



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/16809/2014

THE IMMIGRATION ACTS

Heard at Taylor House
On 23 October 2015

Decision and Reasons promulgated
On 16 May 2016

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Dharak Suryakant Patel
(No anonymity order made)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation

For the Appellant: Ms B Jones of Counsel instructed by Theva Solicitors.
For the Respondent: Ms A Brockleby-Weller, Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Henderson promulgated on 22 May 2015, dismissing the appeal of Mr Dharak Suryakant Patel against the decision of the Secretary of State for the Home Department dated 21 March 2014 to refuse variation of leave to remain as a Tier 1 (Entrepreneur) and to issue removal directions pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.
2. The Appellant's personal details and immigration history are a matter of record on file and known to the parties; they are also set out in the body of the decision

of the First-tier Tribunal. It is unnecessary to re-rehearse such matters here; I refer to any pertinent matters as is incidental for the purposes of this decision.

3. The key issue before the FtT was a narrow one. It is summarised in these terms at paragraph 6 of Judge Henderson's decision:

"The parties agreed the issues to be determined at the commencement of the appeal hearing. The key issue related to the appellant's access to funds as required under provision (d) of Table 4 of Appendix A of the Immigration Rules under the Points Based System ("PBS"), and whether the appellant had provided sufficient evidence to demonstrate that he had access to £50,000 by providing bank letters from banks regulated by the appropriate authorities".

4. In this context, at paragraph 11 of the decision, the Judge identified that the Respondent had been dissatisfied in two respects: *"the bank letters [the Appellant] had supplied were from banks which did not appear to be regulated by the appropriate authorities. There was also the issue of whether the third party declaration been signed by the appellant"*. However, by the time of the appeal Respondent maintained the decision on the sole basis *"that there was insufficient evidence to show that the relevant banks are regulated by the appropriate authorities"* (paragraph 19).
5. I pause to note at paragraph 7 it is recorded that *"the appellant's counsel confirmed that he was not raising any argument under Article 8"*.
6. The Judge addressed the core issue thus identified at paragraphs 22 and 23. It is apparent that the Appellant's representative conceded that letters from the Union Bank of India and the Canara Bank not contain any information to show that they were regulated, and as such the Judge concluded that the Appellant had failed to comply with the requirements of the Rules. That effectively disposed of the matter under the Rules.
7. However, the First-tier Tribunal Judge went on to consider the Respondent's so-called 'evidential flexibility' policy: see paragraphs 24-28. For the reasons set out in those paragraphs the Judge concluded that the Respondent was in error in failing to have proper regard to her own policy, and in particular by failing to check the website of the Reserve Bank of India, such that the Respondent's decision was not in accordance with the law.
8. Notwithstanding the finding that the decision was not in accordance with the law, the Judge did not remit the case to the Respondent but, in purported reliance on **AG and others (Policies; executive discretions; Tribunal's powers) Kosovo** [2007] UKAIT 00082 determined that because *"I cannot be sure of the exact*

nature of evidence shown on RBI's website I cannot allow the appeal" (paragraph 29), adding that the Appellant had not discharge the burden of proving that the relevant banks were regulated (paragraph 30).

9. In my judgement this constituted a clear misinterpretation of AG. As the Judge identified, AG supports the proposition that a Tribunal *may* make a substantive decision in favour of an appellant where a decision 'was not in accordance with the law' by reason of a failure to follow a policy, if "*the claimant can show that the terms of the policy and the facts of his case are such that there was no option open to the decision-maker other than to grant him the remedy he seeks*" (paragraph (4) of the headnote). However, this was to say no more than that the Tribunal need not adopt the 'default' position of remittal if it was clear that an appellant would succeed under a discretionary policy; if it was not so clear cut, the default position still applies and the appeal is to be allowed to the limited extent of it being remitted to be determined by the Respondent in accordance with the law.
10. Accordingly, whilst the uncertainty identified by the Judge herein meant that it was not appropriate to allow the appeal outright, it did not follow that the appeal had to be dismissed. Moreover it was not for the Judge to evaluate the factual circumstances as an aspect of considering how the discretion vested in the Respondent by virtue of the evidential flexibility policy should have been exercised on the facts of this particular case. Once it had been identified that the decision was not in accordance with the law, and that it was not the case under the evidential flexibility policy that the Respondent would have had no option but to allow the Appellant's application, the appropriate course, in accordance with AG, was remittal to the Respondent.
11. I find that there was an error of law in the decision of the First-tier Tribunal, and the decision must be set aside.
12. As acknowledged before me by the representatives of each of the parties, the decision in the appeal can simply be remade on basis that the case should have been allowed to the limited extent that it be remitted to the Respondent because the immigration decision was not in accordance with the law.

Notice of Decision

13. The decision of the First-tier Tribunal Judge contained a material error of law and is set aside.

14. I remake the decision in the appeal. The Respondent's decision was not in accordance with the law and the appeal is allowed to the extent that the application is remitted to the Respondent to determine in accordance with the law.

Deputy Judge of the Upper Tribunal I. A. Lewis 8 May 2016

To the Respondent

Fee Award *(This is not part of the determination)*

I have allowed the appeal, albeit on a limited basis such that the Appellant's application in effect remains outstanding before the Respondent. Whilst the Respondent was in error in not having regard to her evidential flexibility policy, the origin of the difficulty lies in the Appellant's failure to provide the required information/evidence in respect of bank regulation with his application. In the circumstances I make no fee award. (Although I have heard this appeal in my capacity as a Deputy Judge of the Upper Tribunal, I make the Fee Award decision in my capacity as a First-tier Tribunal Judge.)

Judge of the First Tier Tribunal I. A. Lewis 8 May 2016