



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/51260/2013
IA/51259/2013

THE IMMIGRATION ACTS

Heard at Field House
On 6th February 2015

Decision & Reasons Promulgated
On 17th February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR AYAZ ZAHID (FIRST APPELLANT)
MISS UM E HABIBA (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Khan, Counsel

For the Respondent: Mr M Shilliday, Home Office Presenting Officer

DECISION AND REASONS

1. These are appeals by the above named Appellants who are citizens of Pakistan born respectively on 6th February 1981 and 11th April 1984. Their immigration history is set out as at paragraphs 2 and 3 of the determination of the First-tier Tribunal. The Appellants had made application following previous leaves which had been granted as students and thereafter as Tier 1 (Post-Study) Migrants for leave to remain in the United Kingdom as Tier 1 (Entrepreneur) Migrants under the points-based system

and for a biometric residence permit. Those applications were refused by the Secretary of State on 20th November 2013.

2. The Appellants appealed and the appeal came before Judge of the First-tier Tribunal Devittie sitting at Taylor House on 8th August 2014. In a determination promulgated on 12th September 2014 the Appellants' appeals were dismissed under the Immigration Rules.
3. The Appellants lodged Grounds of Appeal to the Upper Tribunal and on 24th October 2014 Designated Judge of the First-tier Tribunal McClure refused permission to appeal. The Appellants renewed their application for permission to appeal on 13th November 2014 contending within those grounds that Judge McClure had totally ignored the Appellants' Grounds of Appeal and refused to grant permission without engaging with those grounds. On 19th December 2014 Upper Tribunal Judge Warr granted permission to appeal. He indicated that there were a number of odd features about the case and that in the Grounds of Appeal it was not expressly stated that the Presenting Officer had conceded matters although the Appellants had lodged statements stating that they had and those statements were dated 4th December 2014. It was noted that the renewed Grounds of Appeal differed from the earlier grounds. Judge Warr went on to state

"I have concluded, not without considerable hesitation, that it is right to grant permission to appeal on the Grounds of Appeal as a whole. The Respondent should endeavour to see if the Presenting Officer can assist on the issue of the concession".

4. On 7th January 2015 the Secretary of State lodged a response to the Grounds of Appeal under Rule 24 requesting an oral hearing. It is on that basis that the appeal comes before me.
5. The Appellants appear by their instructed Counsel Mr Khan. Albeit that this is Mr Khan's first involvement with this matter, he has produced a very helpful skeleton argument to supplement the Grounds of Appeal drafted by his colleague Mr Iqbal. The Secretary of State appears by her Home Office Presenting Officer Mr Shilliday. Mr Shilliday has knowledge of this matter being the author of the Rule 24 response. It is on that basis that the appeal proceeds before me solely to determine whether there is a material error of law in the decision of the First-tier Tribunal Judge.

Preliminary Issue

6. I am taken to the point as to whether or not there were any concessions made by the Secretary of State. Helpfully a considerable number of documents have been produced with regard to this. Mr Khan acknowledges that it is accepted that the Grounds of Appeal do not state that there was a concession but that the Appellants were under that impression because no further issues were taken once the Presenting Officer was satisfied with the cross-examination that the source of funds was consistent. He submits that whilst the Secretary of State may never have made a

concession, when there is a point not taken his clients were entitled to conclude that by implication that was the de facto position.

7. This issue is very thoroughly aired in documentation. Mr Shilliday relies on a witness statement of Amy Cooke. Ms Cooke is a barrister and has appeared on many occasions since August 2012 on behalf of the Secretary of State in the First-tier Tribunal. She has adduced a witness statement which appends an attendance note sent to her client, the Respondent, the day after the hearing before the First-tier Tribunal.
8. The relevant extract from that attendance note is as follows

“The Appellants had given consistent evidence on why the money was put into Mr Ayaz’s account then put into the joint account. Miss Habiba said that she gave the remaining money of £2,600 to Mr Ayaz in cash then the cashier said put it all into Mr Ayaz’s account then transfer the whole £50,000 to the joint account. I relied on the refusal letter in this regard but made no further submissions”.

