Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/20532/2013
IA/20536/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 14th July 2014	**On 11th Aug 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MR WICHRAMASINGH DUKAMAHUGE HIRAN TENNAKOON
(2) MRS CHATHURANI SAMANJALA PERERA HAPPANTHANTHRIGE
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr J Plowright (Counsel)
For the Respondent: Ms L Kenny (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Turquet, promulgated on 14th October 2013, following a hearing at Hatton Cross on 4th October 2013. In the determination, the judge allowed the appeals of Mr Wichramasingh Dukamahuge Hiran Tennakoon and his wife Mrs Chathurani Samanjala Perera Happanthanthrige. The Respondent Secretary of State, applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are husband and wife. The first Appellant, the husband, was born on 1st March 1977. The second Appellant, the wife, was born on 18th May 1978. Both are citizens of Sri Lanka.

The Appellants' Claim

3. On 6th December 2012, the first Appellant applied for leave to remain as a Tier 1 (Entrepreneur) Migrant and the second Appellant applied to remain as his dependant as a Tier 1 Migrant. The first Appellant's application was refused on 15th July 2013 under paragraph 245DD(b) and the second Appellant's application was refused on the same day in line with that of her husband. The Appellants claim that all the necessary documentation had been submitted in compliance with Rule 41-SD. All the required evidence under Appendix A, such as was required for the Tier 1 (Entrepreneur) category had been submitted. In particular, the company incorporation certificate, memorandum, which stated the name of the first Appellant as the sole director of the company, were also submitted, together with various marketing materials, website details, business cards, letterheads, e-mails, communications with customers, marketing research prepared in the name of the business, Tapro Trading Limited, such as to allow the Secretary of State to grant the Appellants the leave that was sought in this case.

The Judge's Findings

4. The judge had regard to the fact that the Appellant had provided sufficient evidence to demonstrate that he had access to £50,000. He had been living in the UK since 2004 and had established private and family life. He had now set up a company called Tapro and supporting documentation had been provided. The judge held that Table 4 of Appendix 1 set out the requirements in respect of "investment and business activity" and it is stipulated here that the applicant must have access to not less than £50,000. The judge reviewed the evidence before him (see paragraphs 18 to 20) and held that in the circumstances, the Secretary of State should have applied her Evidential Flexibility Policy if there was a missing document, such as a current appointment report, because all else was available for the Respondent Secretary of State to see. Given that "everything else related to Tapro except the current appointment report" the Respondent should have applied the evidential flexibility policy and that there was a failing of a public law duty to do so in this case, such as would give effect to the Respondent Secretary of State's own policy (paragraph 20). On this basis, the appeal was allowed of the Appellants.

Grounds of Application

5. The grounds of application state that the judge wrongly decided that under the case of **Rodriguez** the appeal should be allowed because the evidential flexibility policy, which was dealt with in **Rodriguez**, was withdrawn some two months before the determination of the judge.

6. On 22nd May 2014, permission to appeal was granted.

7. On 15th June 2014, however, a Rule 24 response was entered by those representing the Appellant, namely, by Mr Joe Plowright, who appeared before me to make oral submissions. The essence of these Rule 24 submissions is that the determination of Judge Turquet was promulgated on 15th October 2013. The Home Office application for permission to appeal is dated 18th October 2013. However, the application date stamped as being received by Loughborough Support Centre is 30th April 2014, some six months after the Grounds of Appeal were apparently drafted. In granting permission, no regard was given by the Tribunal to this fact.

Submissions

8. At the hearing before me on 14th July 2014, Ms Kenny, appearing on behalf of the Respondent Secretary of State, submitted that this was indeed a preliminary issue before the Tribunal that needed to be dealt with before she could address me on the merits of the appeal by the Secretary of State. Ms Kenny submitted that given that the Grounds of Appeal had been drafted timeously, they must then have been submitted timeously, so as to arrive at Loughborough timeously. She could not understand why there had been such an extensive delay. She could not provide an explanation as to why the date of the stamp at Loughborough is some six months after the drafting of the Grounds of Appeal.

9. For his part, Mr Plowright submitted that it was not enough for the Respondent to say that if the Grounds of Appeal had been drafted timeously then they must have been sent without any delay on their side. This was a matter of conjecture and supposition. To make good such a submission there had to be evidence before this Tribunal.

10. The Rules are clear that the Grounds of Appeal must be received by the Tribunal five days after promulgation of the determination that is under challenge. Here we were looking at six months.

11. No evidence was provided of a postage envelope with a stamp on it or of special delivery post, or anything like this. Nor, was there any evidence from the Tribunal authorities that they had made a mistake in not forwarding Grounds of Appeal that had been received by them timeously for the last six months. In the circumstances, one had to take the matter as it stood.

12. The Respondent Secretary of State could not simply blame the Tribunal unless the Tribunal were to accept responsibility, of which there was no evidence today. There should have been an audit trail confirming exactly what happened over the last six months. This was non-existent. The Rules fell to be applied.

13. In reply, Ms Kenny referred to the Tribunal case of **NA (Excluded decisions; identifying judge) Afghanistan [2010] UKUT 444**, and read out the head note of that determination, to say that the Tribunal had a right of appeal in these circumstances, which could not be denied it. However, Mr Plowright retorted by a reference to the

case of **Samir (FtT Permission to appeal: time) [2013] UKUT 00003**, which he submitted dealt precisely and specifically with the point at issue today, such as to allow this Tribunal to say that there was no jurisdiction to determine and hear the appeal made before it today.

No Error of Law

14. I am satisfied that the making of the decision by Judge Turquet cannot now be impugned because as a preliminary matter the first question for this Tribunal to consider is whether the appeal by the Secretary of State is properly before this Tribunal. It is not. Although Ms Kenny has drawn my attention to the case of **NA (Excluded decisions; identifying judge) Afghanistan [2010] UKUT 444**, Mr Plowright has directed my attention to the much more relevant case of **Samir (FtT Permission to appeal: time) [2013] UKUT 00003**. That case confirmed the longstanding jurisprudence of the courts in the case of **Boktor and Wanis [2011] UKUT 00442** that the grant of appeal is conditional, and that it is important to consider whether there are special circumstances which make it unjust not to extend time. The extension of time is what I am asked to do here. There are no circumstances, which have properly been put before me, which suggest that time should be extended. The burden of proof is on the Secretary of State. That burden of proof has not been discharged. I have had regard to the very helpful skeleton argument by Mr Plowright which extensively sets out the position, supported by authorities, in this respect. The decision to extend time is part of the original decision on the application. The applicable provision is to be found in Section 24 of the Asylum and Immigration Tribunal (Procedure) Rules 2005, which read that, "a party seeking permission to appeal to the Upper Tribunal must make a written application", which was plainly done here, but there is also the proviso that, "an application … must be sent or delivered to the Tribunal so that it is received no later than five days after the date on which the party making the application is deemed to have been served with written reasons for the decision".

15. In this case the date of the stamp shows that it was delivered to the Tribunal some six months after it was drafted. For the Tribunal to extend time it must be satisfied "that by reason of special circumstances it would be unjust not to do so". The fact of the matter is that there have been no "special circumstances" put before me in any sustainable way that would impel this Tribunal to conclude that time should be extended. That being so, I have no jurisdiction to consider this appeal.

Decision

16. There is no material error of law in the original judge's decision. The determination shall stand.

17. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 11th August 2014