



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/02267/2016
IA/02268/2016

THE IMMIGRATION ACTS

Heard at Field House
On 7 June 2018

Decision & Reasons Promulgated
On 22 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellants

and

MR NISARGKUMAR GHANSHYAMBHAI PATEL (FIRST APPELLANT)
MS MIKISHABE CHANDRAKANTHBHAI PATEL (SECOND APPELLANT)
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellants: Mr C Howells, Senior Home Office Presenting Officer
For the Respondent: Mr A Chohan, Counsel instructed by S.Z. Solicitors

DECISION AND REASONS

1. For convenience I shall employ the appellations “Appellants” and “Respondent” as at first instance.
2. The Appellants are nationals of India who made an application for leave to remain here as a Tier 1 (Entrepreneur) Migrant with the second Appellant being the dependant on the first Appellant. Their applications were refused by the Secretary of State and their appeal heard by First-tier Tribunal Judge Davey (in the absence of the

Respondent) on 25th October 2017 and a subsequent decision allowing the appeal on Article 8 ECHR grounds promulgated on 28th November 2017.

3. Grounds of application were lodged by the Secretary of State. Ground 1 states that the judge appears to have proceeded on the basis that the appeal was captured by the new provisions of Section 84 and 85 of the Nationality, Immigration and Asylum Act 2002 as amended by Section 15 of the Immigration Act 2014. However, although the decision in the appeal post-dated the change made by the Immigration Act 2014 the appeal was one which was squarely covered by the previous appeal regime prior to the changes. Reference is made to the Immigration Act 2014 (Commencement No. 4, Transitional and Saving Provisions and Amendment) Order 2015. The second ground is that having proceeded on the incorrect statutory basis the judge failed to apply the relevant provision of the Nationality, Immigration and Asylum Act 2002 namely Section 85A dealing with new evidence. It was said that in relying on the post-dated evidence the judge had made a procedural error. Ground 3 observes that the judge made no findings of fact in relation to whether or not the Appellant met the Immigration Rules at the date of decision. Ground 4 says that the judge could have adjourned the case for the matter to be addressed ensuring fairness to all parties. As such Ground 5 says that given the issues identified, the assessment of Article 8 ECHR outside the Rules cannot stand as it is based on a multiplicity of errors of law.
4. Permission to appeal was granted and thus the matter came before me on the above date. For the Home Office Mr Howells said that the judge had not applied the correct law and had he done so the appeal would have been dismissed under the Immigration Rules. As such the decision should be set aside and remitted for a fresh hearing.
5. Mr Chohan indicated that the judge had no requirement placed on him to adjourn the case to ensure fairness as there was nothing to say why the Home Office did not attend on the due date. While the Home Office might well be correct in their assessment of the statutory provisions the fact of the matter was that the judge had listened to the evidence and found that the appeal should be granted under Article 8 ECHR and therefore there was no error in law.
6. I reserved my decision.

Conclusions

7. The judge noted that there was no cause shown why the Respondent did not attend the hearing. He had no idea considering the Respondent's stance what, if any, questions they would had of that evidence. There was prejudice or unfairness in proceeding with the hearing in the absence of the Respondent and I did not understand this assessment by the judge to be seriously challenged by Mr Howells.
8. The judge concluded that there no criticism could be made to suggest that there was an element or a scintilla of evidence to suggest bad faith on behalf of the first Appellant. The judge found that the first Appellant had fairly, openly and properly disclosed the information as and when requested and required (paragraph 6). He had

no concerns as to his personal integrity and honesty in dealing with the application. The judge found that at the material time he had available funds.

9. The judge concluded in paragraph 8 that the evidence did show the Appellant met the £200,000 funding arrangements requirement. He said that he had taken the documents which supported the funds relied upon into account, noting that from the first Appellant himself, either in the UK or in India, in his personal accounts he had a sum of £125,000. There is funding from his mother-in-law in the sum of £35,000 and from a close friend in the United States an availability of £40,000. The totals were rounded down to make up the total but it was comprehensively set out in the Appellant's statement and no purpose was served in reciting the minutiae of those figures. The judge indicated (paragraph 9) that he had paid particular regard in relation to numerous documents set out in the Appellants' bundle.
10. In paragraph 10 the judge said the position as of now was that the Appellant does clearly meet the Tier 1 provisions.
11. The judge then went on to refer to well-known case law concluding that the appeal should be allowed under Article 8 ECHR, finding, as he did, that there was largely unchallengeable and compelling evidence in showing the Respondent's decision was disproportionate.
12. Given that the Home Office were not present in the hearing, it is understandable why the judge did not appreciate that the appeal was under the provisions set out in the grounds of application by the Secretary of State. Mr Chohan did not disagree with the proposition that as at the date of the application the Appellant did not meet the Immigration Rules and therefore the judge could be said to be wrong in that regard when he said that the Immigration Rules were satisfied.
13. Nevertheless, there was one principal issue in this case, namely whether the first Appellant met the £200,000 funding requirements. The factual matrix of the case has not changed with the passage of time. The refusal letter set out the proposition that he did not meet those requirements but the judge has found otherwise and given considerable detail as to how that finding is justified. It seems to me important that the Home Office do not challenge the proposition that as at the date of the hearing before the judge the Appellant did meet the financial requirements. While the judge was wrong to say in paragraph 14 that he met the requirements of the Immigration Rules the fact of the matter is that at the time of the appeal hearing before him the Appellant did not meet those Rules and he was entitled to take that fact into account as at the date of the hearing before him. He found the evidence of the first Appellant to be true and as he said "unchallengeable".
14. It is not disputed that the judge was entitled to make those findings as at the date of the hearing before him. As such it seems to me that the proposition that the appeal should be allowed on human rights grounds under Article 8 ECHR was one that was certainly open to the judge and cannot be said to be a material error of law.

15. Given that there is no material error of law in the judge's decision it must stand.

Notice of Decision

16. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

17. I do not set aside the decision.

18. No anonymity order is made.

Signed *JG Macdonald*

Date 21st June 2018

Deputy Upper Tribunal Judge J G Macdonald