Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26543/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25 March 2014	**On 28 April 2014**

Before

MR JUSTICE JEREMY BAKER
UPPER TRIBUNAL JUDGE DAWSON

Between

MR RAJESH REDDY SANGA
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs T Choudhry, Legal Representative
For the Respondent: Mr C Avery, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. In this case the Secretary of State for the Home Department appeals against the decision of the First-tier Tribunal promulgated on 27 January 2014 whereby it allowed the appeal of Mr Rajesh Reddy Sanga against the Secretary of State's refusal

to grant him leave to remain as a Tier 1 (Entrepreneur) Migrant under the points-based system.

2. The history of Mr Sanga's presence in the United Kingdom is as follows. He is a citizen of India and is now 30 years of age, having been born on 29 March 1984. On 14 October 2008 he entered the United Kingdom with leave as a student, valid until 31 May 2010. On 24 June 2010 he was granted leave to remain as a Tier 4 (General) Student valid until 30 April 2011. On 13 May 2011 he was granted leave to remain as a Tier 1 (Post-Study Work) Migrant valid until 13 May 2013. The nature of his work was energy efficiency and he carried out surveys for those wishing to access the financing of energy efficiency schemes.

3. On 13 May 2013 Mr Sanga applied to the Secretary of State for leave to remain as a Tier 1 (Entrepreneur) Migrant under the points-based system. As such he required to be awarded a total of 95 points; 75 of which were required to be awarded under Appendix A: Attributes. This was the part of the system which evidenced his ability to prove that he had sufficient finance to support his business in the United Kingdom. As part of the application he asserted that he had access to £25,000 which had been made available to him by a third party, and supplied documentation in support of that assertion. The Secretary of State refused the application in a decision letter dated 13 June 2013.

4. The Secretary of State stated that four of the documents which had been supplied with the application did not comply with the provisions of paragraph 41-SD of Appendix A to the Immigration Rules. In that:

    i. the bank letter,

    "...is not acceptable because it does not confirm that the institution is regulated by the appropriate regulatory body, does not state your name, does not confirm the amount of money being made available to you from the third party's funds, does not confirm that the money can be transferred to the UK".

    ii. the bank statements,

    ".....you have provided are not acceptable because they are for an account that does not state your name as having access to the funds".

    iii. the third party declaration,

    "...you have submitted is not acceptable because it does not contain your signature".

    iv. the letter from Mr Subramaniam Srikanthalingam,

> "...you have submitted is not acceptable as it does not confirm the number, place of issue and dates of issue and expiry of Mr Gali Reddy Sanga's identity document".

5. The Secretary of State went on to explain that as a result of these omissions she was unable to award Mr Sanga any points under Appendix A: Attributes; accordingly his application was refused. It was this decision which was the subject of an appeal before the First-tier Tribunal. It appears to have been accepted by the Tribunal that the documentation which had originally been supplied to the Secretary of State by Mr Sanga with his application was defective to the extent set out in the decision letter. However, the Tribunal identified that the key matter which it considered had to be determined was whether Mr Sanga had access to sufficient funds. The Tribunal concluded that despite the omissions in the documentation it was satisfied that Mr Sanga did have access to sufficient funds, stating at paragraph 25, "...it seems to me that the appellant has provided a substantial body of material to show that he did have access to the funds of no less than £50,000 and so in my judgment ought to be entitled to the points (25) that he has sought".

6. In relation to some of the documentation originally supplied by Mr Sanga with his application the Tribunal made these observations:

> "27. It is extraordinarily difficult to see how someone in the appellant's shoes could really satisfy some of the requirements that were apparently set for him by the respondent, for example Mr Subramaniam could not confirm the number, place of issue, dates of issue and expiry of the appellant's father's identity document given that Mr Subramaniam was in this country and the father was obviously abroad.
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> 28. As regards the situation with the bank and the fact that the appellant's name is not stated there as being someone to have access to the funds, this is a matter that the bank cannot deal with anyway and frankly this ought to have been seen properly by the respondent before framing the Rules in this matter."

