



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/21783/2013

THE IMMIGRATION ACTS

Heard at Field House
On 12 February 2014

Determination Promulgated
On 26 March 2014
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Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

MR WAHAJ SIDDIQUI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Iqbal
For the Respondent: Mr G Jack

DETERMINATION AND REASONS

1. The appellant is a citizen of Pakistan who was born on 16 March 1991. He made an application on 3 September 2012 for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant under the points-based system. The application was

refused on 20 May 2013 and a decision was also made to remove him from the UK by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The appellant appealed that decision and the appeal was heard by First-tier Tribunal Judge M A Khan. In a determination promulgated on 8 November 2013 the judge dismissed the appeal. On a renewed application to the Upper Tribunal an arguable challenge in relation to the reasoning of the judge was found and the matter was then listed for an oral hearing before me.
3. By way of background the appellant claimed 25 points under Appendix A: Attributes Access to Funds. According to the refusal letter:-

“You have stated that you have access to funds of £200,000 being made available to you(r) business by Mr Sajjad Afzal Shawl. As evidence of this you have provided:

1. Allied Bank Limited letter
2. a declaration from Mr Sajjad Afzal Shawl
3. a letter from Farani Javid Taylor Solicitors

However, the bank letter is not acceptable because it does not specifically confirm the amount of money being available to you from the third party's funds nor the third party's full contact details.

The letter from Farani Javid Taylor Solicitors that you have submitted is not acceptable as it does not confirm the number, place of issue and dates of issue and expiry of Mr Sajjad Afzal Shawl's identity document.

You have therefore not submitted the specified evidence as listed under paragraph 41-SD to establish that you have access to the funds that you are claiming.

In accordance with paragraph 41 of Appendix A of the Immigration Rules, you are therefore not considered to have access to the funds you have claimed.

The decision has been made not to request additional documentation or exceptionally consider the application under the provisions of paragraph 245AA as it is not anticipated that addressing the omission or error would lead to a grant of leave.

You have not provided any evidence that you qualify for points under any of the other provisions in the first row of Table 4 of Appendix A of the Rules and we have therefore been unable to award points for Attributes.”

4. The grounds of appeal refer to that refusal and go on to say at paragraph 4 that:-

“As a domino effect points for other attributes were refused by the respondent for the appellant’s inability to score 25 points for ‘access to funds’ as alleged by the respondent.”

In fact that is not correct. Under “Appendix B: English language” 10 points were claimed but the appellant was awarded none because the score as shown by the English language test certificate provided did not reach the minimum level of C1 requirement as specified under Appendix B. Furthermore the qualification that the appellant provided was a Diploma of Business Administration issued by West London College which did not meet the requirements specified under Appendix B for the award of points. This is because it is not recognised by the National Academic Recognition Information Centre for the UK as being equivalent to a UK Bachelors Degree. This latter point regarding the academic qualification does not appear to have been addressed anywhere in the appellant’s statement, by the judge that heard the appeal, in the grounds seeking permission to appeal or in submissions before me.

The Judge’s Determination

5. The judge that heard this appeal appeared to think that because the appellant knew little about the documents which had been submitted with his application the appellant was not a credible or consistent witness and the documentary evidence he provided, about which he knows little, is inconsistent and not credible either. It is not apparent how this may be relevant to a PBS decision where strict requirements have to be met and they are met by provision of the documentation itself.
6. There was no suggestion by the respondent that the appellant had produced forged or fraudulent documentation so it is difficult in the circumstances to understand the relevance of the points made by the judge. Immigration Rule 245DD(l) applicable at the time showed that the Secretary of State would not carry out (subsequently amended to may decide not to carry out) the assessment in 245 DD(h) *if the application already falls for refusal on other grounds* (my italics) but reserves the right to carry out this assessment in any reconsideration of the decision. Rule 245 DD(h) refers to the Secretary of State in essence needing to be satisfied that the applicant’s intentions are genuine and that money is genuinely available to the applicant. This is the so-called “genuine entrepreneur test” intended to deal with the credibility of suspicious applicants.
7. In the current appeal the respondent did not carry out an assessment as she might have done under paragraph 245DD(h) so no decision had been made in relation to the appellant’s credibility or indeed the genuineness of his application.
8. It seems to me that the judge was entitled to comment as he did. However, if his findings formed the reasons for him dismissing the appeal there would have been procedural unfairness to the appellant in that he was completely unaware of the point that was to be taken against him coming as it did entirely unannounced at the hearing. It was not something that the judge needed to determine but if for some reason he wished to do so he should have provided the reasons for this and given the appellant the opportunity to respond.

