Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/11496/2013

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham	**Determination Promulgated**
On 21 May 2014	**On 5 June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON

Between

MRS MINDO
ANONYMITY DIRECTION NOT MADE

Appellant

And
ENTRY CLEARANCE OFFICER
INDIA (NEW DELHI)

Respondent

Representation:

For the Appellant: Mr Omjeet Sidhu, the Sponsor
For the Respondent: Mr Smart, Senior Presenting Officer

DETERMINATION AND REASONS

Immigration History

1. The Appellant in this appeal was the Respondent at the First-tier Tribunal hearing, decided on the papers on 26 February 2014. However, for ease

of reference, the Appellant and Respondent are hereafter referred to as they were before the First-tier Tribunal. Therefore Mrs Mindo is referred to as the Appellant and the Entry Clearance Officer is referred to as the Respondent.

2. The Appellant's appeal against the decision of the Respondent to refuse to grant her leave to enter the UK as a visitor under paragraph 41 of HC395, as amended (the Immigration Rules) to visit her brother, the Sponsor, was allowed by First-tier Tribunal Judge Lingham (the Judge).

3. In the grounds of application, the Respondent submitted that the Judge erred in failing to give adequate reasons for findings on a material matter because refusal of the Appellant's application was on the basis that she had been to the UK on two previous occasions and had stayed beyond the period of time that she said that she would stay in the UK. This therefore established that she did not intend to leave the UK at the end of the period of the visit as stated by her pursuant to the provisions of paragraph 41 (ii). It was also submitted that the Judge referred to **Sawmyden (family visitors – considerations) [2012] UKUT 161 (IAC)** but it was unclear how this case related to the appeal by the Appellant; in **Sawmyden** at [8] there is reference to 'family emergencies which are likely to result in longer visits should not be regarded as taking up residence' but the Respondent had not argued that the Appellant was seeking to take up residence; the basis of the refusal was that the Appellant did not meet the requirements of paragraph 41 (ii) because she had overstayed on two previous occasions. The Appellant did not provide an explanation as to why she overstayed on the two previous occasions.

4. Permission was granted on the basis that it was arguable that:

> a. The Judge failed to explain the evidential basis for finding that the Appellant was genuinely seeking to leave to enter for the limited period stated by her (as stated in the visa application form) as required by paragraph 41 (i) and
>
> b. This finding was arguably important because she admitted to having remained in the United Kingdom, on two previous occasions, for periods longer than those that she had declared when she made the relevant applications and she failed to provide an explanation.

The Hearing

5. Mr Smart handed up a copy of paragraph 41 and provided the Sponsor with a copy of the relevant parts of paragraph 41 highlighted. He also handed up a copy of **Sawmyden**.

6. The decision by the Judge to allow the appeal was made on the papers before him. The Sponsor attended the hearing before me and it was clear that he had difficulty with expressing himself in English and it was not clear how much he could understand of what was being said. Mr Smart,

who had the advantage of seeing the Sponsor before me, stated that he had explained the reason why the Respondent was challenging the decision of the Judge in simple terms and if one speaks slowly, the Sponsor was able to understand.

7. The Sponsor confirmed that Mr Smart had helped him to understand and it was apparent that he understood that the Respondent's objection was that the Judge had not considered why the Appellant had on two previous occasions stayed in the UK beyond the period of time she had stated in the relevant visa applications because he said that on one occasion his sister had stayed for the opening of his restaurant and on the second occasion it was his mistake because the visa had been granted for six months and he had thought that provided she returned within the six month period, she would be complying with the terms of the visa.

8. In submissions, Mr Smart essentially relied on the grounds of application. He submitted that the Judge had stated, "The real concern of the respondent seems to relate to the appellant having extended her time of stay beyond that indicated in her first and second visit applications for visa to the UK. I accept that the appellant had stayed further than the period indicated by her in her previous applications but on both applications the appellant did not remain beyond her grant of leave" [16].

9. When asked whether the omission by the Judge was material, Mr Smart stated that the ECO was entitled to know the reasons for the decision.

10. In response, the Sponsor reiterated that it was his mistake that his sister had overstayed, that he had been in the UK for 23 years and sponsored many people who had returned within time. His brother had come in October for a month and had stayed 27 days. He did not want his sister's visa to be withheld because he had made a mistake.

