



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/27882/2013

THE IMMIGRATION ACTS

Heard at Field House
On 3 March 2014

Determination Promulgated
On 12 March 2014

Before

UPPER TRIBUNAL JUDGE WARR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

MR AAMIR SALMAN

Appellant

Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Mr V Makol (Maalik & Co)

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State but for convenience I will refer to the original appellant, a citizen of Pakistan born on 28 March 1980, as the appellant herein.

2. The appellant arrived as a student on 10 October 2006 and was granted extensions of stay as a student until 2011 and subsequently until 21 March 2013 under Tier 1 (Post-Study).
3. On 2 March 2013 the appellant applied for leave to remain as a Tier 1 (Entrepreneur) but this application was refused on 17 June 2013. The respondent was not satisfied that the appellant genuinely intended to establish the business or that he genuinely intended to invest the money required under table 4 of Appendix A in the business nor that it was genuinely available to him. Among the points taken by the respondent was that the name of the appellant's company did not feature in a Companies House search and the respondent referred to what were claimed to be errors and inconsistencies in the agreement reached raising concerns as to whether there was genuine evidence of trading. The respondent noted that the appellant's sister had made a third party declaration in which she stated that she would make £50,000 available to the appellant to invest in his business and this was supported by a letter from the National Bank of Pakistan. The respondent was concerned as to whether the funds were genuinely available to the appellant.
4. The respondent raised other concerns about whether the business was viable, noting the appellant had no real business experience and he had not apparently used his period of current leave to undertake genuine and credible steps to prepare, plan, develop and launch his business. There were concerns that the appellant wished to extend his stay for economic reasons and about his intentions. The appellant did not accordingly score the required number of points.
5. The matter came before a First-tier Judge on 2 January 2014 when the appellant was represented, as he is now, by Mr Makol. Having set out the evidence the judge's decision concluded as follows:
 - “13. In oral evidence the appellant stated that he had only issued one invoice so far in the sum of £500 and was awaiting receipt of £50,000 from his sister who would not have any shared in the company. The appellant had made it very clear that he had only signed one contract which he had referred to in his application. He accepted that he did not have a business account and had maintained turnover of approximately £2,000. He was hoping to concentrate on resolving the visa appeal issue first before seeking injection of funds from his sister.
 14. At the conclusion of the oral evidence, I heard helpful submissions from both representatives which I have considered and noted in the record of proceedings.
 15. For reasons that follow I find that this appeal must be allowed.

16. I accept that the concern of the respondent could have been clarified in relation to the status of Precision Repairs Ltd by further enquiry, as there was in existence a firm with a similar name, but this was not undertaken.
17. I also accept that it is not necessary for the appellant's sister Mr Jarved to make an initial investment of £50,000 prior to granting of the Entrepreneur visa. I accept that if a visa is granted, and the funds are not forthcoming, then such a visa will be subject to curtailment provisions.
18. I am therefore not concerned as to whether these funds would be genuinely available. I accept that the appellant has supplied a contract but I do not find that the appellant has sought to suggest the creation of a website which I agree entirely is a separate business, but rather that he was at pains to suggest that he would include contractual arrangements in his website. I also accept that the appellant does have relevant business academic studies which is acknowledged in the refusal decision itself.
19. Nor do I make any adverse findings by virtue of the fact that the business does not require mandatory accreditation or registration. I also find it credible that the appellant may wish to remain in the United Kingdom as the economy is presently stable and that he had credible reasons for doing so. There is no adverse immigration known in relation to the appellant which I must weigh in his favour. "

6. Accordingly the judge allowed the appeal.
7. Permission to appeal was applied for by the Secretary of State arguing that the judge had dealt with the issues raised in the refusal letter briefly and inadequately in the paragraphs which I have recited above. It was noted that checks had been conducted about the appellant's company and there had been no company called Precision Repairs and Company Limited. No findings had been made as to how the appellant satisfied Appendix A and there was insufficient evidence as to the appellant's access to the purportedly available funds and that the funds were disposable in the United Kingdom. It was not clear how the judge had arrived at a conclusion that the appellant was able to satisfy the requirements of the Rules.
8. Permission to appeal was granted by First-tier Judge Holmes on 22 January 2014 commenting that the judge had failed to deal with the issue about whether the funds relied upon in Pakistan were genuinely available to the appellant. It was suggested that the judge had quite simply misread the requirements of the Immigration Rules. There was no finding that the appellant genuinely intended to establish a business in the UK.
9. Mr Tarlow relied on the grounds and submitted that the judge's reasoning was inadequate and in particular he was in error to state in paragraph 18 that he was not concerned as to whether the funds would be genuinely available. The judge had

failed to come to grips with the detailed reasons in the refusal letter. There were no findings about whether the appellant genuinely intended to finance a business and the findings were indeed so lacking that the appeal should be remitted for a fresh hearing.

10. Mr Makol submitted that the Rules relating to entrepreneurs had not received effective parliamentary scrutiny having been presented to Parliament on 30 January 2013 and brought into force on 31 January 2013.
11. I told Mr Makol I had no power to declare the Rules to be ultra vires. I note this does not appear to have been a point that featured in the initial grounds of appeal and if it were raised the judge did not deal with it. The Court of Appeal in **Ishtiaq v Secretary of State [2007] EWCA Civ 386** made the position perfectly clear at paragraph 58 – even if a Rule was ultra vires the Tribunal must give it full force and effect and had no power to declare it to be ultra vires. Even in the Upper Tribunal’s new jurisdiction of judicial review the Tribunal is not permitted to entertain a challenge to the validity of Immigration Rules under the direction of the Lord Chief Justice of 21 August 2013.
12. Mr Makol submitted that the findings were adequate and reminded me that he was present at the hearing and while the wording of paragraph 18 of the determination was unfortunate when read as a whole, the judge had not erred in law.
13. Both parties were agreed that the material part of the applicable version of the Rules relating to entrepreneurs is as set out below.
14. I told the parties that the judge had clearly erred in paragraph 18 and that in the light of the points made by Mr Tarlow and having listened to the submissions of Mr Makol this was a case which had to be remitted for a fresh hearing.
15. The Rules require that an applicant genuinely intends to invest the money referred to in table 4 of Appendix A in the business and paragraph 245DD(iii) provides:

“that the money referred to in table 4 of Appendix A is genuinely available to the applicant, and will remain available to him until such time as it is spent by his business or businesses. “Available to him” means that the funds are:

- (1) in his own possession,
- (2) in the financial accounts of a UK incorporated business of which he is a director, or
- (3) available from the third party or parties named in the application under the terms of the declaration(s) referred to in paragraph 41-SD(b) of Appendix A;...”

It does appear, with respect, that the judge did misinterpret this Rule. The money must be genuinely available to the applicant – these words are not qualified by what follows. It appears that Mr Makol accepted that the judge had misdirected himself in this respect but submitted that when the determination was read as a whole it was sustainable.

16. I am unable to accept that this is the case. The reasoning is inadequate as Mr Tarlow points out and it is impossible to overlook what is stated in paragraph 18 when this was a clear misdirection. The judge was indeed concerned with whether the funds would be genuinely available and wrong to find otherwise.
17. For the reasons I have given, this appeal must be remitted for hearing afresh before a different First-tier Judge with none of the findings to stand.

Signed

Date 7 March 2014

Upper Tribunal Judge Warr