Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09869/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 4 August 2014	**On 7 August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

HARSHIKA SHARMA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Hone, Counsel instructed by Westkin Associates
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India and her date of birth is 8 February 1971. On 5 February 2013 she made an application to vary her leave to remain in the UK as a Tier 1 (Entrepreneur) under the points-based system. Her application was refused on 4 February 2014.

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2. The decision-maker refused the application on the basis that it was not genuine. It was noted that the £50,000 that the appellant claimed that she intended to invest in the company was given to her by Mr Law whom she met in the British Library when researching her company. The appellant did not clarify how long she had been in possession of the money from Mr Law The decision-maker went on to state that the appellant had failed to take substantial steps towards establishing a business.

3. The appellant appealed against the decision of the Secretary of State and her appeal was allowed by Judge of the First-tier Tribunal Troup, in a decision dated 12 May 2014, following a hearing on 6 May 2014. The appellant made an application for permission for leave to appeal which was granted by Judge of the First-tier Tribunal V A Osborne, in a decision of 23 June 2014. Thus the matter came before me.

The Decision of the First-tier Tribunal

4. The First-tier Tribunal heard evidence from both the appellant and Mr Law. The parties were both represented at the hearing. The Judge made findings at paragraphs 20 to 28 of the determination as follows:

> "20. Miss Jones simply told me that she relied upon the contents of the Refusal Letter.
>
> Miss Norman produced her Skeleton Argument. She submitted that Paragraph 245DD(h)-(l) which is reproduced at paragraph 3 of the Skeleton, sets very concise parameters.
>
> The first issue is whether Mrs Sharma has become a director of a business in the UK and continues to operate it. It was submitted that that requirement is met, and as evidence of it I was referred to:-
>
> - The 2013 Business Plan that accompanied the application and the amended Business Plan (2014) at pages 8-22 of the Appellant's Bundle.
> - The company's *'Customer Management List'* at page 7 containing details of nine clients acquired between January 2013 and April 2014.
> - The company's bank statement at page 23 containing a debit entry on 1 April 2014 for an insurance premium of £16.13 payable to AXA Insurance.
> - A credit of £300 on 15 April in the same bank statement from AS Asia Company (being one of the companies listed in the Customer Management List).
> - A cheque payable to the company from Devan Construction Limited for £300 dated 24 April 2014: they also appear in the Customer Management List.

- A *'Contract Completion Letter'* from AS Asia at page 50 of the Bundle saying that they had received services from the company which were completed on 4 April 2014.

21. It was submitted that on that evidence it is more probable than not that the Appellant is a director of the company which continues to trade.

    I accept the submission. The company is incorporated and from the Share Certificate and the witness statement, I find it to be more probable than not that Mrs Sharma is a Director and Shareholder.

22. From the first Business Plan I note that the company had ambitions to generate a gross income of £34,200 in its first year of trading (2013/14). It has fallen a very long way short of that ambition however. £300 was credited to the bank account on 15 January 2013, £300 on 15 April 2014 and there is a cheque for the same amount dated 24 April 2014 and thus there is evidence of a gross income of only £900.

    However, that evidence, together with the Business Plans, the Agreement with Zenith (which seems to have produced no income for the company) and the proposal put to the Nepalese Catering Association indicate that the company is trading, albeit at a very low level. I conclude from that that the requirements of Paragraph 245DD(h)(i) are met.

23. The second limb of the appeal is Ms Norman's invitation to the Tribunal to accept for the purposes of (h)(iii) that Mr Law has genuinely provided funds of £50,000 and that they remain available for the company's use.

24. I am satisfied from the oral and documentary evidence that Mr Law provided those funds. I must go on however to consider the requirements of (h)(ii), namely the question of whether Mrs Sharma genuinely intends to invest the money into the business.

    To answer that question I must examine the nature of the business and its capital needs. Mrs Sharma has an MBA in HR Management and the company is in reality an alter ego for the presentation of her specialist expertise.

    The 2013 Business Plan at paragraph 4 puts the start-up costs at £1,600 and declares that *'start up capital is low because the owner will be initially working from home with minimum infrastructure…'*.

25. The cash flow forecast in the Business Plan talks of the company's *'…strong liquidity position which helps the company by providing cushion against emergencies and its ability to utilise business opportunities in a better way'*. The *'Financial plan'* at paragraph 10 of the Business Plan however

makes no reference at all to capital requirements. Indeed, the plan implies that there are no capital needs as the business is personal to the *'owner'*, that is to say Mrs Sharma.

26. There is no evidence before me that Mrs Sharma intends to invest money in the business or, if she does, for what purpose, when and in what amounts. The financial forecasts anticipate that income will outstrip expenses year by year and there is no suggestion of a need for capital in any amount.

27. It follows from that conclusion that I am not satisfied to the required standard that Mrs Sharma intends, as Paragraph 245DD(h)(ii) requires, to invest the sum of £50,000 in the business as there is simply no need to do so.

