



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/13316/2013

THE IMMIGRATION ACTS

Heard at Field House
On 2 June 2014

Determination Promulgated
On 9 June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

ANKUSH ANKUSH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Biggs of Counsel instructed by Berkleys Solicitors
For the Respondent: Mr P Nath of the Specialist Appeals Team

DETERMINATION AND REASONS

The Appellant

1. The Appellant is a citizen of India born on 20 April 1987. On 9 February 2009 he arrived with leave to enter as a student. He was granted further leave expiring on 13

December 2012 to remain as a Tier 1 (Post-Study Work) Migrant until 13 December 2012. Before expiry of that leave, on 26 October 2012, he applied for further leave as a Tier 1 (Entrepreneur) Migrant under the Points-Based System.

2. On 15 April 2013 the Respondent refused the application under paragraph 245DD(b) of the Immigration Rules and by way of reference to Appendix A: Attributes because she was not satisfied the Appellant had shown he had access to sufficient funds as required under the Immigration Rules. She declined to consider whether the Appellant met the other requirements of the Rules, relying on paragraph 245DD(l). The Respondent gave no other reasons in the notice of decision for refusing the application and went on to make a decision to remove the Appellant by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. It would appear from the Tribunal file that this decision followed an application by the Appellant for permission to bring judicial review proceedings which was settled by consent.

The original appeal and determination of the First-tier Tribunal

3. On 29 April 2013 the Appellant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended. The grounds refer to the funds which the Appellant had available and that they were sufficient to meet the requirements of the Immigration Rules. The grounds also address the question of evidence of business activity with particular reference to information filed at Companies House and contracts for services offered by the Appellant's business. They also make a general non-specific reference to the jurisprudence on the review of the exercise or failure to exercise a discretion vested in the Respondent in *Ukus (discretion: when reviewable) [2012] UKUT 00307 (IAC)*.
4. By a determination promulgated on 6 February 2014 Judge of the First-tier Tribunal Warren Grant found the Appellant had correctly claimed that he could show third party support to the extent of £50,000 and so could meet the requirement for Access to Funds of provision (d) of Table 4 of Appendix A.
5. He went on to note the declaration signed by the Appellant and those funding him did not disclose any landline telephone number for the business but did show a mobile number. He appeared not to consider this omission of as much importance as what he subsequently described as the significant omission from the declaration of an explanation how the Appellant and those funding him were related, if at all. He went on to state he did not consider himself bound by paragraph 245AAA of the Immigration Rules. I take this to be a reference to paragraph 245AA in relation to these matters. He then addressed the Respondent's concern about the Appellant's failure to show that relevant information had been filed at Companies House. In this respect he found:-

In this case the receipt by the Respondent of an application to register should have triggered either an internet search or a request for further information under 245AAA to see whether the application to register had resulted (as one would normally expect) in an actual registration.

Contrary to his earlier statement the Judge at this point clearly did consider paragraph 245AA of the Rules. Then, without further comment, he went on to dismiss the appeal in its entirety.

6. The Appellant sought permission to appeal. The grounds are lengthy and not all of them are applicable such as references to *SSH D v Rodriguez [2014] EWCA Civ 2* and the complaints in paragraph (vii) that the Respondent failed to make further enquiries. The grounds make generic references with citation of case law to the duty to give reasons and what constitutes a material error of fact. Generally, they fail to focus on the specific treatment of the appeal in the Judge's determination.
7. On 16 April 2014 Designated Judge of the First-tier Tribunal French gave permission to appeal, noting the Judge had found in favour of the Appellant in several respects and it was arguable he should have found the Respondent was in error in failing to seek clarification of other matters under paragraph 245AA. Further, the Judge had referred at paragraph 11 to "two gaps in the evidence" but had not stated what these were. Additionally, he had failed to make an express finding on the Respondent's refusal of the application because the Appellant had failed to produce contracts to show he was trading.

The Upper Tribunal Hearing

8. At the start of the hearing Mr Biggs for the Appellant submitted a detailed and extensive skeleton argument setting out the relevant provisions from the Immigration Rules. The skeleton argument identified the Judge's findings that the Appellant had in fact shown access to sufficient funds as required by the Rules. This finding showed the Respondent's decision had been made on the basis of a material mistake of fact or failure to have regard to material matters. Consequently the Respondent had failed lawfully to exercise her discretion. So, following the determination in *Ukus*, the Judge should have found the Respondent's decision was not in accordance with the law and have remitted the matter to the Respondent for further consideration.
9. In the course of discussion with the advocates, I indicated I considered the reference made by the Judge in paragraph 11 of his determination to "two gaps in the evidence" was to the two omissions he had identified in paragraph 10 namely, the absence of a landline telephone number and of evidence how those who signed the declaration were related, if at all.
10. Mr Biggs continued that the Respondent had not taken issue with the apparent lack of reference to a landline telephone number and the Judge should not have taken this point on his own motion, having already found the decision in relation to Appendix A: Attributes - Access to Funds to have been not in accordance with the law. Similarly, the Respondent had not raised the point that the declaration did not show how those signing it were related or connected.
11. Further, the Judge had not addressed the Respondent's concern about lack of evidence of contracts detailing the services which the business offered. In any event

the law on this had been clarified (after the hearing before the Judge) in the recent decision in *Shebl (Entrepreneur: proof of contracts) [2014] UKUT 216 (IAC)*.

12. I indicated to the parties that I found the Judge's determination contained a material error of law and accepted the submissions of Mr Biggs in his skeleton argument and at the hearing. Having found the Respondent had made her decision on the basis of a material error of fact the Judge should have concluded the decision was not in accordance with the law and remitted it. Mr Nath for the Respondent raised no objection to proceeding on that basis.
13. Consequently, I find the First-tier Tribunal's determination contained a material error of law in that having found the Respondent's decision to have been based on a material error of fact about a major requirement of the Immigration Rules for Tier 1 (Entrepreneur) Migrant applicants the Judge should have remitted the matter to the Respondent for further consideration.

Anonymity

14. There was no request for an anonymity direction and having considered the appeal I find that none is required.

DECISION

The First-tier Tribunal's determination contained a material error of law in that having found the Respondent's original decision to have been vitiated by a material error of fact the Judge failed adequately to deal with that finding by not concluding the Respondent's decision had been made other than in accordance with the Immigration Rules and the law and failed to remit the matter to the Respondent for further consideration.

The appeal of the Appellant is allowed to the limited extent that the whole matter including the issue of third party funds is remitted to the Respondent for further consideration.

Signed/Official Crest

Date 06. vi. 2014

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

TO THE RESPONDENT: FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award.

Signed/Official Crest

Date 06. vi. 2014

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal