



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/28020/2013

THE IMMIGRATION ACTS

Heard at Field House
On 10 April 2014
Determination given orally at the hearing

Determination Promulgated
On 29th April 2014

Before

THE HONOURABLE MR JUSTICE BEAN
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE MCGEACHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAYEED MD IMRAN

Respondent

Representation:

For the Appellant: Mr M Hossain, Legal Representative
For the Respondent: Mr S Walker, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a decision of Judge of the First-tier Tribunal Aziz who, in a determination promulgated on 11 February 2014, allowed the appeal of Mr Sayeed Md Imran against a decision of the Secretary of State, who

had refused his application for leave to remain as an Entrepreneur. The appeal was allowed to the limited extent that the matter was remitted back to the respondent, the judge having considered that that was the appropriate course of action under paragraph 245AA of the Rules.

2. Although the appeal before us was that of the Secretary of State we will refer to him in this decision as the respondent as she was the respondent before the First-tier Tribunal. Similarly, we refer to Mr Sayeed MD Imran as the appellant as he was the appellant before the First-tier Tribunal.
3. The appellant was born in 1986. He came to Britain as a student in 2007 and then was granted various extensions of stay as a student, the last until 30 December 2012. On 12 December 2012 he made the application as a Tier 1 (Entrepreneur). That was refused by the Secretary of State on 17 June 2013 the reasons for the refusal being set out in a detailed letter of that date. It was considered that under Appendix A attributes the third party declaration which had had to be provided did not meet the requirements of the Rules because it did not contain both the appellant's signature and that of the third party. In making that decision the Secretary of State stated that a decision had been made not to request additional documentation or exceptionally consider the application under the provisions of paragraph 245AA as it was not anticipated that addressing the omission or error would lead to a grant of leave. It was also considered that the appellant did not have the relevant funds disposable in the United Kingdom and finally that he did not meet the maintenance requirements of the Rules. The notice of refusal when referring to Appendix C – 'Maintenance' - stated:

"We have assessed the Maintenance funds requirement for the period 14 September 2012 to 7 December 2012. From the evidence provided you have not demonstrated that you have that you have maintained the minimum level of available funds required throughout this full 90 day period, as specified in Appendix C of the Immigration Rules. This is because on 3 December 2012 the level of available funds fell below £900 to £720.90."

These were the issues in the appeal when it came before Judge Aziz.

4. The judge heard evidence from the appellant and then set out various findings of fact. He noted, when considering the evidence that the appellant had accepted that a signature had not been on the bank document from Bangladesh which was required under the Rules. He also noted that the appellant accepted that the bank statement which he had submitted with his application revealed that on 3 December 2012 the funds in his account had fallen below £900. The judge went on to state in paragraph 29, referring to the balance of 3 December, that:

"His balance on that day was £720.90. However, if I were to look closely at the bank statement and in particular the online version of the statement contained within the appellant's supplementary bundle, then this revealed that on 4 December 2012 (the following day), £600 entered his account. This increased his balance to £1,319.40. The

deposit took him above the £900 threshold. However, he had deposited the £600 the day before. It had been deposited on 3 December 2012.”

5. The judge then referred to the Annual Summary Information which showed that the deposit had been made at 16:49 hours on 3 December and noted the argument that if he were to take that into account the document showed that the funds had cleared before the day had finished. He noted however the appellant’s acceptance that that had not been reflected in either version of the Barclay’s Bank statement which he had submitted.
6. The judge set out his findings of fact in paragraph 33 onwards of the determination. With regard to the third party declaration he noted that it was accepted by the appellant and his representatives that the requirement that both signatures be on the relevant letter had not been met. He went on then to consider the issue of the maintenance funds and concluded at paragraph 44:

“In light of his testimony, I find that he only submitted one Barclays Bank statement, the statement contained in the respondent’s bundle, which reveals that had not held at least £900 for 90 days during the qualifying period. Therefore, even if the Barclays Bank statement at page 23 of the appellant’s bundle was legible, I would have been prevented from considering it by virtue of Section 19 of the UK Borders Act 2007.”

I pause there to note that the judge had before him a bundle of documents which did include a savings account with approximately £223 in it at the relevant time but the judge found that that had not been submitted with the application.

