



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/25537/2013
IA/25540/2013

THE IMMIGRATION ACTS

Heard at Field House
On 14 March 2014

Determination Promulgated
On 02nd May 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) MR NAHID AHMED
(2) MRS SABINA SULTANA
(ANONYMITY ORDER NOT MADE)

Respondents/Claimants

Representation:

For the Appellant: Mr T Melvin, Specialist Appeals Team
For the Respondents/Claimants: Mr I Hossain, Legal Representative, ACM
Immigration Experts

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 Secretary of State to refuse to grant him leave to remain as a Tier 1 (Entrepreneur) Migrant.

The claimant's wife, Mrs Sabina Sultana, joined in the appeal as his dependant. As the first claimant is the main claimant in the appeal, I shall hereafter refer to him simply as the claimant save where the context otherwise requires. The First-tier Tribunal did not make an anonymity order, and I do not consider that an anonymity order is warranted for these proceedings in the Upper Tribunal.

2. In his application, the claimant declared in section G that he had access to not less than £50,000 and had previously held leave as a Tier 1 (Post-Study Work) Migrant and was now registered as self-employed or as a director, and was engaged in business activity and occupation at degree level. He had not yet invested any of the funds. He was relying on funds held overseas. He was enclosing a letter of permission from the third party funds provider and a letter of confirmation from a legal advisor. With respect to the funds held overseas, he was relying on a letter from each financial institution "holding your funds" confirming the amount of money held in that institution, and confirming that it was regulated by the home regulator and that money was disposable in the UK.
3. In section G10 he said he was relying on a letter from M&T Bank showing access to just over £26,000 and a letter from Cardinal Bank showing access to just over £28,000.
4. On 10 June 2013 the Secretary of State gave her reasons for refusing the application, and for making a decision to remove the claimant by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. He stated he had access to funds of £50,000 being made available to his business by third party funding from two third party funders. As evidence of this he had provided a letter from Cardinal bank and M&T Bank, and a declaration from both funders. However the bank letter was not acceptable because it did not confirm the institution was regulated by the appropriate regulatory body, it did not state his name, nor did it confirm the amount of money being made available to him, and it did not confirm that the money could be transferred to the UK.
5. The third party declaration he had submitted was not acceptable because it did not contain both his signature and that of the third party.
6. No declaration from a legal representative had been supplied to establish that the letter of permission supplied was valid, as required by paragraph 41-SD(b)(ii) of Appendix A of the Rules.

The Hearing before, and the Decision of, the First-tier Tribunal

7. The claimant's appeal came before Judge Nightingale sitting at Hatton Cross on 14 January 2014. Mr Hossain appeared on behalf of the claimant, and Mr Khan of Counsel appeared on behalf of the Secretary of State. The claimant gave oral evidence, and explained that one of his business partners, his uncle from the United States of America, had now sent the funds which he had offered to invest in the business. This was a sum of £23,500. His uncle had sent him this money in December 2013. He showed the judge that he now had in a bank account in the UK a sum just short of £52,000. This was made up of money sent by his uncle in the

United States, and the rest was savings accrued by himself and his wife from the employment that they had had in the United Kingdom.

8. The claimant explained that his uncle had sent the money over to him after he had been refused leave to remain. The documents which his uncle had given him to send with the application were not in the format that the Home Office wanted. His uncle had told him that his bank in the USA could not provide a letter in the format that the Home Office wanted.
9. The claimant was importing clothes from Bangladesh and selling them in the UK. His role was to do sales and marketing for his business. He proposed to use the United Kingdom as the main base of operations, and import garments from Bangladesh and send them on the United States of America and also to Africa. He had now invested in his business as he had ordered the garments referred to in the invoice at page 46. He had already paid for some of the order. If he was not granted further leave to remain it would cost him financially. He would have to pay compensation to factories if he cancelled the orders, and that would mean he would make a financial loss.
10. In his closing submissions on behalf of the Secretary of State, Mr Khan submitted that the bank letter from Cardinal Bank did not meet the requirements of the Rules. The claimant had given evidence that it was not possible to get a letter from Cardinal Bank which complied with the Rules. Therefore it would have made no difference if he had been asked to obtain such a document. With regard to Article 8, the Rules were sufficient to meet the Secretary of State's obligations. The claimants did not meet the Rules. If the claimant had chosen to invest a lot of money without any insurance, that was a risk which he had to accept.
11. On behalf of the claimants, Mr Hossain submitted that evidential flexibility should have been applied as there was clearly information missing which could have been provided. The missing information such as the bank letter could have been counteracted very easily by the sending of the money to the United Kingdom in the manner which had now occurred. If the claimant had known that the bank could not write the letter in the format required, then the uncle could quite simply have sent the money directly to the claimant very quickly, and the transfer could have been notified to the respondent to meet an alternative requirement of the Rules. Mr Hossain invited the judge to find that the claimant was engaged in a genuine business venture.
12. In her subsequent findings, the judge held that the claimant had not complied with the Rules. The documents which had been submitted were not in the correct format specified within the Rules. She asked herself whether it would have made any difference if the claimant had been asked to deal with the shortcomings in the documentary evidence which was submitted. Had the claimant been aware of the shortcomings of the bank letter, it was quite clear that the money could have been forwarded to him and the Rule met in an alternative manner. That being so, she

could not find it would have made no difference if he had been contacted by the Secretary of State and the shortcomings of the bank letter pointed out to him.

