



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/06552/2014
IA/06553/2014

THE IMMIGRATION ACTS

Heard at Field House
On 09 July 2015

Decision and Reasons Promulgated
On 14 July 2015

Before

UPPER TRIBUNAL JUDGE BLUM

Between

ENOKA SAJEEWANI BANDARANAYAKA
PRIYANTHA PALIHAKKARA SAMARAWICKRAMA
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: None (The Appellants appeared in person)
For the Respondent: Ms Brocklesby-Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal G A Black who, in a decision promulgated on 12/01/2015, dismissed the appeals of Mrs E Bandaranayaka (the 1st Appellant) and Mr P Samarawickrama (the 2nd Appellant and spouse and dependent of the 1st Appellant), both nationals of Sri Lanka, against decisions of the respondent to refuse to issue the 1st Appellant further

leave to remain as a Tier 4 (General) Student and to refuse the 2nd Appellant leave to remain as the Dependent Partner of the 1st Appellant, and to remove both appellants under section 47 of the Immigration, Asylum and Nationality Act 2006.

Decision of the First-tier Judge

2. The Appellants applications for further leave to remain were refused on the basis that the 1st Appellant did not have available to her £2,560 for a consecutive 28 day period as required by Appendix C to the immigration rules. Her application for further leave contained bank statements belonging to the 2nd Appellant. His account held sufficient funds. The Respondent did not however find that the requirements of paragraph 13 of Appendix C were satisfied as the funds were not in the 1st Appellant's sole or joint account, or her parents or legal guardian's account.
3. At the First-tier Tribunal (FtT) hearing on 05 January 2015 counsel who represented the Appellants, who was not counsel who drafted the Grounds, conceded that the 1st Appellant did not meet the requirements of the immigration rules and that evidence of funds available in Sri Lanka could not be relied on (paras 7 & 8 of the FtT determination). It was submitted at the hearing that the 1st Appellant met the spirit of the rules and that she had established that she had full access to the funds and that the 2nd Appellant agreed to finance her studies from the funds in his account.
4. The Judge was satisfied the evidence relied on was credible but found the Appellants failed to meet the specific mandatory requirements of the immigration rules. The fact that the 1st Appellant had access to the funds in practice took the matter no further. Counsel did not seek to rely on Article 8 and the appellants were dismissed.

Grant of permission

5. The Grounds of Appeal originally served on the First-tier Tribunal for permission to appeal to the Upper Tribunal were relatively vague and lacked particularisation. It was claimed that the 1st Appellant had, in essence, sufficient funds and that insufficient consideration was given to that evidence and that the decision was not compatible with the law. These grounds were properly refused by Judge of the First-tier Tribunal Frankish on 17 March 2015.
6. Amended Grounds were however provided to the Upper Tribunal, drafted by other counsel. These amended Grounds asserted that paragraph 13 of Appendix C had to be read in conjunction with paragraph (c) of Appendix E and that, on such a reading, the 1st Appellant was entitled to rely on the funds in the 2nd Appellant's bank account. It was submitted that, following *Mahad* [2009] UKSC 16, one had to adopt a sensible construction of the immigration rules and that it made little sense if the 1st Appellant could rely on her parents' funds but not those of her husband. It was further submitted that the Respondent failed to apply paragraph 245AA of the immigration rules or her 'evidential flexibility'

policy, and that the Judge ought to have considered the conclusions of the Upper Tribunal in *CDS (PBS "available" Article 8) Brazil* [2010] UKUT 305 (IAC) where funds were said to be 'available' to a person as the material time if they belonged to a third party but the party had shown willingness to deploy them to support the person for the purpose contemplated. Permission was granted by Deputy Upper Tribunal Judge to argue these points.

The hearing

7. At the hearing the Appellants indicated they were no longer represented by Shanthi & Co. I was informed by my clerk that the Upper Tribunal had received a letter from these solicitors on 07 July 2015 indicating that they had come off the record. No correspondence had however made its way to the Tribunal file.
8. The 1st Appellant indicated that her father passed away two months ago and that she did not, as a result, have access to funds. As such she could not afford to pay for representation at the hearing. She requested an adjournment. There was no evidence of the death of her father. I asked the 1st Appellant what she would be able to do if there was an adjournment. She indicated that she wanted an adjournment for a visa. The adjournment application was opposed by the Presenting Officer. Given that I had relatively detailed grounds of appeal, and given the narrow issue of construction that I had to consider, and having already preliminarily considered the relevant immigration rules, I did not consider that it was appropriate to adjourn the hearing and that, following *Nwaigwe (adjournment: fairness)* [2014] UKUT 00418 (IAC), the Appellants would not, as a result of my decision not to adjourn, be deprived of the benefit of a fair hearing.
9. I explained to the Appellants that I would not grant the adjournment. I indicated to them that I had read all the documents before me and that I was aware of the basis of the appeal. And I asked them whether there was anything further they wished to add. The 1st Appellant indicated that she was unable to open a bank account in her own name or become a joint account holder with her husband. The 1st Appellant indicated that she wanted to study, that she still had money in Sri Lanka, and that she wanted the case 'finished or not'. I heard submissions from the Presenting Officer and reserved my decision.

