



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/40936/2013
IA/40766/2013

THE IMMIGRATION ACTS

Heard at: Field House
On: 8 January 2015

Decision and Reasons Promulgated
On: 5 February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR RAHEEL AKHTER MALHI (1)
MR IMRAN YOUNAS BUTT (2)
(NO ANONYMITY DIRECTIONS MADE)

Respondents

Representation

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondents: Miss S Haji, counsel (instructed by Immigration Chambers)

DECISION AND REASONS

1. For the sake of convenience I shall refer to the appellant as the secretary of state and the respondents as "the claimants."
2. The claimants' applications made on 16 February 2013 for leave to remain in the UK as joint Tier 1 entrepreneur migrants under the points based system were refused by the secretary of state in each case on the basis that they were not entitled to any points in respect of access to funds as required under Appendix A of the

Immigration Rules. It was contended in accordance with paragraph 39, Table 4d of Appendix A of the Rules that the claimants had to show on a date falling within three months immediately prior to the date of application that they had access to not less than £50,000. For money held in the UK only, the account must be in the applicant's own name only or both names for an entrepreneurial team.

3. It was contended that the first claimant who had formed a Tier 1 Entrepreneurial team with the second claimant supplied his Halifax current account statements from 17 September 2012 to 15 January 2013. During that period, the balance was consistently below £50,000 within the three months preceding his application.
4. He had also supplied Barclays Cash Card account statements from 14 June 2012 to 12 December 2012, a Barclays current account statement from 3 December 2012 to 23 January 2013 and an Every Day Saver Account from 18 June 2012 to 23 January 2013. The combined savings totalled less than £50,000 on any given day in the three months preceding their applications.
5. Nor had they submitted any evidence demonstrating that they had registered with HM Revenue and Customs as self employed, or registered as the director of a new or existing business, as required under Table 4(d).
6. The first claimant had stated that he had access to funds of £25,000 being made available to him by the second claimant. As evidence, he produced a declaration from Mr Butt. However, there was no letter from the financial institution in which Mr Butt's funds were held that was supplied to establish that the funds are accessible to the claimant as specified in paragraph 41-SD(a)(i) of Appendix A. Nor was there a declaration from a legal representative establishing that the letter of permission supplied was valid, as specified in paragraph 41-SD(b)(ii) of Appendix A.
7. Further, the first claimant was awarded no points for maintenance under Appendix C. The Halifax bank statements that he supplied were dated to 15 January 2013 only and were accordingly not within one month of his application date.
8. Insofar as the second claimant's reasons for refusal are concerned, the same contentions are made in respect of access to funds as required under Appendix A. In his case, he had provided a declaration from the first claimant but no letter had been supplied from the financial institution where Mr Malhi's funds are held. Nor was there a declaration from a legal representative. The second claimant was however awarded ten points for maintenance (funds) under Appendix C.
9. In each case the secretary of state stated that the decision had been made not to request additional documentation or to consider their applications exceptionally under paragraph 245AA of the Immigration Rules, as it was not anticipated that addressing the omission or error would lead to a grant of leave.