Decision and Reasons

11. Paragraph 41 (ii) and (ii) of the Immigration Rules provides:

> "41. The requirements to be met by a person seeking leave to enter the United Kingdom as a general visitor are that he:
>
> (i) is genuinely seeking entry as a general visitor for a limited period as stated by him, not exceeding 6 months or not exceeding 12 months in the case of a person seeking entry to accompany an academic visitor, provided in the latter case the visitor accompanying the academic visitor has entry clearance; and
>
> (ii) intends to leave the United Kingdom at the end of the period of the visit as stated by him; and does not intend to live for extended periods in the United Kingdom through frequent or successive visits;..."

12. These provisions require the Appellant to establish that she intends to leave the UK "...at the end of the period of the visit..." stated by her. Whilst the main purpose of paragraph 41 is to ensure that those who come to the UK as visitors do not overstay or breach the conditions of grant, one of the ways in which the assessment is made is by considering whether an applicant has previously been in breach of the provisions of the Immigration Rules. In the Appellant's case, she has been to the UK on two previous occasions, in 2007, when she stayed in the UK for a period of six months when she stated on her application that she would leave the UK at the end of the period of two months. On the second occasion, in 2009, she was refused a visa because she had stayed in the UK beyond the period of the visit stated by her in 2007, during which the ECO stated that she was working for her son. She appealed against that decision in 2009 and her appeal was allowed.

13. The Appellant gave reasons, in her grounds of appeal for overstaying on "a previous visit" although which visit was not identified. She stated that this was because her son was to open a restaurant and she extended her visit from two to four months. It is likely that this was the second occasion as the failure to leave the UK within the period stated by her during the first visit in 2007 is likely to have been dealt with during the course of the appeal in relation to the application in 2009.

14. The Appellant has a history of failing to leave the UK at the end of the period of the visit stated by her in her visa application forms. As this issue had been previously raised to refuse a visa application, the Appellant should have been aware that if she failed to meet the terms of the Immigration Rules on the next visit, any future applications were likely to be refused. The ECO took issue with it on the present application; he decided that the failure to abide by the terms of the Immigration Rules taken together with his lack of satisfaction as to her finances meant that she would not leave the UK at the end of the period of the visit for which she is seeking leave. She did not address it and the Judge did not do so either. He merely stated that this was one of the reasons why her application was refused but made no findings on it. In the context of her previous failure to abide by the Immigration Rules, I accept Mr Smart's submission that an ECO is entitled to know the reason why a past breach of the Immigration Rules did not result in a finding against the Appellant.

15. There was no challenge to the findings of fact on other issues raised in the notice of refusal and these are therefore preserved.

16. As to the remaking of the decision, the Sponsor, who is not legally qualified, had explained in submissions why the Appellant had overstayed on the second occasion; Mr Smart accepted that I had sufficient evidence before me on which to remake the decision. Mr Smart, very fairly to the Appellant, explained again to the Sponsor the importance of ensuring that she returns within the period of the visit stated by her; if she required a longer period (up to the six months permitted by paragraph 41) she should stipulate that in her visa application form. The Sponsor stated that he was now aware that she must adhere to the provision within the

Immigration Rules to return to India within the period of the visit stated by her in her visa application form and that they would ensure that she did.

17. There was nothing before me to indicate that the Sponsor was not a credible witness and I accept his evidence that the reason why the Appellant overstayed on the second occasion was because he had persuaded her to. In view of the fact that he now knows what adherence to the Immigration Rules means, there is no excuse for staying beyond the period stipulated by her on any future occasion. He stated that other relatives had been to the UK and returned within the period of time stated by them. I find that an adequate explanation has been provided.

18. As all the findings of the Judge on other issues are preserved, on the evidence in the round I remake the decision to allow the appeal under the Immigration Rules.

Decision

19. It follows from the above that there is a material error of law in the decision of Judge Lingham. I set aside his decision. I remake the decision to allow the appeal under the Immigration Rules.

Anonymity

20. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and immigration Tribunal (Procedure) Rules 2005 and I see no reason why an order should be made pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date

M Robertson
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

In light of my decision to there is no reason for me to change the fee award made by Judge Lingham.

Signed Dated

M Robertson
Deputy Upper Tribunal Judge