



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/28344/2013

THE IMMIGRATION ACTS

Heard at Field House
On 26 September 2014

Determination Promulgated
On 20 October 2014

Before

UPPER TRIBUNAL JUDGE PETER LANE

Between

MUHAMMAD TAHIR HAFEEZ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Saini, instructed by Rashid & Rashid Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Pakistan, born on 17 January 1983, appealed against a decision made on 26 June 2013 to refuse to vary his leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant. The reason given by the respondent for refusing the appellant's application concerned access to funds made available to the

appellant by Mr Hassan Arshad. A third party declaration from the latter, regarding access to funds of £25,000, was not acceptable to the respondent because it did not confirm Mr Arshad's relationship to the appellant or confirm that funds would be available until such time as transferred to the appellant. In addition, bank statements were not acceptable because the relevant bank account was not in the appellant's name; there was no declaration from a legal representative to confirm the letter of permission supplied was valid; and no letter from a financial institution in which Mr Arshad's funds were held, to establish that funds were accessible by the appellant. All this led the respondent to conclude that the appellant had not supplied "the specified evidence as listed under paragraph 41-SD [of Appendix A to the Immigration Rules] to establish that you have access to the funds that you are claiming". Accordingly, pursuant to paragraph 41 of Appendix A, the appellant was not considered to have access to those funds.

2. The refusal letter went on to state that a decision had been made "not to request additional documentation or exceptionally consider the application under the provisions of paragraph 245AA as it is not anticipated that addressing the omission or error would lead to a grant of leave".
3. The appellant appealed to the First-tier Tribunal against the respondent's refusal. His appeal was heard at Taylor House on 29 January 2014 by First-tier Tribunal Judge Brenells. At paragraph 10 of the resulting determination, the judge noted that the appellant accepted that he did not submit with his application the required legal declaration confirming the signatures on the funds letter dated 20 May 2013. However, both that and other documents were submitted under cover of a letter delivered to the respondent on 17 June 2013.
4. The judge concluded that the judgment of the Court of Appeal in Secretary of State for the Home Department v Raju & Others [2013] EWCA Civ 754 was authority for the proposition that material submitted after the date of the application could be considered. He further held that paragraph 245AA of the Immigration Rules did not apply, since the appellant had not submitted a "specified document".
5. Before me, there was a wide measure of agreement between the representatives. There was nothing in the case of Raju or, indeed, section 85A of the Nationality, Immigration and Asylum Act 2002, which precluded the judge from considering the material submitted by the appellant to the respondent after the date of the application but before the respondent reached her decision. Accordingly, much potentially turned upon the application of paragraph 245AA of the Immigration Rules. At the relevant time, paragraph 245AA was in a form which, Mr Jarvis accepted, would have covered certain of the material submitted after the date of application and in practice considered by the respondent before she reached her decision. However, paragraph 245AA(c) stated that the respondent "will not request documents where a specified document has not been submitted... or where the UK Border Agency does not anticipate that addressing the omission or error referred to

in sub-paragraph (b) will lead to a grant because the application will be refused for other reasons”.

6. The problematic document was, Mr Jarvis contended, to be found at page 67 of the appellant’s bundle. It is a letter dated 6 June 2013 from the manager of the Habib Bank in Pakistan, concerning funds of £27,000 said to be available for the appellant from the account of a Mr Bilal Murtaza. Mr Jarvis pointed out that paragraph 41-SD(4) of Appendix A required this document, if it was to be relied upon, to “have been produced within the three months immediately before the date of your application”. Since the letter post-dated the application (made on 23 May 2013), it could not satisfy the Rules and, given that the appellant’s case depended upon reliance being placed upon this letter, paragraph 245AA(c) made it plain that that paragraph could not avail the appellant.
7. Mr Saini, however, initially submitted that it was not necessary for the appellant to rely on the letter of 6 June since he could demonstrate compliance with the financial requirements of the Rules by reference to United Kingdom bank accounts. At page 72 of the bundle, there is a letter dated 12 June 2013 from Halifax Bank of Scotland to Mr Arshad, informing the latter that he had £26, 418.48 in his account. However, Mr Saini later accepted that this letter of 12 June did not, in fact, dispense with the appellant’s need to rely upon the letter of 6 June and the bank statements attached to it. Mr Saini submitted that it was the bank accounts themselves, rather than the enclosing letter, that had to have been produced within three months immediately before the date of the application.
8. I consider it plain that paragraph 41-SD(i)(4) cannot bear the construction contended for by Mr Saini. It is manifest from the wording of that provision that it is the letter from the financial institution holding the funds, which must have been produced within the relevant three month period.
9. Mr Saini, with his customary energy and diligence, submitted, in the alternative, that the particular requirement highlighted by Mr Jarvis had not featured in the respondent’s reasons for refusal. In the circumstances, Mr Saini submitted that that provision of the Rules had, in reality been waived by the respondent. For this proposition, Mr Saini relied upon the judgment of the Court of Appeal in R v Secretary of State for the Home Department ex-parte Khan [1980] 2 All ER 337. In that *habeas corpus* case Lord Denning, in what appear to have been *obiter* remarks, held that a person being asked questions by an Immigration Officer was under no duty to volunteer the information that he had subsequently married, in the absence of questions or other enquiries from the Immigration Officer.
10. I am unable to accept Mr Saini’s submission regarding ex-parte Khan. Lord Denning’s proposition, arising in a *habeas corpus* case, was not relied upon by the other judges (Lawton and Ackner LJ). But, in any event, in an appeal under the Nationality, Immigration and Asylum Act 2002, where the Tribunal must dismiss the appeal except insofar as it finds that the decision under challenge was not in

accordance with the law (including immigration rules), the relevant authority is Kwok on Tong (R v IAT & another ex-parte Kwok on Tong) [1981] Imm AR 214. Subject to issues of procedural fairness, even if an appellant shows that he met a particular requirement of the Immigration Rules that had been in issue in the appeal, the decision to refuse him is not a decision that was not in accordance with the law/immigration rules unless, at the time of the decision, the appellant met the requirements of the Rules applicable to his case. As the Asylum and Immigration Tribunal held in RM (Kwok on Tong HC 395 para 320) India [2006] UKAIT 00039:

“To put it another way, an appellant can lose his appeal by failing to meet just one requirement of the Rules (whether specified or not in the notice of refusal) but he can win only by meeting all the requirements of the Immigration Rules (whether specified or not in the notice of refusal)”

11. In the present case, the letter of 6 June had to be relied upon by the appellant, in order to meet the requirements of the Rules; but because of its date, it could not meet those requirements. Paragraph 245AA accordingly had no application, so as to impose upon the respondent the duty of seeking further relevant material from the appellant.
12. Whilst it would be possible for the respondent, in a particular case, actually to waive one or more requirements of the Rules, any such waiver would need to be clearly articulated by the respondent. The fact that a decision letter neglects to articulate every reason why an applicant is not considered to meet the requirements of the relevant Immigration Rules cannot be said to constitute a waiver of every requirement except those expressly relied upon in the letter.
13. In the present case, there is no issue regarding procedural unfairness. Accordingly, I find that, although there was an error in the determination of the First-tier Tribunal, it is not appropriate for me to set aside that determination, pursuant to section 12 of the Tribunals, Courts and Enforcement Act 2007, since the error was entirely immaterial. The appellant could not succeed under the Immigration Rules and his appeal against the respondent’s decision thus fell to be dismissed.
14. The appellant’s appeal to the Upper Tribunal is, accordingly, dismissed.

Signed

Date

Upper Tribunal Judge Peter Lane