The proceedings before the First-tier Tribunal: 27 June 2014

10. In a short determination First-tier Tribunal Judge Lobo allowed their appeals under the Immigration Rules. He set out the requirements under the rules [4-6].
11. He stated that 'on the files' were the bundles of the respondent, which included the applications, the refusal letters, notice and grounds of appeal and the documents which accompanied both the application and the appeal [7]. The claimants relied on a bundle of 182 pages including signed witness statements, and other documents in support of their appeals (that bundle is before the Upper Tribunal).
12. He stated that he had read and considered all the papers before him. The whole of the documentation set before him has assisted him in arriving at his conclusions [9].
13. He set out a summary of the reasons for refusal, namely that they had failed to provide satisfactory evidence that they had the required £50,000 for the specified period prior to their applications. They had failed to provide the "specified document", namely evidence that they were registered with HMRC. In addition, he noted that the first claimant failed to provide evidence that he had the £900 for maintenance for the required period of time.
14. Judge Lobo's conclusions are set out at paragraph 13. He found "on the evidence" that:
 - (a) both claimants made statutory declarations confirming that they each possessed in excess of £25,000 in personal bank accounts and that they mutually agreed that the funds were available to each other - bundle pp. 33-34);
 - (b) solicitors acting for the claimants at the time confirmed the preparation and making of each statutory declaration;
 - (c) each claimant sent to the secretary of state their application via solicitors' letter, each letter reciting the documents which were sent and which included evidence that each claimant is a director of AR Digital Ltd; that it is registered with HMRC and there was evidence of contract and invoices with clients;
 - (d) that the first claimant had, in a personal account with Halifax, in excess of £26,000 and that the second claimant had in his personal bank accounts both savings and current, in excess of £25,000. He referred to pages 131 to 133 and 136 to 151. The first claimant's account with Halifax showed that he held in excess of £28,000 on 13 February 2013.
15. The documentation provided by the first claimant included further copies of his current account statement. The statement bears the stamp of the Halifax bank (Ilford) dated 17 June 2014.

16. Insofar as the second claimant is concerned, Judge Lobo stated that he had shown in his personal bank accounts with Barclays, both savings and current, that he had in excess of £25,000. He referred to pages 136-151 of the claimants' bundle.
17. Again, these are statements produced after the date of decision, including his statement as at 12 March 2013 indicating his balances with Barclays exceeding £26,000. The Barclays statement at page 138 showed that he had in excess of £25,000 in his account on 23 January 2013. However, on 28 January 2013, £25,200 was transferred to his Every Day Savers account. The relevant credit is shown at page 141, indicating that on 28 January 2013, he had £26,209.10 in his account. On 18 February 2013, £25,200 was transferred to his cash card account with a description in the bank statement "Ref: Investment".
18. Judge Lobo found that as a consequence 'of the decided facts', each claimant persuaded him that they fulfilled the requirements of Appendix A and the first claimant had also fulfilled the requirements under Appendix C.
19. On 7 October 2014, Upper Tribunal Judge O'Connor granted the secretary of state permission to appeal. It was arguable that the Judge failed to determine the issue of whether the required funds were available with reference to paragraph 41-SD(a)(i) and (b)(ii) of Appendix A, and in the alternative, failed to provide legally adequate reasons for concluding that such specified documents were provided to the secretary of state with the applications.
20. Mr Whitwell relied on the secretary of state's grounds supporting the application for permission. He referred to paragraph 7 of the grounds, where it is asserted that the Judge failed to make any finding as to whether a legal representative declaration was submitted at the time of and in support of the claimant's applications. The Judge found that the solicitors acting for them at the time confirmed the preparation and making of each statutory declaration.
21. However, I have had regard to the claimants' former solicitors, Consilium Chambers LLP, who sent an accompanying letter in support of the claimants' applications, dated 13 February 2013. The solicitors confirm that the 'enclosed original statutory declaration' was made under oath and was signed before Mr Syed Akhtar, their solicitor, on 13 February 2013. He stated that he checked the signatories' identity documents which were original Pakistani passports. In the event Mr Whitwell did not pursue that particular ground.
22. He submitted in reliance on the other grounds that the Judge had given inadequate reasons for his finding that they fulfilled the requirements of paragraph 245DD(b) of the rules. The bank statements submitted with the application failed to demonstrate the required funds on any given day in the three months preceding the application. He failed to make any finding as to whether the bank account statement submitted with the application demonstrated the possession of such funds on any one given day.

