Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/01102/2014
IA/01201/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25 July 2014	**On 12 August 2014**
Oral determination given following hearing	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

YADWINDER SINGH SIDHU
RAKESH KUMAR

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S Bellara, Counsel, instructed by S & S Immigration Law
For the Respondent: Mr G Jack, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal brought by the appellants against a decision of First-tier Tribunal Judge M A Khan promulgated on 19 May 2014 following a hearing at Hatton Cross on 25 April 2014. The issue can be stated succinctly.

2. The appellants applied to vary their leave to remain as Tier 1 (Entrepreneur) Migrants but their applications were refused for effectively one reason only which was that the evidence which they submitted that they had the requisite funds available to them could not be verified by the respondent. This was a points-based system application and the Rules include a requirement for points to be awarded under Appendix A 'Attributes' showing that an applicant has access to funds as required. Applicants also have to show that they have funds in a regulated financial institution and that they have available funds which are disposable in the United Kingdom. In this case the appellants provided letters and statements from HDFC Bank as evidence that they met the requirements to be awarded points in the categories I have set out.

3. It is provided in the Rules that this evidence has to be "verifiable". In the refusal letter sent to each appellant on 10 December 2013 the respondent stated that:

> "We have attempted to verify the documents detailed above [that is the documents said to be from HDFC Bank which showed that they had funds available which were in the name of a third party] as evidence that you meet the requirements to be awarded points for applicant has access to funds as required using standard procedures, but have been unable to do so.
>
> We have therefore been unable to include this evidence in our consideration of your claim for points for applicant has access to funds as required."

4. As a result of this the appellants were not awarded any points either for 'funds held in regulated financial institution' or funds disposable in the United Kingdom

5. The appellants appealed against this decision and as already noted their appeal was heard before Judge Khan, who dismissed it. The central plank of the appellants' appeal was that the documents they had provided from the bank were indeed verifiable and that the failure of the respondent to verify these documents was not the fault of the appellants but must have been because the respondent had in some way made a mistake when attempting to verify these documents.

6. In support of the appeal the appellants put before the judge a further letter from HDFC Bank dated 17 April 2014 (and which was apparently produced at the hearing not having been served prior to the hearing) in which it was said on behalf of the bank that the funds said to be available were indeed available. This letter is signed by someone called Meena Kumari, said to be a personal banker. Obviously this document has not itself been verified either and could not have been before the date of the hearing.

7. At the hearing the respondent provided a copy of what is said to be "GCID – Case Record Sheet" which sets out what steps were taken in order to verify the information. Apparently the CID in GCID stands for Computer Information Database or something similar and the G refers to "General" which is used for enquiries which are general in respect of either deportation or asylum claims. In any event the document refers to various emails which were sent by the respondent both to the bank and Entry Clearance Officers outside the UK but parts of the enquiries they made have been redacted, it just being stated within the record sheet that in respect of these parts of the record they are "restricted – not for disclosure outside of Home Office". This evidence was all considered by Judge Khan whose "conclusions" were set out from paragraphs 20 onwards. I set out the relevant parts of these conclusions as follows:

> "Conclusions as to the Appeal
>
> 20 I have taken all of the evidence into consideration before arriving at my decision in this matter.
>
> 21 Both appellants made a joint application for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrants. The respondent is not satisfied that the appellants meet the requirements of paragraph 245DD(b) of the Immigration Rules.
>
> 22 Both appellant[s] provided letter[s] and documents to confirm that their funds for the investment in the UK business are available in HDFC Bank in India. These funds are held in the name of one Afsar Mohiddin. The HDFC letter dated 03/06/2013 provides Mr Mohiddin's details. On 28/10/2013, the respondent sent an email to the bank for the confirmation of information provided in their letter of 03/06/2013. There has been no response from the bank to the respondent's request. This information is noted in the respondent's GCID case Record Sheet. Having received no response to the enquiry, the respondent refused the appellants' application.
>
> 23 The appellants now provide a further letter from HDFC Bank dated 17/04/2014, which is mostly in similar terms as the letter of 03/06/2013. It makes no reference to any enquiries by the respondent. This letter is post decision and it is open to the appellants to use such evidence in any fresh application to the respondent.
>
> 24 I remind myself that it is for the appellants to establish their case on the balance of probabilities and this includes verifiable evidence, which in this case they may have failed to provide.
>
> 25 On the evidence before me, on the balance of probabilities, I am not satisfied that the appellants have met all the requirements of paragraph 245DD(b) of the Immigration Rules."