7. The Tribunal went on to say that if its approach to this matter was erroneous then it would allow the appeal on the basis that it was satisfied that Mr Sanga had sufficient funds. Any refusal of leave to remain as a Tier 1 (Entrepreneur) Migrant would infringe his Article 8 ECHR rights to private life in the United Kingdom to the extent that it would be disproportionate. The Tribunal explained the matter in these terms:

> "31. If I am wrong in that approach and analysis which seems to me really deals with the basic mischief in this case and is rooted in being practical and realistic, but if I am wrong in that approach, it does seem to me that the appellant does have a right to respect for his private life. That right has been interfered with in a sufficiently marked and substantial way by the decision of the respondent such as to engage Article 8. It seems to me

that applying the appropriate five stages under *Razgar* that the interference is indeed a disproportionate one.

32. I say that principally because the plain and simple fact of the matter is that the appellant does have access to the sum of £50,000 and that is really what the respondent ought to be looking for in relation to this type of application under Tier 1. It is simply unreasonable to be expecting applicants to provide documents in a form, by way of example, that the banks will simply not produce. That would lead to an utterly absurd impasse."

8. The Secretary of State appeals against the decision of the First-tier Tribunal on the basis that the Tribunal were not entitled to ignore the accepted omissions in the documentation originally submitted by Mr Sanga and reach its own conclusion about the sufficiency of funds available to him. Rather, the Tribunal had to determine the matter on the basis of that documentation, such that if it did not comply with the provisions of paragraph 41-SD then it was obliged to refuse the appeal. Furthermore, the Tribunal was not entitled to make up for any perceived lack of fairness in the strictures of the points-based system by allowing the appeal on Article 8 grounds. In any event the Tribunal's reasoning of Article 8 was inadequate and failed to comply with the steps required to be considered under *Regina v SSHD ex parte Razgar [2004] UKHL 27.*

9. Ms Choudhry of Counsel, who appears on behalf of Mr Sanga, accepts that the documentation provided by Mr Sanga did not comply with the requirements of paragraph 41-SD of Appendix A in the manner set out in the decision letter of 13 June 2013. However, she submits to us as she did before the First-tier Tribunal, that the Secretary of State, thereafter the First-tier Tribunal and ourselves, can look at the reality of the matter and on the basis of the documentation which was provided conclude that Mr Sanga did have access to the necessary funds. In those circumstances she submits that the First-tier Tribunal was entitled to overturn the decision of the Secretary of State and we in turn should uphold the decision of the First-tier Tribunal.

10. In support of her submission she submits that it would be very difficult, if not impossible, that the third party declaration could be compliant with the paragraph 41 SD of Appendix A in that the third party was at all material times in India, whilst Mr Sanga was in the United Kingdom and thereby it would not have been possible for one and the same document to contain both signatures. In relation to any documentation emanating from the bank, she submits that it is not possible to dictate to the bank what information it records on its documents. She submits that for these reasons the focus of enquiry for the Secretary of State and the Tribunal should be whether in general terms the evidence is sufficient to establish that Mr Sanga had access to the relevant funds.

11. In *Alam & Others v SSHD [2012] EWCA Civ 960,* the Court of Appeal said that the effect of Section 85A of the Nationality, Immigration and Asylum Act 2002 was that a

Tribunal is obliged to consider the question of compliance with the points-based system on the basis of the documentation provided by an applicant with his application and was not entitled to remedy omissions in that documentation with further evidence made available at the hearing. At paragraph 45 of the decision Lord Justice Sullivan said this:

> "...I endorse the view expressed by the Upper Tribunal in *Shahzad* (paragraph 49) that there is no unfairness in the requirement in the PBS that an applicant must submit with his application all of the evidence necessary to demonstrate compliance with the Rule under which he seeks leave. The Immigration Rules and the policy guidance and the prescribed application form all make it clear that the prescribed documents must be submitted with the application and if they are not the application will be rejected. The price of security consistency and predictability is a lack of flexibility that may well result in 'hard' decisions in individual cases but that is not a justification for imposing an obligation on the Secretary of State to conduct a preliminary check of all applications to see whether they are accompanied by all of the specified documents, to contact applicants where this is not the case, and to give them an opportunity to supply missing documents..."

12. There is a reflection of those observations in the more recent case of *SSHD v Rodrigues & Others [2014] EWCA Civ 2* which was considering the extent to which the "evidential flexibility policy" can afford or ought to afford flexibility to the Secretary of State, and in particular Tribunals, in overcoming defects or omissions in documentation provided in support of immigration applications. At paragraph 92 Lord Justice Davis said this:

> "...Taken overall, the evidential flexibility process instruction is demonstrably not designed to give an applicant the opportunity first to remedy any defect or inadequacy in the application or supporting documentation so as to save the application from refusal after substantial consideration."

