Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/07756/2014

THE IMMIGRATION ACTS

Heard at Field House
On 23rd July 2014

Determination Promulgated
On 4th August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE FRANCES

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VAMSHIDHAR PARVATHAN

Respondent

Representation:

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer
For the Respondent: In person

DETERMINATION AND REASONS

1. I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of India born on 21st October 1986. His appeal against the Respondent's decision of 30th January 2014 refusing to vary leave to remain as a Tier 2 (General) Migrant and the decision to remove him to India under section 47 of the Immigration, Asylum and Nationality Act 2006 was allowed by the First-tier Tribunal on 20th May 2014. The Secretary of State appealed.

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2. The Appellant arrived in the UK on 30th December 2009 as a student with leave to enter until 30th November 2011. On 12th December 2012, he was granted leave to remain as Tier 1 HS Post Study Migrant until 12th December 2013. He applied for further leave to remain as a Tier 2 (General) Migrant on 11th December 2013. His application was refused on 30th January 2014 on the grounds that his salary on his Certificate of Sponsorship [COS] was not at or above the appropriate rate for the job.

3. The Appellant's appeal against this decision was allowed by First–tier Tribunal Judge Moore on the basis that the letter from the Appellant's employer dated 4th February 2014 showed that there was an error on the COS as to the number of hours the Appellant worked. This was an administrative error by the company and therefore the Appellant satisfied all the requirements of the Immigration Rules.

4. Permission to appeal was granted by First-tier Tribunal Judge Frankish on 11th June 2014 on the grounds that the Judge failed to properly direct himself following section 85A Nationality, Immigration and Asylum [NIA] Act 2002 and wrongly took into account post-application evidence.

5. Mr Duffy submitted that the Judge had allowed the appeal having taken into account the employer's letter of 4th February 2014, which was inadmissible under section 85A. The Appellant should have made a fresh application. The Judge had erred in law and the decision should be remade and the appeal dismissed.

6. The Appellant submitted that there was an administrative error on the COS. The Appellant's employer attended and apologised for the error. He stated that this was the first time the company had made a Tier 2 application and the Appellant was a valued employee. His working hours were 35 not 40 because his lunch hour was unpaid. This was clear from the contract of employment submitted with the grounds of appeal.

7. For the reasons set out below, I explained that the Judge had failed to properly apply section 85A and he was not entitled to take into account evidence which was not submitted with the application: the contract of employment and the letter dated 4th February 2014. On the evidence before the Judge, the Appellant was unable to satisfy the Immigration Rules and the appeal should have been dismissed. It was open to the Appellant to make a fresh application and submit this evidence. Mr Duffy stated that the Appellant's leave would continue for 28 days after the Upper Tribunal's decision and that he would endeavour to return the Appellant's original documents to enable him to make a new application without delay.

8. At paragraph 6 of the determination the Judge stated that the burden of proof was on the Appellant to show that the Respondent's decision was on the balance of probabilities against the weight of the evidence and that this had been judicially construed to allow evidence to be adduced which as available to the Appellant, but not produced the Respondent at the date of the decision. The significance of the date of the decision had been confirmed by section 85(5)(b) of the 2002 Act.

9. I find that the Judge misdirected himself in law. He failed to apply section 85A NIA Act 2002. The letter from the Appellant's employer dated 4th February 2014 post dated the decision of 30th January 2014. It was not evidence to which section 85A(4) applied. The Judge was therefore only entitled to consider evidence adduced by the Appellant at the time of making the application. The Judge has erred in law in taking into account the letter of 4th February 2014, which was inadmissible under section 85A. The Respondent's appeal to the Upper Tribunal is allowed.

10. The Appellant's contract of employment was submitted with the grounds of appeal and was not before the Respondent at the time of making the decision. Therefore, on the evidence submitted at the time of the application the Appellant was working 40 hours per week and was paid £20,300 per annum. This was below the appropriate job rate for the post.

11. I find that the Judge erred in law in allowing the appeal under the Immigration Rules and I set the decision, dated 20th May 2014, aside. The Appellant's appeal against the refusal of leave to remain as a Tier 2 (General) Migrant is dismissed under the Immigration Rules.

Deputy Upper Tribunal Judge Frances
24th July 2014