Discussion

10. The Grounds contend that paragraph 13 of Appendix C must be read in conjunction with paragraph (c) of Appendix E and, on such a conjunctive reading, the immigration rules can be interpreted as allowing the 1st Appellant to rely on the funds held in her husband's bank account.
11. paragraph 13 of Appendix C reads:

Funds will be available to the applicant only where the specified documents show or, where permitted by these Rules, the applicant confirms that the funds are held or provided by:

- (i) the applicant (whether as a sole or joint account holder); and/or
- (ii) the applicant's parent(s) or legal guardian(s), and the parent(s) or legal guardian(s) have provided written consent that their funds may be used by the applicant in order to study in the UK; and/or
- (iii) an official financial sponsor which must be Her Majesty's Government, the applicant's home government, the British Council or any international organisation, international company, University or Independent school.

12. On the face of it this paragraph excludes from consideration funds held in the 2nd Appellant's bank account, unless the 1st Appellant is a joint account holder.

13. Appendix E is entitled, "Maintenance (funds) for the family of Relevant Points Based Systems Migrants". Paragraph (c) reads,

Where the applicant is applying as the Partner of a Relevant Points Based System Migrant the relevant amount of funds must be available to either the applicant or the Relevant Points Based System Migrant.

14. The Appellants argue that, as it is sufficient for the purposes of a partner of a relevant PBS migrant if the required level of funds is available to the partner, partner, so, in turn, it would be sufficient that the partner holds the required level of funds for the relevant PBS migrant.

15. Having regard to the structure and purpose of Appendix C and Appendix E, and to the specific wording of the provisions of both Appendixes, I cannot accept this submission.

16. The purpose of Appendix E is to ensure that dependents of the relevant PBS migrant have available to them sufficient funds. The focus of Appendix E is upon the partner or child of a relevant PBS migrant rather than the migrant him or herself. In the present case the 1st Appellant is the relevant PBS migrant.

17. It is sufficient for the purposes of Appendix E that the relevant PBS migrant has the required funds. There is no need for any dependent of the relevant PBS migrant to hold the funds independently. However, Appendix E does not deal with the quite separate requirements that the relevant PBS migrant must meet. Those are dealt with in Appendix C. The wording of Appendix C is quite clear. The 2nd Appellant is not a person in respect of whom the 1st Appellant can rely to demonstrate that she has the required funds available to her.

18. Further, paragraph (aa) of Appendix E indicates that paragraphs 1A and 1B of Appendix C also apply to Appendix E. Paragraph 1A(a) of appendix C indicates that the relevant PBS migrant must have the funds specified in the relevant part of Appendix C at the date of the application, and paragraph 1A(c) requires that the relevant PBS migrant had those funds for a consecutive 28-day period of time. Moreover, paragraph 1A(ca)(i) of Appendix C states that the Tier 4 Migrant must confirm that the funds she is required to have are available in the manner

specified in paragraph 13 of the same Appendix. It is clear to me that the focus in these provisions is upon the funds held by the relevant PBS migrant, in this case, the 1st Appellant. This is a requirement in addition to the requirements identified in Appendix E.

19. I am further fortified in my conclusion by reference to paragraph 1A(g) of Appendix C. This reads,

Where the application is made at the same time as applications by the partner or child of the applicant (such that the applicant is a Relevant Points Based System Migrant for the purposes of paragraph 319AA), each applicant must have the total requisite funds specified in the relevant parts of appendices C and E. If each applicant does not individually meet the requirements of appendices C and / or E, as appropriate, all the applications (the application by the Relevant Points Based System Migrant and applications as the partner or child of that relevant Points Based system Migrant) will be refused.

