



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/38592/2013
IA/38593/2013

THE IMMIGRATION ACTS

Heard at : Field House
On : 30 September 2014

Determination Promulgated
On: 3 October 2014

Before

THE RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE KEBEDE

Between

KAUSHAL MAHESHKUMAR PRAJAPATI
JANKI KAUSHALKUMAR PRAJAPATI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Lim, Counsel

For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants, husband and wife, are citizens of India, born respectively on 19 November 1986 and 18 November 1988. They have been given permission to appeal

against the determination of First-tier Tribunal Judge Callow dismissing their appeals against the respondent's decision to refuse the first appellant's application for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant and the second appellant's application as the Partner of a Tier 1 Migrant.

2. The first appellant (from hereinafter referred to as "the appellant") entered the United Kingdom on 31 August 2009 with leave to enter as a Tier 4 General Student and was granted further leave to remain as a Tier 1 Post Study Work Migrant until 13 July 2013. On 12 July 2013 he applied for further leave to remain as a Tier 1 (Entrepreneur) Migrant. His application was refused on 5 September 2013.

3. The application was refused under paragraph 245DD(b) of the immigration rules on the grounds that the appellant was unable to meet the requirements to be awarded a minimum of 75 points under Appendix A. He was awarded zero points for access to funds as the evidence he had provided, namely a bank statement from Barclays Bank, did not meet the criteria specified under paragraph 41-SD(a)(ii) since it did not state his name and his team member's name but only stated the business name and he had failed to demonstrate that he had invested the money.

4. The appellant appealed against that decision and the appeal was heard in the First-tier Tribunal by Judge Callow. The focus of the appeal was upon the documentary evidence consisting of the bank statement which was for an account in the name of Kavit Consultancy Ltd issued by Barclays Bank on 11 July 2013 which recorded a balance of £50,000 made up of a transfer of £25,000 from a current account said to be the appellant's and a further £25,000 transferred by the appellant's entrepreneurial team member Kwinkalkumar Patel. The statement was endorsed by the branch manager, confirming that Kwinkalkumar Patel was one of two directors on the account and had full access to the funds. There was a short adjournment of the hearing to enable Mr Lim and the appellant to attend at Barclays Bank in order to obtain a letter on official letter-head confirming the availability to the appellant of the funds in the business account. Mr Lim produced a statement to the Tribunal confirming that the bank would not issue a letter as they considered the statement already produced as being on official letter-head and as being in accordance with their guidelines. The judge, referring to paragraph 41-SD(c)(i), found that the bank statement did not meet the relevant evidential requirements and accordingly dismissed the appeal under the immigration rules. He went on to consider Article 8 but dismissed the appeal on that ground as well.

5. Permission to appeal that decision was sought on behalf of the appellant on the ground that the judge had erred by finding that the document did not meet the criteria in paragraph 41-SD(c)(i) as a "letter" and that he should have considered the document under the provisions of paragraph 41-SD(c)(ii) which related to bank statements.

6. Permission to appeal was initially refused but was subsequently granted on a renewed application on 11 April 2014. With that application, the appellant produced a copy of a similar bank statement endorsed by the branch manager with confirmation that he was

one of the directors on the account. It was stated that he had not realised that he was in possession of the document as the original had been retained by the Home Office.

Appeal hearing and submissions

7. At the hearing we pointed out to the parties that the judge's findings appeared to have proceeded on the basis of the wrong immigration rule, namely paragraph 41-SD(c), rather than paragraph 41-SD(a). The contents of both were broadly similar but the latter was the relevant rule in force at the time of the refusal decision. That same error also appeared in Mr Lim's grounds of appeal before us. Accordingly we invited submissions on the matter.

8. Mr Lim did not disagree but submitted further that the judge had erred in law by considering only the requirement in the immigration rules for a bank letter and by failing to recognise that the immigration rules required in the alternative a bank statement. The judge did not have the benefit of the bank statement adduced with the permission application but that was not the appellant's fault as the Home Office had retained the documents produced with his application and had failed to return them to him. The bank statement contained all the necessary information to meet the evidential requirements of the rules and confirmed the funds available to the appellant. Mr Lim went on to submit that the evidential flexibility requirements of the rules required the Home Office to have made further enquiries of the appellant as to the availability of funds, but they did not do so. The signed endorsement from the bank manager on the bank statement provided reasonable grounds for considering that the appellant had the funds and therefore enquiries should have been made of him. Even if that issue was not raised before the judge, he should have considered the matter. Mr Lim said that he now had a letter from the bank confirming that the appellant had the available funds. He sought to admit the letter, which he advised us was dated 10 June 2014. Given that the letter had not been before the First-tier Tribunal we did not consider it relevant to the error of law issue.