At paragraph 3 of her witness statement Ms Cooke makes reference to the issue of money within this attendance note. In her opinion she notes that the account given was in her view “consistent” and that she relied on the refusal letter in this regard but made no further concessions. She states that she did not make any concession. That view is reaffirmed in the Rule 24 response served by Mr Shilliday whereby having seen the note and the witness statement of Ms Cooke he states

“It is denied that there was any concession made before the First-tier Tribunal Judge. Therefore all matters were live before him and he was entitled to come to the conclusion he did on the evidence. It is submitted that the learned judge appropriately directed himself and that the determination contains no material error”.

9. Thereafter I am taken to Mr Iqbal’s statement. Mr Iqbal, like Ms Cooke, is a member of the Bar and he was instructed to appear before the First-tier Tribunal on the Appellants’ behalf. He is also the author of the Grounds of Appeal. I am specifically taken by Mr Khan to paragraph 9 of his witness statement where he states

“I am in agreement with what Ms Cooke has said in her witness statement and I am also in agreement with the hearing note prepared by Ms Cooke. On behalf of the Respondent both Appellants were thoroughly cross-examined on the issue of viability and credibility of the source of money and then no submissions were made on the Respondent’s behalf challenging credibility of the Appellant’s evidence on this very point. Indeed, it was this point that I attempted to make in the Grounds of Appeal”.

10. All documents fully explain the position. The arguments can basically be reduced to two sentences. Mr Shilliday’s conclusion based on the above that as all matters were live before him the judge was entitled to come to the conclusion he did on the

evidence, and to Mr Iqbal's statement emphasised by Mr Khan both in his skeleton and his oral submission that no submissions were made on the Respondent's behalf challenging the credibility of the Appellants' evidence once they had been thoroughly cross-examined on the issue of the viability and credibility of the source of the money.

General Submissions/Discussions

11. Mr Khan takes me to his skeleton argument. He submits that the First-tier Tribunal Judge ignored the oral evidence given by the Appellants and that the very fact it is accepted they were robustly cross-examined, despite this the First-tier Tribunal Judge failed to mention that evidence. He takes me in particular to paragraphs 11 and 12 of the First-tier Tribunal Judge's determination. He points out that at paragraph 11 the judge had indicated that he was satisfied that plausible explanations to most of the concerns raised in the refusal letters had been provided, and that thereafter at paragraph 12 he merely mentioned that the Respondent takes issue with the inadequacy of the evidence regarding the Appellants' source of funds. He reiterates the point that Ms Cooke has confirmed that the Appellants' evidence is consistent and that she has no further submissions to make on the point and therefore Mr Khan submits that that is proof that the Secretary of State was happy about the position regarding the Appellants' funds. He points out that the judge does not explain the witness statements and the affidavit from a third party that had been provided at all and submits that there is, as a result, a failure to properly assess the credibility of the Appellants and he relies on the guidance given by Mr Justice Ousley in *MM (DRC - plausibility) [2005] UKIAT 00019*, submitting that the First-tier Tribunal Judge did not apply the required approach in reaching his credibility findings. He asked me to find that there is a material error of law, to set aside the decision of the First-tier Tribunal and to remake the decision allowing the appeal.
12. Mr Shilliday submits that it really is immaterial to try and surmise whether or not Ms Cooke on behalf of the Secretary of State was or was not satisfied about the provision of funds by the Appellants. The important fact is whether or not the judge was persuaded that he was satisfied and it was clear from his determination that he was not. He submits that paragraph 16 of the First-tier Tribunal Judge's determination is fatal to the Appellants' appeal. He points out that the Appellants can have no complaint given that they were allowed the opportunity to provide evidence and that once that evidence had been provided they still failed to persuade the judge. He acknowledges that perhaps the judge should have made further reference to the evidence but the fact that he did not specifically refer to it, bearing in mind the conclusions reached at paragraph 16, do not constitute an error of law. Further he submits that the approach adopted in seeking to rely on *MM (DRC - plausibility) Democratic Republic of Congo [2005] UKIAT 00019* is wrong in that that was an asylum appeal and it is inappropriate where there is a lower standard of proof to try and apply an asylum authority to the evidence that is provided in a points-based system appeal. He submits that there is no material error of law and he asked me to dismiss the Appellants' appeal.

