



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/22940/2013

THE IMMIGRATION ACTS

Heard at Bradford
On 11th February 2014

Determination Promulgated
On 27th February 2014
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Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMMAD MONIRUL HASSAN

Respondent

Representation:

For the Respondent: Solicitor, Mr Hosein, E1 Solicitors
For the Secretary of State: Mr M Diwnycz, Senior Presenting Officer

DETERMINATION AND REASONS

1. Mr Mohammad Monirul Hassan is a national of Bangladesh born on 1st October 1977. On 4th February 2010 he was granted leave to enter the UK as a student. His leave was valid until 14th May 2011. On 6th July 2011 he was granted further leave to remain in the UK until 3rd February 2012. On 15th May 2012 he was further granted leave to remain in the UK until 15th September 2012 as a Tier 4 (General) Student. He completed his course of study on 15th September 2012 and on that date submitted a combined application for leave to remain in the UK as a Tier 1 (Entrepreneur) Migrant under the points-based system and for a biometric residence permit. Those applications were refused by the Secretary of State on 29th May 2013. The

Respondent successfully appealed to the First-tier Tribunal (Judge Doyle), in a determination that was promulgated on 14th November 2013 on the papers. The Secretary of State now appeals that determination.

2. Paragraph 245DD of the Immigration Rules (HC 395) sets out the requirements an applicant must satisfy to qualify for leave to remain as a Tier 1 (Entrepreneur) Migrant. For this appeal, the relevant requirement is found at paragraph 245DD(b):

“The applicant must have a minimum of 75 points under paragraphs 35 to 53 of Appendix A.”

Paragraph 36 of Appendix A provides that the available points are set out in Table 4. The basis upon which the application was refused is set out in the notice of immigration decision dated 29th May 2013. It was noted that the Respondent had claimed 25 points for having access to funds as required under Appendix A of the Immigration Rules but that the Secretary of State was not satisfied that he had produced specified documents required so as to be awarded points in this area. There were two reasons given in relation to his application which was based on his claim to have access to funds of 200,000 being made available to him by his spouse Mrs Rokeya Hassan. Firstly it was stated that he did not sign the declaration for the provision of third party funds as required under paragraph 41-SD(b)(i) and secondly, he did not provide a letter from a legal representative to validate the signatures on the declaration for the provision of third party funds, as required under paragraph 41-SD(b)(ii). It is plain from the refusal document that those were the only matters raised in respect of that part of the application.

3. Mr Hassan, the Respondent sought to appeal that decision and provided Grounds of Appeal to the First-tier Tribunal. In those grounds it was stated at paragraph 2 that the declaration contained all the information that was required showing the lawyer’s name, address, his practising jurisdiction, his confirmation to the validation of the declaration, the date of it, the name of the third party with address and the name of the applicant with address, official stamp et cetera. It was noted that it was signed by the third party and validated by the lawyer which was the main objective. As to the second issue it was stated that the signature on the declaration was a “minor omission” but that the declaration contained all the information required to show that the fund was available to the applicant from the third party namely his wife. He further submitted that the Secretary of State should have made a simple enquiry about his signature before making the refusal decision based on what he described as a “minor formation error of the document” according to their own policy guidance set out at paragraph 17 of the Tier 1 Entrepreneur policy guidance and the evidential flexibility policy.
4. The appeal came before the First-tier Tribunal (Judge Doyle) on the papers on 11th November 2013. In a determination promulgated on 14th November 2013 he considered the bundle of documents that had been produced on behalf of the Appellant in the light of the matters set out in the refusal letter. In respect of the two issues raised the judge set out his conclusions at paragraphs 12(a to g). He had noted

earlier in the determination that the third party whose funds were relevant for this application was the Appellant's wife resident in Bangladesh. He noted at paragraph 11(c) that she maintained a bank account with the Janata Bank in Dhaka and at the date of the application the credit balance on the account was £227,522. On 12th September 2012 she had sworn a declaration that £200,000 was available from her bank account as an initial investment in her husband's business in the UK. In a letter of the same date, Mohamed Shafiqul Islam, an advocate and notary public from Dhaka, notarised that declaration. The bank statements that were produced before the First-tier Tribunal were noted at paragraph 11(f) namely that for the period of 18th July 2012 to 2nd September 2012 confirmed that the credit balance in that account exceeded £227,000. He further noted at 11(g) that the Janata Bank Limited is the second largest commercial bank in Bangladesh and is owned by the government of Bangladesh and was also regulated by the Bangladesh Bank.

5. The judge noted at paragraph 12(a) that the case related to the funds available from a third party and thus paragraph 41-SD(b)(i) and (ii) applied. He noted that the "Respondent's criticism is that of the nine requirements set out there, the Appellant did not sign the declaration for the provision of third party funds, and did not provide a letter from a legal representative to validate the signature of the declaration." The judge recorded the following:-

"(b) The Respondent is incorrect about the second observation. Contained in the papers before me there is a letter from a practising advocate in Bangladesh confirming the method of signature of the declaration and that the signature is valid in Bangladeshi law. The author of that letter is the notary public who notarised the affidavit. However the Respondent is correct that the Appellant's signature is not on the declaration. At page 2 of the declaration the information required by the Immigration Rules is set out. Name and address of the filing lawyer is produced, details of his practising jurisdiction, and confirmation of the validation of the declaration are set out, along with the date of the declaration, the name of the third party with address, the name of the applicant with address and so on. It is not disputed that the Appellant's signature is missing from the declaration.

