Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25226/2014

THE IMMIGRATION ACTS

Heard at Field House
On 15 July 2015

Decision & Reasons Promulgated
On 22 July 2015

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PAVANKUMAR DIVVE
(anonymity direction not made)

Respondent

Representation:

For the Appellant: Mr P Saini, Counsel instructed by Shri Venkateshwara Solicitors
For the Respondent: Mr S Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

1. We see no need for, and do not make, an order restricting publication of the details of this appeal.

2. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal which allowed the appeal of the respondent (hereinafter "the claimant") to the extent that it found the decision of the Secretary of State to refuse the application to be "not in accordance with the law".

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3. The appeal to the First-tier Tribunal was brought by a citizen of India against a decision of the Secretary of State refusing him leave to remain as a Tier 2 (General) Migrant. The decision that was subject to appeal was made under the points based system.

4. We will try and explain what happened.

5. The application for leave is dated 29 April 2014. The application form is filled in clearly and the appropriate box is ticked to show that the applicant wanted leave for more than three years (see question L1b). In order to satisfy the requirements for admission he had to have a minimum annual income of a specified sum that is close to £30,000. The claimant was not in a position to command that sort of salary and there was no possibility of his satisfying that requirement in the Rules.

6. Ironically it seems reasonably clear that he would have been able to satisfy the requirements of the Rules if he had applied for a stay of less than three years in which event a smaller income would have been satisfactory.

7. In either case he had to support the application with a certificate described as a "Certificate of Sponsorship" from the proposed employer. The certificate in this case showed the start date as 24 April 2014 and the end date as 23 April 2017 which is clearly a period of three years. It followed that the actual period shown on the Certificate of Sponsorship did not match with the period the applicant indicated that he wanted.

8. There was a problem with the Certificate of Sponsorship because it included an endorsement in the following terms:

> "I have entered a UKID number in error – our employee does not have one and this box should be blank. Please could we extend the sponsorship from three to five years to 23 April 2019."

9. This is equivocal. The Certificate of Sponsorship was for three years but indicated a desire to "extend" the period of employment to five years. We know how this problem came about because it is explained in a letter. The letter comes from Assurant Solutions. It is dated 10 June 2014. It says that:

> "The applicant originally requested 'a three year sponsorship' but after the certificate was issued [the applicant] requested a five year sponsorship. I sought advice from the Border Agency Employer Helpline on 24 April 2014 and the advisor informed me that increasing the duration of the sponsorship was not a problem and I just needed to add a note to the certificate of sponsorship."

10. This explains the addendum that we have identified above seeking to "extend" the sponsorship period to five years. It is quite clear of us that the advice on the telephone was given before the application was made on 29 April and probably on 24 April 2014 as is alleged.

11. The decision of the Secretary of State is hard to criticise. The Secretary of State noted that the applicant did not expect to earn enough money from his employment to satisfy the requirements of the rules for five years' leave.

12. We say immediately that we have very considerable sympathy for the applicant. It seems to us that he has not done anything dishonest. The worst that could be said against him is that he has made a bit of a mess in making an application. That is not to his moral discredit. Refusing the application will have very significant consequences for him including personal disappointment and probably considerable financial loss. It is a heavy price to pay for a mistake.

13. We understand the First-tier Tribunal's efforts to do something to assist. The First-tier Tribunal Judge said that the advice given in the telephone conversation was something on which the sponsor relied to its detriment. In the case of **EK (Ivory Coast) v Secretary of State for the Home Department [2014] EWCA Civ 1517** it was decided that although the obligation to act fairly did require the Secretary of State to advise an applicant about matter of which he was unaware, a decision made in reliance on information given might well be unfair. The First-tier Tribunal decided (see paragraph 13) that there was unfairness where:

> "… there had been a change of position of which the Secretary of State was aware, and indeed which she had brought about, in circumstances in which the students were not themselves at fault in any way, but had been caught out by actions taken by the Secretary of State in relation to which they had had no opportunity to protect themselves". It seems to me that the conduct of the respondent's own Employer Helpline, in informing the appellant's sponsor in the course of a legitimate enquiry that the application could be varied in the manner requested, and the employer and appellant then acting to their detriment in relying upon that advice, and the application being refused because the amendment of the Certificate or Sponsorship was then used as the basis of refusal, cumulatively makes this a case where the Secretary of State has brought about the misfortune, rendering the decision unlawful for want of procedural fairness."

14. We cannot agree with that analysis. What has clearly happened here is that the sponsor tried to assist the applicant by extending the period of sponsorship from three years to five years. The sponsor was told that it was permissible to give effect to that intention by writing a note to act as an addendum to the certificate of sponsorship and this is what the sponsor did.

15. We do not know but we think that it would have not been possible to simply change the Certificate before it was submitted because it would have already been served electronically and that is why the note is in the form that it is. That may not be right. It does not matter. The fact is that the note is there.

16. We do not see how the Secretary of State can be criticised. Rather the Secretary of State gave a straightforward answer to a question about how the effect of the form could be changed. The addendum was added as a consequence of that advice. It then followed that the Secretary of State was plainly right to refuse the

ensuing application because the application that was made did not satisfy the Rules.

17. We reflected carefully on the reasons given by the First-tier Tribunal and it seems to us they can only make sense if there is an obligation on the Secretary of State that goes beyond responding to the question asked but which requires her to warn the interlocutor of the other requirements that would have to met before (in this case) an application for three years leave could succeed. We see no justification for that. The point Sales LJ elucidated in **EK** (in which the applicant student was unsuccessful) was that there might be "unfairness" where an applicant was caught out by a change made by the Secretary of Sate in circumstances where an applicant is either ignorant of the change or unable to change his own position. That is very different from the present case where it is the applicant who has changed his mind about the length of leave that he wants.

18. Even if such an obligation existed it would not necessarily have helped this applicant. The difficulty for the Applicant that will not go away is that, whatever the applicant intended, he indicated in answer to question L1b on his application form that he wanted more than three years' leave.

19. We are quite confident it is asking too much of the Secretary of State to require her to go beyond the scope of the application and consider if other Rules apply.

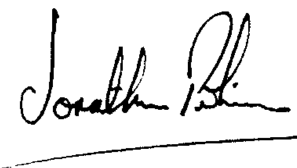
20. The First-tier Tribunal Judge should not have made the decision that he did. He was wrong. We set aside his decision and we substitute a decision dismissing the appeal against the decision made.

21. We are very grateful to both representatives before us. Mr Saini was persistent under a barrage of questions from the Tribunal as we tested the First-tier Tribunal's decision and his submissions but, as is explained above, we are satisfied that they were wrong.

Notice of Decision

22. The Secretary of State's appeal is allowed. We set aside the decision of the First-tier Tribunal and substitute our decision dismissing the claimant's appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 21 July 2015