



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/13287/2013

THE IMMIGRATION ACTS

Heard at Field House
On 10 July 2014

Determination Promulgated
On 28 July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR AJITKUMAR RAMMILAN YADAV

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Collins, Counsel, instructed by Acculegal Solicitors
For the Respondent: Mr E Tufan, Specialist Appeals Team

DETERMINATION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing his appeal against the decision of the respondent dated 26 March 2013 to refuse to vary his leave to remain in the UK as a Tier 1 (Entrepreneur) Migrant, and against her concomitant decision to remove him by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. The First-tier Tribunal did not make an anonymity order, and I do not consider that such an order is warranted for these proceedings in the Upper Tribunal.

2. The appellant initially applied for leave to remain as a Tier 1 (Entrepreneur) Migrant on the basis that he had access to over £200,000 in cash, which was held in foreign bank accounts. In his application form he said he was part of an entrepreneurial team, and he identified as his other member of the entrepreneurial team Mr Vangari Kumar, a fellow Indian national. Mr Kumar made his application on 8 August 2012, and the appellant made his application on 25 August 2012.
3. Prior to a decision being made on the appellant's application, he provided a letter stating his circumstances had changed and that he had invested a sum slightly in excess of £50,000 in GM Enterprises PVT Limited, which had recently taken over a filling station in Sunderland. The appellant said he had been offered the position of director in the company. Appendix I of the respondent's bundle contains a receipt dated 25 October 2012 issued by the company to the appellant, confirming that the company has received a total sum of £50,034 from him.
4. On 26 March 2013 the respondent refused the appellant's application inter alia under paragraph 322(1A) of the Rules on the basis that the documents provided by him in support of Access to Funds were false.

The Decision of the First-tier Tribunal

5. The appellant's appeal came before Judge Adio to be determined on the papers at Hatton Cross on 4 April 2014. He dismissed the appeal under the Rules.

The Application for Permission to Appeal

6. The appellant instructed Acculegal Solicitors to assist him in his application for permission to appeal to the Upper Tribunal. His case was that, despite relying on the same source of funding as Mr Kumar, he had submitted a separate set of documents, including a letter from Oriental Bank of Commerce dated 20 June 2012, a separate letter from Central Bank of India dated 9 July 2012 and a letter from the State Bank of Hyderabad dated 23 June 2012. On or around 12 November 2012 the appellant had varied his initial application by way of submitting a change of circumstances form. This was due to investment of his own money in GM Enterprise PVT Limited. He had thereby severed himself from the entrepreneur team, which the respondent acknowledged.
7. In refusing the application on 26 March 2013, the respondent had relied on bank documents submitted by Mr Kumar instead of the bank documents submitted by the appellant. It was the documents submitted by Mr Kumar that had two additional sentences added to it at the bottom right-hand corner which were not authenticated by the issuing party. The bank documents submitted by the appellant did not have these additions.
8. The appellant sought permission to appeal in relation to the refusal under paragraph 322(1A) on the following basis:

- (a) the judge had erred in law in failing to first ascertain which version of documents was actually submitted to the respondent in support of the appellant's Tier 1 entrepreneur application;
 - (b) the judge had erred in law in considering documents that were not submitted by the appellant in support of his application and adjudicating that the respondent had discharged her burden under paragraph 322(1A) to establish that they were false;
 - (c) the finding that the appellant had contravened paragraph 322(1A) of the Rules had had a detrimental effect on the appellant's right to remain and on all the appellant's future applications.
9. The judge had also erred in law in failing to consider the appellant's private life under Article 8 ECHR when the appellant had invested heavily for over five years in his education, and now in business.
10. Thirdly, the judge had erred in law in failing to adjudicate at all on the erroneous removal directions of the respondent under Section 47 of the Immigration, Nationality and Asylum Act 2006.

The Grant of Permission to Appeal

11. On 22 May 2014 Designated Judge Zucker granted permission to appeal for the following reasons:

"The grounds, which I accept have been lodged in time, submit the judge's analysis of the issues arising under paragraph 322(1A) are flawed. I have some difficulty reconciling what appears at paragraph 12 with what appears at paragraph 16 of the determination. It is not clear whether the judge found in favour or against the appellant on this important issue."

The Hearing in the Upper Tribunal

12. At the error of law hearing before me, I found that an error of law was made out with regard to the judge's disposal of the question whether the respondent had discharged the burden of proving that the application had been rightly refused under paragraph 322(1A) of the Rules, and my reasons for so finding are set out below. I then received submissions from both Mr Collins and Mr Tufan as to how the decision should be remade. It was agreed that the best course was to remit the appellant's application for further consideration by the Secretary of State, for reasons upon which I expand below.

