



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/34632/2014
IA/34634/2014

THE IMMIGRATION ACTS

Heard at Field House
On 28th September 2015

Decision & Reasons Promulgated
On 26th November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR RIPAN KUMAR RUDRA (First Appellant)
MRS SANCHITA KANDU (Second Appellant)
(Anonymity Direction Not Made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Lay of Counsel

For the Respondent: Ms Isherwood, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The first appellant made an application on 20th June 2014 for leave to remain as a Tier 1 (Entrepreneur) Migrant under the Points Based System and the second appellant made an application as his dependent further to Paragraph 319C of the Immigration Rules.

2. On 18th August 2014 the respondent refused to vary the first appellant's leave under Paragraph 245BB (d) and refused to vary the second appellant's leave under Paragraph 319C. The respondent also made decisions to remove them. Under Paragraph 245DD (b), the first appellant must comply with Paragraph 41(c) of Appendix A of the Immigration Rules. In line with that requirement an applicant would only be considered to have access to funds where

'... the money is either held in a UK regulated financial institution or is transferable to the United Kingdom'

3. The funds upon which the appellant was said to be reliant were held in the Mutual Trust Bank in Bangladesh and the evidence he had submitted did not confirm that the funds in that institution were transferable to the United Kingdom. It was not considered that he had access to funds as per Paragraph 41 of Appendix A of the Immigration Rules.
4. Further he claimed to have an investment of £8,485 from the cost of sales and had provided a letter from Green Associates and unaudited accounts dated 16th June 2014 but the reason for refusal letter stated that this was 'not acceptable evidence of investment as it is from sales and stock purchases'.
5. Judge of the First-Tier Tribunal Quinn refused the appellant's appeal on 23rd January 2015 in the following terms;

'14. I found that the letter from Mutual Trust Bank Limited dated June 19th 2014 was written specifically for the UK Border Agency but that letter failed to indicate that the funds held in Bangladesh were transferrable to the United Kingdom. Whilst Mr Khan, who wrote the letter, might not be aware that this was a requirement, I was satisfied that the appellant knew of this requirement and he had not obtained a letter confirming that his funds in Bangladesh could be transferred to the United Kingdom and this was fatal to his claim. He was in my view correctly scored nit points under Appendix A.

15. Paragraph 41C of Appendix A of the Immigration Rules required an applicant to have access to funds where 'the money is either held in a UK regulated financial institution or is transferrable to the UK'. Neither of these conditions was met.

16. Similarly no points were appropriate for money held in a regulated financial institution as the money was not so held'

17. If the money was transferrable to the United Kingdom it begged the question of why some, or all, of the money had not been transferred.

18. With regard to investment a balance sheet dated 16th June 2014 for Mars 3 International Limited showed that sales of £8,485 had generated a loss for the period of £9,023. The company was therefore trading at a loss.

19. I had some trouble understanding the accounts as there were creditors shown of £12,662 which would suggest that some sales had taken place. However the letter dated 29th December 2014 read 'no sale was made at this period and directors invest

(sic) £8,485 for purchasing goods'. The accounts **were unaudited and** did not provide acceptable evidence of investment'.

6. The appellant made an application for permission to appeal on the basis that it was clear from the wording of the letter that the funds were transferrable to the UK. It was clear from the letter from Mutual Trust Bank dated 19th June 2014 which was put before the Secretary of State as it was in the Home Office bundle that the letter did refer to funds being transferable on the request of the appellant. It could be inferred from the wording of the paragraph as a whole that it was for an investor visa in the UK and that the funds were transferable to the UK for that purpose and the judge failed in taking into account the wording of the letter. Alternatively the judge did not give reasons for finding that the letter did not say that the funds were not transferable. Further the judge erred in stating that even at the date of hearing there was no letter from the bank in Bangladesh confirming that the funds could be transferable to the United Kingdom.
7. Secondly the appellant claimed that he had already in the business to make up the shortfall of £50,000 and already invested over £8,000 in the company and he had submitted unaudited accounts to support this and a letter from Green Associate Accountants page E of the respondent's bundle. He provided company bank statements with payments from his personal account going into the company account as investment.
8. The judge only addressed this at paragraph [19] and stated that he did not understand the accounts.
9. However the judge failed to address (i) whether the claimed figure was in fact *costs of sales* as alleged by the respondent where there was no evidence of any sales. (ii) Although stock purchases had been made by the company where this money had come from (iii) the fact that the company bank statements in the bundle demonstrated the investments made by the appellant in the form of money paid in by him (which was in turn spent on the stock purchases).
10. Paragraph 45 of Appendix A set out when points should be awarded for money invested under the Immigration Rules.
11. It was an error to reject unaudited accounts as evidence when Paragraph 46-SD(a)(ii) of Appendix A states clearly that where a company is not required to produce audited, unaudited accounts can be used.
12. There were additional funds of £1,500 in a UK Lloyds Bank account which were available in cash and accessible to be invested in the company. These were not considered.
13. Thirdly the judge failed to consider the Article 8 claim under the Immigration Rules in particular under Paragraph 276ADE. Although the judge accepted that there was a private life he undertook no proportionality balancing exercise outside the

