



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/33284/2013
IA/38842/2013

THE IMMIGRATION ACTS

Heard at Manchester
On 7th May 2014

Determination Promulgated
On 22nd July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE HARRIS

Between

MISS MUTUNRAYO MONSURAT TAIWO
(NO ANONYMITY ORDER MADE)

First Appellant

And

SIKIRU ABAYOMI BELLO

Second Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Chimpango, Legal Representative
For the Respondent: Mr A McVeety, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are citizens of Nigeria, born respectively on 20th November 1985 and 6th November 1979. On 29th June 2013 both Appellants had made a combined application for

leave to remain in the United Kingdom as Tier 1 (Entrepreneurs) Migrants under the Points Based System (PBS) and for a Bio Metric Residence Permit (BRP). Those applications were refused by the Secretary of State in Notice of Refusals dated 16th July 2013. The grounds upon which they were refused are set out in detail within that Notice of Refusal to show that according to the Secretary of State, the Appellants were not able to meet the terms of Appendix A: Attributes and consequently were not awarded the appropriate points that were required for the sections entitled

- Applicant has access to funds as required.
 - Funds held in regulated financial institution(s)
 - Funds disposable in the United Kingdom
2. The Appellants appealed and requested that the appeal be dealt with on the papers and the appeal came before Judge of the First Tier Tribunal Fox sitting at North Shields on 16th January 2014. In a determination promulgated on 20th January 2014, the appeal was dismissed. The Appellants lodged grounds of appeal to the Upper Tribunal on 20th January 2014 and on 12th February 2014, First Tier Tribunal Judge Levin granted permission to appeal. Judge Levin noted that the grounds argued that the Judge had erred in law in finding that the Appellants had failed to demonstrate that they had sufficient funds to be awarded points under Appendix A as the balance in the Appellant's NatWest Bank Account was overdrawn on 16th May 2013. As this pre dated the date of the application and the bank statement showed that the bank account was in credit in the sum of in excess of £15,000 on 2nd July 2013 until 15th November 2013, then arguably there was an error of law in the Judge deciding the issue on the basis of the Appellant's financial position at a date prior to the application.
 3. It is on that basis that the appeal comes before me. The Appellants are represented by their instructed legal representative Mr Chimpango. The Secretary of State is represented by her Home Office Presenting Officer Mr McVeety.

Submissions/Discussions

4. Mr McVeety points out that he acknowledges that there is an error in the decision of the First Tier Tribunal Judge in that the Judge got his analysis wrong, but not for the reasons given. He points out two issues. First of all as a preliminary point he advises that the Second Appellant Mr Bello, does not have a right of appeal, because he currently has outstanding leave. Further, he points out that this is an appeal of a Points Based System application and that pursuant to para 85A(3) of the Nationality, Immigration and Asylum Act 2002. The Judge only considered evidence that was before the decision maker and therefore he was wrong to consider further evidence and points out that this has been referred to in the Rule 24 Response dated 26th February 2014.
5. He submits that the Judge failed to consider the issues in the refusal properly, but to some extent acknowledges that the Judge was hampered by the limited information that was before him as he heard the appeal on the papers.
6. Mr Chimpango relies on the grounds of appeal and contends that documents were provided with the application and that it should therefore be considered under Section 85A(4) of the 2002 Act, and that it was appropriate for the Judge to give due consideration to them. He asked me to allow the appeal.

The Law

7. Errors of legislative interpretation, failure to following binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
8. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story told is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

9. The arguments of the Secretary of State are persuasive. It is generally acknowledged that the Rules relating to application by entrepreneur migrants prescribe very strictly the format and documentation that has to be provided. Further, as Mr McVeety points out, the Appellants are not going to be subjected to any removal directions if their appeal fails, but what is required by the Secretary of State is that the applications are properly completed and that all requirements of the Rules are adequately met. In this case, I understand from the Appellant that they wish to set up a financial advisory service and there is no reason that I can see why they should not do so, providing they meet the requirement of the Rule and can show that they are entitled to a visa as entrepreneurial migrants. However, in order to do that, I agree with the submission made by Mr McVeety that it is imperative that the strict requirements of the Rules are met.
10. The decision of the First Tier Tribunal does contain material errors of law. The Judge considered the evidence that was before him without being aware as to when it was submitted, and whilst I acknowledge Mr Chimpango's contention that the evidence was submitted at the time of the application, that is most strongly refuted by Mr McVeety on behalf of the Secretary of State and the burden of proof is on the Appellant to show that it was. However, the Judge has erred that in finding that in May 2013 the account was overdrawn for a short period of time, that that in itself under the Rules was good reason for refusing the application. I thus set aside the decision of the First Tier Tribunal.
11. I am, between dictation and promulgation of this determination, advised that leave is sought to withdraw the appeal. I am prepared to consent to that approach.
12. However, if I remade the decision I would have dismissed the Appellant's appeal. The reasons are twofold. Firstly, so far as the Second Appellant, he clearly does not have a right of appeal. That has not been picked up by a First Tier Tribunal Judge but he cannot be

criticised for that because it was not an issue that was raised before him. The Second Appellant's extant leave had not expired and therefore under the Rules he was not in a position to make his application. Secondly, so far as the First Appellant is concerned, she is not in a position to satisfy the attributes section because the documentation must be provided at the date of application not at the date of appeal. That again is prescribed within the Rules. In such circumstances the appeal would have been dismissed.

Decision

13. The appeals are accepted as withdrawn and the Tribunal makes an Order to that effect.
14. No Anonymity Order was made by the First Tier Tribunal Judge. No application is made to vary that order and none is made.

Signed D N Harris

Date: 17 July 2014

D N Harris
Deputy Upper Tribunal Judge