8. In the grounds of appeal settled on behalf of the appellants it is argued that a document verification report should have been provided, this having been requested on behalf of the appellants. At paragraph 7 of the grounds it is asserted as follows:

> "7. It is submitted that a DVR should have been provided as a matter of course in such cases, but the Home Office can have no justification to conceal it from the appellant despite specific requests to disclose it."

It is further asserted that:

> "It is an error of law for the Immigration Judge to decide this appeal against the appellant in such circumstances."

9. Complaint is then made at paragraph 8 that although the GCID record sheet was provided during the hearing "this makes mention that an email was sent, but confirms nothing more, such as the email address it was sent to and what the email said. Most crucially, there is no copy of the purported email."

10. Then at paragraph 9 the assertion is repeated that "there is no justifiable reason for the respondent not disclosing the DVR or the purported email to the appellant" and "in particular, there can be no reason to refuse to disclose it despite the appellant making repeated requests to see it so that they could then contact their bank on the basis of the information in the DVR". Then at paragraph 10 of the grounds complaint is made that "it is impossible for the appellants to investigate this matter any further if they did not know who the email was sent to, when it was sent, which email address it came from, which branch of the bank it was sent to etc." particularly because "HDFC Bank is a huge organisation with many branches in and outside India" of which particulars are given. Essentially, the complaint is that the process is not a fair one because once the respondent states that she or those acting on her behalf have been unable to verify documents there is no way that this can be challenged if the details are not provided to the appellants. It is said at paragraph 12 of the grounds that "there has been no allegation of deception or wrongdoing against the appellants other than this claim by the Home Office that the bank did not reply to a request for verification" and it is said also that the judge appeared to give no weight to the evidence from the bank that the funds were there.

11. Complaint is made of the finding that the letter from the bank provided at the hearing merely confirmed what the bank had stated previously because it is said that "this letter confirmed the presence of the funds at the time of the application and was just further evidence to reconfirm this in the face of the respondent's allegations" and that the judge was obliged to consider this letter as part of the evidence "that went to the very root of this appeal".

12. Before me on behalf of the appellants Mr Bellara relied on his grounds and attempted to reinforce them by means of succinct and cogent argument. He reminded the Tribunal that the respondent had not made a formal allegation of forgery and that all that was said was that she could not verify the documents. Everything was said to be "inconclusive" and the guiding principle in a case such as this should be that "he who asserts must prove". In this case the respondent said that she could not verify the documents and therefore what should have happened was that the further documents which the appellants had produced should have been reconsidered by the respondent; they should have been remitted back to the respondent to reconsider. If verification had been attempted but had not resolved the situation the appellants should have been given an opportunity to address that position. There was no Section 108 notice (this is a reference to the provisions under Section 108 of the Nationality, Immigration and Asylum Act 2002 concerning investigation of documents alleged to be forged where disclosure is said to be contrary to the public interest) and in this case a Section 108 notice should have been served. Essentially, if the respondent had documents which she was not prepared to disclose, she should have said what those documents were. The difficulty the appellants were in is they could not rebut the assertion. The appellants should not have been punished by the respondent's inability to verify the documents.

13. On behalf of the respondent Mr Jack submitted that the judge's decision was correct in law; there was no irrationality or perversity. The judge had the GCID record sheet before him. He considered this document and the subsequent letter from the bank and there was no error of law in his approach when considering what weight to give to these documents. There was no allegation of forgery and therefore no general paragraph 322 grounds of refusal so there was nothing to stop these appellants reapplying, if indeed they had verifiable evidence which they were able to produce. Further, because this was a PBS appeal, Section 85A of the 2002 Act applied and subsequent evidence such as the later letter from the bank was not admissible in this appeal.

