



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/17184/2013
IA/17188/2013
IA/17197/2013

THE IMMIGRATION ACTS

Heard at Field House
On 6 August 2014

Determination Promulgated
On 26 August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellants

and

MRS NOREEN AKHTAR
MR SABIR MUHAMMAD YOUSAF
MISS IMAAN YOUSAF
(ANONYMITY DIRECTION DISCHARGED)

Respondents/Claimants

Representation:

For the Appellant: Mr G Harrison, Specialist Appeals Team
For the Respondents/Claimants: Professor Rees, Counsel

DETERMINATION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the first claimant's appeal against the decision by the

respondent to refuse to grant her leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant. The First-tier Tribunal made an anonymity order because the third claimant and another child of the first claimant are minors. However, having exercised my own independent judgment on the matter, I do not consider that the children affected by the immigration decision under appeal require anonymity for these proceedings in the Upper Tribunal, given the nature of the issues that are in controversy before me.

2. The first claimant is married to the second claimant, and they have two children. Their eldest child Imaan is the third claimant. The second and third claimants joined in the first claimant's appeal to the First-tier Tribunal as PBS dependants. They were refused leave to remain in line with the refusal of the first claimant's Tier 1 (Entrepreneur) application. As the first claimant is the main claimant, I shall hereafter refer to her simply as the claimant, save where the context otherwise requires.
3. The claimant first entered the UK on 30 March 2005 with valid entry clearance as a student. She has lived in the United Kingdom ever since. Her husband entered the United Kingdom on 13 February 2008 as her dependent spouse. Their daughter Imaan was born in the UK on 30 October 2008, and their second child was born in the United Kingdom on 9 May 2012.
4. The claimant's last grant of leave to remain as a student expired on 15 October 2012. On 14 September 2012 she made her Tier 1 (Entrepreneur) application. She was part of an entrepreneurial team. The other team member was Naveed Aslam, a Pakistani national like her. She was relying on access to funds of not less than £200,000. The funds were held in Silk Bank of Pakistan, and amounted to just over £237,000 sterling equivalent. None of the funds had been invested. The application was accompanied by a letter from the branch manager, Silk Bank Ltd in Islamabad. The letter was dated 16 August 2012. The bank certified that the following account was being maintained at Silk Bank Ltd E - 11 branch, namely an account held by Miamoona Zainub Kazmi. The account had been maintained since 15 August 2012, and the bank confirmed that the balance in the account on that date stood at Rs35,617,625 and 4 paisas only. The letter continued: "this certificate has been issued at the specific request of the customer without any liability on behalf of the bank and bank officers." The writer went on to say that Silk Bank Ltd was regulated by the State Bank of Pakistan.
5. On 11 March 2013 Beverley Brate of the temporary migration team wrote to the appellant's solicitors. She asked them to note that UKBA had identified "two minor omissions" with regards to the evidence that had been submitted. The bank letter that had been supplied had omitted to show both of the applicant's names, who formed an entrepreneurial team. In addition, the third party contact details were missing.
6. The appellant's solicitors responded on 18 March 2013. They commented that Miss Brate's letter suggested that the other two documents (the third party letter and the

legal representative's letter) were in the right format. Their understanding was that she only required the bank letter to be supplied with a current date. They asked Miss Brate to clarify whether they wanted them to provide her with the bank letter only, or whether further documentary evidence was required.

