



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/50269/2013
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THE IMMIGRATION ACTS

Heard at Field House
On 4 September 2014

Determination Promulgated
On 16 September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS TAYE ABIMBOLA ALABI
MR EGBEYEMI ALABI
MASTER EMMANUEL ALABI
(NO ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondents: Mr A Adewoye, Prime Solicitors

DETERMINATION AND REASONS

1. I shall refer to the respondents as the appellants as they were before the First-tier Tribunal. I shall refer to Mrs Taye Abimbola Alabi as the appellant because she is the

main appellant and her husband Mr Egbeyemi Alabi and their son Master Emmanuel Alabi are dependent on her application. They are all citizens of Nigeria. The appellant's date of birth is 13 February 1979, Mr Alabi's date of birth is 6 May 1975 and Master Alabi's date of birth is 23 May 2010. The appellant and her husband have a younger child, I am not aware of his or her date of birth.

2. The appellant was granted leave to enter the UK as a Tier 4 General Student on 12 March 2009 and her leave was extended as a Tier 4 Student until 29 August 2011. She was subsequently granted a variation of leave as a Tier 1 Post-Study Migrant until 27 September 2013. She was joined in the UK by her husband and child Emmanuel in 2010. They were granted leave to enter the UK as Tier 1 dependants until 27 September 2013.
3. The appellant made an application to vary her leave as a Tier 1 (Entrepreneur) on 27 September 2013. The application was refused by the Secretary of State in a decision of 14 November 2013. The appellant has to establish that she has access to funds of not less than £50,000. The business set up by the appellant is Divine Gift Ventures (DGV). Her application was based on third party support from Mrs Modupeola Oshinowo in the UK and Mr Beyioku in Nigeria.
4. The application was refused by the respondent for the following reasons:-
 - (1) The evidence that the appellant produced from GT Bank in Nigeria does not establish that the funds held in Mr Beyioku's account there are transferrable to the UK or that the funds are available to the appellant.
 - (2) The third party declaration submitted by Mrs Oshinowo does not confirm that the funds will remain available to the appellant until such times as it is transferred to her business.
 - (3) The appellant failed to provide a letter from a legal representative confirming the details in the declaration made by Mrs Oshinowo.
 - (4) There is no indication from the bank that the appellant can access the funds belonging to Mrs Oshinowo as and when required.
 - (5) The occupation in which the appellant is engaged is below the required level (National Qualifications Framework level 4) because a courier or delivery service is a lower skilled occupation.
 - (6) The appellant has failed to produce documents in accordance with paragraph 41 41-SD(e)(iv) of the rules because she has not provided a contract.

5. The appellant appealed against the decision of the Secretary of State and her appeal was allowed by Judge of the First-tier Tribunal McIntosh in a determination that was promulgated on 16 June 2014 following a hearing on 30 May 2014. The Judge noted at paragraph 11 that the bank statement from GT Bank dated 24 October 2013 failed to establish that the sums of money were available to the appellant and acknowledged that the evidence from Nigeria was not in a prescribed form. He also recorded (at paragraph 7) that the appellants conceded that they had failed to provide a letter from a legal practitioner in relation to Mrs Oshinowo's funds. The Judge went on to allow the appeal under the Immigration Rules having heard oral evidence from the appellant, her husband and Mrs Oshinowo and having considered further evidence produced by the appellant.
6. The Secretary of State was granted leave to appeal in a decision by First-tier Tribunal Judge Cheales in a decision of 15 July 2014. Thus the matter came before me. The UT issued directions that should it decide to set aside the determination of the First-tier Tribunal, any further evidence, including supplementary oral evidence, that the Upper Tribunal may need to consider if it decides to remake the decision, can be so considered at that hearing.
7. There was no further evidence produced by either party and the appellant did not submit a response pursuant to Rule 24 of the 2008 Procedure Rules.

