



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/41402/2013
& IA/41417/2013

THE IMMIGRATION ACTS

Heard at Field House
On 22 October 2015

Determination Promulgated
On 28 October 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

**WAQAR SAFINA
WAQAR ASHRAF**

[No anonymity direction made]

Appellants

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellants: Mr M Iqbal, instructed by iConsult Immigration
For the respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION ON ERROR OF LAW AND REASONS

1. This is the appellants' appeal against the decision of First-tier Tribunal Judge Devittie promulgated 15.9.15, dismissing their linked appeals against the decisions of the Secretary of State, dated 23.9.13, to refuse their applications made on 12.8.13 for leave to remain as a Tier 1 Entrepreneur (Mr Ashraf) and dependant (Mrs Waqar) under the Points Based System (PBS) of the Immigration Rules. The Judge heard the appeal on 15.8.14.

2. The appeal has an unusual history. Permission to appeal was refused by First-tier Tribunal Judge Lambert and when the application was renewed to the Upper Tribunal, permission was again refused on 18.3.15. However, Judicial Review proceedings were launched and permission to apply for Judicial Review was granted by Mr Justice Collins on 21.5.15, stating: "I have no doubt that it is clearly arguable that the construction of the Rules adopted by the FT Judge was wrong. It is also thoroughly undesirable that there should be conflicting decisions in relation to the same provider particularly as it seems the Home Office has not sought to appeal the decisions allowing appeals."
3. In consequence, the decision of the Upper Tribunal to refuse permission to appeal was quashed by order of 30.6.15 and on 21.7.15 the Vice President granted permission to appeal to the Upper Tribunal, in light of the decision of the High Court, the Upper Tribunal stating, "The parties are reminded that the Upper Tribunal's task is that set out in s12 of the 2007 Act," meaning that the decision can only be set aside if it involved the making of an error of law.
4. Thus the matter came before me on 22.10.15 as an appeal in the Upper Tribunal.

Error of Law

5. For the reasons set out herein, I find no error of law in the making of the decision of the First-tier Tribunal such as to require the decision of Judge Devittie to be set aside.
6. The relevant immigration background can be summarised as follows. Mrs Waqar first entered the UK in 2006 with leave as a student, subsequently extended to 18.2.13. Her application for further leave to remain as a student was refused on 21.2.13. Mr Ashraf first came to the UK in 2008 with leave as a student, valid to 30.4.09. In 2011 he was granted leave to remain as a Tier 4 dependent partner, subsequently extended to 18.8.13. His application for further leave to remain as a Tier 4 dependent partner was refused on 21.2.13.
7. In refusing the applications, the Secretary of State awarded zero points under Appendix A Attributes in relation to access to funds. Under Table 4(b) the appellants claimed access to not less than £50,000 from a venture capitalist firm (VCF) regulated by the Financial Services Authority (FSA), now renamed the Financial Conduct Authority (FCA), namely BriceAmery Capital (BAC). The appellants relied on letters from BAC, dated 6.8.13, stating that £50,000 would be made available to Mrs Waqar. However, the Secretary of State did not accept this evidence as the Financial Services Authority Register (FSAR) did not show that BAC has permission to operate as a Venture Capitalist Business (VCB) only. In consequence, the Secretary of State was not satisfied that Mrs Waqar had access to £50,000 from an appropriate source and refused the application.
8. Mr Ashraf's application as dependent was refused in line with that of Mrs Waqar. Obviously, his appeal stands or falls with that of his partner.
9. The appellants' case is that BCA is registered with the FCA and has the same permission on the Register as "some of the other most prominent Venture Capital

Firms in the UK. It is contended that the Immigration Rules and policy guidance do not state that a VCF should hold a licence to operation as a Venture Capital Firms only and larger firms with broader range of financial services are ineligible.

10. Judge Devittie carefully considered the Rules and in particular Appendix A, noting that where funding is to be made available from a VCF an applicant is required to provide evidence that it is a VCF regulated by the FCA. At §7 of the decision Judge Devittie cited the FCA Handbook definition of a VCF as “a firm whose permission includes a requirement that it must not conduct designated investment business other than venture capital business.” Noting that the FCA Register in respect of BAC shows that it does not meet this definition, and that it has permission to ‘advise in investments only,’ and that the letter from the firm’s accountant does not claim that it is registered as or has permission to operate as a VCF, Judge Devittie was not satisfied that the evidence adduced demonstrated that the firm and thus the appellants met the requirements of Appendix A.
11. According to Mr Iqbal’s submissions, the appeal involves a narrow point of law, the definition of a ‘Venture Capitalist Business’ (VCB) for the purpose of the Immigration Rules. However, this ignores the full reasons for both the refusal of the application and dismissal of the appeal by Judge Devittie.
12. In addition to finding that BAC did not have the express permission of the FCA to operate as a VCF, Judge Devittie also noted that it was not apparent from the papers before the Tribunal that the accountant met the requirements of Appendix A to be a member of a recognised UK supervisory body.
13. There is also a further issue as to the evidence admissible in the First-tier Tribunal appeal hearing. The application in question was made on 12.8.13. In a PBS case the Rules require the evidence in support to be submitted with the application. It is clear from the decision of the First-tier Tribunal that the appellants submitted further evidence, even after the refusal decision of 23.9.13, trying to demonstrate that BCA.
14. This is a PBS case in which the evidence in support must be submitted with the application. I note that section 85A(4)(d) states that evidence may be considered if it is adduced in connection with the Secretary of State’s reliance on a discretion under immigration rules, or compliance with a requirement of immigration rules, to refuse an application on grounds not related to the acquisition of “point” under the “Points Based System,” however the reasons for refusal fall directly under the points requirements of Appendix A.
15. Even if the refusal was not directly based on a points issue, in the recent case of Ahmed and another (PBS: admissible evidence) [2014] UKUT 00365 (IAC), the panel including the Vice President held that “Where a provision of the Rules (such as that in para 245DD(k)) provides that points will not be awarded if the decision-maker is not satisfied as to another (non-points-scoring) aspect of the Rule, the non-points-scoring aspect and the requirement for points are inextricably linked. As a result, the prohibition on new evidence in s85A(4) of the Nationality, Immigration and Asylum

Act 2002 applies to the non-points-scoring aspect of the rule: the prohibition is in relation to new evidence that goes to the scoring of points.”

16. At §5 of Ahmed, the Tribunal explained, “the purpose of that provision is quite clear. It is that where a Points Based application is made and refused, the assessment by the judge is to be of the material that was before the decision-maker rather than a new consideration of new material. In other words the appeal if it is successful is on the basis that the decision-maker with the material before him should have made a different decision, not on the basis that a different way of presenting the application would have produced a different decision.”
17. In Ahmed the First-tier Tribunal Judge had erroneously taken into account “material other than that which was before the decision-maker.” In the present case, Judge Devittie should not have taken into account the further letter from BAC, which is dated 24.4.14, obviously after the submission of the application. On the basis of the principle set out at §5 of Ahmed, there is no purpose in considering any further oral or documentary evidence at all. Judge Devittie should have considered the appeal on the basis only of the evidence before and considered by the Secretary of State when the decision was made in 2013.
18. The submission that BAC carries out activities which are those of a VCF as defined in the FCA Handbook is not determinative of the issue. The appellants must demonstrate on the evidence submitted with the application and on the balance of probabilities that BAC meets the requirements under Appendix A. Paragraph 41-SD was substituted from 1.10.13 and various other amendments made in 2014, but all with savings for applications made before the dates of change. As in force at the date of application, 41-SD(b)(i)(6) of Appendix A requires the following specified document, “if the third party is a venture capitalist firm, confirmation of whether this body is regulated by the Financial Conduct Authority (FCA) and is listed as permitted to operate as a Venture Capital firm,” as well as a recent letter from an accountant who is a member of a recognised UK supervisory body, confirming the amount of money made available to the applicant.
19. The refusal decision is based on an assumption that the register must show that the VCF “has permission to operate as a Venture Capitalist business only.” The reference to “only” derives from the FCA Handbook, which, according to the First-tier Tribunal decision, defines as VCF as a “firm whose permission includes a requirement that it must not conduct designated investment business other than venture capital business,” in other words, a VCF must only conduct venture capital business.
20. In the Rule 24 response dated 21.8.15, the Secretary of State has pointed out that under the FCA regulations a Venture Capital Firm is defined as “a firm whose permission includes a requirement that it must not conduct designated investment business other than venture capital business.”
21. At § 7 of the decision, Judge Devittie observed that the register showed that BAC had permission to ‘advise in investments only.’ “It does not show that the firm has

authority to conduct a Venture Capital business in terms defined in the handbook.” The judge did not focus on the ‘only’ part of the requirement but rather found that the firm did not have permission to conduct a venture capital business at all.

22. In any event, as Mr Iqbal’s skeleton argument asserts at §26, the register states that BAC permission has no requirements, and thus it must follow that it cannot meet the definition of the FCA Handbook, as its permission does not include the necessary requirement restricting activity to venture capital business. The Rule 24 response points out that firms may be registered with permission to conduct venture capital business amongst other activities, but a VCF meeting the definition of such in the FCA handbook is restricted to venture capital business only. There is thus a distinction between a firm which carries out venture capital business amongst other activities and one which is defined by the FCA as a VCF, which must not conduct anything other than Venture Capital business.
23. It follows that on the evidence submitted to and considered by the Secretary of State the appellants’ failed to meet the strict but clear requirements of Appendix A and paragraph 41-SD in relation to proving that BAC is a VCF.
24. Neither the grounds of application for permission to appeal nor Mr Iqbal’s skeleton argument address the failure to demonstrate that the accountant’s letter meets the requirements of paragraph 41-SD in relation to membership of a supervisory body. There was no evidence before the First-tier Tribunal of compliance with this requirement. The appeal would fail for this reason independently of the issue of a VCF registered with permission of the FCA as such.
25. In the circumstances, the failure of the appeal was inevitable. I find no material error of law in the making of the decision of the First-tier Tribunal.

Conclusions:

26. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal of each appellant remains dismissed.



Signed
Deputy Upper Tribunal Judge Pickup

Dated

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.

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.

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 been dismissed and thus there can be no fee award.



Signed
Deputy Upper Tribunal Judge Pickup

Dated