IAC-TH-LW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers:
IA/20096/2013

IA/20099/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 20th August 2014	**On 12th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

RAJIB DEBNATH
MRS ESITA BHOWMIK

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr F Shibli (Counsel)
For the Respondent: Mr S Walker (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. On 14th May 2013, the appellants, who are husband and wife and citizens of Bangladesh, received decisions from the Secretary of State, following their application for leave as a Tier 1 (Entrepreneur) Migrant (the first appellant) and as the partner of a Tier 1 Migrant (the second appellant). On that day, the Secretary

of State decided to refuse to vary the appellants' leave and to remove them from the United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. Their appeals against the adverse decisions were dismissed by First-tier Tribunal Judge Wellesley-Cole ("the judge") in a determination promulgated on 3rd June 2014.

3. The Secretary of State concluded that the requirements of the Tier 1 (Entrepreneur) scheme were not met. In particular, Table 4(d) required evidence of registration with HMRC as a self-employed person or registration of a new business or as a director of an existing business and evidence of business activity. The appellants relied upon an e-mail to the first appellant from HMRC but this did not meet the relevant criteria. Moreover, one or more contracts showing trading was required to be provided with the application. No contracts were submitted and there was nothing in the application for further leave to show that any existed. As such a contract would not form part of a series of documents, the Secretary of State decided not to request any additional evidence under paragraph 245AA of the Rules.

4. Before the judge, reliance was placed upon a letter from the Secretary of State dated 15th March 2013, in which the first appellant was advised that following changes to the rules taking effect from 31st January 2013, and the introduction of a "genuine entrepreneur" test and a change to the minimum funds requirement, the UK Border Agency would contact him in the coming weeks to advise how the changes would affect his application and what steps, if any, would be needed before a decision were made.

5. The judge found that specified documents were not submitted with the application for further leave, as the first appellant admitted. She found that the letter to him dated 15th March 2013 did not substantially advance his case and there was no duty on the Secretary of State to pursue that letter or advise him how the changes might affect his application. She took into account the decision of the Court of Appeal in Rodriguez, found that the Secretary of State was not obliged to offer the appellant a further opportunity to adduce evidence and that the March 2013 letter did not give rise to a legitimate expectation that the application for leave would be decided in any particular way. In paragraph 14 of the determination, there is the following in this context: "The March 2013 letter is not only post-decision but I find does not raise a legitimate expectation on the part of the appellants in relation to the outcome of their applications." The appeals were dismissed.

6. The appellants applied for permission to appeal. Reliance was again placed on the 15th March 2013 letter. The first appellant understood that the Secretary of State would contact him before a decision was made and waited for such contact to occur, before submitting further documents. The judge erred in describing the letter as "post-decision". In a second ground, it was contended that the Secretary of State's procedure was unfair and procedurally flawed, in the light of Thakur [2011] UKUT 00151. The respondent had promised the first appellant that he would be allowed to make "further points before any decision was made". The first appellant was told that he would have an opportunity to do provide further documents.

7. In a third ground, it was contended that the judge erred in concluding that the 15th March 2013 letter did not give rise to a legitimate expectation. The author of the grounds stated that the letter gave rise to an expectation that the first appellant would be consulted before a decision was made, that he would be able to put right any deficiencies in his application, that he relied upon this "promise" and that he "chose not to submit any further documents". He was in a position to make good any deficiency contained in his initial application. In this part of the grounds, reliance was placed upon AA & Others [2008] UKAIT 0003, in relation to highly skilled migrants.

8. Permission to appeal was granted on 23rd June 2014. In a rule 24 response from the Secretary of State, made on 8th July 2014, the appeal was opposed. The Secretary of State submitted that the judge directed herself appropriately. The first appellant did not submit the correct or required documents with his application and the letter about the Tier 1 scheme, dated 15th March 2013, created no legitimate expectation that the Secretary of State would advise him of any deficiency in his application. The first appellant could not succeed in his application (nor could the second appellant succeed in hers) and the decision of the First-tier Tribunal contained no error of law.

Submissions on Error of Law

9. Mr Shibli said that there was a misrecording of fact, at paragraph 11 and paragraph 14, where the judge described the March 2013 letter as postdating the decision. The letter and a legitimate expectation were linked. It was accepted that the appellants could not meet the requirements of the rules and the letter from the first appellant which accompanied the application, dated 24th October 2012, showed that this was so. He candidly admitted there that he had applied for registration as a self-employed person, his application was in process and he would commence his business as an entrepreneur once he had "the switch". However, given the

contents of the letter from the Secretary of State dated 15th March 2013, the Secretary of State ought not to have made her decision when she did. There was an unqualified promise that she would revert to the first appellant. The bundle before the judge included an HMRC registration document dated November 2012. If the first appellant had been invited to provide this, he could have done so.