23. Nor did the claimants provide bank letters demonstrating access to each other's funds. The Judge had failed entirely to consider that ground of the original refusal. The claimants also failed to submit evidence demonstrating registration with HMRC as self employed or registration as the director of a new or existing business. The Judge had failed to consider whether evidence produced at the hearing had been submitted at the time of and in support of their applications. Ms Haji accepted that the Judge had not been entitled to rely on post decision evidence, having regard to the provisions of s.85A of the Nationality, Immigration and Asylum Act 2002.
24. He submitted that the first claimant failed to provide documents demonstrating possession of £900 for the period specified under Appendix C and E of the Immigration Rules. It is contended that the Halifax Bank statements supplied by the first claimant were dated only until 15 January 2013, which was not within one month of the application date.
25. Mr Whitwell submitted that the bank statements produced in the claimants' bundle, which were considered by the Judge related to events post dating the date of the decision. It is clear from the claimants' bundle that the bank statements from Halifax are duplicates, which were only printed on 17 June 2014. The statements are at page 133 and 134.
26. On behalf of the claimants, Ms Haji submitted that paragraph 41-SD (a) referred to specified documents to show evidence that money is available to invest. The sub paragraphs (a)(i) and (a)(ii) are disjunctive. The claimants relied on paragraph 41-SD(a)(ii), which refers to specified documents required for money held in the UK only. In that case, only a recent personal bank or building society statement from each UK financial institution holding the funds, which confirms the amount of money available to the applicant (or the entrepreneurial team if applying under the provisions of paragraph 52 of this appendix), needs to be supplied.
27. Those statements had to satisfy various requirements set out in (a)(ii)(1) to (7). Accordingly, the statements must be originals and not copies; the bank must be in the UK and regulated by the Financial Services Authority; the money must be in cash in the account and not consist of assets such as stocks and shares; the account must be in the applicant's own name only or both names for an entrepreneurial team; and not in the name of a business or third party. The bank statement must be on the institution's official stationery confirming the claimant's name and, where relevant, the entrepreneurial team partner's name, the account number, the date of the statement and the financial institution's name and logo.
28. In paragraph 41-SD(a)(ii)(6) it is provided that the bank statement must have been issued by an authorised official of that institution and produced within the three months immediately before the date of the application.

29. If the statements are printouts of electronic statements from an online account, they must either be accompanied by a supporting letter from the bank or bear the official stamp of the bank in question on each page of the statement.
30. With regard to the latter requirement, it is evident that the second claimant, Mr Butt, did produce to the secretary of state bank statements of that nature for both the current account and the Every Day Saver Account. The statement is not on the institution's official stationery. They do however contain the correct number of his accounts and are described as "view account entries". It appears that copies of that statement were produced in accordance with the requirements under paragraph 41-SD before the First-tier Tribunal from pages 136 onwards. As noted, these are updating statements for the period 13 December 2012 to 12 March 2013. Statements were also produced for the First-tier Tribunal right up to 6 June 2014. All that evidence was inadmissible.
31. Ms Haji produced a schedule prepared by her solicitors summarising the combined totals of the money available in each claimant's account. (Although the schedule refers to "2014" it is evident that it is intended to relate to 2013).
32. As at 15 February 2013, the combined total was £53,223.36. The date of the application was 16 February 2013.
33. Ms Haji submitted that the claimants had accordingly met the requirements with regard to access to funds. The first claimant had an amount in excess of £31,833 in his Halifax account on 15 January 2013. That evidence had been supplied to the respondent as part of the application. Mr Butt also produced evidence to the respondent, referred to as the "view account entries" for January 2013. He had in excess of £24,500 in his current account between 17 and 23 January 2013.
34. Accordingly, although Mr Butt did not present that evidence in accordance with paragraph 41-SD(a)(ii)(5), the secretary of state was nevertheless in possession of statements.
35. Ms Haji submitted that in those circumstances, the secretary of state should, in accordance with paragraph 245AA of the rules, have requested the claimant to produce the originals before making the decision. Copies had been made available at the time
36. She referred to the requirement that the bank statement must have been issued by an authorised official of the bank and produced within three months immediately before the date of the application. It is clear that the statements were produced within the three months immediately before that date.
37. Ms Haji also submitted that the Judge had accepted the claimants' evidence, and in particular their assertions that the bank statements and documents referred to had been submitted to the secretary of state as evidence of funds. Both claimants had

stated that they 'failed to understand' how the bank statements provided were not part of the bundle from the Home Office. In the event, they produced stamped printouts again to show that the funds were available. That showed that there would have been no reason why they would not have been sent and accordingly supported their claim that they had been produced to the secretary of state.

