



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/19510/2013

THE IMMIGRATION ACTS

Heard at Field House
On 30 July 2014

Determination Promulgated
On 08th Aug 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS RUTABEN TARUNKUMAR PATEL
(NO ANONYMITY ORDER MADE)

Respondent/Claimant

Representation:

For the Appellant: Mr S Walker, Specialist Appeals Team
For the Respondent/Claimant: Mr Bellara, Counsel (Direct Access)

DETERMINATION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the claimant's appeal against refusal of leave to remain as a Tier 1 (Entrepreneur) Migrant on the ground that the decision was not in accordance with the law, and that a lawful decision on her Tier 1 application remained

outstanding. 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 claimant is a national of India, whose date of birth is 5 December 1988. She first entered the United Kingdom on 24 December 2010 with valid entry clearance as a student. Leave ran until 27 November 2012, on which date the claimant made her Tier 1 application. She did so, on the basis that she had access to £200,000 in funds from third party funders in India. There were four funders two of them had a joint account with the Bank of Maharashtra. The other two funders had individual accounts with the same bank. The holders of the joint account were Mr Kunalkumar Babubhai Vaghasiya ("KBV") and Mr Babubhai Veljibhai Vaghasiya ("BVV").
3. On 17 May 2013 the Secretary of State gave her reasons for refusing the claimant's application. As evidence of access to at least £200,000 to invest in business in the UK she provided third party documents from three sources. But the evidence she provided was not acceptable. She claimed to have access to sums of £128,000 from KBV and BVV. But the bank letter provided was a scanned copy and not an original copy. Also, the letter did not state that the bank was regulated. The third party declaration was not signed by her, and although she provided a separate declaration this was not acceptable. Also, while KBV and BVV had provided a legal representative letter, this did not contain the identification number, place of issue or the date of issue and expiry. Although a copy of an identity card had been provided, this was not acceptable sufficient evidence as per paragraph 41-SD(b)(ii) of the Rules.
4. Similar, but not identical, objections were raised with regard to the evidence of funding from Mr K Chaudhari ("KDC") and from Mr D Chaudhari ("DJC"). The bank letter provided was a scanned copy and not an original copy. Also the letter did not contain the address of the third party, nor did it state the bank was regulated. The third party declaration was not signed by the claimant.

The Hearing Before, and the Decision of, the First-tier Tribunal

5. The appellant's appeal came before Judge Seelhoff sitting in the First-tier Tribunal at Hatton Cross on 23 April 2014. Mr Bellara appeared on behalf of the claimant, and Miss Leyshon, Presenting Officer, appeared on behalf of the Secretary of State. At paragraph 9 of his subsequent determination, Judge Seelhoff records that the appellant's representative submitted a bundle which included an updated lawyer's letter from India, an updated letter from the bank, and a copy of the covering letter under which the original documents were sent to the respondent by recorded delivery on 24 December 2012. There was also a recorded delivery receipt for the same.
6. It is recorded at paragraph 10 of the determination that in the course of the hearing it became apparent that the original documents attached to the letter of 24 December 2012 were all on the Home Office file, so it was clear that the letter and enclosures had been received by the Home Office. There was a discussion whether these

original documents were admissible. Miss Leyshon submitted that only documents sent with the application were admissible.

