IAC-FH-AR-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/17931/2013
IA/17932/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 July 2015	**On 16 September 2015**
Prepared 30 July 2015	

Before
DEPUTY UPPER TRIBUNAL JUDGE DAVEY
UPPER TRIBUNAL JUDGE WARD

Between

MUHAMMAD AHSAN SHABBIR
NADIA AHSAN
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr A Chohan, Counsel, instructed by A-Z Syed Ali
For the Respondent: Miss J Isherwood, Senior Presenting Officer

DECISION AND REASONS

1. The first Appellant, a national of Pakistan, date of birth 22 June 1978, and his wife, the second Appellant, his dependant, date of birth 24 June 1979, appealed against the respondent's decisions dated 1 May 2013 to refuse a combined application, dated 12 December 2012, to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant under the points-based

system. The Secretary of State also made removal directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. Their appeals came before First-tier Tribunal Judge Cary (the judge) who, on 19 January 2015 promulgated a decision whereby he dismissed their appeals. It is correct to say that the judge failed to note their appeals against removal under Section 47 but in fact the case file shows the removal directions were withdrawn on 2 June 2014.

3. The grounds seeking permission are dated 2 February 2015. Permission was granted by First-tier Tribunal Judge P M J Hollingworth on 9 March 2015. Permission was given essentially on the basis that the judge had made adverse findings based upon evidence which did not contain a full transcript of the interview of the first Appellant. The full transcript was not provided in accordance with directions that were given on more than one occasion (2 June 2014, 22 September 2014 and 1 October 2014) and nor was it provided to the First-tier Tribunal Judge at the hearing of the appeal on 9 January 2014.

4. There was even today no copy of the interview available and there was no explanation for its absence. We would emphasise that Miss Isherwood was at no fault in this respect. Her case file showed that requests for the full interview had been duly made to the caseworker but to which there was no evident response.

5. Nevertheless the absence of the full transcript has formed a significant part of the basis of the submissions by Mr Chohan that it was unfair for the hearing to have proceeded before the judge, in the absence of a copy of the interview. In its absence, the judge had been unfair in his assessment of the reliability and credibility of the first Appellant's evidence.

6. The first ground as drafted stated:-

> "It appears that the IJ demanded evidence that is beyond the threshold of balance of probabilities as he demanded detailed breakdown of a non-PBS interview and the IJ himself admitted not having the complete part of that interview as conducted. The honourable IJ knowingly presided over incomplete fact yet it was the interest of justice that he was clearly directing himself to and it is in the interests of justice that he should preside over the complete facts."[sic]

7. The position was that the judge had the opportunity to hear the first Appellant's evidence, an explanation of the events in question and the documents that had been provided. The first Appellant set out in a document, dated 12 May 2013, a number of robust points of appeal against the adverse decision of the Secretary of State and that included a discussion of, amongst other things, the availability of funds, the nature of the business that he described he had been running for a period of time and on other matters which had formed the basis of adverse comments in the Reasons for Refusal Letter.

8. On a consideration of the decision as such and the ground as drafted it does not seem to us that the judge omitted to consider the evidence that was advanced or the Appellant's explanation of the matter. The same point applied to both the existence of the funds the first Appellant claimed were held by Mr Hussain, a family friend in Pakistan, as well as the nature of the business that he was running and the particular difficulties faced, because of his immigration status, in not having a bank account into which the funds could be paid in the United Kingdom.

9. The judge took those matters into account. At paragraph 24 of the decision he set out the correct burden and standard of proof. He directed himself correctly to the relevant consideration of the date of application, the matters in being at the time and he drew to his attention paragraph 245DD of the Immigration Rules HC 395 as amended.

10. The findings thereafter made the judge, particularly in paragraphs 27 to 30 of the decision, set out why he did not accept that funding was genuinely available and intended for investment in the United Kingdom business.

11. The judge was also mindful of the related issue as to whether there was a genuine business, if self-employment had been established and that the first Appellant was a director of one or more businesses. The judge, at paragraphs 31 to 35 of the decision, concluded that the first Appellant had not shown himself to be a genuine entrepreneur who, at the date of the application, genuinely intended and was able to establish a business within the UK.

12. Consideration of the same issue also touched upon the availability of funds and the existence of a bank account which had been dealt with earlier in the judge’s decision.

13. We find in the circumstances that ground 1 does not succeed because, contrary to what is asserted, the judge was not applying either the wrong standard of proof nor was he taking into account evidence that he was not entitled to do. The first Appellant had for his own purposes advanced explanations and later documentation to show that he had a genuine business at the material time. Such evidence was not being argued to establish as a fact he met the requirements at the date of decision but rather that he was a genuine businessman. It was a matter for the judge, having weighed that evidence, that he did not accept that the first Appellant was a genuine businessman. Thus on either bases, given the refusal with reference to the attributes in Appendix A of the Rules, it was clear that the appeal could not succeed.

14. In relation to the ground 2, the judge did take into account the relevance of the banking situation and for that, and indeed many other reasons, ultimately rejected the first Appellant's credibility and the sufficiency of the evidence to meet the requirements for such a Tier 1 PBS application.We did not find ground 2 raised any arguable error of law

15. Ground 3, raised a legal issue as to dates which were material but that was not pursued before us. Had it been necessary to address it we would have rejected the ground.

16. Finally, the issue was raised, with reference to an unnumbered ground (paragraph8), of a failure by the judge to consider Articles 6 and 8, we assume of the Human Rights Act. There was no record that the Appellant had relied upon Article 8 as a ground of appeal against the Respondent's decision nor did the submitted grounds of appeal refer to Article 8 ECHR.The first appellant's evidence and statement did not refer to Article 8 issues. It is clear that in the grounds to the First-tier Tribunal seeking permission to appeal the decision of the judge, there was an Article 8 ground of appeal but without any particulars.It was not asserted the first Appellant had raised Article 8 as an issue with the judge but it had not been dealt with. Rather as drafted, the ground suggested that because of the Appellants were in effect seeking ILR, as a result of the Tier 1 application, the judge was obliged to consider Article 8. If that was the suggestion we think the point was and is misconceived nor was it a Robinson obvious point that the judge should have addressed.

17. The Record of Proceedings does not suggest that Article 8 was pursued at the hearing before the judge. We note that in paragraph 35 the judge indicated that Article 8 was not raised in the appeal. We conclude from the case file that the Appellants did not provide any evidence to the judge to support an Article 8 claim.

18. It is hard to see how, when a person cannot succeed in obtaining a particular category of PBS which permits him to stay, that it can be argued that their human rights are engaged, particularly when they had no rights to remain. Self-evidently the position was that the Appellants were in a position to return to their home country and have a life for themselves there. In the circumstances, even if Article 8 had been raised we do not think another Tribunal, even considering such a claim, would have reached any different decision.The judge's decision does not disclose any arguable error of law on that matter.

19. We note with concern that whoever at Immigration Chambers drafted the grounds seeking permission, who is not identified, should have wholly ignored the judge's finding in paragraph 35 that Article 8 was not raised in the appeal and, if that fact was disputed, failed properlyto plead the error of law.

20. The Original Tribunal decision stands.

NOTICE OF DECISION

The appeal is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Davey