



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/36267/2013
& IA/45936/2013

THE IMMIGRATION ACTS

Heard at Field House
On 27 November 2014

Determination Promulgated
On 28 November 2014

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department
[No anonymity direction made]

Appellant

and

Guang Hug
Jing Li

Claimants

Representation:

For the claimants:

Mr T Rahman, instructed by Kings Court Chambers

For the appellant:

Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimants, Guang Hug, date of birth 14.4.84, and his wife, Jing Li, date of birth 4.2.72, are citizens of China.
2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Amin promulgated 16.9.14 allowing the claimants' linked appeals against the decision of the Secretary of State to refuse their applications for leave to

remain as a Tier 1 (Entrepreneur) migrant and dependant, and to remove them from the UK by way of directions under section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 1.9.14.

3. First-tier Tribunal Judge Holmes granted permission to appeal on 27.10.14.
4. Thus the matter came before me on 27.11.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Amin should be set aside. For the reasons set out below, I find that the decision was flawed and cannot stand as it involved a number of errors of law.
6. As this is a PBS case, in relation to the Tier 1 application, the Tribunal can only consider under section 85A(4) evidence submitted in support and at the time of making the application under consideration. Post-application evidence cannot be accepted, except where it meets the requirements of paragraph 245AA.
7. In granting permission to appeal, Judge Holmes pointed out that it was conceded by the first claimant that his application did not meet the strict evidential requirements of paragraph 41-SD of Appendix A. In particular, the Secretary of State pointed out that the advertisement submitted by the first claimant did not bear his name. For that reason alone, the appeal was bound to be refused under the Immigration Rules. Secondly, the £50,000 business funds relied on by the first claimant was in an ISA, which is specifically excluded under 41-SD9a)(ii)(3). The money has to be in cash and not in an Individual Savings Account, or assets should as stocks and shares.
8. The First-tier Tribunal Judge appears to have mistakenly considered that there is a discretion in the Tribunal to dispense with these evidential requirements. That was an error of law. It matters not that there might be good business reasons or what advice was given about whether to include the name of the Tier 1 entrepreneur on the advertisement, the requirement is that it must be included. As Judge Holmes stated, "It was not for the respondent or the judge to seek to rectify the omissions in the evidence filed with the application, or for the appeal; Durrani, Fayyaz and Akhter [2014] UKU 295-297. Nor could the deficiencies in the documents submitted with the application be saved by the application of paragraph 245AA; Rodriguez [2014] EWCA Civ 2."
9. I reject Mr Rahman's rather poor argument that because the first claimant is the sole director of the business and that the company name was on the advertisement it can be concluded that he had substantially complied with the requirement. The claimants only had to read the requirements to know what had to be in the advertisement to meet the evidential requirement.
10. In relation to the refusal based on lack of funds, the First-tier Tribunal Judge erred in stating that the respondent's decision was "not in accordance with the law." It that

had been the case the correct course would have been to allow the appeal to the limited extent that it remained for the Secretary of State to make a decision that is in accordance with the law. However, the decision of the Secretary of State was entirely in accordance with the law. Even if there was no clear explanation in the refusal decision as to why the funds were not acceptable, it remains the case that the funds in an ISA were not acceptable and no amount of explanation could have changed that fact, especially since the evidence had to be submitted with the application. There was no way to cure the defect. Thus whilst it would have been better for a clear explanation to be provided, the application was fatally flawed. In considering the evidence of funds a simple examination of the relevant requirements clearly states that ISA funds are not acceptable, but the First-tier Tribunal Judge did not appear to appreciate that.