20. This paragraph indicates that the relevant PBS migrant must individually meet the requirements of Appendix C. The clear words of Appendix C indicates that the funds available to the relevant PBS migrant can only be provided by reference, *inter alia*, to her own bank statement or a joint bank statement, or her parents or legal guardian's bank statements. The implicit exclusion of a spouse's bank account statement cannot be undermined by reference to Appendix E.
21. For these reasons I am not satisfied that Appendix C and Appendix E can be read conjunctively in the sense advanced by the Appellants. I am not satisfied, applying *Mahad*, that the rules could be read in any other way, or that the requirements themselves are in any way irrational to the extent that they potentially exclude funds from a sponsor that are not held in a joint bank account.
22. The Appellants additionally argue that the Judge failed to consider whether the Respondent acted unlawfully in failing to exercise her discretion under paragraph 245AA of the immigration rules or the evidential flexibility policy.
23. With respect to the existence of a separate evidential flexibility policy, the Upper Tribunal in *Durrani (Entrepreneurs: bank letters; evidential flexibility)* [2014] UKUT 00295 (IAC) stated that, "*There is no evidence that some policy on evidential flexibility, independent and freestanding of paragraph 245AA, survived the introduction of that paragraph in the immigration rules.*"
24. I must therefore consider whether the Respondent acted unlawfully in respect of any duty imposed on her by paragraph 245AA of the immigration rules, as it was at the date of the Respondent's decision.

Paragraph 245AA(b) read:

- (b) 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);
 - (ii) A document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or
 - (iii) A document is a copy and not an original document; or
 - (iv) A document does not contain all of the specified information;the Entry Clearance Officer, Immigration Officer or the Secretary of State may contact the applicant or his representative in writing, and request the correct documents.

25. This paragraph cannot apply to the 1st Appellant. There are no missing documents within a sequence, or a document in the wrong format, or a copy rather than an original. Nor can it reasonably be said that the failure to provide a bank statement containing the requisite funds, as specified in Appendix C, constitutes a document that does not contain all of the specified information. I do not regard a failure to prove the required level of funds by reference to paragraph 13 of Appendix C as being comparable in any way to a situation where a document does not contain all of the specified information. There is no merit in this ground.

26. The Appellants also seek to rely on *CDS (PBS "available" Article 8) Brazil* [2010] UKUT 305 (IAC). The first headnote to this authority states,

Funds are "available" to a claimant at the material time if they belong to a third party but that party is shown to be willing to deploy them to support the claimant for the purpose contemplated.

27. The Appellant contend that, as the 2nd Appellant held funds in his bank account, and provided a copy of that bank account to the Respondent in support of the application, he thereby demonstrated a willingness to support the 1st Appellant's application and the those funds were consequently available to her.

28. At the date of the decision under appeal in *CDS* paragraph 13 of Appendix C read,

Guidance published by the United Kingdom Border Agency will set out when funds will be considered to be available to an applicant, including the circumstances in which the money must be that of the applicant and the extent to which a sponsorship arrangement that provides the required funds will suffice.

29. The Guidance was not of course incorporated within the immigration rules and, following first the authorities of *Pankina (Secretary of State for the Home Department v Pankina* [2010] EWCA Civ 719), and then *Alvi, (R (on the application of Alvi) (Respondent) v Secretary of State for the Home Department (Appellant)* [2012] UKSC

33) the Upper Tribunal were more at liberty to assess the definition of 'available to'.

30. Paragraph 13 of Appendix C, in its manifestation as of 16 January 2014, the date of the decision that is the subject of this appeal, was much more restrictive as to the sources and forms of evidence the Respondent would consider when assessing whether the requisite funds were 'available' to an applicant. Paragraph 13 of CDS itself reads,

In the absence of specific additional requirements of the Immigration Rules, it seems to us that funds are "available" to a claimant at the material time if they belong to a third party but that party is shown to be willing to deploy them to support the claimant for the purpose contemplated.

31. It is clear to me that the Upper Tribunal contemplated the possibility that the immigration rules could impose specific requirements in respect of the availability of funds for the purposes of Appendix C. This is precisely what the Secretary of State has done. Paragraph 13 of Appendix C at the date of decision did have specific additional requirements that were absent from the version when CDS was decided. I do not therefore find this authority of assistance when considering the meaning of the term 'available to' in the context of the present appeal.

32. For the reasons I have given above I am not satisfied the FtT Judge made a material error of law and I dismiss the appeal.

Decision:

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



14 July 2015

Signed:
Upper Tribunal Judge Blum

Date: