



**In the Upper Tribunal
(Immigration and Asylum Chamber)
Judicial Review**

JR/2548/2019

In the matter of an application for Judicial Review

The Queen on the application of
Bikash Sapkota

Applicant

versus

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Perkins

HAVING considered all documents lodged and having heard Mr S Karim of counsel, instructed by Legend Solicitors, for the Applicant and Mr Z Malik of counsel, instructed by GLD, for the respondent at a hearing on 22 October 2020.

IT IS ORDERED THAT:

- (1) The application for judicial review is granted for the reasons in the attached notes of my extempore judgment.
- (2) The Respondent must pay the Applicant's costs to be assessed if not agreed.
- (3) There was no application for permission to appeal. I refuse permission because I see no arguable error in my decision.

Signed: Jonathan Perkins

Upper Tribunal Judge Perkins

Dated: 24 February 2021

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date):

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

IN THE UPPER TRIBUNAL
EXTEMPORE JUDGMENT GIVEN FOLLOWING HEARING

JR/2548/2019

Field House,
Breams Buildings
London
EC4A 1WR

22 October 2020

**THE QUEEN
(ON THE APPLICATION OF MR BIKASH SAPKOTA)**

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE PERKINS

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Mr S Karim, Counsel instructed by Legend Solicitors appeared on behalf of the Applicant.

Mr Z Malik, Counsel instructed by the Government Legal Department appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT
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JUDGE PERKINS: This application for judicial review succeeds.

2. The applicant is a citizen of Nepal. He has lived in the United Kingdom since about September 2009. There was a break in his leave from 18 September 2005 when his leave ran out and 30 May 2016 when an application for further leave made on 25 September the previous year succeeded. He was given leave as a Tier 2 (General) Migrant until 1 November 2018 but that leave was curtailed to expire on 25 March 2018 following problems with his sponsor.
3. On 19 March 2018 he applied for leave as a Tier 2 (General) Migrant. The application was refused on 6 December but the applicant asked for administrative review and on 13 February 2019 the respondent affirmed her decision to refuse the application but abandoned one of the reasons on which she had relied. The decision of 13 February affirmed the rest of the decision of 6 December and it is those decisions that are under challenge.
4. Permission was granted on the papers by Upper Tribunal Judge Sheridan.
5. The applicant's case depended on his being offered work as a business development manager with Haveli Fine Dining Restaurants Limited. It is important to emphasise that the application was unsuccessful because the Secretary of State did not accept that there was a genuine vacancy. Mr Karim has pointed out that it is not relevant whether or not the applicant is a genuine employee. What is relevant is whether or not the Secretary of State was entitled to conclude that there was not a genuine vacancy.
6. Certain things are clear. The job was advertised in the proper way. There was compliance with all the requirements and the Secretary of State, being dissatisfied that not all

the information had been sent, makes clear that all that was required was sent at a later stage. So, it is a job that is advertised by an apparently genuine business and there were apparently other applicants and this applicant was successful. At no point has there been any criticism made about the bona fides of the new employer.

7. The Secretary of State, on administrative review, had to reconsider her position and abandoned arguments that the applicant was not qualified to do the job. So, on the undeniable facts in the case, the Secretary of State has accepted that the applicant is qualified for the job and has accepted that the job has been advertised by a firm that is not in any way criticised in the decision-making but then moves to the conclusion that the vacancy is not genuine. Put like that, and that is how Mr Karim did put it, the decision of the Secretary of State looks staggeringly wrong.
8. It is not quite that bad. There were reasons to be concerned about the bona fides of the applicant. These were in effect that things had been said that made compliance officers who were looking into the affairs of the Mount Gurkha Restaurant think that the applicant was not working for them as a business development manager or whatever the job title was. People who investigated that did not think the business would need it. The people investigating that were told things that made them uneasy and that led to an interview with the applicant.
9. However, as Mr Karim has again pointed out properly, if it was the Secretary of State's case that the applicant had been compliant in misbehaviour with the Mount Gurkha Restaurant she had powers to summarily curtail his leave. That is what the Rules provide, it is not an obligation on the Secretary of State but it is the normal course and she chose not to do it.

One assumes that the reason she chose not to do it is that she was not satisfied that the applicant was involved in improper behaviour. We do not know and perhaps we do not have to know but it certainly does not assist the Secretary of State's case. The point is that if this is a man who has been behaving improperly there is a very obvious remedy and it was not taken here.

10. I do not find the snippets we have of the interview particularly revealing. It is very clear from the decision that the Secretary of State did not believe the applicant's answers and preferred the unexplained evidence, which has not been disclosed, that caused the officers to think that the applicant had not been working in the role he claimed with the Mount Gurkha Restaurant. It is not really satisfactory. Not every point has to be given, not a full explanation but to simply say that he was interviewed and we preferred what we had been told to his evidence is not really an explanation or a reason at all, especially when we know that the sponsor, the Mount Gurkha Restaurant, was unsatisfactory. It was an organisation that lost its role as a sponsor. It clearly was not run properly. It might have been run dishonestly but neither of those things necessarily reflect adversely on the applicant, who was treated in the way applicants are treated when they are the victims of incompetent and poor sponsors rather than treated in a way appropriate to somebody who has been complicit in bad behaviour.
11. The reasons for suspecting that the applicant had been behaving properly were a perfectly good reason to interview him. They may be perfectly good reasons to be suspicious of the whole enterprise. It may be that it cried out for further enquiry but when there is no criticism of the new employer it is very hard to see how it can be maintained that the job is not a genuine vacancy. Of course, it is possible that a

person is so spectacularly unsuited to the job that it is just unbelievable that the new job could be possibly genuine *and* made available to him although that is quite a leap because one would have to look at what the applicant said when he was after his new job; but this is somebody who is qualified for it because that is accepted by the Secretary of State.

12. I agree with Mr Karim that the criticisms in the reasons for refusal, even if well-founded do not justify the conclusion that this is not a genuine job. At their very highest they support a conclusion that the applicant is not a genuine applicant but even that, for the reasons I have already indicated, is a very unsatisfactory conclusion to reach when it is expressly conceded he is qualified for the job and when the evidence that is supposed to undermine his integrity is from a disputed source and not really explained.
13. Other points were raised before me but I think that the foregoing is probably enough to deal with this matter.
14. There is an additional point raised by Mr Malik that this case is so bad that it could not possibly have succeeded even if it has been explained inadequately. That does not work. This is not a case where anything about the job is established in a way that supports a conclusion it is not a genuine vacancy or anything about the applicant is established in a way that makes it impossible to say that he could do that job or be allowed to do it, it just does not follow.
15. I make it plain that the alleged two points raised by Mr Malik are really one. The concern was that the applicant was not working in that capacity in his previous employer and did not have the relevant experience. That is not important. He got the relevant qualification and the reasons for it were not really based on lack of qualification but on lack of trust.

16. There is a bit of a red herring that needs addressing here and it is that the applicant is reported to have said that he had done some work for embassies. That is something he denied. I do not think that actually matters very much except that it does seem to me that if this man, who claimed to have worked for Spud U Like and then to work for a restaurant in the East Midlands, really had said that he had also done work arranging for parties for embassies it is so startlingly incongruous that some further enquiry ought to have been made at interview. It seems to me a more likely explanation is that he said something that was misheard and not noted by the applicant or his representatives because they heard it differently but that is speculation and does not feature very highly in my reasons.
17. What really matters here is there is no proper evidence before me to show that the Secretary of State was entitled to conclude that this was not a genuine vacancy and that is what is necessary for the case and that is what the Secretary of State has failed to do.
18. The applicant succeeds and the decisions will be quashed.

Application for Permission to Appeal to the Court of Appeal

19. If an application had been made for permission to appeal I would have refused it because I think I made the right decision, which is why I did it.

Costs

20. Respondent to pay the applicant's costs to be assessed if not agreed.~~~~0~~~~