The Grounds of Appeal and Oral Submissions

8. The grounds of appeal assert that the Judge took into account evidence that was not admissible pursuant to Section 85A of Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and in any event, the decision is contrary to the appellant's concession that she had failed to provide a letter from a legal practitioner (see paragraph 7 of the determination).
9. I heard oral submissions from both parties. Mr Melvin expanded on the grounds of appeal. Mr Adewoye submitted that the documents were produced in the wrong format and pursuant to paragraph 245AA of the Immigration Rules the Secretary of State should have given the appellant an opportunity to produce the documents in the correct format (he confirmed that the documents had still not been produced in the right format). In addition he argued that GT Bank was not willing to produce a letter which complied with the Rules. In his view the letter from Mrs Oshinowo at page 9 of the appellant's bundle is sufficient to comply with the requirements of the Rules, but Mr Adewoye questioned the purpose of the solicitor's letter. In relation to the appellant's application and the requirement for a contract Mr Adewoye referred me to the judgment in **Shebl (entrepreneur: proof of contracts) [2014] UKUT 216 (IAC)** and he argued that it is not necessary to have a formal contract drawn up and submitted when there is evidence of a genuine business placed before the Secretary of State. In addition Mr Adewoye referred me to page 20-23 of the appellant's

bundle which, in his view, is evidence that establishes that the appellant was not only a courier but a procurement officer.

10. Mr Melvin referred me to the Upper Tribunal decision in **Durrani (entrepreneurs: bank letters; evidential flexibility) (Rev 1) [2014] UKUT 295** and **Ahmed & Another (PBS: admissible evidence) [2014] UKUT 365 (IAC)**.

The Immigration Rules

11. The relevant parts of paragraph 41-SD of the Immigration Rules relate to specified documents. 41-SD(d) requires an applicant who is applying using money from a third party as the appellant is to provide the following documents:

“(d) (i) An original written declaration from every third party that they have made the money available to invest in a business in the United Kingdom, containing:

- (1) the names of the third party and the applicant (and his team partner’s name where relevant), or the name of the applicant’s business,
- (2) the date of the declaration,
- (3) the applicant’s signature and the signature of the third party (and the signature of the applicant’s team partner where relevant),
- (4) the amount of money available in pounds sterling,
- (5) the relationship(s) of the third party to the applicant,
- (6) if the third party is a venture capitalist firm, confirmation of whether this body is regulated by the Financial Conduct Authority (FCA) and is listed as permitted to operate as a Venture Capital firm,
- (7) ...
- (8) ...
- (9) confirmation that the money will remain available until such time as it is transferred to the applicant, the entrepreneurial team or the applicant’s business.

and

- (ii) A letter from a legal representative confirming the validity of signatures on each third-party declaration provided, which confirms that the declaration(s) from the third party or parties contains the signatures of the people stated. It can be a single letter covering all third-party permissions, or several letters from several legal representatives. It must be on an original letter and not a copy, and it must be from a legal representative permitted to practise in the country where the third party or the money is. The letter must clearly show the following:
 - (1) the name of the legal representative confirming the details,
 - (2) the registration or authority of the legal representative to practise legally in the country in which the permission or permissions was or were given,
 - (3) the date of the confirmation letter,
 - (4) the applicant's name (and the name of the applicant's team partner's name where relevant) and, where (b) applies, that the applicant is a director of the business named in each third-party declaration,
 - (5) the third party's name,
 - (6) the declaration from the third party is signed and valid, and
 - (7) if the third party is not a Venture Capitalist Firm, Seed Funding Competition or UK Government Department, the number of the third party or their authorised representative's identity document (such as a passport or national identity card), the place of issue and dates of issue and expiry.
- (e) If the applicant is applying under the provisions in (d) in Table 4, he must also provide:
 - (i) his job title,
 - (ii) the Standard Occupational Classification (SOC) code of the occupation that the applicant is been working in, which must appear on the list of occupations skilled to National Qualifications Framework level 4 or above, as stated in the Codes of Practice in Appendix J,

(iii) one or more of the following specified documents:

- (1) advertising or marketing material, including printouts of online advertising, that has been published locally or nationally, showing the applicant's name (and the name of the business if applicable) together with the business activity or, where his business is trading online, confirmation of his ownership of the domain name of the business's website,
- (2) article(s) or online links to article(s) in a newspaper or other publication showing the applicant's name (and the name of the business if applicable) together with the business activity,
- (3) information from a trade fair, at which the applicant has had a stand or given a presentation to market his business, showing the applicant's name (and the name of the business if applicable) together with the business activity, or
- (4) personal registration with a UK trade body linked to the applicant's occupation; and

(iv) one or more of the following documents showing trading:

- (1) a contract. If a contract is not an original the applicant must sign each page. The contract must show:
 - (a) the applicant's name and the name of the business,
 - (b) the service provided by the applicant's business; and
 - (c) the name of the other party or parties involved in the contract and their contact details, including their full address, postal code and, where available, landline phone number and any e-mail address; or
- (2) an original letter from a UK-regulated financial institution with which the applicant has a business bank account on the institution's headed paper, confirming that the business is trading; and

(v)

- (1) if claiming points for being self-employed, the following specified documents to show that he is paying Class 2 National Insurance contributions;

- (a) the original bill from the billing period immediately before the application, if his Class 2 National Insurance is paid by quarterly bill;
 - (b) the most recent bank statement issued before the date of application, showing the direct debit payment of National Insurance to HM Revenue & Customs, if his National Insurance is paid by direct debit;
 - (c) an original small earnings exception certificate issued by HM Revenue & Customs for the most recent return date, if he has low earnings; or
 - (d) the original, dated welcome letter from HM Revenue & Customs containing the applicant's unique tax payer reference number, if he has not yet received the documents in (a) to (c); or
- (2) If claiming points for being a director of a UK company, a printout of a Current Appointment Report from Companies House, dated no earlier than three months before the date of the application, listing the applicant as a director of the company, and confirming the date of his appointment. The company must be actively trading and not struck off, or dissolved or in liquidation. Directors who are on the list of disqualified directors provided by Companies House will not be awarded points."

Error of Law

12. The Judge materially erred in law because he took into account evidence that was inadmissible pursuant to Section 85A of the 2002 Act (post application evidence). It is clear that the appellant cannot satisfy the Immigration Rules not least because she had not produced a letter from a legal representative relating to Mrs Oshinowo's declaration. I set aside the decision of the Judge to allow the appeal pursuant to Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. I informed the parties that it was my view that I could go on and remake the decision. There was no objection from either representative. I gave both representatives the opportunity to make further submissions. The appellant, her husband and Mrs Oshinowo gave oral evidence at the hearing before the First-tier Tribunal and there is no challenge to the evidence as recorded by the Judge.

