



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/14026/2013

THE IMMIGRATION ACTS

Heard at Glasgow  
On 5 March 2014

Determination Promulgated  
On 21 May 2014  
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Before

MR C M G OCKELTON, VICE PRESIDENT  
UPPER TRIBUNAL JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR PRITHVIRAJ SARKAR

Respondent

Representation:

For the Appellant: Mr R Parkinson, Home Office Presenting Officer  
For the Respondent: Mr Boyd, Temple & Co

DETERMINATION AND REASONS

- 1) This is an appeal by the Secretary of State against a determination by Judge of the First-tier Tribunal Juliet Grant-Hutchison allowing an appeal by Mr Prithviraj Sarkar (hereinafter referred to as "the applicant".) The appeal to the First-tier Tribunal was brought against a decision dated 18 April 2013 by the Secretary of State refusing the applicant leave to remain as a Tier 1 (Entrepreneur) Migrant under the Points Based System.
- 2) The applicant's position is that he is a director and the majority shareholder of a company called Connect-IN Ltd. The sum of £40,000 has been invested in this

company by Gabriel Investments Ltd. In addition, the applicant had over £10,000 in his personal account available to invest in the company. On the basis of these two sums, the applicant maintained that he had available to invest or had invested £50,000 in his business. The issue in the appeal was whether the £40,000 invested in the business by a third party, which was money which had never been through the hands of the applicant himself, albeit that he was a director of the business, could count towards the total of £50,000 which the applicant was required to invest in the business either from his own resources or from a third party.

- 3) In the view of the Secretary of State, where relevant funds had been invested in a UK business before the date of the application for leave to remain, as they had in this case, then in terms of paragraph 46-SD of Appendix A of the Immigration Rules the applicant could not rely on this money as part of the investment of £50,000 required under the Rules.

### **Decision of the First-tier Tribunal**

- 4) The Judge of the First-tier Tribunal made a thorough and careful determination, in which she addressed this point. At paragraph 19 of her determination she quoted from the Secretary of State's reasons for refusal letter, in which it was stated "that any accounts submitted must show the investment made by the applicant in his own name." She then quoted the following requirements from paragraph 46-SD(b):

"Audited or unaudited accounts must show the investment in money made directly by the applicant, in his own name or on his behalf (and showing his name). If he has invested by way of share capital, the business accounts must show the shareholders, the amount and value of the shares (on the date of purchase) in the applicant's name as it appears in his application. If the value of the applicant's share capital is not shown in the accounts, then share certificates must be submitted as documentary evidence. The accounts must clearly show the name of the accountant, the date the accounts were produced, and how much the applicant has invested in the business."

- 5) At paragraph 20 of the determination the judge found that the applicant had not made any investment as yet in his own name or on his own behalf. The investment had been made by a third party, Gabriel Investments Ltd, directly into the company of Connect-IN Ltd, in return for a share of future profits. The judge found that in these circumstances paragraph 46-SD(b) did not apply. Further requirements in paragraph 46-SD(c) similarly did not apply. In reaching this conclusion the judge referred to paragraph 45 of Appendix A, which states the following:

"If the applicant has invested the money referred to in Table 4 in the UK before the date of the application, points will be awarded for funds available as if the applicant had not yet invested the funds, providing the investment was made no more than 12 months before the date of the application and the specified documents in paragraph 46-SD are provided."

- 6) The judge observed that the sum of £40,000 was not invested by the applicant but by Gabriel Investments Ltd and credited to the bank account of Connect-IN Ltd. It was

referred to in the management accounts of Connect-IN Ltd for the period from 1 July 2012 to 28 February 2013 under the heading "Capital and Reserves". The applicant did not receive the money personally to pass on to the company. Because the money was not invested by the applicant paragraphs 45 and 46-SD of Appendix A did not apply.

- 7) Having decided that paragraphs 45 and 46-SD of Appendix A did not apply, the judge then went on to consider the alternative requirements of paragraphs 41 and 41-SD of Appendix A. Paragraph 41(d) refers to money available to the applicant and the judge observed that this meant funds:
  - (1) in the applicant's own possession;
  - (2) in the financial accounts of a UK incorporated business of which he is the director, or
  - (3) available from the third party or parties named in the application in terms referred to in paragraph 41-SD(b) of Appendix A.
- 8) The judge noted that the £40,000 invested by Gabriel Investments Ltd was detailed in the accounts prepared by a certified accountant for Connect-IN Ltd, which was itself an incorporated company of which the applicant was a director. This was sufficient to show that the funds were available to the applicant under paragraph 41-SD.
- 9) In support of this argument the judge referred to the Secretary of State's policy guidance in respect of applications made on or after 31 January 2013, which had been submitted on behalf of the applicant. Under Section d of this guidance, where an application has been made following on from leave as a Tier 1 (Post-Study Work) Migrant (which applies in respect of the applicant), and access to £50,000 is required, the guidance states at paragraph 48 that "this money can be made up from money already invested in the business together with access to any balance of money needed to total £50,000."
- 10) Having regard to paragraph 41-SD(d) and to the associated guidance the judge found that the £40,000 invested by Gabriel Investments Ltd in Connect-IN Ltd did constitute funds available to the applicant. To this could be added a sum of more than £11,000 available to the applicant according to bank statements in his own name. Accordingly the judge was satisfied that the applicant had access to the required £50,000 to make up a score of 75 required in order to qualify for leave as a Tier 1 (Entrepreneur) Migrant.
- 11) The judge then went on to say that for the reasons she had given she did not accept the reasons for refusal relied upon by the Secretary of State. The judge further stated that the Secretary of State had not discharged the burden of proof and the reasons given by the respondent did not justify the refusal. The Secretary of State's decision was not in accordance with the law and the Immigration Rules.