10. So far as contracts are concerned, it was accepted that none were available when the application was made but at page 160 of the bundle was a receipt showing the purchase of goods from a company in Dhaka. If the Secretary of State had made contact with the first appellant, he might have been able to provide supporting evidence. The March 2013 letter raised a legitimate expectation that he would be given an opportunity to do so.

11. Mr Walker said that paragraph 15 of the determination was clear. The judge was entitled to find, as was conceded by the first appellant, that the requirements of the rules were simply not met. The letter from the Secretary of State dated 15th March 2013 did not give rise to a legitimate expectation as the first appellant knew perfectly well that his application was bound to fail as he had not provided the specified documents required under the rules.

12. In a brief response, Mr Shibli said that the judge's findings could not be relied upon as she had made a fundamental mistake about the letter and whether it followed the decision or not. A material error of fact had been made. Again, the 15th March 2013 letter contained an unqualified promise of contact which was not followed up.

Conclusion on Error of Law

13. At the heart of the challenge to the judge's dismissal of the appeal is the contention that the letter from the Secretary of State dated 15th March 2013 gave rise to a legitimate expectation that she would make contact with the first appellant and allow him to remedy any deficiencies in his application. I have no hesitation in concluding that this contention has no merit and is not made out.

14. The judge correctly found that the application made by the first appellant and his wife was one which did not meet the requirements of the rules. The judge recorded the first appellant's candid evidence that this was so and the letter he wrote on 24 October 2012, to the respondent's Tier 1 (Entrepreneur) team, clearly revealed that the application could not succeed. It is apparent from that letter that the first appellant intended to commence in business as an entrepreneur at a later date. As at the date of application, he was simply unable to provide, for

example, contracts showing business activity. As he had merely applied for registration as a self-employed person, he was unable to show completed registration in that capacity or as a new business or as a director of an existing business at the required time, prior to the date of application.

15. Those deficiencies in the application were not capable of being cured by a further opportunity to submit documents. The first appellant was in a similar position to the appellants in Raju & Others [2013] EWCA Civ 754. The rules required certain evidence to accompany the application but that evidence was not available at the relevant time. Again, submission of the evidence at a later date could not cure the deficiency.

16. The copy receipt from a company in Dhaka, purporting to show the purchase of several handbags and similar items, dated 3rd November 2012 falls woefully short as evidence of a contract or business activity, sufficient to meet the requirements of the rules, even if that evidence had accompanied the application (which, of course, it had not).

17. Turning to the 15th March 2013 letter, Mr Shibli maintained that this document gave rise to a legitimate expectation. The author of the grounds in support of the application for permission to appeal suggested that the letter amounted to a reliable representation that the first appellant would be consulted before any decision was made and that he would be able to remedy any deficiencies in his application. I find that the letter cannot sensibly or reasonably be construed in this way.

18. The content of any representation that the Secretary of State would make contact is severely limited to advice about the new changes introduced with effect from 31st January 2013 and what steps, if any, would be needed before a decision were made on the application. Neither of those changes bore directly on the deficiencies in the first appellant's application. The letter manifestly did not contain any promise that the first appellant would be "consulted" before a decision or that he would be able to put right "any deficiencies" in his application.

19. The application was doomed to failure for reasons wholly unconnected with the introduction of a genuine entrepreneur test and a requirement for applicants to hold funds on an ongoing basis rather than solely at the time of the application. No response that the appellants might have made to those changes to the Tier 1 scheme could have made a difference. The Secretary of State did not act in any procedurally unfair way in refusing the application, in May 2013, for the reasons she gave. The letter gave rise to no legitimate or reasonable expectation that the appellants would be

invited to provide further evidence which, at best, might have shown that the requirements of the rules were met long after the date of application in October 2012, still less that the Secretary of State would overlook or ignore their failure to meet the requirements of the rules.

20. The judge undoubtedly made a factual mistake in describing the March 2013 letter as postdating the decision, in paragraphs 11 and 14 of the determination. She might perhaps have meant that it postdated the application, which was made in October 2012. That factual error falls very far short of showing any error of law in the decision. Her conclusion that the requirements of the rules were not met was clearly open to her, as was her finding that the March 2013 letter did not give rise to any legitimate expectation or an opportunity to remedy the deficiencies in the application for leave.

21. Overall, I conclude that the decision contains no material error of law and shall stand.

Notice of Decision

22. The decision of the First-tier Tribunal contains no material error of law and shall stand.

Signed Date **12th December 2014**

Deputy Upper Tribunal Judge R C Campbell