38. Similarly, the claimants contended that the cover letter provided by their previous solicitors listed the letter from the legal representative as required under the Appendix. It is accordingly "not understandable" why the Home Office contends that this had not been provided.
39. Mr Malhi had stated in his witness statement that his former solicitors' firm was closed down and he was unable to obtain confirmation from them. This also applied with regard to the current appointment report. The claimants themselves took the report from the Companies House website whilst at the solicitors' office. That had also been mentioned in the covering letter. They had established therefore that they had been appointed directors of a new business, no more than three months prior to the date of application. The Companies House report produced meant that they met the specified evidential requirements in that regard.
40. He contended that if the Home Office had mistakenly misplaced their documents and they therefore did not have them available at the date of decision, they should simply have asked for further information under paragraph 245AA of the rules.
41. In his witness statement, Mr Butt stated that on 23 January 2013, he had over £25,000 in his cashcard account. Therefore, on that date, both he and his partner had access to over £50,000 in funds. He contends that his partner had provided stamped bank statements from his Halifax account up to 13 February 2013, showing that on 21 January 2013 and after that date, they both had access to over £50,000. That was within three months before the date of the application.
42. He explained that having received a call from his bank, he was advised not to place large amounts in the current account for lengthy periods. Accordingly, he transferred the sum into his Saver account, and then provided statements of that account as evidence of funds.

Assessment

43. In her reasons for refusal, the secretary of state contended in respect of both claimants that there had been no letter provided from the respective financial institutions where their partner's funds are held to establish that those funds are accessible to both as required under paragraph 41-SD(a)(i) of Appendix A.
44. I have had regard to Table 4 under Appendix A. Each claimant applied for leave to remain on the basis that he had been last granted leave as a Tier 1 (Post Study Work) Migrant. Accordingly, they had to show that on a date falling within the

three months immediately prior to the date of application that they had registered with HMRC as self employed or registered a new business in which he is a director, or registered as a director of an existing business. In addition, it is provided that they must have access to not less than £50,000 – Table 4(d)(v).

45. Although the secretary of state contends in the refusal reasons that Table 4(d) requires that the applicant must have access to not less than £50,000 on a date falling within the three months immediately prior to the date of application, it is evident that the three month requirement, as seen from its context under Table 4(d)(iii) relates to the registration requirements which I have set out. The access to not less than £50,000 is a separate requirement under the Table.
46. Furthermore, the claimants are relying on paragraph 41-SD(a)(ii) of Appendix A as the money that they hold is in the UK only. Accordingly, the letter referred to at paragraph 41-SD(a)(i) does not apply to their application. As noted 41-SD(a)(ii) is in the alternative and relates to monies held in the UK bank accounts.
47. It is provided in 41-SD(a)(ii) that the bank statement must have been issued by an authorised official of that institution and produced within the three months immediately before the date of application.
48. It is evident that the bank statements relied on evidencing access to £50,000 were produced within the three months immediately before the date of the application. The schedule produced by the claimants, and which has not been disputed, indicates that as at 15 January 2013 onwards the claimants had access to cash in excess of £50,000.
49. The evidence produced to the secretary of state by Mr Butt with regard to his respective Barclays accounts were however not in a form as specified by paragraph 41-SD of Appendix A.
50. In those circumstances, the claimant had failed to produce the appropriate specified evidence.
51. The document they submitted in that respect was in the wrong format, alternatively, the document is a copy and not the original. I have had regard to version 2.0 of the guidance relating to PDS Evidential Flexibility. This sets out documents which it may be appropriate for the case worker to request. Those in respect of Tier 1 Entrepreneurs refers to evidence that is copied instead of an original. It also includes missing information from the required letters or documents which cannot be readily ascertained by the case worker.
52. The secretary of state contended in the refusal letters that despite the production of bank statements by Mr Butt up to 23 January 2013, he had less than £50,000 on any given day in the three months preceding the application.