7. Miss Brate responded on 27 March 2013. The letter from Silk Bank dated 16 August 2012 was not acceptable as it contained the following omissions;
 - (1) It should name both applicants.
 - (2) It should confirm that the required funds are being made available by the third party to both applicants.
 - (3) The third party contact details should also be included in the letter.
8. Miss Brate said that the above evidence should be supplied within ten working days.
9. The solicitors responded on 18 April 2013 saying they had taken instruction from their clients, who had contacted their sponsor Mrs Kazmi who had in turn approached Silk Bank in Islamabad. Unfortunately the manager confirmed they had a set template which they would not depart from in any circumstances, and this would be in line with UK bank policy as well. They questioned whether it was a requirement that the names of the applicants needed to be stipulated in the bank letter. Furthermore they referred to an affidavit of Mrs Kazmi in which she said she was prepared to make available the required funds for both the applicants, whom she named, and in which she described her relationship with the applicants as that of a first cousin. Finally, she had provided a full address and telephone number in order that UKBA could verify the information with her.
10. On 2 May 2013 the Secretary of State gave her reasons for refusing the application. Paragraph 41-SD(a)(i) 6, 9 and 10 of Appendix A of the Rules stated that a letter from a financial institution holding funds which were available to the applicant, must state the applicant's name (and team member's name where appropriate), confirm the amount of money provided to the applicant from the third party, and confirm the contact details of the third party, including their full address including postal code, landline number and any email address. On 18 April 2013 Ali Sinclair Solicitors replied by letter that they were unable to provide a letter from Silk Bank containing the required information. In line with Appendix A of the Immigration Rules, the Home Office has therefore been unable to award any points for access to funds as required.
11. It had therefore been decided to refuse her application for leave to remain under paragraph 245DD of the Rules, as she did not meet the requirement of paragraph 245DD(b). In line with paragraph 245DD(l) of the Rules, they had not carried out an assessment as detailed in paragraph 245DD(h) of the Rules as her application had been refused. But they reserved the right to carry out this assessment and any challenge to the decision or in future applications for Tier 1 (Entrepreneur) status.

The Hearing Before, the Decision of, the First-tier Tribunal

12. The claimants' appeals came before Judge Stokes sitting in the First-tier Tribunal at Taylor House on 15 April 2014. Mr Carroll, Home Office Presenting Officer, appeared on behalf of the Secretary of State and Professor Rees, Counsel, instructed by Ali Sinclair Solicitors appeared on behalf of the claimants. The judge received oral evidence from the claimant, who adopted her witness statement of 31 March 2014 as her evidence-in-chief, and who was not cross-examined.
13. The judge's findings on the question of whether the claimant qualified for leave to remain under the Rules are set out at paragraphs 24 to 33 of his subsequent determination.
14. At paragraph 27, he accepted Mr Carroll's submission that the Home Office had complied with its evidential flexibility policy by requesting the details missing from the bank's letter. At 28, he said it was not in dispute the letter from the bank produced with the application did not meet the specific requirements of paragraph 41-SD of Appendix A.
15. At paragraph 29 he found that the bank refused to provide a letter which would be in accordance with the requirements of the Rules because of Pakistani banking Regulations. He accepted Professor Rees' submission that, if the bank's letter and Miss Kazmi's affidavit were read together, they contained all the details specified under paragraph 41-SD(d)(i) of the Rules.
16. At paragraph 30, he held that the documents before the Secretary of State contained the information required by the Rules, "albeit not in a specified format". The judge went on to find that the Secretary of State had not given due appreciation to the discretionary power set out in paragraph 245AA(b)(iv) of the Immigration Rules. Thus the Secretary of State's decision in refusing the application under the Rules was not in accordance with the law and she should have exercised her discretion differently.
17. In the light of that finding, he found that the claimant was eligible to be awarded 25 points for access to funds, and also eligible to be awarded 25 points for funds held in a regulated financial institution, and funds disposable in the UK, and her appeal succeeded, and the appeals of the second and third claimants succeeded in line with her, as they were her dependants.
18. The judge went on to make findings under Article 8 ECHR. The background to this was that the removal directions under Section 47 of the 2006 Act had been withdrawn by Mr Carroll at the outset of the hearing. But the judge was nonetheless asked to consider the claimant's rights under Article 8 ECHR "should removal be directed again". The judge rejected Professor Rees' submission that the first claimant met the requirements of paragraph 276ADE(vi) of the Rules. After a discussion of the children's best interests in paragraph 42, he concluded at paragraph 43 that the decision to refuse the claimant's application for further leave to remain in the UK

outside the Rules would be proportionate, and would not cause the UK to be in breach of its obligations under Article 8.