13. In the present case the arguments which were presented on behalf of Mr Sanga by Ms Choudhry were clearly sufficient to persuade the First-tier Tribunal that the real question in the case was whether, in reality, the evidence was sufficient to satisfy the Secretary of State that Mr Sanga had access to these funds. With great respect we cannot accept that that was the correct approach. It is clear that since the inception of the points-based system, it is the provisions of the system which have to be complied with in respect of any applications made under it. The system is indeed strict and the evidential requirements set out in paragraph 41-SD of Appendix A are strict. However, the fact that it is strict does not in our judgment allow Tribunals to ignore those strictures and simply deal with the situation as it sees fit on the merits of whether the evidence taken as a whole can provide sufficient assurance that the funds are available to a particular applicant.

14. Moreover, there was not only no evidence before the First-tier Tribunal to support the matters urged by Ms Choudhry, but upon being pressed in argument it became

clear that Ms Choudhry accepted that given time it was perfectly possible for Mr Sanga to have complied with the evidential requirements set out in paragraph 41-SD. However she submitted that the reason that time would not allow that to occur in this case was that a previous application for leave to stay as a Tier 1 (Entrepreneur) Migrant had been refused on 18 April 2013. Although we have no evidence about the reasons for its refusal, Ms Choudhry appeared to accept the Secretary of State's assertion that the reason given by her for the refusal of the first application was non-compliance with another aspect of the evidential requirements of paragraph 41-SD. It was submitted by Ms Choudhry that in the intervening period there simply was no time for Mr Sanga to have travelled to India in order to effect compliance with the third party declaration. For our part we cannot see that that was necessarily required, in order to effect compliance. In any event we do not consider that that would provide sufficient justification for the Tribunal not to require compliance with paragraphs 41-SD of Appendix A. The reality is that there was no impossibility or undue difficulty in effecting compliance with the evidential requirements. As Ms Choudhry accepted it is perfectly possible, given time, that these provisions can be complied with and the reality is that Mr Sanga should have ensured that he made a sufficiently timely application so that he could comply with the provisions.

15. We consider that in reality what the First-tier Tribunal has done in this case is to seek to effect a "near-miss" type of approach in order to justify allowing the appeal, in that because it considered that the requirements of paragraph 41-SD were overly strict it would ignore the omissions in the documentation which had originally been submitted by Mr Sanga and instead reach its own conclusions as to the sufficiency of his funds on the evidence before it. It may be that the Tribunal was not referred to the *Alam* case, nevertheless in approaching the appeal in this manner, it fell into error. Moreover, although there may be cases in which the circumstances are such that Article 8 private life considerations have to be considered, this was not one of them. There was no evidence, over and above his failure to obtain leave to remain as a Tier 1 (Entrepreneur) Migrant because of his failure to comply with the points-based system, which would have justified the Tribunal holding that there had been a disproportionate interference with Mr Sanga's Article 8 right to private life in the United Kingdom. In this regard reference can be made to the speech of Lord Carnwath in *Patel & Others v Secretary of State for the Home Department [2013] UKSC 72* at paragraph 57 where he said:

> "It is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules which may be unrelated to any protected human right. The merits of a decision not to depart from the rules are not reviewable on appeal: section 86, sub-Section 6. One may sympathise with Sedley LJ's call in *Pankina* for 'common sense' in the application of the rules to graduates who have been studying in the United Kingdom for some years (see paragraph 47 above). However, such considerations do not by themselves provide grounds of appeal under article 8 which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his

course in this country, however desirable in general terms, is not in itself a right protected under article 8."

It is apparent that the First-tier Tribunal did not in any event consider the matter in the staged approach set out in *Razgar*.

16. We do not consider that the Tribunal would have been entitled to take the view in this case that any private life considerations would have justified the First-tier Tribunal in allowing Mr Sanga's appeal and overturn the decision of the Secretary of State. Accordingly, and for the reasons that we have given, we allow this appeal and set aside the decision of the First-tier Tribunal. We remake the decision and dimiss the appeal against the decision of the Secretary of State set out in the decision letter dated 13 June 2013.

Signed Date

The Honourable Mr Justice Jeremy Baker
Sitting as a Deputy Judge of the Upper Tribunal