9. Whereas the judge appears to have erred I ask myself if he has erred materially and I consider that there are two relevant questions. Firstly, whether his findings on credibility were relevant in leading to his conclusion as to the appellant's inability to meet the strict requirements of the PBS Rules. Secondly, whether his findings on credibility could in any way have led to a different decision as to the requirement for the respondent to exercise her evidential flexibility policy in favour of the appellant if that policy applied.
10. I am far from persuaded that the judge did err materially on either point. Paragraph 28 of the determination makes clear that the documentation provided does not meet the requirements of the Rules and that "any request by the respondent under the flexibility rule could not cure the deficiencies at the root of this application". Therefore the findings of the judge on credibility were not material as the conclusion would have been the same in any event.
11. I turn now to the matters raised as ground 2 in the grounds seeking permission to appeal where ground 2 incorporates the appellant's skeleton argument.

Tier 1 (Entrepreneur) Migrants Requirements for Leave to Remain

12. Paragraph 245DD sets out the qualifications for leave to remain as a Tier 1 (Entrepreneur) Migrant. At the date of application the appellant was required to provide in support of his application all the relevant documentation as per the Rules applicable at that date.
13. Paragraph 34A(iii) states that where an application form is specified the application must also comply with the requirement that any section of the form which is designated as mandatory in the application form and/or related guidance notes must be completed as specified. That relates to such an application as the current one.
14. Paragraph 34A (a) requires that the application be accompanied by the photographs and documents specified as mandatory in the application form and/or related guidance notes.
15. By paragraph 34C an application that does not comply with the requirements of paragraph 34A will be invalid and will not be considered. Paragraph 34A is subject to paragraph A34 that deals with the online application process. See also 85A Nationality, Immigration and Asylum Act 2002 as to the Tribunal considering only evidence adduced by the appellant in support of and at the time of making the application to which the immigration decision relates.
16. I deal with the English language requirement point first. Under Appendix B as at the date of application the requirement for the appellant's knowledge of English had to be equivalent to level C1 although by Statement of Changes HC 760 as from 13 December 2012 the level became B1 (a lower threshold). Although the judge did not deal with that matter it is apparent that the appellant did not meet that requirement at the date of issue. He provided an English test certificate from ETS TOEIC showing

that he achieved a score of 475 in the listening section and 435 in the reading section. The minimum level of the C1 requirement at the time of the application was 490 for listening and 455 for reading.

17. As to the Diploma of Business Administration issued by West London College paragraph 7 of "Appendix B - English Language" would have allowed 10 points to be awarded for a degree taught in English if the applicant has a relevant level of English language shown in Table 1 (this appellant does not) and if he has obtained an academic qualification which "is deemed by UK NARIC to meet the recognised standard of a Bachelor's degree (not a Master's degree or a PhD) in the UK, and UK NARIC has confirmed that the degree was taught or researched in English to level C1 of the Council of Europe's Common European Framework for Language Learning or above ...".
18. The appellant has not obtained that academic qualification on the evidence provided.

Submissions

19. Mr Iqbal's oral submissions on behalf of the appellant were very lengthy and at one point drew the comment from me that if I was to understand those submissions they should have been put in a proper skeleton argument and made available for perusal prior to the hearing. Mr Iqbal said that he had only been instructed for the Upper Tribunal hearing at the last moment although I note that he did appear before the First-tier Tribunal Judge, so was better prepared, one might have thought, than me or the Presenting Officer.
20. I have no intention or need to set out Mr Iqbal's lengthy verbal submissions that I noted down in full because I consider that the issue is far simpler than he submits. In any event on examination of his written skeleton argument produced for the First-tier Tribunal hearing broadly the same submissions are set out there.
21. In essence Mr Iqbal submits that when the requirements of Appendix A are considered as to showing that the applicant has access to funds paragraph 41-SD (a) does not make specific reference to "money from a third party" whereas paragraph 41-SD (b) clearly does. Therefore the requirements of 41-SD (a) do not apply to the appellant, he has met the requirements of 41-SD (b), and therefore he has met the requirements of the Rules.
22. Mr Iqbal submits that the purpose of these complicated Rules is to ensure that money is genuinely available to the applicant and I doubt that anybody would disagree with that submission. Mr Iqbal further submits that as 41-SD stands at the moment it appears that each applicant has to meet all the requirements of subparagraphs (a), (b) and (c) but on a careful reading subparagraphs (b) and (c) are conditional. Subparagraph (b) is conditional upon use of third party funds and subparagraph (c) is conditional upon a few requirements out of which the most notable is to have last leave to remain under the Tier 1 (Post-Study Work) category. Therefore either subparagraph (a) applies or (b) or (c) applies. All three cannot apply at the same time unless the applicant uses a mixture of his own money and money from a third

party. Thus at the end of subparagraphs (a) and (b) the word “or” should have been used or paragraph 41-SD should be read in this way. Under subparagraph 41-SD (b) the appellant needs to demonstrate access to £200,000 and that is done by fulfilling the conditions of paragraph 41(a), (b) or (c) and (d)(3) of Appendix A and paragraph 41-SD(b). The appellant it is said meets all of those conditions. As to paragraph 41 (d) (3) of Appendix A it is the case that this was not introduced until 31.01.2013 by Statement of Changes HC 943 and so did not apply at the date of this application.