11. In the circumstances, it is clear both that the decision of the First-tier Tribunal was flawed and that once the application had been submitted it was doomed to failure under the Immigration Rules.
12. In relation to article 8 ECHR, I note that it although it was raised in the grounds of appeal to the First-tier Tribunal, it was not pursued at the appeal hearing except by Mr Rahman's very short submission on the first claimant's family life in the UK, which was referenced by the judge at §18 and again at §25, where it was described as not pursued with much vigour.
13. There has been no cross-appeal by the claimants against the judge's decision not to address article 8. Having informed the representatives that I had found such error of law in the decision that I was going to set it aside but proceed to remake it immediately, consistent with the directions to the parties, I invited Mr Rahman to make any further submissions he wished. He told me that he had nothing further to say.
14. It is clear, without having to go into the detail of the provisions that under Appendix FM neither claimant nor their son can meet the requirements of the Rules for leave to remain on the basis of family life. In relation to private life and paragraph 276ADE, nothing has been put forward to suggest that they have lost all ties to China, including family, social and cultural. Thus they do not meet the Rules for either family or private life.
15. Nothing has been put before me to suggest that there are compelling circumstances insufficiently recognised in the Rules so as to justify, exceptionally, allowing the appeal under private and/or family grounds of article 8 ECHR on the basis that the decision is unjustifiably harsh.
16. However, Appendix FM and paragraph 276ADE have been held not to be a complete code for consideration of article 8 private and family life rights and in the light of section 86 of the 2002 Act I consider that I am required to consider article 8 ECHR.
17. Although case law on this issue continues to develop, the current position is perhaps best expressed in paragraph 135 of R(MM (Lebanon)) v SSHD [2014] EWCA Civ 985:

“135. Where the relevant group of IRs [immigration rules], upon their proper construction provide a “complete code” for dealing with a person’s Convention rights in the context of a particular IR or statutory provision, such as in the case of “foreign criminals”, then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although reference to “exceptional circumstances” in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a “complete code” then the proportionality test will be more at large, albeit guided by the Huang tests and UK and Strasbourg case law.”

18. I also bear in mind that the threshold to engage article 8(1) is not particularly high (see VW (Uganda) v SSHD [2009] EWCA Civ 5).
19. In the circumstances, and applying the Razgar five step tests, I find for the reasons set out herein that the decision does not engage article 8 family life.
20. Even if it did, the crucial issue is the proportionality balancing exercise between on the one hand the rights of the claimants and their child and on the other the legitimate and necessary aim of the state to protect the economic well-being of the UK through immigration control, which under section 117B of the 2002 Act is in the public interest. The decision may potential interfere with or interrupt their private life established in the UK with friends and associates. However, the sort of interference occasioned by the refusal decision does not materially affect their physical or moral integrity and cases such as Nasim and Patel have held that the sort of private life enjoyed by students in the UK does not engage article 8 ECHR.
21. In Nasim and others (article 8) [2014] UKUT 00025 (IAC), the Upper Tribunal considered whether the hypothetical removal of the 22 PBS claimants, pursuant to the decision to refuse to vary leave, would violate the UK’s obligations under article 8 ECHR. Whilst each case must be determined on its merits, the Tribunal noted that the judgements of the Supreme Court in Patel and Others v SSHD [2013] UKSC 72, “serve to re-focus attention on the nature and purpose of article 8 of the ECHR and, in particular, to recognise that article’s limited utility in private life cases that are far removed from the protection of an individual’s moral and physical integrity.” The claimants can continue their friendships from China through modern means of communication.
22. Although the claimants have a son born in the UK, none of the family are British citizens or settled in the UK. Whilst I have to have regard to the best interests of the child, he was born in 2012 and thus will have no concept of life outside the family unit. He has no significant private life outside the family. The family will be removed together and thus will be able to continue family life in China. No credible or satisfactory reason has been proffered as to why they cannot return to China or that there would be serious difficulties in doing so. In the circumstances, it is clear that the decision is not disproportionate.
23. As Judge Holmes noted in the grant of permission, “Arguably if the judge had gone on to consider the appellants’ article 8 rights he would have been bound to find that

the evidence relied upon did not establish that the removal of the family as a unit would interfere in their ability to pursue their "family life" together. Moreover, he would be bound to find that the appellants had failed to provide any evidence to show that either of them had established in the UK a "private life" of sufficient substance to render disproportionate the decision to remove them." I entirely concur with that opinion and I have set out the reasons why that is so.

24. I accordingly find that the claimants do not meet all the requirements of the Immigration Rules. Neither is the decision of the Secretary of State to remove them from the UK disproportionate to their private and family life rights under article 8 ECHR.

Conclusions:

25. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside and remade. Pursuant to the directions issued to the parties I proceeded to remake the appeal immediately by dismissing it on all grounds for the reasons set out above.

I set aside the decision.

I re-make the decision in the appeal by dismissing the appeal of each claimant.



Signed:

Date: 27 November 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal of each claimant has been dismissed and thus there can be no fee award.



Signed:

Date: 27 November 2014

Deputy Upper Tribunal Judge Pickup