7. At paragraph 12 the judge observes that Annex P to the Immigration Rules contained a list of banks and financial institutions in India which are specifically recognised, and that the list includes Maharashtra Bank.
8. At paragraph 13 the judge records that, during further oral argument, he asked Miss Leyshon if she is willing to concede that the original documents held on the Home Office file were genuine. She said she did not believe that they had been examined by those instructing her and that she was not in a position to accept that they were genuine documents. Given that she was not in a position to accept the documents as genuine, he indicated that he was in agreement with the suggestion of Mr Bellara that he ought to find that the decision was not in accordance with the law.
9. The judge went on in his subsequent determination to explain the rationale for this finding. At paragraph 15 he cited sub-paragraphs (a) and (b) of paragraph 245AA as they stood at the date of application. At paragraph 16 he held there had not been compliance with sub-paragraph (b)(iii) as the UK Border Agency had not contacted the applicant or his representative in writing, to request the originals. Had the procedure been followed, the Secretary of State would have been directed to the letter of 24 December which had already been submitted and which had clearly already found its way to the Home Office file. The decision was flawed procedurally as a result of the failure to follow the provisions in the Immigration Rules which specified steps to be taken in the decision making process. Because the Home Office had not formally examined the original documents, it would not be appropriate to proceed to allow the appeal outright as their authenticity needed to be tested. On his reading of the documents, the Secretary of State also needed to consider whether it was appropriate to waive the requirement that the bank letter had stated that Maharashtra Bank was regulated in India, given that the bank was expressly acknowledged and recognised in the Immigration Rules.

The Grant of Permission to Appeal

10. On 25 June 2014 First-tier Tribunal Fisher granted permission to appeal for the following reasons:

In his determination, the judge stated, at paragraph 11, that where copies of documents had been sent with an application, the case worker was under an obligation to contact the appellant to request the originals. However, that ignores paragraph 245AA(c) of the Rules, which states that such requests will not be made where the application would be refused for other reasons. At paragraph 12, the judge observed that legal letters from India did not meet the evidential requirements, but decided that documents attached to them should be read as a whole. It is arguable that, in so doing, the judge replaced the requirements of paragraph 41-SD with his own interpretation. It is arguable that the judge ought to have dismissed the appeal, rather than allowing it to the extent indicated.

The Hearing in the Upper Tribunal

11. At the hearing before me, I received submissions from Mr Bellara and Mr Walker on the question of whether the decision was vitiated by a material error of law. I ruled in the Secretary of State's favour on this question, and indicated my reasons for doing so in short form. My extended reasons are set out below. On the question of remaking, Mr Bellara submitted that the decision should be remade in his client's favour. He relied, among other things, on a modification to paragraph 245AA of the Rules which he said had been introduced in February 2014. He submitted that, as from that date, paragraph 245AA provided inter alia as follows:

- (d) if the applicant had submitted a specified document:
 - (i) in the wrong format; or
 - (ii) which is a copy and not an original document; or
 - (iii) which does not contain all of the specified information, but the missing information is verifiable from:
 - (1) other documents submitted with the application,
 - (2) the website of the organisation which issued the document, or
 - (3) the website of the appropriate regulatory body; the application may be granted exceptionally, providing the Entry Clearance Officer, Immigration Officer or the Secretary of State is satisfied that specified documents are genuine and the applicant meets all the other requirements.

12. Although the above provision was not in force at the date of application or date of decision, Mr Bellara submitted this did not matter as sub-paragraph (d) merely codified a pre-existing discretion which the case worker could have exercised when reviewing the documents provided by the appellant.

Reasons for Finding an Error of Law

13. As I informed the parties at the hearing, the primary ground for finding an error of law is that the judge failed to take into account paragraph 245AA(c) which at all material times provided as follows:

The UK Border Agency will not request documents where a specified document has not been submitted; or where the UK Border Agency does not anticipate that addressing the omission or error referred to in sub-paragraph (b) will lead to a grant because the application will be refused for other reasons.

14. So the judge failed to direct himself that the obligation under sub-paragraph (b) to request originals was overridden where the UK Border Agency did not anticipate that the provision of originals would lead to a grant of leave, because the application would be refused for other reasons.

15. The appellant's application stood to be refused for other reasons, as there had not been full compliance with the requirements of paragraph 41-SD with regard to the content of the bank letters and third party declarations. So, on the face of it, there was no breach of paragraph 245AA(b) by the Secretary of State not requesting the originals of the specified documents relied on in support of the application. Thus, the judge erred in law in finding that the Secretary of State was in breach.
16. Mr Bellara submitted that the judge's error was not material, as the outcome could be justified for other reasons not specifically articulated by him. But since the sole ground of the judge's finding that the decision was not in accordance with the law was the Secretary of State's alleged failure to comply with the obligation under subparagraph (b) of paragraph 245AA, such arguments are only relevant to the question of how the decision should be remade.