The Evidence of the Appellant

13. The appellant's evidence is contained in her witness statement of 14 May 2014 in addition to the oral evidence as recorded by the Judge. In her witness statement the appellant describes her business as follows:
 - "4. I presently run a business outfit in February with the sole aim of providing consumer services such as negotiating, sourcing, procuring goods, purchasing and delivering goods mainly to Africa. The outfit is unique in the sense that I looked at the difficulties people have in purchasing goods and services and then exporting the goods. The intention was to get a total package for a client. The business no doubt needs a procurement officer who will double as procuring items for the business needs and at the same time procuring for clients and customers. It was decided that I will double as both the director and the procurement officer for the business. My husband assists me from time to time in the business when he gets a chance to do the same. The name of the business is Divine Gift Ventures (DGV) Ltd. The business has its presence on the internet and is advertised on Gumtree and Yell. I will rely on evidence of same at the hearing of my appeal.
 5. Since inception of the business, I have had clients who require my services such as individuals and companies who trust our services and instruct us to purchase goods for them at reasonable prices and ship the goods to an agreed destination upon payment of our fees. Because of the delicate nature of the business, both parties involved usually proceed upon having a clear understanding of the liabilities of both parties".
14. The appellant works as a procurement officer and it is this aspect of the business that is relied upon and not the courier delivery service as regards the application. Funds are to be provided by Mrs Oshinowo and Mr Beyioku. GT Bank in Nigeria would not issue any other letter and it is obvious that funds can be transferred to the UK. In relation to the invoice produced in support of the application, there was an oral contract between the parties.
15. The appellant understood that there was no need for a letter from a legal practitioner in relation to the UK-based sponsor. Although the letter from Mrs Oshinowo which was submitted with the application does not state that the money will be available until it is transferrable for use in the appellant's business, it does state that the money will be available until it is required by the Home Office.
16. The appellant has a private life in the UK. She is currently a sole director of her company and she pays taxes. Her eldest son is 4 and he is settled well in his school. The family have no home to go back to in Nigeria. They married in the UK.

The Evidence of Mr Alabi

17. Mr Alabi's evidence is contained in his witness statement of 14 May 2014 in addition to the oral evidence as recorded by the Judge. In his witness statement he agrees with his wife's evidence and asserts that they have developed a private and family life here in the UK.

Evidence of Mrs Oshinowo

18. Mrs Oshinowo's evidence is contained in a witness statement of 25 May 2014 in addition to the oral evidence recorded by the Judge. Her evidence can be summarised. She is providing £20,000 to the company. She believes the company will grow and it will become one of the leading companies of its kind.

The Documentary Evidence

19. The appellant submitted various documents with her application as follows:
- (1) A letter from Mrs Oshinowo of 27 September 2013 which is a declaration confirming that she has £20,000 in her account which can be used for the purpose of the application. She attached a bank statement from NatWest Bank confirming that she has the necessary funds in her bank account.
 - (2) A letter from GT Bank in Nigeria of 24 October 2013 which is entitled a letter of reference relating to Mr Beyioku and confirming that he has three accounts as at the close of business on 23 October 2013.
 - (3) A declaration from Mr Beyioku of 21 October 2013 confirming that he has £30,000 which is made available to the appellant.
 - (4) A letter from legal practitioners in Nigeria of 21 October 2013 referring to Mr Beyioku's declaration.
 - (5) An invoice for £4,047 from Divine Gift Ventures (DGV) Ltd dated 26 September 2013 to an individual in Basingstoke for "purchase and courier service." The invoice states; "service for Phedumez Consulting" and "courier service: goods sent via JMK Logistics and Divine Cargo".
 - (6) A printout from Gumtree relating to procurement services and logistics services (courier and cargo services) and Divine Gift Ventures indicating that it is one of the growing businesses recently set up with the objective of providing quality business help, to source and negotiate for goods and services.

- (7) A letter from HM Revenue & Customs of 20 May 2013 to Divine Gift Ventures Ltd indicating that the company needs to pay its corporation tax by 1 December 2014 and deliver its company tax return by 28 February 2015.
 - (8) Documents relating to the registering of the company at Companies House and confirming that both the appellant and her husband are directors of the company.
 - (9) A letter from HM Revenue & Customs of 2 September 2013 to Divine Gift Ventures which is a VAT online enrolment acknowledgement.
 - (10) A letter from HM Revenue & Customs of 27 August 2013 confirming that the company needs to pay its corporation tax on 6 January 2015 and deliver its company tax return on 5 April 2015.
 - (11) There is an incomplete tax return and a notice to make a CT61 return.
20. At the hearing before Judge McIntosh the appellant produced a bundle and in the bundle there was further evidence relied upon namely a further declaration by Mrs Oshinowo of 27 May 2014, a letter from Mrs Oshinowo of 25 May 2014, a letter from Mayfair Solicitors relating to Mrs Oshinowo's declaration.