Immigration Rules. There was not even a reference to their continuous lawful residence which now exceeded 5 years.

14. That application for permission to appeal was refused by Judge Pirotta but renewed to the Upper Tribunal and Upper Tribunal Judge Kebede considered that there was an arguable error of law. She considered that the Article 8 ground had no merit in isolation.
15. At the hearing before me it was submitted by Mr Lay who produced the case of **Durrani** (Entrepreneurs : bank letter : evidential flexibility [2014] UKUT 295 (IAC) that the question of transferability had been addressed by the letter dated 19th June 2014. This was in relation to the £45,000.
16. In relation to the further £8,000 if that sum in the accounts related to sales it was not of assistance but if it related to stock purchases this was acceptable for the purposes of investment. The Secretary of State was confused as to whether stock purchases could count and the letter from Green Associates made that clear. The letter dated 29th December 2014 showed that there had been purchase. This letter was evidence which was produced after the decision of the respondent. Indeed there was a letter in which Green Associates stated

‘We write to confirm that we act as accountants for Mars3 International Limited Company Registration No 08823615 registered in England and Wales. Based on the information and explanation provided by the management, we have prepared unaudited report and accounts for the period from 2nd May 2014 to 16th June 2014.

The company’s purchases in this period were £8,485. No sale was made at this period and directors invest £8,485 for purchasing goods. However the stock position was confirmed by client and not considered by us as the accounts were prepared for management purpose only. The net realisable value of goods at the year end should be accounted as stocks in the balance sheet of statutory accounts.

In accordance with our usual practice this letter is given in good faith without any liabilities on the part of this firm or its writer’

17. Mr Lay also submitted that there were also bank statements that showed that there were payments going into the company account which were used to purchase stock. The First-Tier Tribunal incorrectly rejected the evidence on the basis that the accounts were not audited but this was not necessary. The judge appeared to consider that the entries were generated by sales but this was incorrect. The Lloyds Bank account showed cash deposits from the appellant.
18. Ms Isherwood submitted that the appellant had changed his evidence at the First-tier Tribunal appeal. At Section E of the respondent’s bundle there was a reference to cost of sales equalling £8,485. That was the evidence before the Secretary of State and this was referred to at Paragraph 19 of the decision. The judge was entitled to take the view he did. With reference to transferability the letter did not comply with the strict wording of the Immigration Rules and this was referred to at paragraph 14 and the wording was precise. The wording did not conform.

19. Mr Lay submitted that as long as the funds were transferable to the UK that was acceptable and it was an issue of terminology.
20. Section E of the bundle with reference to the £8,485 should be read alongside the balance sheet and at this point Mr Lay attempted to reopen the issue with respect to Article 8 to which Ms Isherwood objected.

Conclusions

21. The requirements for leave to remain as a Tier 1 (Entrepreneur) Migrant are set out under Paragraph 245DD(b) and state that the appellant must have a minimum of 75 points under paragraphs 35 to 53 of Appendix A. Under Table 4 of Appendix A the applicant must have access to not less than £50,000 and he was previously Tier 1 (Post Study Work Migrant).
22. Nonetheless Paragraph 41 states
‘An applicant will only be considered to have access to funds if ...
...
(iii) The money is either held in a UK regulated financial institution **or is transferable to the UK**; and..
23. The rules specifically state that the money must be transferable *to the United Kingdom*. The letter from the Mutual Trust Bank Ltd does not state this. It refers to funds held jointly between Mr Manash Chowdhury and Mr Ripan Kumar Rudra and notes that they are making an application to the UK Border Agency for further leave to remain in the United Kingdom and the letter states ‘*In this regards, we can confirm that fund stated above in their account is genuine and we have no objection to transfer the fund according to their instruction*’. Even though the bank might transfer the funds at the instruction of the appellant there was no confirmation from the bank that the funds could indeed be transferred out of Bangladesh to the United Kingdom. The rules make clear that the money must be transferable to the United Kingdom. It cannot be assumed even if the funds can be transferred at the behest of the account holder that they can necessarily be transferred out a country and further to the United Kingdom.
24. I am not persuaded that **Durrani** assists the appellant. Rather the conclusion in **Durrani** was that ‘*there is no substance in the argument that the relevant requirements contained in paragraph 41-SD(a)(i) produce an absurd result and must, therefore, be interpreted in some other manner*’. **Durrani** referred to banks in the United Kingdom but nonetheless the requirement regarding transfer of funds to the UK, in this instance, is absolutely specific and could be complied with; it was not as the judge found.
25. I turn to the question of the stock. It is clear from Paragraph 45 that if the applicant has invested the money referred to in Table 4 in the UK before the date of the application, points will be awarded for funds available as if the applicant had not yet invest the funds, **providing**

45 (a) the investment was made no more than 12 months ... before the date of the application and

(b) all of the specified documents required in paragraph 46-SD (a) to (g) are provided to show

(i) the amount of money invested: and

(ii) that the applicant has established a business in the UK in which the money was invested

26. The appellant claimed to have invested money in his company. It would, however, appear that the appellant has amended his interpretation of the accounts since the application was made. Indeed at Section E of the respondent's bundle is the letter from Green Associates dated 19th June 2014. In this the £8,485 is clearly referred to as '*cost of sales*'. There is no reference to purchase of stocks. This is afforded as a later explanation and post decision. Indeed as the judge points out, in the profit and loss account for the period 2nd May 2014 to 16th June 2014 the sales of £8,485 are recorded as a 'gross loss'. Indeed the overall loss of £9,023 is made up of the administrative expenses of £538 and the 'cost of sales' of £8,485. That figure is referred to twice in the accounts as *cost of sales* and once as *purchases*. The explanatory letter of 19th June 2014 refers to the figures as being sales. It is not surprising that the judge stated that he had difficulty in understanding the accounts and the appellant must bear the responsibility of producing clear accounts. This is the evidence that was placed before the Secretary of State when considering the application. I find that a figure which is clearly described as cost of sales (and then shown as a loss) cannot then be transfigured into an 'asset'.
27. The judge at [18] clearly picked up on the point that the company was trading at a loss and did not accept that the £8,485 could be interpreted as an investment. His comments at [19] merely reflected the confused state of the accounts and description as sales and then purchases. As I say, the onus is on the appellant to produce a clear explanation of his accounts. The judge referred to the letter of 29th December 2014 from Green Associates which attempted a post dated explanation of the accounts and terminology and further attempted to reflect the figure as a purchase of stock. This evidence post dates the application and could not be taken into account. **Ahmed and Another (PBS: admissible evidence) [2014] UKUT 00365 (IAC)** confirms the prohibition on new evidence in Section 85A(4) of the Nationality, Immigration and Asylum Act 2002 applies to the non-points-scoring aspect of the Rule such that where a points-based application is made and refused the assessment by the judge is to be of a material that was before the decision maker rather than a new consideration of the material.
28. There was criticism that the bank accounts, showing the appellant had transferred money to the business and had made stock purchases, were not considered by the judge and that he was wrong to reject evidence from unaudited accounts, but I am not persuaded that the appellant could in any event comply with the requirements of Paragraph 46-SD(b). Further to Paragraph 46-SD (b)

'Audited or unaudited accounts must show the investment in money made directly by the applicant, in his own name or on his behalf (and showing his name)'.

The amount said to be invested by the appellant himself was not specific and it was not clear from the bank accounts to what use the money was being put in the business. Jointly with his partner Mr Manash Chowdhury he was said to have invested £11,792 but that sum did not equate with the sales and administrative expenses shown in the accounts. It was not clear what the appellant himself had invested. As indicated it is the *accounts* that must show the investment and the appellant's investment in his own name or on his behalf. The accounts must show how much the appellant has invested in the business. They did not.

29. The judge made no material error of law in respect of his analysis of the financial requirements. Nor was there an error with regards Article 8 and indeed the permission was made noting that there was no merit for this ground in isolation.

Conclusion

30. I find that the judge made no material error of law and the decision shall stand.

Signed

Date 23rd November 2015

Deputy Upper Tribunal Judge Rimington