The Law

13. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
14. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

15. Applications for leave to remain as Tier 1 entrepreneurs are acknowledged as being complex. The Rule requirements need to be met to the letter. One of the requirements is that applicants genuinely need to have access to at least £50,000 to invest in their business and that the money is disposable in the United Kingdom. The Secretary of State in refusing the Appellants' application was not satisfied that such monies were available and consequently refused the application under paragraph 245DD(k) of the Immigration Rules which provides that if the Secretary of State is not satisfied with the genuineness of the application in relation to a points-scoring requirement in Appendix A those points will not be awarded. Other concerns raised in the refusal letter were addressed at paragraph 11 in the First-tier Tribunal Judge's determination where the judge accepted that the Appellants had provided plausible explanations to most of the concerns raised in the refusal letter, such as the poor quality of the website, the allegation that the website was plagiarised and the claim that the business plan was also plagiarised. However, he found that the Appellants had still failed to adequately explain the source of funds available and that the Respondent had taken issue with the inadequacy of the evidence regarding their source of funds.
16. Much has been made by Mr Khan and previously by Mr Iqbal in the Grounds of Appeal that the failure of the Secretary of State to cross-examine on this point constitutes to all intents and purposes a concession that the Secretary of State was satisfied with regard to the adequacy of the funds. It is now, for reasons set out in

some detail above, accepted that there was no concession on this point. The issue remains as to whether or not the finding of the First-tier Tribunal Judge was in such circumstances plausible.

17. I am satisfied that it was and I agree with the detailed comments made with regard to paragraph 16 of the determination by Mr Shilliday. The judge has at paragraphs 11 to 14 set out the factual analysis that he has made with regard to the provision of such funds. He has considered the provisions of paragraph 245DD of the Immigration Rules and he has made findings which he is entitled to make. It is important to note the judge has set out that he has considered the evidence in its totality, including the documentary evidence and the explanations that had been offered by the Appellant. I acknowledge that merely stating that does not guarantee that there is no error of law in the determination but when looked at as a whole it is clear that in this instant case the judge has considered fully the provision of funds and has concluded having heard the evidence that the Appellants had failed to prove to him the sources of their funds. The judge heard the evidence and he thereafter made conclusions that they had failed to show to him that they had established on a balance of probabilities that they had genuinely intended to invest in the United Kingdom and that the funds in the account would remain available to them for use in the business.
18. In such circumstances I am satisfied that this was a finding that the judge was entitled to make. Submissions consequently of the Appellants' legal representatives amount to nothing more than argument and disagreement. I remind myself that it is not the role of the Upper Tribunal to per se rehear matters merely because one party or the other disagrees with the decision of the First-tier Tribunal. The Upper Tribunal's role inter alia is to correct errors. This decision does not disclose any errors and whilst it is always debatable as to whether or not another judge would or would have not come to the same conclusion, the fact remains that Judge Devittie heard all the evidence and made findings of fact that he was entitled to. In such circumstances the decision of the First-tier Tribunal discloses no material error of law and the Appellants' appeal is dismissed and the decision of the Secretary of State is maintained.

Notice of Decision

The decision of the First-tier Tribunal discloses no material error of law. The appeal of the Appellants is therefore dismissed and the decision of the First-tier Tribunal Judge is maintained.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application for a fee award is requested and none is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris