



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/14964/2014

THE IMMIGRATION ACTS

Heard at Field House
On 18 September 2015

Decision & Reasons Promulgated
On 28 September 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR MUHAMMAD AMIR SHAKEEL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Jafar, Counsel instructed by Lee Valley Solicitors

For the Respondent: Ms A Fijiwala, Specialist Appeals Team

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing his appeal against the decision by the Secretary of State to refuse to grant him leave to remain as a Tier 1 (Entrepreneur) Migrant, and against the Secretary of State's concomitant decision to remove him under Section 47 of the 2006 Act. The First-tier Tribunal did not make an anonymity direction, and I do not

consider that the appellant requires to be accorded anonymity for these proceedings in the Upper Tribunal.

2. The appellant made his application on 28 March 2013, and he was interviewed about his application in Sheffield on 21 February 2014. His application was refused on 7 March 2014 on non-points-scoring grounds. The Secretary of State was not satisfied that he was a genuine entrepreneur. The Secretary of State gave extensive reasons for making this assertion, quoting extensively from documents which the appellant had provided in support of his application and from questions and answers in the interview. One of the areas of concern was funding. He stated he had access to funds of more than £50,000 which had been provided by a third party funder, who was family friend. He said in interview that he had not invested any of the money yet and it was still available. The UKVI had sent his documents for verification with NIB Bank who confirmed that at the date stated on the letter the balance stated was correct. But on 12 June 2013 the balance had fallen to PKR4,400, which was equivalent to £28,95. So his claim in interview that there were more than £50,000 of funds still available, and that they remained untouched in NIB Bank, was clearly incorrect.

The Hearing Before, and the Decision of, the First-tier Tribunal

3. The appellant's appeal came before Judge S Taylor sitting at Taylor House on 3 December 2014. The appellant appeared in person, and there was no Presenting Officer. The appellant gave oral evidence. He understood the main issue which he had to answer was that the £50,000 required was no longer in the funder's account. His funder, Mr Bilal, told him he still had the money and that the money had not been withdrawn. He was satisfied that Mr Bilal could transfer the funds when he needed them. He trusted Mr Bilal.
4. In his subsequent decision, the judge observed at paragraph [9] that it would have been helpful to have had a verification report from the respondent, or a copy of the letter from NIB Bank, confirming that the funds had been removed as of June 2013. However, the assertion had been made in the refusal letter and the appellant had been unable to answer the allegation. In the absence of any documentary evidence that the funds were still available, he found that the appellant no longer had access to £50,000 from his business; and that the funds were withdrawn by his funder prior to the decision being made. Accordingly, he found the appellant failed to qualify for points in respect of access to funds.
5. At paragraph [10], the judge held that as the appellant had failed to qualify for points in such a fundamental area, he had also failed to satisfy paragraphs 245DD(h) and (i). In the circumstances, he found it would be superfluous to consider all of the answers given at the interview. The appellant clearly did not have the funds as claimed, and he had made no attempt to provide documentary evidence of having the funds. So he was also not satisfied the appellant had a genuine business proposition to establish a business in the UK, and thus he did not meet the requirements of paragraph 245DD(k).

The Eventual Grant of Permission to Appeal

6. The appellant was refused permission to appeal by the First-tier Tribunal, but was granted permission to appeal on a renewed application to the Upper Tribunal. On 14 May 2015 Upper Tribunal Judge Rintoul granted permission to appeal for the following reasons:

It is arguable that, as the renewed grounds aver at [2], the judge erred in law in requiring the appellant to prove that the relevant funds were still available to him, given that the respondent had provided no evidence in support of that assertion. It may also be arguable that the judge erred in taking into account [9] the appellant's failure to adduce additional evidence to rebut the respondent's assertion, as it may be that section 85A (4) would have prevented such evidence from being adduced.

Permission is granted on all grounds.

The Hearing in the Upper Tribunal

7. In advance of the hearing before me, John Parkinson of the Specialist Appeals Team settled a Rule 24 response opposing the appeal. He submitted that the Judge of the First-tier Tribunal had directed himself appropriately. The appellant had produced no evidence to demonstrate the respondent was incorrect in the assertion that the funds were unavailable. The respondent made it clear that the bank was contacted and had confirmed the balance was minimal. The respondent was not challenged on the evidence of this enormous reduction, and the determination was not fatally flawed.
8. Ms Fijiwala did not adopt her colleague's Rule 24 response. She agreed with Mr Jafar that the judge had materially erred in law, and that the decision should be set aside and remade.

Reasons for Finding an Error of Law

9. The position taken by Ms Fijiwala at the hearing is not determinative of the issue which I have to decide. However, I am in no doubt that she was right to concede that the decision discloses a material error of law.
10. The judge was wrong to decide the appeal against the appellant on the sole ground that he had not rebutted the assertion in the decision letter that the balance in the funder's bank account had dropped from over £53,000 sterling equivalent at the date of application to nearly zero as at June 2013.
11. This was only one concern, amongst many other concerns raised in the refusal letter, which *cumulatively* led to the conclusion that the appellant was not a genuine entrepreneur. The fact that the appellant, a lay person, thought that the removal of funds was the main issue which he had to deal with in the appeal did not relieve the judge of the obligation to consider the reasons for refusal in the round, and to decide whether the decision was right in substance, having regard inter alia to the appellant's performance in interview.

12. If the judge had reviewed the interview, he would have noted that it had not been put to the appellant in interview that the funds had disappeared from the funder's bank account. This in turn highlighted the importance of the respondent producing proof of the allegation that the funds had vanished. In accordance with general principles, the burden rested with the respondent to prove that the balance had dropped to nearly zero as of June 2013. The burden did not rest with the appellant to disprove this allegation.
13. Following **Ahmed and Another** (PBS: admissible evidence) [2014] UKUT 365 it is arguable that the appellant was in any event debarred from adducing evidence in rebuttal of the allegation. For it was not being alleged that he had produced a false document in support of his application. On the contrary, it was accepted that the documentary evidence of funding as at the date of application was genuine and valid. The allegation was simply that the funding which had appeared to be in place at the date of application was no longer in place. So if **Ahmed and Another** is good law, the appellant could not provide additional evidence by way of rebuttal of it. This would be manifestly unfair and would render a refusal decision which was solely based on such an allegation a decision which was not in accordance with the law.
14. Accordingly, on this particular issue (the alleged disappearance of funds from the account) the judge should have found that the burden of proof had not been discharged by the Secretary of State and/or that she could not rely on post-application evidence where the appellant was not allowed to rely on post-application evidence on the same discrete issue.
15. It is argued in the grounds of appeal that the judge should have found that the entire refusal decision was not in accordance with the law, as the appellant had not been given an opportunity to comment on the concerns expressed in the refusal letter before the Secretary of State reached her conclusion that he was not a genuine entrepreneur.
16. I find that this case is not made out. The other concerns raised in the refusal letter are based on what the appellant said in the interview, and on what the Secretary of State has gleaned from documents which the appellant provided with his application. So, unlike the allegation relating to the disappearance of funds from the funder's account, the Secretary of State does not purport to rely on post-application evidence of which the appellant is unaware, and which has neither been disclosed to him nor to the Tribunal. So all the other concerns raised in the refusal letter are concerns which are fairly raised, and they can be fairly resolved by the First-tier Tribunal by an examination of the relevant material.
17. As the First-tier Tribunal Judge failed to engage with the other concerns raised in the refusal letter, both parties have been deprived of a fair hearing in the First-tier Tribunal, and the proper course (as agreed by Mr Jafar and Ms Fijiwala) is that the decision of the First-tier Tribunal should be set aside in its entirety, and the appeal remitted to the First-tier Tribunal for a de novo hearing before another judge.

Conclusion

18. The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside in its entirety.

Directions

19. **This appeal is remitted to the First-tier Tribunal at Taylor House for a de novo hearing before any judge apart from Judge S Taylor.**

20. **My provisional time estimate for the hearing is two hours. None of the findings of fact made by the previous Tribunal are to be preserved.**

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Monson