



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/16167/2013
IA/16174/2013
IA/16180/2013

THE IMMIGRATION ACTS

Heard at Field House
On 21 January 2014

Determination Promulgated
On 27 January 2014
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Before

MR JUSTICE FOSKETT
UPPER TRIBUNAL JUDGE KOPIECZEK

Between

LI MAY CHONG
MING SHI
WENXI SHI

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr D. Mold, Counsel

For the Respondent: Mr T. Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The first appellant is a citizen of Malaysia, born on 5 July 1983. The second appellant is her husband and is a citizen of China, his date of birth being 16 December 1977. The third appellant is their daughter and was born on 28 July

2009. For the sake of clarity, where in this determination we refer to “the appellant” we are referring to the first appellant.

2. During the currency of their existing leave the appellants applied, on 7 December 2012, for further leave to remain. The appellant's application was made as a Tier 1 (Entrepreneur) Migrant, with the other appellants as her dependants.
3. The appellant’s application was refused and those of her husband and daughter were refused in line with the decision in her case. No substantive considerations arise in respect of the second and third appellants whose position is entirely dependent on that of the first appellant.
4. The appellant's application was refused on the basis that the letter from the Bank of China, which evidences the availability of the necessary funds, failed to confirm that she has access to the £200,000 necessary for investment in the business. Consequently, she was not awarded the required points under Appendix A for access to funds. Correspondingly, she was awarded no points for funds held in a regulated financial institution, and in respect of funds disposable in the UK.
5. A separate ground of refusal was in relation to Maintenance (Funds), it being said that the bank statements the appellant had produced did not show that she had the requisite £2,100 for the required consecutive 90 day period ending no more than 31 days before the date of application.
6. First-tier judge Chohan dismissed the substantive appeals, finding that she had failed to submit relevant documentary evidence as at the date of application. He declined to take into account post-decision evidence, having regard to section 85A of the Nationality, Immigration and Asylum Act 2002. He allowed the appeals in relation to the unlawful decision taken under section 47 of the Immigration, Asylum and Nationality Act 2006 and nothing now turns on that decision.
7. The appellant contends that the First-tier judge erred in law by failing to take into account evidence which showed that she had been requested by the Secretary of State to re-submit evidence, that the decision was taken before that evidence was received and that the evidence showed that she met the requirements of the Rules. Secondly, it is said that the First-tier judge had failed to deal with the issue of maintenance, about which the Secretary of State’s decision was flawed. Thirdly, it is contended that the judge had failed to consider Article 8 of the ECHR.

Our assessment

8. So far as maintenance under the Immigration Rules is concerned, it is accepted on behalf of the appellant that she was required to show funds of £2,100 for a consecutive period of 90 days in an account that is dated no earlier than 31 days prior to the date of application. The respondent’s decision states that the funds in her account dipped below that minimum level on two occasions in the relevant

period. That conclusion was reached with reference to the appellant's HSBC account. However, it is clear that the appellant provided bank statements from two HSBC accounts. She referred to two bank statements on the application form and there are indeed statements from accounts with HSBC with different account numbers in the respondent's bundle.

9. It is not necessary for us to set out the detail of the dates of the accounts or the funds in them because it was conceded by Mr Wilding that there were sufficient funds evidenced in one of the HSBC accounts such as to comply with the requirements of Appendix C. It was also conceded that the First-tier judge erred in law in failing to determine the issue of maintenance.
10. It is clear that the respondent failed to have regard to the second bank statement from HSBC which did evidence the required level of funds. In turn the First-tier judge erred in law in not determining that issue, and moreover, in not determining it in the appellant's favour.
11. It is as well to state at this point that it was also conceded on behalf of the respondent that the First-tier judge erred in law in not considering the Article 8 ground of appeal. That is a concession rightly made, given that Article 8 is raised in the grounds of appeal to the First-tier Tribunal. Mr Wilding submitted however, that that was not an error of law that requires the decision to be set aside, on the basis that apart from the length of time the first and second appellants had been in the UK, there was little evidence as to their private lives here.
12. Whether the admitted errors of law require the decision to be set aside depends on the outcome of our assessment of the other arguments advanced on behalf of the appellants, to which we now turn.
13. Appendix A of HC 395 (as amended) ("the Immigration Rules") provides that an applicant for leave to remain as a Tier 1 (Entrepreneur) Migrant must accrue the requisite number of points set out in Table 4 of that Appendix. That in turn requires that in this case the appellant has access to not less than £200,000, that the money is held in one or more regulated financial institutions and that the money is disposable in the UK.
14. Paragraph 41 of Appendix A requires the appellant to provide specified documents as set out in paragraph 41-SD. In particular for the purposes of this appeal, paragraph 41-SD(a)(i)(6) requires that the letter from the financial institution holding the funds must state the applicant's name. In passing we note that this is not precisely what is said in the decision letter about why the appellant does not meet the requirements of the Rules, the decision letter stating that "you have provided evidence that the funds are held in the Bank of China, however this letter from the financial institution must also confirm that you have access to the funds." This phraseology to some degree chimes with paragraph 41(b) of Appendix A which states that the specified documents in paragraph 4-SD are

provided to show that the applicant has permission to use the money to invest in a business in the UK.