14. In reply Mr Bellara submitted that although the judge may have "considered" the subsequent letter he really ought to have given the document closer consideration. If documents were produced after the hearing which may be verifiable then the appellant should have had an opportunity of having that document verified.

Discussion

15. In my judgment the determination of Judge Khan, while short, did not contain any error of law; I set out my reasons below and shall also deal briefly with the submissions which were made. I consider it right that I deal first of all with the submission made on behalf of the respondent that by virtue of Section 85A of the Nationality, Immigration and Asylum Act 2002 the subsequent letter from the bank was not admissible. The starting point is Section 82 which provides as follows:

"82. *Right of Appeal: General*

(1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal.

(2) In this part "immigration decision" means – ...

(d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain."

16. It is accordingly clear that because this is an immigration decision pursuant to Section 82(2)(d) the appellants may appeal. This appeal has to be brought on one of the grounds set out in Section 84(1) of which the relevant parts provide as follows:

"84. *Grounds of appeal*

(1) An appeal under Section 82(1) against an immigration decision must be brought on one or more of the following grounds –

(a) that the decision is not in accordance with Immigration Rules;

...

(e) that the decision is otherwise not in accordance with the law;

(f) that the person taking the decision should have exercised differently a discretion conferred by Immigration Rules...".

17. The matters to be considered are then set out in Section 85 of which the relevant parts provide as follows:

"85. *Matters to be considered*

(1) An appeal under Section 82(1) against the decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under Section 82(1).

...

(4) On an appeal under Section 82(1) ... against a decision the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of decision.

(5) But sub-Section (4) is subject to the exceptions in Section 85A."

18. The relevant provisions of Section 85A are as follows:

"85A. *Matters to be considered: new evidence: exceptions*

(1) This section sets out the exceptions mentioned in Section 85(5).

...

(3) Exception (2) applies to an appeal under Section 82(1) if –

(a) the appeal is against an immigration decision of the kind specified in Section 82(2)(a) or (d),

(b) the immigration decision concerned an application of a kind identified in Immigration Rules as requiring to be considered under a "points-based system", and

(c) the appeal relies wholly or partly on grounds specified in 84(1)(a), (e) or (f).

(4) Where exception (2) applies the Tribunal may consider evidence adduced by the appellant only if it –

(a) was submitted in support of, at the time of making, the application to which the immigration decision related,

(b) relates to the appeal insofar as it relies on grounds other than those specified in sub-Section (3)(c),

(c) is adduced to prove that a document is genuine or valid, or

(d) is adduced in connection with the Secretary of State's reliance on a discretion under Immigration Rules, or compliance with the requirement of Immigration Rules, to refuse an application on grounds not related to the acquisition of 'points' under the 'points-based system'...."

19. This is an appeal brought under Section 82(1) in respect of an immigration decision as defined in Section 82(2)(d) and this is also an appeal which is subject to the provisions of Section 84. The grounds of appeal are indeed that the decision is not in accordance with the Rules (as provided under Section 84(1)(a)) or alternatively that it is otherwise not in accordance with the law (an argument advanced forcefully before me at this hearing by Mr Bellara) as provided under Section 84(1)(e). It is accordingly necessary to consider what is set out within Section 85(4) and

(5) which is effectively that although the Tribunal may consider any evidence relevant to the substance of the decision including evidence concerning a matter arising after the date of decision this is subject to the exception in Section 85A. The exception that is relevant in this case would be exception (2) as provided by Section 85A(3) because this is an immigration decision of the kind specified in Section 82(2)(d) being a refusal to vary a person's leave. It is a decision concerning an application of a kind identified in the Rules as requiring to be considered under the points-based system and the appeal also relies wholly or partly on the grounds specified in Section 84(1)(a) and (e). For this reason the provisions of Section 84A(4) bite and accordingly the Tribunal may only consider evidence adduced by the appellants if:

(a) it was submitted in support of and at the time of making the application (which was not the case in respect of the subsequent letter), or

(b) it relates to the appeal insofar as it relies on grounds other than those specified in Section 84(1)(a), (e) or (f) (which is not the case here), or

(c) it is adduced to produce that a document is genuine or valid (which is the key question here), or

(d) is adduced in connection with the respondent's reliance on either a discretion under Immigration Rules or compliance with the requirement to refuse an application on grounds not related to the acquisition of points.