53. It is also contended that his team member, Mr Malhi, had supplied bank statements from 17 September 2012 to 15 January 2013, which together with his own savings totalled less than £50,000 on any given day in the three months preceding his application.
54. However, on 15 January 2013, Mr Malhi had a closing balance in his Halifax account in the amount of £31,833.31. The respondent also had regard to Mr Butt's saver account from 18 June 2012 to 23 January 2013. The secretary of state contended that their joint savings totalled less than £50,000 on any given day in the three months preceding their application. However, as indicated, the combined total of the claimants' funds was in excess of £50,000 from 15 January 2013.
55. As required in paragraph 41-SD(a)(ii)(6), the bank statements must have been issued and produced within three months immediately before the date of the application.
56. There was accordingly evidence produced showing that the claimants had access to not less than £50,000 as confirmed by bank statements issued by an authorised official of the respective banks, and which were produced within the three months immediately before the date of the application.
57. Judge Lobo found that each claimant had in excess of £25,000 in their respective bank accounts with Halifax and Barclays. Accordingly, they fulfilled the requirements of Appendix A and insofar as the first claimant is concerned, Appendix C as well.
58. At the hearing before the First-tier Tribunal, the claimants produced bank statements in proper form. That evidence post dated the date of decision. It is evident that Judge Lobo accepted that evidence, even though it was not admissible. The bank statements for example produced by Mr Malhi related to the company's account. Mr Butt produced copies of his Barclays statements in proper form. However, the originals were not produced.
59. Judge Lobo, without any reasoning, accepted that the claimants had shown access to funds in the required amount. However, he did not make an explicit finding as to whether the bank statements submitted with the application demonstrated possession of the necessary funds on any one given day.
60. I have also had regard to the application forms of each claimant, in which they have identified their respective bank accounts contending that each had at least £25,000 in their account so that the total of money available to them was at least £50,000. Bank statements had been submitted at the time, albeit not in proper form.
61. The secretary of state did have evidence from Mr Malhi that as at 15 January 2013, he had £31,833.31 in his Halifax account. Mr Butt produced evidence to the respondent showing that he held £24,562.83 in his Every Day Saver account.

62. Accordingly, apart from the account being in the incorrect format, the evidence produced to the secretary of state indicated that from about 17 January 2013 onwards, amounts in excess of £50,000 were held as a combined total.
63. The claimants had however not produced the originals of that account which is a requirement under paragraph 41-SD as referred to. The originals have since been produced. They are however not admissible evidence.
64. In the circumstances, they should have been given an opportunity to produce the originals of that bank statement. To that extent, the decision was not in accordance with the law and the immigration rules.
65. Mr Butt has produced original bank statements from Barclays in compliance with paragraph 41-SD covering the same period as the copies sent to the secretary of state, namely account entries from 1 January 2012 to 23 January 2013 in the Every Day Saver account number 33068195, sort code 20-44-22. It appears that Mr Butt also had a current account 73711358 with sort code 20-20-20, which is a different account to the Every Day Saver account referred to.
66. The findings of Judge Lobo were not supported by full reasons. He allowed the appeals outright under the Rules without proper analysis. However, the appeal should only have been allowed to the limited extent that the decision was not in accordance with the law as the claimants had not been given the opportunity of producing the original bank statements referred to. The combined total in their respective accounts however appeared to exceed £50,000 from at least 21 January 2013.
67. The making of the decision by the First-tier Judge thus involved the making of an error on a point of law.
68. I accordingly set aside the determination of the First-tier Tribunal and remake it by substituting a decision allowing the claimants' appeals to the limited extent on the basis that the secretary of state's decision was not in accordance with the law. The claimants accordingly await the making of a lawful decision.

No anonymity direction is made.

Signed

Dated 4/2/2015

Deputy Upper Tribunal Judge Mailer