Paragraph 41 of Appendix A

23. It may help to attach to this determination paragraph 41 and paragraph 41- SD as they were at date of application so I have done so.
24. Paragraph 41 of Appendix A defines how an applicant will be considered to have access to funds. To do this an applicant will need to provide the specified documents in paragraph 41-SD to show cash money to the amount required, that the applicant has permission to use the money to invest in a business in the UK, and the money is either held in a UK regulated financial institution or is transferable to the UK (as per 41(a) (b) and (c)).
25. There are then listed under 41-SD the specified documents in Table 4 and paragraph 41 so that at 41-SD (a) the specified documents required are "to show evidence of the money available to invest" which under 41-SD (a) (i) is a letter containing certain specified information. 41-SD (a) (ii) applies if the money is held in the UK (not applicable here) and 41-SD (a) (iii) refers to £50000 from a Venture Capital Firm etc (not applicable here either).
26. Then I find that additionally if the applicant is using money from a third party 41-SD (b) applies and the applicant has to provide the various documents referred to which includes a letter from a legal representative.
27. The letter provided by Allied Bank refers to an application of the appellant for entrepreneur status and the fact that the bank has the consent of Mr Shawl to

“share these findings with the UKBA. I will confirm the contents of this letter to the UKBA at their request. Mr Sajjad Afzal Shawl has £200,000 available for investment and will be disposable in the United Kingdom on his request.”

On any view that letter does not comply with the specified document requirements of the Rules not least because it does not show Mr Shawl’s contact details or that the appellant has permission to use the sum of £200000.

28. As a matter of common sense it seems to me that the interpretation of the Rules as drafted at the applicable time allows for none other than as is set out above. It is apparent to me that the appellant has not met the requirements of the Rules not only in relation to the English language and qualification requirements but in failing to provide all that was required of him to show that he genuinely has access to at least £200,000 for investment purposes to be used in the United Kingdom.

29. As to the evidential flexibility issue it was incumbent upon the respondent to seek additional information, but only in certain circumstances. Without seeking to define the policy here that applied at date of decision the respondent would not be required to seek missing evidence if basic requirements as required by the Rules have not been met. The current application is not a situation where, for instance, there is one bank statement missing from a series or there have been minor errors or omissions made. It has not been shown that evidence exists or there is sufficient reason to believe that information exists which upon enquiry would provide the requisite evidence. The rules require the appellant to show that he had access to £200,000 as defined and what was produced came nowhere near showing that. It is not a minor error or omission or a situation where clarification was required. Paragraph 245AA of the rules applied at the date of decision. It refers to documents not submitted with the application. As per the refusal letter the respondent decided not to request additional documentation or exceptionally consider the application under paragraph 245AA as it was not anticipated that addressing the omission or error would lead to a grant leave. I agree and the First-tier Tribunal Judge came to the same conclusion.

Conclusions

30. The appellant does not succeed under the Rules. Although I find that the First-tier Tribunal Judge erred for the reasons that I have set out earlier in this determination I do not find that the errors are material but if I am wrong about that then for the further reasons that I have set out above I would still dismiss this appeal for the reasons given.
31. I note that the appellant's Statement of Additional Grounds refers to a breach of the appellant's Article 8 right to private and family life by the refusal of his application to remain in the United Kingdom and any consequent decision to remove him. The judge did not deal with that aspect of the appeal and erred in that respect. It is said that the appellant has established a private life in the United Kingdom and has invested a significant amount of time and money into his education and business here. The appellant's statement filed before the First-tier Tribunal hearing refers to him having lived in the UK for more than two years. In addition to his business life he has established a private life in this country and he would be devastated if his appeal is dismissed and he is required to leave.
32. Undoubtedly the appellant will have built up a private life that is deserving of respect. The decision interferes with that private life. The decision is in accordance with the law and is for one of the specified purposes, namely fair and firm immigration control. It is for the respondent to show that the decision is a proportionate one. There are no non-standard or particular features demonstrated that the decision is anything other than reasonable and proportionate in all the circumstances. The appellant has not been in the United Kingdom for very long and had no expectation absent full compliance with the Rules that he would be able to remain here. What qualifications he has acquired may well benefit him in Pakistan.

Decision

33. The decision of the First-tier Tribunal stands and the appeal is dismissed. The judge did not deal with the Article 8 claim but in all the circumstances the appeal does not succeed on that ground either for the reasons given above.
34. I was not addressed on the issue of anonymity. No anonymity direction has been made previously and the particular circumstances of this appeal do not warrant such a direction being made.

Signed

Date

Upper Tribunal Judge Pinkerton