15. Part of the narrative to this appeal is that on 28 March 2013 the respondent wrote to the appellant stating that due to an administrative error the Bank of China letter and deposit certificate sent following her application were not linked to her file. The letter requests that the appellant send a new copy of that evidence. No time scale is given by which those documents were to be submitted.
16. On 19 April 2013 the appellant wrote to the respondent stating that she had asked the bank to provide another copy of the deposit certificate, stating that she had had an e-mail from the bank which said that they would post it shortly. The appellant then stated that as soon as it is received she would send it to the respondent. The letter concludes by asking that she be contacted if any other information is required.
17. We observe that neither of those letters was in the respondent's bundle that was before the First-tier Tribunal. However, they were contained in the appellant's bundle that was before the First-tier Tribunal.
18. The appellant's case, set out in the grounds before the First-tier Tribunal, is that she received the 'new' letter from the bank and certificate of deposit on 29 April 2013 and was in the process of posting it to the respondent but received the refusal decision on 30 April 2013 (paras 10 and 11). Later, at para 3 she states that she received those documents on 1 and 2 May 2013, respectively. In any event it is said that the decision was taken before she had had the chance to submit the documents to the respondent. This, it is said, was unfair in common law terms and the decision in Naved (Student - fairness - notice of points) [2012] UKUT 14(IAC) is relied on.
19. That 'new' letter from the Bank of China, dated 23 April 2013 with a translation dated 29 April 2013, states that the deposit can be used by one Jimmy Eng Seng Tan (presumably the appellant's business partner) and Ms Chong Li May (the first appellant) for their Tier 1 Entrepreneur application. However, the original bank letter that was sent to the respondent in support of the application only has the name of the account holder on it, that is the appellant's husband, the second appellant.
20. It follows therefore, that at the date of the decision the respondent only had a bank letter that did not comply with the requirements of the rules; it did not contain the appellant's name.
21. Mr Wilding suggested, and we agree, that it is likely that the respondent in fact located the documents that the appellant had sent with the application, because the decision was made with reference to those documents which appear in the respondent's bundle, and before the further documents were sent to the respondent.

22. The contention that there was 'unfairness' in the respondent taking the decision before the 'new' bank letter was sent is not made out in our view, at least not on the basis on which it was argued. It was never represented to the appellant that a decision would not be taken until evidence that complied with the Immigration Rules was provided. It was simply a question of the appellant providing further copies of what she had already provided. On the basis that the respondent located the documents that were mislaid, there was no reason for the decision not to be made on the basis of those documents, subject to what we say below.
23. The appellant's letter to the First-tier Tribunal dated 9 May 2013 in the appellant's bundle, states at para 3 that she explained to the respondent that as the funds were being provided by her husband who was in the UK he would have to ask his parents to obtain the bank letter and that this could take a while. In fact, as is evident from our summary of the letter the appellant wrote to the respondent on 19 April 2013, there was no indication of those difficulties in obtaining further copies of those documents. Again therefore, to suggest unfairness on the basis that those difficulties were not taken into account is not tenable.
24. We proceed on the footing therefore, that on the face of it the respondent was entitled to 'proceed' on the basis of the evidence that was before her. That is not necessarily the same as stating that she was entitled to make the decision on the application on that basis of that evidence.
25. This was an application in which a piece of information in one of the documents was missing. The appellants rely on the decision of the Upper Tribunal in Rodriguez (Flexibility Policy) [2013] UKUT 00042 (IAC). However, that decision was overruled by the Court of Appeal in Rodriguez [2014] EWCA Civ 2. Mr Mold now relies on the decision of the Court of Appeal, in essence in terms of what is said in that decision about the correct appreciation of the evidential flexibility guidance. However, the decision does explain the limits of the guidance (see para 90). The facts of that appeal were very different from those in the appeals before us. Mrs Rodriguez did not demonstrate that she had the required level of funds and, as the Court of Appeal observed at para 93, there was no reason for the Secretary of State to believe that she had other funds such as would allow her to meet the relevant financial requirement.
26. It was accepted before us on behalf of the respondent that there was in existence at the time of this appellant's application and at the time of the decision Evidential Flexibility guidance. We were provided with a copy of it. It is stated to be valid from 12 March 2013. Mr Wilding referred us to page 5 of the guidance which states that

"This page tells you about requesting additional information if there is missing evidence, or evidence that is not in an acceptable format.