13. As for the third party declaration, these shortcomings had been dealt with in a more recent declaration. In any event, had the money been in the claimant's own account, a third party declaration would not in fact have been relevant to the application.
14. She was persuaded that addressing the omission or error might well have led to a grant of leave in this particular case. Certainly, the Secretary of State had not explained how addressing the omission or error would not have led to a grant of leave or indeed upon what other grounds the application would fail. The claimant had demonstrated on balance that he may well have been able to address the omissions had he been given the opportunity in accordance with paragraph 245AA of the Rules and in accordance with the Secretary of State's own published policy. That being so, she was bound to find that the Secretary of State had not given any consideration to her own published policy and consequently the decision was not in accordance with the law.

The Grant of Permission to Appeal to the Upper Tribunal

15. On 7 February 2014 First-tier Tribunal Judge Cheales granted the Secretary of State permission to appeal for the following reasons:

It is arguable that the Secretary of State was not to know that the claimant had funds available and more information to show business activity. The evidential flexibility policy does not require the Secretary of State in every case where there was a failure to meet the requirements of the Immigration Rules to make further enquiries.

The Hearing in the Upper Tribunal

16. At the hearing in the Upper Tribunal I received submissions from the parties to whether the decision of the First-tier Tribunal contained an error of law. I found that the decision did contain an error of law, and should be set aside. My reasons for so finding are set out below.

Reasons for Finding an Error of Law

17. This application was governed by Paragraph 245AA, which was introduced in the autumn of 2012 and was expressly designed to codify the Secretary of State's evidential flexibility policy. Under paragraph 245AA, the UK Border Agency/Home Office will not request documents *where a specified document has not been submitted*. This Rule was in force at the date of application, and it also was in force at the date of decision.
18. The Secretary of State continues to publish internal guidance to caseworkers on evidential flexibility, but this guidance does not give applicants any relief that is not contained in paragraph 245AA.

19. The current Home Office guidance on evidential flexibility is valid from 7 November 2013. The introduction to the latest guidance which is directed to caseworkers, provides as follows:

This guidance tells you about the use of evidential flexibility when an application has missing evidence or there is a minor error on an application.

This guidance puts together cross-cutting guidance which previously existed in separate products, and combines relevant information from other operational instructions. It supersedes all previous instructions and guidance on evidential flexibility.

Under the evidential flexibility process, if there are minor errors or omissions on specified documents submitted with 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.

For applications made on or after 13 December 2012 you can accept a specified document which is:

- in the wrong format, or
- a copy of an original document

If you are satisfied it is genuine the applicant meets all the other requirements of the Immigration Rules. You do not have to write out in these circumstances.

However, the Home Office reserves a right to request a specified original document in the correct format in all cases where paragraph 245AA(b) applies, and to refuse applications if these documents are not provided as set out in this paragraph.

All documentary evidence must be treated in the same way as any submitted with the initial application.

For applications decided in or after 1 October 2013 further to amendments made on 13 December 2012 under evidential flexibility you do not have to write to an applicant about a specified document if it does not contain all of the specified information where you can get the missing information from:

- other documents submitted with the application
- the website of the organisation which issued the document, or
- the website of the appropriate regulatory body

20. With respect to the policy guidance introduced in June 2011 (which was superseded by paragraph 245AA – see above), Davis LJ said as follows in paragraph [92] of **Rodriguez** in the Court of Appeal:

In this regard it is quite true that the introduction to the process instruction flagged up two significant changes, one of which was that ‘there is no limit to the amount of

information that can be requested from the applicant'. It is to be noted that this is immediately qualified by the instruction that requests for information should not be speculative and – as subsequently reiterated – there must be sufficient reasons to believe that any evidence requested existed. The same point is made in step 3 of the procedure table – taking the example of bank statements (specified documents), the example given is that of bank statements missing from a series; see also what is said in this regard under the heading 'maintenance' at page 10 of the instruction. Taken overall, the evidential flexibility process instruction is demonstrably not designed to give an applicant the opportunity first to remedy *any* defect or inadequacy in the application or supporting documentation so as to save the application from refusal after substantive consideration.

