it arrived. The judge noted at paragraph 8 of the determination that “the appellant”, as the first claimant was then described, had posted the contract on or about 2 August. The judge accepted that there was no corroboratory evidence that that is what the claimant had done. This observation follows closely from the judge’s manuscript Record of Proceedings which I have read. Post generally arrives. Something that is posted probably gets to the destination and I am satisfied that the judge meant that he was satisfied that the documents had been posted and they had arrived and they had not been processed by the Secretary of State.
11. It is rather regrettable that this has to be characterised as unfairness on the part of the Secretary of State because there is no evidence that the Secretary of State ever realised that the document had arrived. It has not been suggested that the Secretary of State is acting spitefully or perversely, but I can only make sense of the judge’s findings by accepting that the judge believed the oral evidence before him.
12. Mr Jack, who is an experienced Presenting Officer, immediately pointed out there were various things that could have been done. It would have been interesting to have asked the appellant how the documents were posted, where precisely they were posted, why he did not think it important to get any proof of posting, why he did not use Record Delivery, why, if he is so concerned with the effect on his wife, his wife did not come with him and give evidence that the documents had been posted, or why there was no follow up with the Secretary of State's Department to see if in fact they had been received.
13. All of these are things that could have been raised in cross-examination and it appears they were not. Perhaps they should have been. I note the Secretary of State was represented before the First-tier Tribunal by Counsel. It may be that Counsel was not particularly experienced. I do not know. It may be that the quality of the evidence given was so transparently honest that questions of that kind would have seemed rather pathetic and futile. I was not there. What is clear is that they were not asked and the judge made findings and that were not perverse or otherwise not.
14. It follows therefore, although not with any great enthusiasm, I think the proper way of interpreting the determination is by finding that the First-tier Tribunal Judge accepted that documents were sent by post and therefore arrived and should have been considered by the Secretary of State.
15. There is not very much that Miss Litchfield can add to this. It must be the judge’s finding they were sent and they arrived and that they have been lost by the Secretary of State. It follows therefore that, given the findings, the judge made a correct decision. It required the Secretary of State to

make a new decision. No doubt the claimants will be asked to provide copies of the disputed documents.

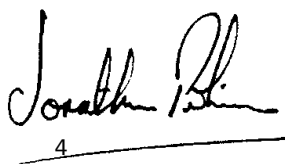
16. I do hope that nobody reading this decision will get the impression that it is an easy matter to get round a failure to provide documents on time. An applicant who omits documents from an application by mistake would be very well advised to go to a great deal of trouble to prove that the documents were sent later and had been received. Similarly if their arrival is disputed at an appeal the Secretary of State's representatives should be encouraged to cross-examine rigorously people who claim to have sent documents that cannot be traced.
17. The fact is that I have before me an appeal that has already been decided and I am persuaded by reading it carefully that the judge made permissible findings that he did not explain as well as he might have done. The finding support the conclusion reached by the judge although the decision to allow the appeal against a removal was made for entirely the wrong reasons.

15. It follows therefore that I dismiss the Secretary of State appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 3 July 2014



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