7. The judge also said in paragraph 46 of the determination that:

“The appellant relies upon an extract from a document from Barclays Bank called the “Annual Summary Information” to support his position. There are a number of problems with this document. Firstly, I am prevented from considering it by virtue of Section 19 of the UK Borders Act 2007. Secondly, even if I am entitled to look at the document, on a strict reading it reveals that prior to the deposit of £600 on the afternoon of 3 December 2012, that the appellant must have held, even if only for a few hours, funds below £900. Finally, the simple fact is that the Barclays Bank statement which he submitted shows that on 3 December 2012 he had cleared funds of £720.90. The Tribunal is not prepared to go behind the figure recorded in his own bank statement.”
8. The judge then in paragraphs 47 onwards considered what he referred to as “remittal under paragraph 245AA”. He considered the issue before him was whether the appellant should have been contacted so he be given an opportunity to submit a bank letter and third party declaration in the correct format and produce evidence of other funds that he might hold to demonstrate that he could meet the maintenance requirements such as funds held in a second Barclays Bank account. He stated the key question for the Tribunal in this appeal is whether the matter ought to be remitted back to the respondent under paragraph 245AA.
9. He then went on in paragraphs 48 and 49 to state:

“Whilst the appellant did not do himself any favours by provided contradictory evidence in respect of how many Barclays Bank statements he submitted with his application, looking at the evidence in the round, I find that the issues raised by the respondent in respect of the bank letter, third-party declaration and the Barclays Bank statement were omissions which the appellant should have been given an opportunity to address. Given the nature of the errors I find that he may well have been in a position to rectify the mistakes had he been approached.

He then stated:

“The appellant’s appeal is therefore allowed under paragraph 245AA to the extent that it is remitted back to the respondent for them to provide the appellant with an opportunity to submit evidence in the proper format as per paragraph 41-SD of Appendix FM of the Immigration Rules to demonstrate that he is able to meet the requirements of Appendix A and Appendix C of the Rules”.

He therefore concluded that he should allow the appeal to the extent that the matter would be remitted back to the respondent for consideration.

10. In paragraph 9 of the determination the judge had set out the provisions of paragraph 245AA. That is the paragraph dealing with what was at one time referred to as the evidential flexibility policy. It states that where specified documents should be provided the Secretary of State will only consider documents to have been submitted with the application and would only consider documents submitted after the application when they have been submitted in accordance with certain requirements. Those were where some of the documents in a sequence have been omitted, the example being given if one bank statement from a series is missing or a document is in a wrong format, for example if a letter is not on the letterhead paper specified, or if documents are copies and not original documents or that a document did not contain all the specified information.
11. The Secretary of State appealed, arguing that the judge had misinterpreted the terms of paragraph 245AA of the Rules. The grounds stated that the bank statement submitted to show maintenance was a complete document. It was submitted that there was no reason for the Secretary of State to have known that there was a second bank account. It was submitted that there was no requirement for the Secretary of State to request further evidence regarding the appellant’s finances to gain 10 points under Appendix C. It is submitted that the Secretary of State was correct to refuse the appellant’s application under that Appendix.
12. At the hearing before us Mr Walker relied on the grounds of appeal. Mr Hossain referring to the bundle of documents before the judge argued that the further sum in the second statement was relevant and should have been taken into account. He also referred us to a determination of the Upper Tribunal in the case of **NA (Tier 1 post-study work – funds) [2009] UKAIT 00025**.
13. We have found that there are material errors of law in the determination of the Tribunal. The reality is that the judge quite correctly made findings in paragraphs 33 onwards, particularly in paragraphs 40 and 42 onwards, that the second bank

statement had not been before the decision-maker, had not been put in with the application and therefore could not be taken into account and furthermore that the amount in the appellant's account had dipped below the required £900. We have concluded that having reached those findings the judge should have dismissed the appeal. As we have said, the judge went on to consider the issue of remittal under paragraph 245AA. However, there is no basis on which that would have been appropriate. There was no document which was one of a series of documents which was missing. The requirements of that Rule were simply not met. There was therefore no basis on which the judge could have correctly decided this case should have been remitted back to the respondent.

14. For these reasons we have decided that it is appropriate to set aside the decision of the First-tier Judge and as the requisite evidence was not before the Secretary of State we conclude that the appeal should be dismissed.

Decision

This appeal is dismissed.

Signed

Date

Upper Tribunal Judge McGeachy