The Application for Permission to Appeal

19. The Secretary of State applied for permission to appeal, arguing that the judge materially erred in law in allowing the appeal under the Rules, when it was accepted by the claimant that the Rules were not satisfied. With regard to evidential flexibility, the judge had made conflicting findings. Moreover, at the relevant date paragraph 245AA(b)(iv) did not exist. Furthermore, the judge had not identified how the claimant could fall within its parameters. The document provided was neither in the wrong format, nor was it a copy of an original. The deficiency was missing specified information.

The Grant of Permission to Appeal

20. On 24 June 2014 Judge Pooler granted permission to appeal for the following reasons:

“It is arguable that the judge, who recorded the agreed fact that a letter from a bank did not meet the requirements of paragraph 41-SD of Appendix A of the Immigration Rules, erred in law in allowing the appeal by reference to the Rules.”

The Hearing in the Upper Tribunal

21. At the hearing in the Upper Tribunal, Professor Rees robustly defended the judge’s decision, for the reasons set out in his skeleton argument. He confirmed that subparagraph (d) of paragraph 245AA had not been in existence at the date of the decision, but had only been introduced into the Rules on 21 October 2013. But he submitted this did not matter, as the provision was merely codifying a pre-existing discretion.
22. He submitted that no distinction could reasonably be drawn between missing information and presenting information in a wrong format. He submitted that “format” surely included the presentation of information or lack of it. Professor Rees reported that recent published statistics show that 90% of Tier 1 applicants had their Tier 1 applications rejected. He said that the problems for Tier 1 applicants had become more acute since the decision in **Rodriguez** had been overturned by the Court of Appeal. He submitted that the decision of the Secretary of State in this instance did not accord with common sense. It was beyond the claimant’s control that the bank in Pakistan refused to issue a bank letter which met the requirements of the Rules. It was open to the judge not only to find that the discretion under paragraph 245AA(d) had not been exercised properly by the Secretary of State, but to find that the discretion should have been exercised in the appellant’s favour, and thus to go on to allow the appeal outright.

23. In reply, Mr Harrison submitted that there was nothing inherently unreasonable in requiring the letter from the foreign bank to provide all the information specified in paragraph 41-SD. If the provision of all the specified information was contrary to the Regulations which govern the bank, the solution for the claimant was to find another bank, or to arrange for the funds to be transferred to the United Kingdom.
24. The claimant interjected to say that she had raised this possibility with her solicitors, but she had been told that she could not do this. Mr Harrison submitted that the advice she had been given was correct, insofar as it related to an existing application. In order to rely on access to funds in a different bank account, she would have needed to make a fresh application.
25. After receiving further submissions from Professor Rees, I gave my error of law ruling. I held that the Secretary of State had established that the decision of the First-tier Tribunal under the Rules was vitiated by a material error of law, such that it should be set aside and remade. My reasons for so finding are set out below.

Reasons of Finding an Error of Law

26. As stated by Judge Pooler when granting permission to appeal, it was an agreed fact that the bank letter relied on in support of the application did not meet the requirements of paragraph 41-SD. It did not state the applicant's name and her team partner's name. It did not confirm the amount of money provided to the applicant and her team partner from the third party, and it did not confirm the name of the third party funder and the third party funder's contact details. It had also not confirmed that the money could be transferred into the UK (albeit this is not a point taken in the refusal letter). On the face of it, the bank letter did no more than confirm that the named account holder, who had only opened her account on 15 August 2012, had a specified sum in her new account at the close of business on the day she opened her account.
27. As the bank letter did not contain all the mandatory information specified in paragraph 41-SD, the claimant had plainly failed to comply with the Rules, and her appeal could not succeed, subject to two arguments raised on her behalf.
28. It is convenient to deal first with Professor Rees' argument that, because the missing information was obtainable from other specified documents, the omissions were not material and it was open to the judge to allow the appeal under the Rules outright.
29. Under the points-based system, the Secretary of State does not have to demonstrate materiality. The Secretary of State can insist on strict compliance with each and every provision in paragraph 41-SD, and is not open to the judicial decision maker to waive compliance with a particular set of requirements because he regards the claimant as having a good excuse for non-compliance.
30. Secondly, although the omissions in the bank letter were originally characterised by UKBA as being minor omissions, on analysis they were highly significant. This

explains the progressive hardening of the stance taken by the Home Office, culminating in refusal.