The Remaking of the Decision

17. Mr Bellara submitted that the Secretary of State ought to have taken into account the original documents provided under cover of a letter of 24 December 2012, and that as a result of her not doing so, the claimant was deprived of the possibility of discretion being exercised in her favour with regard to non-compliance with the other requirements identified in the refusal letter. In short, if the Secretary of State had been persuaded of the authenticity of the original documents, she might have been prepared to waive compliance with the other requirements.
18. In order for an applicant to obtain the relief of a finding that the decision is not in accordance with the law, it must first be established that the applicant has been a victim of common law unfairness; and/or that there has been a breach of evidential flexibility principles, as codified in paragraph 245AA or otherwise.
19. Since it was a reasonable exercise of discretion, and in accordance with paragraph 245AA, for the Secretary of State not to request the originals of the specified documents, and not to take into account the documents provided under cover of the letter of 24 December 2012, the claimant has arguably not established a prima facie case.
20. But I have also asked myself the question whether the deficiencies in the copy specified documents provided by the claimant were minor ones, such that there was a legitimate expectation that the Secretary of State would overlook them or at least give her the opportunity to provide the missing information.
21. Mr Bellara referred me to the published IDIs on PBS evidential flexibility, valid as from 28 March 2014. These provides as follows on the topic of obtaining additional information:

Before you request additional evidence you must have enough reason to believe the information exists. This is limited to cases where:

- documents (for example bank statements) omitting from a series;

- photocopies of the required documentation have been received; or
 - a document is in the wrong format: “wrong format” covers documents which contain all of the substantive information required by the Immigration Rules but are not laid out in the way described in the Rules. For example, where a specified document should be submitted on letter headed paper ... you must refuse the application if it would fall for refusal even if the missing information was provided, or if a minor error was corrected. You must not request any missing information if it cannot change the decision on the case.
22. Mr Bellara initially submitted that the missing information relating to the contact details of the third party funders fell into the category of a specified document being provided in the wrong format. But in the light of the clarification in the IDIs as to what is constituted by a document being in the wrong format, he did not maintain the stance.
23. Instead, he relied on sub-paragraph (d) paragraph 245AA which was introduced into the Rules on 1 October 2013 (not February 2014). I am prepared to accept that this provision codifies a pre-existing discretion, and that this provision assists the claimant on the evidential issue of the bank being regulated. The bank letter was found not to contain all of the specified information, but the missing information about the bank being regulated is verifiable from Annex P (and presumably from the bank’s website).
24. But the missing information in respect of the contact details of all four party funders is not verifiable from other documents submitted with the application or from a relevant website. Moreover, as I canvassed with Mr Bellara at the hearing, the Indian lawyer has on the face of it failed to establish satisfactorily the identity of KBV and BVV. The document relied on by the Indian lawyer as establishing their identity (see E2 of the Home Office bundle) is not on the face of it an identity document. It is a document issued by the Indian tax department, not an identity card, as was provided by the other two funders. While the document issued by the tax department refers to both KBV and BVV, it only contains a photograph of one individual. The photocopied document at E2 also only contains the signature of KBV.
25. At the hearing before me, it was also established that the original of the document at E2 had not in fact been provided under cover of the letter of 24 December 2012. What was provided was merely another photocopy.
26. In conclusion, the deficiencies in the specified documents were not minor ones such as arguably to trigger an obligation on the part of the Secretary of State to seek further information or documents from the claimant before making a decision on her application. So she does not discharge the burden of proving that the decision appealed against was not in accordance with the Rules or was otherwise not in accordance with the law.
27. No alternative claim under Article 8 was pursued before me.

Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: this appeal by the claimant against the refusal of leave to remain as a Tier 1 (Entrepreneur) Migrant is dismissed under the Rules.

Signed

Date

Deputy Upper Tribunal Judge Monson