Conclusions

21. I am not able to take the post-date evidence (paragraph 20 above) into account in relation to the appeal under the Immigration Rules pursuant to Section 85A of the 2002 Act. As already stated the appellant cannot satisfy the rules, not least because she has not produced a letter from a legal representative (with her application) relating to Mrs Oshinowo's declaration. There are further reasons for the lack of compliance. In my view the evidence does not establish that the funds from Mr Beyioku would be available to the appellant or her business. I reject Mr Adewoye's submissions on the point having considered the Upper Tribunal judgment in **Durrani**. I am not satisfied that there is confirmation that the money in either Mrs Oshinowo's account (or Mr Beyioku's) will remain available until such a time as it is transferred to the applicant. Third party declarations must comply with a number of requirements and neither declaration confirms that the money will remain available until such time as it is transferred to the applicant.
22. The appellant's case is that she is a procurement officer in accordance with the occupation listed at Appendix J SOC code 3541. The Judge of the First-tier Tribunal failed to make a finding in relation to this issue. The evidence in relation to this is lacking. The appellant submitted with her application one invoice and details relating to a website. Whilst I appreciate that the respondent appears to accept that Divine Gift Ventures is a genuine company, the evidence in my view does not establish that the appellant's job is as she describes in her statement of evidence and one that could be described as a procurement officer.

23. There was one further issue taken by the Secretary of State namely that the appellant had failed to produce documents in accordance with paragraph 41-SD(e)(iv) because she has not provided a contract. The decision letter inadequately explains this point and I have considered this in the context of the Upper Tribunal decision of **Shebl**. This case is different to the case of **Shebl** because the appellant has produced one invoice only in contrast to the substantial evidence submitted by the appellant in **Shebl**. In my view the appellant has not submitted documents which would enable her to satisfy the requirements of paragraph 41-SD(e)(iv)(1). However the refusal letter does not adequately deal with the other requirements of the Rules which are alternatives to the requirement for a contract. In any event this is not material to the decision because the appellant cannot meet the requirements of the Rules in any event.
24. Mr Adewoye argued that the appellant failed to consider paragraph 245AA of the Immigration Rules. In fact this is not accurate because paragraph 245AA was considered by the Secretary of State who stated as follows:
- “The decision has been made not to request additional documentation or exceptionally consider the application under the provisions of paragraph 245AA as the missing contracts are a specified document which should have been provided, it is not anticipated that addressing this omission would lead to the grant of leave”.
25. Paragraph 245AA does not benefit the appellant and the decision is in accordance with the law. In addition this was not an argument that was advanced before the First-tier Tribunal.

Article 8

26. The appellant relies on Article 8 of the 1950 Convention on Human Rights. The appellant and her husband and their two children are citizens of Nigeria. They have a private life here but they would be returning together to Nigeria. In relation to their private life Judge McIntosh seemed to accept that there was a genuine business. However, the evidence does not establish that the trading of the business is significant or that it is making such a profit as to support the appellant and her family. There are two young children to consider, the eldest of which is 4 years old. However, he has not started full-time compulsory education. The children’s best interests are to be with both their parents and return with them to Nigeria. In relation to Article 8 I am not satisfied that the appellants have a significant private life that is material to their application however should I be wrong about that I am satisfied that the decision is proportionate to the legitimate aim which is the economic wellbeing of the country through the maintenance of immigration control. I note that the original grounds of appeal before the First-tier Tribunal argue that the appellant has been paying tax, but the evidence produced does not establish a tax liability or payment made by the appellant.

27. I remake the decision pursuant to Section 12(2)(b)(ii) and dismiss the appeal under the Immigration Rules. In addition the appeal is dismissed under Article 8. No anonymity direction made.

Signed

Joanna McWilliam

Date 15 September 2014

Deputy Upper Tribunal Judge McWilliam