Reasons for Finding an Error of Law

13. The decision of Judge Adio on paragraph 322(1A) discloses a clear error of law as he has made inconsistent findings.

14. There is no difficulty in the judge's finding at paragraph 11 that the respondent has not discharged the burden of proving that the certificate of balance from the Central Bank of India is false. The judge does not depart from this finding later in his determination.
15. But at paragraph 12, he finds the respondent has discharged the burden of proof with regard to the certificate of balance for the State Bank of Hyderabad. At paragraph 13 the judge also finds that the respondent has made out the case under paragraph 322(1A) of the Rules with regard to the certificate of balance for the Oriental Bank of Commerce.
16. At paragraphs 14 and 15 the judge addresses the appellant's explanation that there is "a big difference" between the certificates he submitted and the certificates mentioned by UKBA. At the end of paragraph 15, the judge says as follows: "I prefer the account in the DVR in view of my analysis above."
17. But at the beginning of paragraph 16 he finds that the respondent has not discharged the burden of proof that the appellant submitted false documents as claimed by the respondent. He says the appellant has been able to highlight the differences in the certificates he submitted and more importantly the respondent has not provided any document verification report or communication between the relevant banks to show that the appellant's documents are false. He says he is therefore willing to give the appellant the benefit of doubt in finding that the appellant had submitted documents to show that he had access to funds as required. The same would apply, he finds, to funds held in the regulated financial institution. He therefore finds that the appellant satisfied the requirements with regard to access to funds.
18. The judge goes on to find that the appellant does not however satisfy the requirements with regard to proof of investment of funds, which was the basis on which the appellant varied his application in November 2012. He also finds that the appellant did not meet the requirements of Appendix C on the basis of the bank statement which he provided with the application. The appellant sought to rely on two other bank statements to show that he met the maintenance requirement of Appendix C, but as these had been provided after the date of application, the judge held that he could not take these into account.
19. It is not contended by way of appeal that the judge erred in law in his findings under Appendix C, or in finding that the appellant had not provided the specified documents to show that he qualified for leave to remain on the alternative basis of investment of £50,000 in a new or existing business. However there are Robinson obvious errors in these findings.
20. The logic of the positive finding made at paragraph 16 is that the appellant can rely on the original basis of his application, which was access to at least £200,000 in funds. So it does not matter that the appellant has not proved investment of £50,000. As for compliance with Appendix C, while the general rule is that the applicant has to provide the specified bank statements with the application, the voluntary provision

of additional bank statements after the date of application will not necessarily be excluded from consideration, having regard to the evidential flexibility policy codified in paragraph 245AA of the rules.

21. Alternatively, as the Section 47 removal decision was made before an amendment to Section 47 came into effect on 8 May 2013, the Section 47 removal decision against the appellant was unlawful following **Adamally and Jaferi**. So, absent the adverse finding under paragraph 322(1A), there would be no impediment to the appellant making a fresh application as a Tier 1 (Entrepreneur) Migrant, relying on specified documents that he failed to provide with his original application.

Conclusion

22. For the above reasons, the decision of Judge Adio contains an error of law such that the decision appealed against should be set aside and remade.

The Remaking of the Decision

23. As I indicated at the outset of the hearing, the appellant's appeal against removal is allowed on the ground that it was not in accordance with the law, following **Adamally and Jaferi**.
24. With regard to the decision to refuse to vary the appellant's leave, in the normal course of events the appropriate course would be to remit the appeal for a de novo hearing in the First-tier Tribunal to determine inter alia the crucial question of whether the refusal under paragraph 322(1A) is made out.
25. But given the nature of the appellant's case in rebuttal, it is in accordance with the overriding objective that the Secretary of State should reconsider the refusal under paragraph 322(1A). The Secretary of State is best placed to ascertain whether the appellant supplied a different set of bank letters with his application, as detailed in paragraph 14 of Judge Adio's determination; and, if so, the Secretary of State should be the primary decision-maker on whether these different bank letters showed access to funds, and on whether to exercise discretion in respect of acknowledged defects in the original application with regard to Appendix C.
26. It is clear from the document verification report in the respondent's bundle that the documents in respect of which verification was sought were documents provided by Mr Kumar. So a lawful decision on whether documents provided by the appellant trigger a refusal under paragraph 322(1A) remains outstanding.

Decision

The decision of the First-tier Tribunal dismissing the appellant's appeal contained an error of law, and accordingly the following decision is substituted: the appellant's appeal against removal is allowed on the ground that the Section 47 removal decision was not in accordance with the law; and the appellant's appeal against the decision to refuse to vary

his leave to remain is allowed on the ground that it is not in accordance with the law, and the application is remitted to the Secretary of State for further consideration.

Signed

Date

Deputy Upper Tribunal Judge Monson