21. In this appeal the judge took into account the additional documents provided by way of appeal, and pondered whether the claimant would have been able to provide these additional documents in support of a continuing application if the errors or omissions in the original documentation had been pointed out to him. Having answered this question in the affirmative, the judge leapt to the conclusion that the Secretary of State must have acted in breach of paragraph 245AA of the Rules and/or her published policy on evidential flexibility.
22. The judge's approach was fundamentally flawed. **Secretary of State for the Home Department v Rodriguez [2014] EWCA Civ 2** had not been published by the date of the hearing. But the law always speaks. The judge had to place herself in the shoes of a caseworker assessing the application on the documents that had been provided. She was wrong to apply hindsight to determine the question of whether evidential flexibility policy principles had been breached. She was also wrong to take into account additional information and documents that had not been before the caseworker assessing the application.
23. Another fallacy in the judge's approach was the presumption that because the evidential flexibility policy was not referred to in the refusal letter, it should be taken that the Secretary of State has not applied it or considered whether it should be applied.
24. The claimant clearly did not provide all the specified documents in table 4 and paragraph 41, as required by paragraph 41-SD. Under 41-SD(a)(i), the claimant had to provide a letter from each financial institution holding the funds, to confirm the amount of money available to the appellant. Each letter had, inter alia, to comply with the following requirements:
 - ...
 - (4) have been produced within the three months immediately before the date of your application,
 - ...
 - (8) confirm the amount of money available from the applicant's own funds (if applicable) that are held in that institution,

- (9) confirm the amount of money provided to the applicant from any third party (if applicable) that is held in that institution
25. Paragraph 41-SD(b) also contains further specific requirements relating to third party funding. The specified documents that must be provided include:
- (i) an original declaration from every third party they have made the money available for the applicant to invest in a business in the United Kingdom, containing, among other things:
 - (3) the applicant's signature and the signature of the third party ...; and
 - (ii) a letter from a legal representative confirming the validity of signatures on each third party declaration provided, which confirms that the declarations from the third party/parties contains the signatures of the people stated. It can be a single letter covering all third party permissions, or several letters from several legal representatives. It must be an original letter and not a copy, and it must be from a legal representative permitted to practise in the country where the third party or the money is.
26. On the claimant's own evidence, the bank letter from Cardinal Bank deliberately did not confirm that the amount in the third party's bank account was available to him. It follows that there is no scope for the application of evidential flexibility principles. This is not a case where the claimant had accidentally omitted some information. He was simply unable to obtain a bank letter from Cardinal Bank which complied with the requirements of the Rules, and he could not cure this non-compliance. As previously noted, the bank letter has to be produced "within the three months immediately before the date of your application". The claimant was faced by an historic timeline constraint. Once he had made his application, he could not rely on a new bank letter which post-dated the date of application. Similarly, he could not rely on an alternative method of demonstrating access to funds. For the same historic time line constraint applies to funds held by an applicant in his own bank account. The funds have to be there *before* the application is made. So there was no obligation on the part of the caseworker to point out to the claimant that the bank letter from Cardinal Bank was deficient, before making a decision on his application.

The Re-making of the Decision

27. It follows that the decision of the First-tier Tribunal should be set aside, and that the claimant's appeal against the refusal of leave to remain as a Tier 1 (Entrepreneur) Migrant should be dismissed. As the Section 47 removal decision was made after 8 May 2013, it is lawful. The only issue which remains unresolved is the claimant's Article 8 claim which the judge did not consider as she had allowed the appeal on another basis.
28. Mr Hossain invited me to take account of the evidence given by the claimant in his witness statement for the hearing in the First-tier Tribunal. He was granted leave to enter the United Kingdom as a student in July 2007, and his last leave to remain was

extended as a Tier 1 (Post-Study Work) Migrant until 3 March 2013. His wife had been granted leave to enter the United Kingdom on 1 April 2012 as a PBS dependant. Whilst being in the United Kingdom, the claimant had successfully completed his master of science degree from the University of Greenwich.

29. The claimant says he is a law-abiding migrant who has never breached immigration law during his stay in the UK. He is deeply integrated with British culture and society. His private life has been formed through his study and work. The required funds are available to him, and he is keen to continue with his business so as to build his career. If he has to leave the UK, then his career will be adversely affected.
30. In his closing submissions on behalf of the Secretary of State, Mr Melvin submitted that the Article 8 claim should be dismissed, citing Gulshan. In reply, Mr Hossain acknowledged that the claimant could make a fresh application relying on new specified documents. He submitted that it would be quite difficult for the claimant to get together the required documents within 28 days, and the proposed interference with private life was disproportionate.
31. In Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 the Upper Tribunal held that after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them. In the absence of insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh.
32. There are plainly not insurmountable obstacles to family life continuing in the claimant's home country of Bangladesh, as they will be returning there together. It is also not suggested that either of the claimants has a viable private life claim under paragraph 276ADE of the Rules. The first claimant is still some way short of qualifying for leave to remain on the grounds of ten years' lawful residence, and neither he nor his wife has severed ties with Bangladesh.
33. On the evidence before me, there are not arguably good grounds for granting leave to remain outside the Rules, and therefore I do not consider it is necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them. There are no non-standard and particular features in this case demonstrating that removal would be unjustifiably harsh. I am reinforced in this finding by the fact that it is open to the claimant to make a fresh application. Provided he makes a fresh application within 28 days of the date when his appeal rights are deemed to be exhausted, he will not thereafter be treated as an overstayer. Since his case before the First-tier Tribunal was that he is now able to provide all the correct specified documents, it is reasonable to expect the claimant to make a fresh application within 28 days, if so advised.

Decision

34. The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimants' appeals against the refusal of leave to remain are dismissed under the Rules and under Article 8 ECHR.

Signed

Date

Deputy Upper Tribunal Judge Monson