



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/26586/2013
IA/26571/2013

THE IMMIGRATION ACTS

**Heard at Manchester
On 14th May 2014**

**Determination Promulgated
On 15th July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE HARRIS

Between

**MRS PREETI CHOUDHARY
(ANONYMITY ORDER DIRECTION NOT MADE)**

First Appellant

And

MR RAGHAVENDRA RAMCHANDRA KANKONKAR

Second Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	In person
For the Respondent:	Mr A McVeety, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are citizens of India. The First Appellant was born on 22nd February 1986. The Second Appellant is the husband of the First Appellant born on 20th December 1981. The First Appellant had applied on 17th May 2013 for a combined application for leave to remain

in the United Kingdom as a Tier 1 (General) Migrant under the Points Based System and for a Biometric Residence Permit. That application was refused by the Secretary of State on 11th June 2013 on the grounds that the Appellant had not satisfied the attributes section – Appendix A, requirements for Tier 1 (General) Applicants, in that the Appellant did not satisfy the requirements of previous earnings and for UK experience. The refusal to award points for UK experience was based as no points for previous earnings had been awarded. The area where the Secretary of State experienced difficulty was that the Appellant claimed earnings from self employed activity, for reasons given in the Notice of Refusal those earnings were not considered acceptable.

2. The Appellants appealed and the appeal came before Judge of the First Tier Tribunal Matthews sitting at Stoke on 7th February 2014. In a determination promulgated on 25th February 2014, the appeal was dismissed on all grounds.
3. The Appellants appealed to the Upper Tribunal on 5th March and on 18th March 2014 Judge of the First Tier Tribunal Keane granted permission to appeal. The permission to appeal set out the salient features. Judge Keane noted that in dismissing the appeals in respect of the Immigration Rules, the Judge found that Mrs Choudhary had not established a net income deriving from her self employment of £10,817. He noted that it was common ground between the parties to the appeal that bank statements generated in connection with an account held by Mrs Choudhary at HSBC had been submitted to the Respondent with Mrs Choudhary's application for leave to remain and a letter addressed to Mrs Choudhary dated 11th June 2013 explicitly confirmed that bank statements had indeed been presented to the Respondent.
4. He noted that it was a feature of the hearing before the Judge that the bank statements were not contained in the Respondent's bundle of documents. On the first page of the Judge's record of proceedings, the Judge noted Mrs Choudhary's answer to a question put by Counsel that a collection of documents which had been presented to the Respondent with her application and including her bank statements were not contained in the Home Office bundle. He noted that at paragraph 18 of his determination, the First Tier Tribunal Judge attributed responsibility for the omission to the Respondent, to include the bank statements in her bundle as indeed her responsibility stating,

"it is a matter of regret that the Respondent has been inefficient and has not copied them for me ..."

At page 8 of the record of proceedings, the Judge had noted Counsel's submissions made after evidence concluded that

"Respondent's bundle does not have Appellant's bank statements and doesn't suggest that her income doesn't reconcile with them".

5. Judge Keane in granting permission considered that there was an arguable error of law as it was the Respondent's responsibility to include Mrs Choudhary's bank statements in her bundle of documents and as neither the Respondent nor the Home Office Presenting Officer were present at the hearing submitted that the income record in Mrs Choudhary's bank statement was inconsistent with the claim as to a net profit of £10,817 and the Judge arguably perpetrated a procedural irregularity failing to take into account that the bank statements,

(albeit not before him) confirmed that her self employment as a painter generated a profit of £10,817 which was in accord with the statement as to a net profit made in an accountant's report submitted to the Respondent with the application.

6. On 31st March 2014, the Secretary of State provided a response pursuant to Rule 24. The Respondent opposed the Appellant's appeal stating that the Judge had noted at paragraph 22 that there was no evidence of the self employment income declared on the tax return, and that at paragraph 23 the Judge had noted that he did not have the bank statements or final accounts. Even if the bank statements were not in the Respondent's bundle, the Judge clearly did not have sufficient evidence before him to show that the Appellant had a self employed income of £10,817.
7. It is on that basis that the appeal comes before me to consider whether or not there has been a material error of law in the decision of the First Tier Tribunal. In this instance, the Appellants appear in person, but rely on a detailed submission document which they have prepared and which I have considered. The Secretary of State appears by her Home Office Presenting Officer Mr McVeety.

Submissions

8. Mrs Choudhary submits that the decision of the First Tier Tribunal dismissed her appeal on three grounds, namely
 - (i) Her professional qualification or competency in painting to undertake painting business.
 - (ii) Invoices and bank statements not corroborating
 - (iii) The expenses incurred for purchase of material for preparation and creating paintings.

She then sets out, (and I have given very careful consideration to criticisms of the First Tier Tribunal Judge's determination at paragraphs 4 to 17 of her submissions), and concludes by stating

"She has the necessary skills and qualifications to meet the desired salary band as evidence from her previous Tier 1 visa, but that she took up the self employment as an artist as she wants to pursue a living out of what she enjoys doing. I note that copies of her paintings are available within the bundle, and I have no reason to doubt that she is an accomplished and experienced artist".

9. Mr McVeety acknowledges that original bank statements were produced but considers the position as to whether or not the evidence provided was suitable, pointing out the important factor of whether or not the bank statements matched the invoices at the date of application. He points out that if they were, then the question should be raised as to why were they not considered by the Judge on the basis that they are on the file, and therefore the question arises as to whether or not this overcomes the evidential burden. He accepts that there has been considerable documentation sent in with the application. The question still remains as to how much income the self employed income of the First Appellant is generating. Having

said that, he acknowledges that the documents may not have been properly considered; albeit that may be through no fault whatsoever of the First Tier Tribunal Judge.

The Law

10. Errors of legislative interpretation, failure to following binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
11. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story told is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

12. There is a procedural requirement of fairness in these proceedings that fairness includes the proper and full consideration of all the evidence. For reasons that have been set out in considerable length both in the Notice of Refusal and previous determination as well as the grounds of appeal and submissions, documentary evidence as to the income generated by the First Appellant to show that she meets the attributes section at the time of application may not have been properly before the Tribunal nor properly considered. There are, I am aware, a considerable number of bank statements. Those statements are not collated nor in order before me, so it is not possible to go on to reconsider them. However, had those documents been available and provided in the manner in which they should, it is the strong contention of the Appellant that she would have met the financial criteria. That is the only issue in this matter, and in such circumstances, it seems appropriate to find that there is a material error of law on the basis that had those documents been properly considered, and before the Tribunal, then the outcome may well have been different and the matter to be remitted to the First Tier Tribunal to be heard on the first available date so that the Appellants are given a final opportunity to show to the satisfaction of the Secretary of State and the Tribunal that they meet the required attributes section. To that extent, I find that there is a material error and I set aside the decision of the First Tier Tribunal and I set out in the decision section directions for the rehearing of this matter.

Decision

- 1) The decision of the First Tier Tribunal contains a material error of law and the decision is set aside and the appeal is remitted to the First Tier Tribunal for rehearing.
- 2) The rehearing is to take place at the Manchester hearing centre and to be before any First Tier Tribunal Judge (either salaried or fee paid) other than First Tier Tribunal Judge Matthews with an estimated length of hearing of 1½ hours. The hearing to be listed for the first available date 28 days hence.
- 3) That the Secretary of State do produce to the Appellants and the Tribunal at least 14 days pre hearing, a bundle of those statements that have been lodged with them and upon which they intend to rely at the hearing.
- 4) That if there are any discrepancies between the bundle produced by the Secretary of State and that produced by the Appellants they be entitled to respond by way of a contra bundle 7 days pre hearing.
- 5) No interpreter required.
- 6) The First Tier Tribunal Judge did not make an Order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that Order and none is made.

Signed D N Harris

Date: 14th July 2014

D N Harris
Deputy Upper Tribunal Judge