9. Mr Bramble accepted that there had been an error of law in that the judge had relied on the wrong rule. However he submitted that the error was not material as the appellant could not in any event have met the requirements of the rules. With regard to paragraph 41-SD(a)(ii) he accepted that the appellant had submitted, together with his application, his business bank statement endorsed by the bank manager and that the document had therefore been before the Secretary of State, although not before the First-tier Tribunal. The bank statement, however, did not conform to the evidential requirements in paragraph 41-SD(a)(ii)(4) as it was in the business name and not in the names of the entrepreneurial team members. Neither could it be considered as a letter for the purposes of 41-SD(a)(i) as it did not state the appellant's name and that of his partner and it did not confirm the amount of money available. By putting the money into an account in the name of the business, the appellant had brought himself into paragraph 45 and therefore needed to meet the requirements of paragraph 46-SD, which he could not do. With regard to paragraph 245AA the evidential flexibility provisions did not apply to the appellant's circumstances.

10. In response, Mr Lim submitted that the document fell within the evidential flexibility provisions as it was in the wrong format, but the bank would not issue a letter at the time. The respondent ought to have requested a typed letter from the bank. The bank had now issued such a letter.

Consideration and findings.

11. As we advised the parties, we preferred the submissions made by Mr Bramble and considered that, whilst Judge Callow erred by looking at the wrong immigration rule and by failing to consider the alternative to a letter from the bank, namely a bank statement, as provided for in paragraph 41-SD(a)(ii), the appellant could not in any event have succeeded under the correct rule and the error was accordingly not material.

12. Mr Lim's grounds before us maintained that the appellant was able to meet the requirements of paragraph 41-SD(c)(ii) as he had produced a bank statement showing a balance of £50,000 in funds available to him. As established at the hearing, the relevant rule was in fact paragraph 41-SD(a)(ii). That rule provided, at paragraph 41-SD(a)(ii)(4) that the account had to be in the names of the entrepreneurial team members. Given that the bank statement was not in the name of the appellant and his partner, but in the name of the business Kavita Consultancy Ltd, the document plainly did not meet the evidential requirements of the rules. Mr Lim made no submissions challenging that conclusion.

13. Neither did Mr Lim seek to make any particularised challenge to Mr Bramble's submission that the document also failed to meet the requirements of paragraph 41-SD(a)(i). Clearly the document was not a letter falling within those provisions. In fact the only document before Judge Callow was that at page 10.1 of the appeal bundle, namely a bank statement referring to the appellant's business partner and endorsed with confirmation from the branch manager that his partner was one of two directors on the account. Whilst the bank statement showed two deposits of £25,000 made into the account, only one of those deposits identified the source of the funds, namely his business partner. Although Mr Bramble accepted that the Home Office had been provided with a bank statement endorsed with a similar confirmation in the appellant's name that was not before the judge at the time and was only provided by the appellant with the permission application. In any event, that bank statement again did not identify the appellant as the source of one of the £25,000 deposits.

14. Mr Lim did not challenge Mr Bramble's submission that the appellant had, by putting money into an account in the name of the business, brought himself into paragraph 45 of the rules and thereby subject to the evidential requirements of paragraph 46-SD, which he could not meet. Clearly Mr Bramble was correct in so submitting.

15. The focus of Mr Lim's challenge before us was in fact the evidential flexibility provisions of paragraph 245AA of the rules. However that was not a matter raised before Judge Callow. When we put that to Mr Lim, his response was that the judge ought nevertheless to have considered the matter himself. We do not agree. It was not an obvious point and had it been one that the appellant was pursuing it was up to his

representative to make relevant submissions before the judge. In any event neither the grounds seeking permission to appeal put before the First-tier Tribunal nor those before the Upper Tribunal sought to challenge Judge Callow's determination in that respect.

16. We do not, in any event, find any merit in the submission and we agree with Mr Bramble that the appellant's circumstances did not fall within the provisions of paragraph 245AA. We do not agree that the bank statement at page 10.1 of the appeal bundle could be considered as a letter in the wrong format or even that a combination of that document and the bank statement produced with the permission application could be so considered. The reason why the document did not meet the requirements of paragraph 41-SD(a)(i) was that, aside from the matter of format, there was clearly significant and relevant information missing. That was not a matter that could be resolved through those provisions by the submission of subsequent documentation from the bank, as Mr Lim sought to do.

17. In all of the circumstances, and on the evidence available to the judge, we find that he was entitled to conclude that the appellant was unable to meet the evidential requirements of the rules. Indeed he was unable to conclude otherwise. Accordingly the grounds of appeal disclose no material errors of law in his decision.

DECISION

18. The making of the decision of the First-tier Tribunal did not involve an error on a point of law such that it should be set aside. Accordingly we do not set aside the decision. The decision to dismiss the appeal stands.

Signed:

Upper Tribunal Judge Kebede

Dated: 1 October 2014