You must only request additional information in certain circumstances which would lead to the approval of the application.

Before requesting additional evidence you must have sufficient reason to believe the information exists.”

27. Examples are given of the type of information, the lack of which may prompt a request for additional information, that paragraph stating that the examples are not limited to those given. Mr Wilding very fairly also referred us to another page of the guidance which gives other examples which are more apposite to the facts of the appeals before us. Under the heading “Tier 1 Entrepreneur” one of the two examples given is “missing information from the required letters or documents”.
28. Mr Wilding suggested that there was no reason to believe that the missing information in the bank letter was in existence, thus there was no reason for the appellant to be contacted pursuant to the Evidential Flexibility policy. However, it is clear from the decision letter that the Secretary of State was aware that the appellant was relying on the ‘third party’ funds of her husband who had provided a statutory declaration as to the availability of the funds for the appellant's use as a Tier 1 entrepreneur. The bank deposit certificate was in his name but the Secretary of State acknowledged that he was willing for those funds to be used for the appellant, the decision letter referring to the “third party declaration.”
29. It is of interest to note that evidential flexibility under the Points Based System is now, and was at the time of this decision, a matter reflected in the Immigration Rules. It is not necessary for us to set out the detail of paragraph 245AA (entitled “Documents not submitted with applications”) which applied at the date of this decision. Suffice to say, its terms arguably would not have availed the appellants.
30. Returning then to the Evidential Flexibility policy. It is true that it contains within it a discretion on the part of the decision maker, for example on page 2 it states that

“...if there are minor errors or omissions on a valid application but there is enough evidence to show the application would otherwise be granted, you *may* contact the migrant, sponsor or representative as appropriate for clarification or to request missing documents and or/information” (our emphasis).
31. However if, as we understood Mr Wilding to have suggested, that discretion meant that there was no requirement for the appellant to be contacted, we disagree. If the discretion under the policy could be exercised or not in a completely random or arbitrary way, that would make the policy redundant for practical purposes. It is to be expected that a policy such as this would be applied in the ordinary course of events unless there were reasons not to apply it. The decision letter does not refer to any (not that the Evidential Flexibility policy was expressly referred to at all in the letter) and Mr Wilding did not suggest any reasons as to why purely in terms of its discretionary application, it should not have applied to this appellant.

32. We recognise that, perhaps, there is a debate to be had about what amounts to a “minor error or omission”. However, a specific example given in the guidance to which we have referred in relation to Tier 1 Entrepreneur applications is missing information from the required letters or documents. In the context of this appeal we are entirely satisfied that the fact that the appellant's name was not on the Bank of China letter comes within the Evidential Flexibility guidance.
33. The decision letter does state that the decision was taken “in line with the published guidance and Appendix A of the Rules”. However, if that could be said to show awareness of the Evidential Flexibility policy, that awareness was not translated into action in conformity with that guidance in this case.
34. We are satisfied that the decision maker acting on behalf of the Secretary of State should have contacted the appellant in accordance with the Evidential Flexibility policy in relation to the missing information on the bank letter. It is no answer that the Secretary of State was of the view that the application failed in terms of the maintenance requirement. As we now know, that was based on an incorrect appreciation of the evidence in the bank statements.
35. We have further considered the requirements of Appendix A in terms of evidence required where funds are provided by a third party, as here, in particular what appears to be a requirement under 41-SD for a letter from a legal representative in relation to the third party declaration. However, the Secretary of State’s decision does not raise this as an issue and no submission was made on behalf of the respondent before us to the effect that that requirement would have defeated the appellant’s application in any event. In short, it was not given as a basis for refusal of the application.
36. The result in our view is that the Secretary of State’s decision is not in accordance with the law in that it failed to have regard to, or failed to apply, the Evidential Flexibility policy in circumstances where that policy applied. The appeals are therefore to be allowed on that limited basis. It follows that the applications remain outstanding before the Secretary of State, awaiting a lawful decision.
37. In these circumstances, the alternative Article 8 ground of appeal is academic.
38. The decision to remove the appellants under section 47 of the Immigration, Asylum and Nationality Act 2006 was, as the First-tier judge recognised, an unlawful decision. Thus, as Mr Wilding said, a lawful removal decision remains to be made, the appeal against that removal decision having been allowed by the First-tier Tribunal.

Decision

39. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal is set aside and the decision re-made allowing the appeals of each appellant on the limited basis that those decisions in each case are not in accordance with the law.

Upper Tribunal Judge Kopieczek

22/01/14