Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/17818/2013
IA/20032/2013

THE IMMIGRATION ACTS

Heard at Glasgow

On 25 February 2014

Determination Promulgated
On 22 April 2014

Before

UPPER TRIBUNAL JUDGE DEANS

Between

MR VIVEK KUMAR
MR MANEESH VARSHNEY

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr D Duheric, Solicitor
For the Respondent: Mr M Matthews, Home Office Presenting Officer

DETERMINATION AND REASONS

1) This is an appeal with permission against a decision by Designated Judge J G Macdonald dismissing these conjoined appeals. The appellants had made a combined application for leave to remain as Tier 1 (Entrepreneur) Migrants but their applications were refused by the respondent in a decision dated 20 May 2013.

2) Prior to the hearing before me an application was made for an adjournment on the basis that the appellants wished to instruct a representative with

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specialisation in the field of entrepreneur cases and on the same basis a request was also made for a transfer from Glasgow to London. This application was refused on the grounds that the appellants had known since early January 2014 that permission to appeal had been granted and had had an adequate opportunity to seek alternative representation since then.

3) The basis of the appeal to the Upper Tribunal is that the Designated Judge decided the appeal in reliance upon factors which did not form part of the original refusal decisions but which were raised on behalf of the respondent during the course of the hearing before the First-tier Tribunal. In the application for permission to appeal it was contended that the appellants had met every adverse point raised by the respondent in the refusal decisions. It was submitted that if a ground of refusal was not cited in the notice of decision the Tribunal was entitled to assume that this was not at issue. If the respondent sought to raise a new issue relying on different provision then the appellants had to be given a fair opportunity to address this.

4) The two new issues raised on behalf of the respondent at the hearing before the First-tier Tribunal were these. The first arose from the terms of paragraph 41-SD(b)(i)(4), which requires that the amount of money available to the applicants from a third party must be expressed in pounds Sterling. In relation to this application the amount was expressed in Indian Rupees. The second issue arose under paragraph 41-SD(b)(i)(3), which requires that a declaration from a third party that they have made money available for the applicants to invest in a business in the UK must be signed not only by the third party but also by the applicants themselves. This document was not signed by the appellants and the explanation was offered at the hearing before the First-tier Tribunal that, as the document in relation to third party support had been signed in India, it was not possible for the appellants to travel to India to sign it. As the Designated Judge pointed out, however, it did not appear to be a requirement of the relevant provision that all the parties had to sign at the same time in the same place.

5) The Designated Judge concluded that the grounds of refusal set out in the decision of 20 May 2013 were met but the two additional issues raised by the respondent at the hearing, as set out above, were not satisfied. Accordingly the appeals were dismissed.

6) At the hearing before me, Mr Duheric submitted that the two issues set out above, namely the absence of signatures on the Affidavit or document regarding the availability of funds for investment, and the statement of funds in Rupees, did not form part of the original refusal decisions. Mr Duheric sought to rely on the case of RM (India) [2006] UKAIT 00039, in terms of which, even though the facts could support a ground for refusal not cited in the notice of decision, the Tribunal was entitled to assume that this potential ground for refusal was not relied upon and was not at issue. Mr Duheric submitted that the proper procedure for the respondent in the circumstances would have been to withdraw the refusal decisions and issue

new decisions or to allow the appellants to remedy the defects in the documents they had submitted. Mr Duheric acknowledged that he had not sought an adjournment or requested that the decisions be withdrawn at the hearing before the First-tier Tribunal. He acknowledged that he had been taken by surprise.

7) For the respondent Mr Matthews submitted that the decision of the Designated Judge was that these applications were genuine but that they failed on certain technical points. It was possible for the appellants to have cured this by making a further application within 28 days after their section 3C leave expired, in terms of paragraph 245DD(g) of the Immigration Rules. Mr Matthews acknowledged that such an application would have no right of appeal but if the substantive requirements were met the application would be granted. If the appellants had the evidence now then they could make a fresh application.

8) Mr Duheric submitted in response to this that this would take some time and the proper course would be for the refusal decisions to be remitted to the Secretary of State for reconsideration.

9) Mr Matthews further submitted that the case of <u>RM</u> (India) concerned a discretionary ground of refusal and sought instead to rely on <u>Kwok on Tong</u> [1981] Imm AR 214 and <u>Hubbard</u> [1985] Imm AR 110, in terms of which the respondent could raise additional grounds of refusal. The Tribunal needed to be satisfied that all the Rules were met.

10) I accept that there is merit in this contention by Mr Matthews but both of the decisions to which he referred stated that where further issues were raised to parties should have an adequate opportunity to respond to them. I am concerned that in the present appeals the appellants did not have a fair hearing before the First-tier Tribunal. Their appeals were dismissed not on the basis of the reasons for refusal given in the decisions appealed against but were dismissed on the basis of fresh issues raised on behalf of the respondent at the hearing itself. The appellants did not have adequate notice of these issues and did not have a proper opportunity of preparing a response to them. It may be, of course, that given the evidential restrictions in section 85A of the 2002 Act in respect of Points Based System applications that even having adequate notice of the new issues being taken against them will avail the appellants little. Nevertheless, they should have the opportunity of considering what their response might be made.

11) I accept that the appellants were represented at the hearing before the First-tier Tribunal by an experienced solicitor, but even he was taken by surprise in the circumstances of the hearing. In view of the complicated nature of the Immigration Rules in respect of applications of this nature, the appellants' representative could hardly be expected to respond adequately without notice of the issues raised.

12) I note further that although the judge who granted permission to appeal referred to paragraph 245AA of the Immigration Rules in relation to when further documentary evidence may be requested by the respondent, since permission was granted the scope of the application of evidential flexibility has been considered by the Court of Appeal in Rodriguez [2014] EWCA Civ 2.

13) Notwithstanding the difficulties the appellants may face in succeeding in their appeals, I am satisfied that the Designated Judge made an error of law by dismissing the appeals on the basis of matters of which the appellants had no notice prior to the hearing. The effect of this error was to deprive the appellants before the First-tier Tribunal of a fair hearing and of a full opportunity of putting their case for consideration by the First-tier Tribunal. Accordingly, in terms of Practice Direction 7.2 the proper course is to remit the appeals to the First-tier Tribunal for the decisions to be re-made.

Conclusions

14) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision.

15) The appeals are remitted to the First-tier Tribunal to be remade before a different judge.

Signed Date

Judge of the Upper Tribunal