



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/05393/2014

THE IMMIGRATION ACTS

Heard at Field House
On 15 July 2014
Prepared 15 July 2014

Determination Promulgated
On 30th July 2014

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS SINTHU SIVAGUMARAN

Respondent

Representation:

For the Appellant: Ms S Ong, Senior Home Office Presenting Officer
For the Respondent: Mr P Saini of Messrs Berkleys Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals, with permission, against a decision of Judge of the First-tier Tribunal Handley who in a determination promulgated on 31 March 2014

allowed the appeal of Miss Sinthu Sivagumaran against a decision of the Secretary of State to refuse her leave to remain as a Tier 1 (Entrepreneur) Migrant.

2. Although the Secretary of State is the appellant in the appeal before me I will for ease of reference refer to her as the respondent as she was the respondent in the First-tier Tribunal. Similarly I will refer to Miss Sinthu Sivagumaran as the appellant as she was the appellant in the First-tier Tribunal.
3. The appellant applied on 10 October 2013 for leave to remain as a Tier 1 (Entrepreneur).
4. In the application form she stated that she was relying on money from a venture capital firm, Equinox Venture Capital and she produced a letter from Morgan Reach Certified Chartered Accountants which it appears stated that she had access to the sum of £50,000. She confirmed that she had studied at Birmingham City University receiving a BA Degree in International Business. To show that she had the necessary sums for maintenance she produced bank statements starting on 24 June when the account was opened with a nil balance but into which on 1 July had been paid £624.40 and on 2 July a further sum had been paid bringing up the amount in the account to £1,016.19. The following bank account statement showed steady balances of over £1,000 as did a bank statement issued on 23 September 2013 – that bank statement being the last bank statement prior to the date of application.
5. On 15 January 2014 her application was refused. She was granted points for access to funds, funds held in a regulated financial institution and funds disposable in the United Kingdom as well as for her knowledge of the English language. However she received no points for maintenance.
6. The letter of refusal stated that:-

“You have claimed 10 points for maintenance (funds) under 245DD(d) and Appendix C of the Immigration Rules but the Secretary of State is not satisfied that the documents you have provided demonstrated that you have been in possession of sufficient funds for the specified period as laid out in Appendix C of the Immigration Rules.”
7. The reason for the decision was:-

“You provided Barclays Bank statement’s (sic) to demonstrate that you have been in possession of at least £900 of available funds for a consecutive 90 day period ending no more than 31 days before the date of your application.

We have assessed the maintenance requirement from the period 26 June 2013 to 23 September 2013. From the evidence provided you have not demonstrated that you have maintained the minimum level of available funds required throughout this full 90 day period, as specified under Appendix C of the Immigration Rules. It is because from 26 June 2013 to 23 September 2013 the level of funds available fell below £900 e.g. on 26 June your statement shows a balance of £0, further on 1 July 2013 your statement shows you had a balance of £616.90.

We have therefore been unable to award points for maintenance.”

8. The appellant’s grounds of appeal stated that

“... the balance checked for 1 July does not apply, because though the statement is from 1 July 2013 the balance was held from 2 July 2013 to 12 October 2013 (the application date) and constitutes more than the required 90 days.”

9. Before Judge Handley (who considered the appeal on the papers) the appellant provided a further bank statement dated 23 October 2013 showing a start balance on 24 September of £1,310 but showing a balance on 14 October of £912. A document entitled “ grounds of appeal”, submitted just before the appeal was determined, alleged that the respondent had erroneously calculated the maintenance from 23 June to 23 September 2013 and asserted that the appellant had made available two bank statements as evidence of maintenance and accidentally omitted one and that that fact was corroborated and could be ascertained by referring to the application form submitted where the appellant had clearly ticked confirmed that she had maintenance funds for a period of 90 days. It was therefore implied from her actions that the appellant had access to the relevant funds for the relevant period of 2 July to 12 October and that the Secretary of State should have ascertained from the appellant that she had enough money up to 12 October - the date of application. It was for the respondent to scrutinise the bank statements in order to ascertain whether a bank statement from a series or sequence was missing. It was stated that the Secretary of State had been under an obligation under the evidential flexibility policy to ascertain from the appellant whether a bank statement from a series was missing and that it was unfair that that had not been done. It was argued that the Secretary of State should have afforded the appellant an opportunity to provide a missing bank statement from a series.
10. The grounds went on to refer to the terms of paragraph 245AA and various reports relating to the “flexibility policy” as well as the determination of the Tribunal in **Rodriguez (Flexibility Policy) [2013] UKUT 00042 (IAC)**.
11. Reference was also made to the appellant’s subsisting private life in Britain.
12. Judge Handley considered the submissions made and stated that the appellant had presented bank statements with the notice of appeal covering the period from 26 June to 23 October 2013. He noticed the balance on 2 July of £1,016 and that the account remained in excess of £900 until 14 October. He concluded that this showed that the appellant had the requisite funds available to her during the relevant period. He stated that he accepted that the appellant had made a “minor error” in not sending the final page of the bank statement and that had she done so her application would not have been refused for the reasons given in the refusal letter. He said that the appellant was aware of the requirement to have £900 available for a 90 day period and had indicated so in her application form. It was also clear that she had those funds available to her for that period. He found moreover that she should

have been afforded an opportunity of producing the missing document. He therefore found the requirements of the Immigration Rules had been met.