### **Application for permission to appeal**

- 12) The application for permission to appeal on behalf of the Secretary of State was based on two grounds. The first of these was that the judge erred by concluding that

company funds were the same for the sake of the Rules as those held by the applicant himself. The Secretary of State pointed out that the funds of the company were not automatically those of the directors. The second ground was that the judge appeared to have applied the wrong burden of proof by stating that the Secretary of State had not discharged the burden of proof and that the reasons given by the Secretary of State did not justify the refusal. Permission was granted on both these grounds.

### **Consideration by the Upper Tribunal**

13) The starting point for our consideration of the appeal is the finding made by the Judge of the First-tier Tribunal to the effect that the applicant had £10,000 to invest from his personal bank statements and another £40,000 already invested in the company. This latter sum was not invested by the applicant but the applicant was a director and the majority shareholder of the company.

14) For the Secretary of State Mr Parkinson referred to paragraph 41(d) of Appendix A, which sets out the circumstances in which an applicant will be considered to have access to funds. Sub-paragraph (d) states as follows:

“The money will remain available to the applicant until such time as it is spent in the establishment or running of the applicant’s business or businesses. “Spent” excludes spending on the applicant’s own remuneration. The UK Border Agency reserves the right to request further evidence or otherwise verify that the money will remain available, and to refuse the application if this evidence is not provided or it is unable to satisfactorily verify. “Available to him” means that the funds are:

- (1) in his own possession,
- (2) in the financial accounts of a UK incorporated business of which he is the director,  
or
- (3) available from the third party or parties named in the application under the terms of the declaration(s) referred to in paragraph 41-SD(b) of Appendix A.”

15) The Judge of the First-tier Tribunal found, of course, that the £40,000 in question was in the financial accounts of a UK incorporated business of which the applicant was a director. Before us Mr Parkinson sought to argue that the reference in paragraph 41(d)(2) to “the director” meant the sole or only director. In reply Mr Boyd submitted that this was an attempt to read into the Rules something which was not there. This provision was compared with Table 4(d)(iii), which refers specifically to “a director”. Mr Parkinson submitted that Table 4(d) was concerned with a qualifying requirement of the Rules but the provision in paragraph 41(d) was concerned with the source of the funds relied upon and hence the use of the term “the director”.

16) It was pointed out that according to paragraph 41(d) the money must be available to the business and must not be used for the maintenance of the applicant. Mr Parkinson

confirmed that the money must be available to the applicant or to the entrepreneurial team for business use.

- 17) On behalf of the applicant, Mr Boyd submitted that the company was a very successful one but was in difficulty because of the refusal decision and the appeal. The company continued to attract funding and had shareholdings from Scottish Enterprise and Strathclyde University amounting to a further sum of £100,000.
- 18) For our part we accept that there might possibly be some merit in Mr Parkinson's argument relying on the use of the term "the director" in paragraph 41(d) rather than the term "a director" as in Table 4, though it strikes us as unlikely that paragraph 41(d)(2) was intended to apply only to companies with a single director without that being made clear separately. This, however, is not a matter which we need to consider in the context of this appeal. It was not raised in the Secretary of State's grounds for permission to appeal. Those grounds stated that company funds were not the same for the purpose of the Rules as funds held by the applicant and that company holdings were not automatically those of the company's directors. This latter observation is, of course, entirely correct, although of no relevance to the outcome of the appeal. The point made by the Judge of the First-tier Tribunal, however, was that the investment of £40,000 made in the company of which the applicant is a director and the majority shareholder constituted funds available to the applicant for the purpose of showing available funds of £50,000 under Appendix A. We consider that for the reasons given by the judge, she was entitled to make this finding and we see no reason on the basis of the grounds before us to overturn the judge's interpretation of these complex rules.
- 19) The second point relied upon in the Secretary of State's grounds was rightly not argued before us by Mr Parkinson. The use by the judge of the phrase relating to the burden of proof in paragraph 25 of the determination is a regrettable slip of the pen but it has no impact on the outcome of the appeal, particularly as the facts were not in dispute and the judge's reasoning was entirely adequate.

## Conclusions

- 20) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
- 21) We do not set aside the decision.

Signed

Date

Upper Tribunal Judge Deans