31. One of the features of the points-based system is that frequently the onus is placed on a third party to provide verification. The bank letter requirement fits this model, in that the bank relied on by the applicant is required to provide confirmation of a number of pieces of information. The missing information in the bank letter is highly significant as the effect is that the bank does not provide confirmation of the proposed arrangement. The bank does not confirm that the money in the account is available for investment by the claimant and her entrepreneurial team member in the United Kingdom.
32. It is thus no answer to say that the third party herself has provided an affidavit certifying that the money in her account is available to the claimant and her entrepreneurial team member, nor that the claimant has provided a letter from a legal representative confirming the validity of the signatures on each third party declaration provided. For under paragraph 41-SD the claimant was required to provide such specified documents in any event. What was missing was the vital third component, which was the bank's confirmation, from its own knowledge, that the claimant had access to the entirety of the funds in the relevant bank account.
33. I turn to the question of evidential flexibility. There is an historic timeline constraint in paragraph 41-SD with regard to an applicant's reliance on a bank letter. One of the requirements specified is that the bank letter must have been produced "within the three months immediately before the date of your application". When the Home Office came to assess the claimant's application, it was apparent that the bank letter did not meet all the relevant requirements. In light of the historic timeline constraint, the claimant could not cure this defect by obtaining a new bank letter in the context of the existing application. A new bank letter would have to be produced in support of a new application. Against this background, the Home Office was displaying some indulgence to the claimant in giving her an opportunity to deal with the deficiencies in the bank letter in the context of her current application. The claimant was not able to take advantage of the opportunity that was afforded to her, because of the position taken by the bank in Pakistan. That was not the fault of the Home Office, and so on the face of it the claimant has no cause for complaint on evidential flexibility grounds.
34. Judge Stokes appears to have recognised this, but nonetheless found that there had been a breach of evidential flexibility principles. The judge's reasoning in so finding was fundamentally flawed.
35. Although sub-paragraph (d) of paragraph 245AA had not been introduced into the Rules at the date of decision, I am prepared to accept that this merely codifies a discretion which the Secretary of State already had at the date of decision.
36. The relevant gateway requirement for the exercise of the discretion is that the specified document is in the wrong format. The problem with the bank letter relied

on is not its layout, but the fact that it omits mandatory pieces of information. As stated previously, it is no answer to say that the information can be obtained from the other specified documents, for the essential ingredient is the bank's confirmation of the information in question.

37. Accordingly, for the reasons given above, the judge erred in law in allowing the claimants' appeal against refusal to vary their leave to remain under the Rules and/or on the basis that the refusal was not in accordance with the law.

The Remaking of the Decision

38. For the reasons given in my error of law ruling, there can only be one outcome to the claimants' appeals against the decision to refuse to vary their leave to remain, and that is that their appeals should be dismissed. The decisions appealed against were in accordance with the Rules and were otherwise in accordance with the law.
39. The judge's Article 8 findings were made in the context of a possible future removal decision, but they are equally applicable to the proposed interference consequential upon the refusal of leave to remain.
40. There is no cross-appeal against the judge's Article 8 findings, and in any event the claimants are not necessarily required to leave the country. It is open to the first claimant to make a fresh application within 28 days of her appeal rights being deemed to be exhausted. She can demonstrate access to funds by having the funds transferred into a bank account in the UK which is in her name and that of her entrepreneurial team member.

Decision

41. The decision of the First-tier Tribunal did not contain an error of law in dismissing the claimants' appeals under Article 8 of the ECHR, and that part of the decision stands.
42. But the First-tier Tribunal's decision allowing the claimant's appeals against the decision to refuse to vary their leave contained an error of law, and accordingly the following decision is substituted: the claimant's appeals against the decision by the respondent to refuse to vary their leave to remain are dismissed under the Rules.

Signed

Date

Deputy Upper Tribunal Judge Monson