28. That conclusion leads me on to (h)(iii) and the question of whether the funds are *'genuinely available'* to Mrs Sharma. I have found that Mr Law has provided £50,000 to her and that that sum remains *'available'*. I am not satisfied however that it is genuinely available.

Mrs Sharma has singularly failed to identify any need for capital. I am not told where the fund is kept at present (it was not in the company's account in March/April 2014) but, be that as it may, and taking the Business Plan at face value, there is no capital requirement.

The cash flow forecast spreadsheet at page 16 of the Bundle refers to loans from Directors but the purpose of such loans is not apparent and is, in any case, contradicted by the forecasts at part 10 of the 2014 Business Plan. If, therefore, the funds are to be genuinely available, they must for an identified need. I find that no such need is made out and thus there is no genuine purpose for the fund to be available. It follows therefore that I am not satisfied that the requirements of sub-paragraphs (ii) and (iii) are made out and I must dismiss the appeal under the Rules."

The Grounds Seeking Leave to Appeal and Oral Submissions

5. The grounds argue that the decision of the First-tier Tribunal was perverse because the Judge accepted the evidence of the appellant and Mr Law and found them to be credible and on that basis he allowed the appeal under paragraph 245 DD (h) (i) and (ii). The Judge accepted that there was an operating business. The Judge did not address the supporting evidence of emails and the business plan which showed the cash flow forecast which indicated that the appellant intended to invest £50,000.

6. Both parties made oral submissions. Mr Hone submitted that the evidence showed that the capital was needed for growth and expansion of the business and he referred

me to Appendix B of the business plan at page 16 which indicated that there would be a loan from the director in year 1 (2014-15) of £15,000 and in year 2 (2015-16) of £25,000 and in year 3 (2016-17) of £10,000. The business plan therefore showed how the capital of £50,000 would be invested in the business.

Conclusions

7. In my view the findings of the Judge are not perverse. It was open to the Judge to find that the appellant was able to satisfy Rule 245 (h)(i) (which requires in this case that the appellant has established or become a director of one or more businesses and continues to operate the business), but not (ii) (which requires that the applicant genuinely intends to invest the money in the business) and (iii) (which requires that the money is genuinely available to the appellant and will remain available to her until such a time as it is spent for the purposes of his business). Contrary to the grounds seeking leave to appeal the Judge did not find favour of the appellant under Rule 245 (h) (iii). The Judge did not find that the appellant or Mr Law were credible witnesses. He found that is was more probable than not that the appellant was a director of the company which continues to trade and thus she satisfied Rule 245 (h)(i).

8. The appellant's argument is that the Judge erred because he did not take into account the business plan at Appendix B. However, it is clear from [28] of the determination that the Judge took into account the business plan and the cash flow forecast at Appendix B. The Judge found that there was no genuine need identified for the £50,000 investment in the business and concluded that there was no genuine intention to invest this money. The Judge found that the cashflow forecast was not consistent with the financial forecast at part 10 of the business plan because the financial forecast does not make reference to the investment of £50,000.

9. It was open to the Judge to conclude that the financial forecast at part 10 of the business plan, which shows income and expenditure, is not consistent with the cashflow forecast. The appellant's evidence is that that the sum of £50,000 was not a gift as such but Mr Law hopes to receive a return on it in the future. Were it to be a gift or a loan (liability) one would expect it to feature as income or expenditure in the financial forecast at part 10 of the business plan, but it is not apparent from the figures. Mr Hone's submission to me was that the investment of £50,000 was needed to expand the business, but the Judge was entitled to conclude that this was not made out. I note that the figure for expenditure in the financial forecast at part 10 of the business plan includes staff costs that increase over the period. There is no evidence that the investment of £50,000 is needed to cover these costs. On the evidence before the First-tier Tribunal, it was open to the Judge to find that there was no business need for the investment made out. There is no requirement under the Rules that the appellant must show the need for investment or that the business must be shown to be making a profit in accordance with the projections in the business plan, but these are factors to which the Judge was entitled to attach weight when

determining intention (particularly in the light of the circumstances of the "loan".) It was open to the Judge to dismiss the appeal under paragraph 245 DD (h) (ii).

10. The Judge also dismissed the appeal under Rule 245 h(iii) The Judge found that the sum of money has been provided by Mr Law to the appellant, but that it is not genuinely available to her. His finding is ambiguous and it may be that he has conflated 245h (ii) and (iii). There was also evidence before the Judge that in March/April 2014 the funds were in the appellant's personal account. In any event, whether or not the Judge erred in this respect is not material because his decision under 245 h (ii) is lawful and sustainable.

11. In my view there is no material error of law and the determination of the First-tier Tribunal and the decision to dismiss the appeal under the Rules is maintained.

Signed Joanna McWilliam Date 6 August 2014

Deputy Upper Tribunal Judge McWilliam