(c) It is not surprising that the Appellant's signature is missing from the declaration because the declaration was sworn in Dhaka. The declaration is not the declaration of the Appellant, but the declaration of his wife (the third party). The Immigration Rules quite clearly state that the applicant should sign the declaration. The question for me is whether or not the absence of the applicant's signature on the declaration (that is not his) is fatal to the application."

6. The judge went on to state that the Secretary of State had made no attempts to contact the Appellant so that his signature could be appended to a document that would otherwise fulfil the requirements of the Immigration Rule. The judge made reference to the evidential flexibility policy under the points-based system which was

incorporated into the Rules at paragraph 245AA on 6th September 2012. He also made reference to the case of **Rodriguez (flexibility policy) [2013] UKUT 00042 (IAC)** and the discretionary powers to request further information from applicants in any case and the exercise thereof in accordance with established legal principles. At paragraph 12(f) he made reference to the Tier 1 Entrepreneur policy guidance which placed an obligation on the Respondent to contact the Appellant if there was an error in the documentary evidence. He thus found that on the evidence placed before him the Secretary of State had not followed her own policy guidelines. At paragraph (g) the judge said this:-

“I consider the evidence that is placed before me. It is not disputed that the Appellant’s spouse is able to provide access to £200,000 to fund the Appellant’s proposed business. In reality the Respondent has refused this application solely on a minor technicality. The reason to refuse is something that could easily have been remedied, but the Respondent chose not to seek the remedy.”

He reached the conclusion that having taken into account the terms of the Immigration Rules and the evidence and having taken a “holistic and balanced view of the evidence” he reached the conclusion that the Appellant fulfilled the requirements of the Immigration Rules. Thus he allowed the appeal under the Rules.

7. The Secretary of State sought permission to appeal that decision on two grounds and permission was granted by First-tier Tribunal Judge Blandy on 5th December 2013.
8. Mr Diwnycz on behalf of the Secretary of State relied upon the grounds. He submitted that on the findings of fact made by the judge and having reached the conclusion that this was a case that fell within the evidential flexibility guidelines or policy he should not have allowed the appeal outright but should have allowed the appeal to the extent that it was not in accordance with the law and remitted the appeal back to the Secretary of State and thus made a material error of law. Mr Hosein on behalf of the Appellant was in agreement with the submission made by Mr Diwnycz that the judge, on the findings of fact that he made by reaching the conclusion that there had been a minor technicality which, had the Secretary of State applied the flexibility policy correctly that it would have been open to Mr Hassan to remedy it before refusing the application, would have required the judge to have allowed the appeal only to the extent of remitting it back to the Secretary of State.
9. It is common ground between the parties that on the findings of fact made by the judge, that he fell into error by allowing the appeal outright rather than allowing the appeal to the extent that it was remitted to the Secretary of State. In those circumstances it is accepted that an error of law is established and that the decision allowing the appeal should be set aside and be remade allowing the appeal to the extent that it is remitted to the Secretary of State to allow the applicant to rectify the errors identified relating to his signature. Mr Diwnycz on behalf of the Secretary of State does not seek to challenge any of the findings of fact made by the judge nor does he seek to argue that the evidential flexibility policy or paragraph 245AA does not apply in the way the judge found it to apply in this particular case.

10. The judge reached the conclusion from the evidence that he was satisfied that the applicant had provided bank statements from 18th July 2012 to 2nd September 2012 confirming a credit balance of a sum exceeding £227,000 (see paragraph 11(f)) and that his wife, whose name the third party funds were in, had sworn a declaration to that effect and that in all other respects the declaration met the requirements of the Rules. However it was common ground that the applicant's signature was not on the declaration (see paragraph 12(b) of the determination). That is accepted also by Mr Hosein. Whilst the judge found that it was not surprising that his signature was missing from the declaration because the declaration was sworn in Dhaka and that the declaration was not the declaration of the applicant but that of his wife, the Rules did require the declaration to be signed by him (see paragraph 12(c)). The judge however reached the conclusion that this was a case where the difficulties with the documents were such that in terms of applying evidential flexibility or in the alternative the requirements of paragraph 245AA, that this was the type of document that should have triggered a request from the Secretary of State but that it had not happened on the facts of this case, which the judge found did apply. Mr Diwnycz does not seek to challenge the findings made by the judge in respect of whether or not the evidential flexibility policy did apply or paragraph 245AA and thus I proceed on the basis that this was a proper finding made by the judge.
11. That related to his signature on the declaration, however it seems to me that this omission also extended to the validation of the signature on the declaration by the legal representative. The judge did find that the letter from the practising advocate in Bangladesh confirmed the method of signature of the declaration and the signature was valid in Bangladeshi law (see paragraph 12(b)). As the judge found, the Appellant's signature was not on the document and it follows that the notary therefore could not have validated his signature. If there was an omission which the applicant should have had the opportunity to rectify it extends to that document also as it concerns the same issue namely the Appellant's missing signature. Therefore the appropriate course is to set aside the decision to allow the appeal outright and to substitute in its place a decision to allow the appeal to the extent that it is remitted to the Secretary of State to give the Appellant the opportunity to rectify that omission before a decision is taken.

Decision

12. The making of the decision of the First-tier Tribunal involved the making of an error of law. The decision is remade as follows, the appeal is allowed to the extent that it is remitted to the Secretary of State.

Signed

Date

Upper Tribunal Judge Reeds