13. The Secretary of State appealed arguing that the judge should have considered the judgment of the Court of Appeal in **Rodriguez [2014] EWCA Civ 2** regarding the Secretary of State's obligations under the evidential flexibility policy. The grounds referred to the fact that the Court of Appeal had made it clear that

"Requests for information should not be speculative and that there must be sufficient reasons to believe that any evidence requested existed. Furthermore the evidential policy was not designed to give an applicant the opportunity first to remedy any defect or inadequacy in the application or supporting documentation so as to save the application refusal after substantive consideration."

It was therefore stated that the Secretary of State had been under no obligation to request further documents from the appellant.

14. At the hearing of the appeal before me it was agreed that a relevant issue was the meaning of the term "series".
15. Ms Ong submitted that a series was a number of documents starting at the beginning and ending with the final document provided. As the appellant had produced documents in a series – the bank statements came one after the other then that was the series which had been provided and from which none were missing. There was therefore no requirement on the Secretary of State to ask for a further document.
16. In reply Mr Saini stated that a series was effectively a line of documents and that if one were missing whether it be within the middle of a number of documents or at the beginning or at the end then that should be requested under the provisions of paragraph 245AA. There did not have to be a particular beginning or end of the series that related to the subject matter.
17. Moreover that document should, under the provisions of paragraph 245AA be requested if there was an insufficiency in the application. He pointed out that the application had not been refused until 15 January 2014 and that there had therefore been ample time for the Secretary of State to have asked for the missing document and moreover there was a duty of public law fairness to allow an opportunity for the document to be produced. He pointed out that under the provisions of Section 3C(5) of the 1971 Immigration Act it was possible to vary an application up to the point of decision and that the whole purpose of paragraph 245AA was because the Secretary of State considered that it was only fair to alert an applicant to a deficiency in the application and in so doing the Secretary of State was exercising the public law duty of fairness.
18. It was obvious from the application form that the appellant had missed out one document and therefore it was appropriate to request the final document in the series.

19. He argued that the reference to the Court of Appeal judgment in **Rodriguez** was effectively irrelevant as this was a case relating to the provisions of Rule 245AA. It was a question of the Rules rather than policy. He pointed out in fact that Judge Handley had not himself referred to the determination of the Tribunal in **Rodriguez**. He argued moreover that the grounds of challenge were merely a disagreement with conclusions which the judge was entitled to reach on the evidence before him.

Discussion

20. I have considered the terms of paragraph 245AA of the Rules. The relevant subparagraph is (b) which reads as follows:-

“If the applicant has submitted specified documents in which:

- (i) some of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing);”

then that should be requested from the applicant.

21. I have considered various definitions of a series; the term implies a sequence or a run or a succession of documents. I have come to the conclusion that I do not accept Ms Ong’s submission that a series of documents must be one where the documents at the beginning and the end of the series must be provided and it must be one of the documents between those which is missing. I see no reason why a series of documents from which one is missing cannot be a document before the first which has been produced or that after the last which has been produced. However the difficulty is that the documents for the relevant 90 day period must be documents which lead up to the date of application and therefore documents which are available at the date of application but, in error, have not been submitted.
22. In this case the reality is that no such document exists. Although it appears from the bank statements that in the 90 day period prior to the application the applicant had over £900 in her account there is no document in existence, that was available to submit with the application that showed that. Therefore even if the respondent had asked for that document it did not exist. The Rules require evidence to be submitted with the application that the requirements of the Rules are met. That piece of documentary evidence was not available at the date of application and I do not consider that a statement dated well after the application can be taken into account.
23. The judge allowed the appeal on the basis that he considered that the necessary funds were available for the 90 day period. However those funds had to be evidenced by documentary evidence and there is no documentary evidence which was available at the date of application, the relevant date, which would have shown that the maintenance requirements of the Rules were met.

24. I consider that the judge made a material error of law in not focusing on the documentary evidence that was available at the date of application rather than on the funds which were available.
25. I therefore set aside the decision of the Immigration Judge.
26. In re-making the decision, for the same reasons I find that the appellant did not produce and indeed has not produced documentary evidence, available at the date of application which showed that the appellant met the financial requirements of the Rules. I note, of course, that Mr Saini argued that the appellant would be entitled to vary her application after the date of application and before the date of decision. However the application was not so varied by the appellant and there is no requirement under the Rules that the respondent should ask an appellant if he or she wishes to vary the application so as to strengthen the application.
27. For these reasons I re-make the decision and dismiss this appeal.

Signed

Date

Upper Tribunal Judge McGeachy