This does not apply in this case either.

20. The basis upon which Mr Jack on behalf of the respondent asserted that the subsequent evidence should not be admitted is that this evidence could not properly be said to have been adduced to prove that "a document is genuine or valid" and that is the only basis upon which the subsequent evidence would be admissible. When asked as to what was the difference between "genuine" and "valid" Mr Jack submitted that while a document that was not genuine obviously would not be valid either, the term "valid" was wider because it included documents which, while genuine, did not satisfy requirements under the Rules, for example because they did not cover the specified period. So for example, where an applicant under the points-based system (which covered many applications other than applications in the category under which these appellants were applying) was required to provide bank statements for a particular period, a document provided might be genuine but because it did not cover the necessary periods would not be "valid".

21. I asked Mr Jack whether or not this category could therefore include genuine documents which should be treated as not valid because they had not been "verifiable" to which he replied that the words "verifiable" and

"valid" were treated differently in the Rules but he could not take this argument any further at this time.

22. Without hearing more considered argument on this point, in light of my other findings below, I do not consider it is necessary for me to reach any definitive conclusion as to whether or not the use of the word "valid" is sufficiently wide to include "verifiable". Accordingly, I make it clear that for the purposes of this determination only and not because I am making a formal finding to this effect which might be relied upon by other applicants in other cases, I will consider this appeal on the basis that the subsequent letter from the bank at the very least might be admissible. On this basis I now turn to consider Judge Khan's determination.

23. Although brief, in my judgment this determination is sufficiently reasoned to satisfy the requirements that a determination should contain within it sufficient findings to enable both parties to understand the basis upon which the decision was reached.

24. Judge Khan considered all the evidence put before him and gave considerable weight to the fact that the respondent had made attempts to verify the information provided but had been unable to do so. He also gave consideration to the subsequent letter provided by the bank but the weight he gave this letter was not great because as he noted it was mostly in similar terms to the earlier letter provided and made no reference to any enquiries which had been made by the respondent.

25. I have considered whether it is implicit in his then stating that this letter could be used in any fresh application the appellants may choose to make that he did not consider it in the present appeal, but have concluded that this cannot be implied. In my judgment he did consider this evidence and gave it the weight he considered appropriate for the reasons which he gave.

26. I note that when granting permission to appeal First-tier Tribunal Judge Fisher stated at paragraph 4 that "it is arguable that the judge erred in law in concluding that the fact that the respondent had not been able to verify the bank letter should weigh heavily against the appellants, especially when there was apparently no evidence in support" and that "there would certainly have been insufficient evidence to substantiate an allegation of fraud" but having considered this argument I find that he did not err in law in so concluding. What weight to attach to particular pieces of evidence were for the judge and there is no obligation on the respondent to provide details of confidential enquiries she or those working for her undertake in order to verify documents which have been produced. In order to operate an effective system of immigration control the respondent must from time to time keep her sources confidential and while there may be cases in which a judge finds on the facts that even though the respondent claims to have been unable to verify a document, that document was nonetheless verifiable, it is for a judge to decide on a case-by-case basis what weight to place on evidence that despite trying to verify a particular document,

the respondent has been unable to do so. This is not a case where the requirements of fairness include a requirement to make the system more complicated. In this case, the respondent put evidence before the Tribunal that she had attempted to verify the documents and had been unable to do so and on the basis of this evidence, having taken into account the further evidence provided by the appellants, the judge found and was entitled to find that the material provided was not verifiable. It follows that this appeal must be dismissed and I so order.

Decision

There being no error of law in Judge Khan's determination the appellants' appeal is dismissed.

Signed:

Upper Tribunal Judge Craig Date: 11 August 2014