



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: OA/06540/2013
OA/06532/2013
OA/06536/2013
OA/06542/2013

THE IMMIGRATION ACTS

Heard at Field House

On 5th June 2014

Oral Determination

Promulgated

On 07th Aug 2014

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

**MRS ELIF AYBAKAR
GIZEM AYBAKAR
AHMET CAN AYBAKAR
ALI AYBAKAR**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Basharat Ali instructed by KC Law Solicitors
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the appeal of Mrs Elif Aybakar and others. This matter came before me on 18 March 2014 where I provided a determination set out over six pages dealing with the error of law. That determination will form Appendix 1 to the determination that I am now making.
2. There was one matter which arose in the course of the hearing which I identified in paragraph 11 of the determination. This arose from the treatment of a sum of money which became available as a result of the cessation of the business being carried out by the limited company. The information showed that there were funds of £22,907, of which the sponsor's share was £21,761.65. I was satisfied that that money was created by the transactions which took place, but it was important in order to satisfy the requirements of the Immigration Rules that the appellant demonstrate that it was properly to be aggregated to the drawings from the business so that he could meet the financial limits of the Immigration Rules. That was not a matter which in my judgment had been properly identified in the financial documentation which I had seen and since it was a matter raised by me in the course of the hearing and for the first time, I did not consider it fair to conclude the determination of the appeal without hearing additional material on that issue.
3. There is now to hand a letter from Thornton Hass Ltd, Chartered Accountants, dated 29 May 2014 which addresses the sum of money to which I have referred. It says that dividends of £21,761 from Capview Ltd, which ceased to trade on 30 September 2010, were declared in their financial accounts for the period 1 November 2011 to 30 September 2012 and corporation tax was correctly paid on that profit, and as Mr Akbar was a 95% shareholder it was therefore open to him to draw down those dividends in the form of a cash sum which was declared by him on his tax returns for the year ending 5 April 2013. It is apparent therefore that this sum of money, £21,761.65, should be treated as income in the hands of the sponsor and could therefore be aggregated with his other income. In those circumstances I am satisfied that the appellants met the requirements of the Immigration Rules and consequently the appeal is allowed.

DECISION

The Judge made an error on a point of law and I re-make the decision in the following terms:

The appeal is allowed under the Immigration Rules.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL

Appendix 1

Representation:

For the Appellants: Mr B. Ali, Solicitor, of Aman Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

REASONS FOR FINDING ERROR OF LAW

4. The appellants are Mrs Aybakar who was born on 15 November 1975 and who is a citizen of Turkey and her three children who are respectively aged 9, 14 and 15. The family sought entry clearance to join Mrs Aybakar's husband and the father of the children who is the sponsor in the United Kingdom. An application was made under the provisions of the Ankara Agreement and the standstill provisions which are contained within it.
5. The issue before me is whether the business which undoubtedly is operated in part at least by the sponsor is a business which generates sufficient income profits or remuneration for those involved in it to satisfy the requirements for entry clearance of this family. It is common ground that the appellant has to show that her husband is able to generate income of £15,933 plus £10,200 by way of rent plus council tax of £1,156.84 making a total of £27,289.84. The only way this can be done or the only way this was attempted to be achieved was by showing that the applicant had director's remuneration of £11,487 and was in addition to that able to extract from the business a further amount of retained profit of something in the region of £22,000. The basis upon which he does that will be described by me now. Page 99 shows the relevant accounts. The accounts are in relation to a business called Catview Limited. Catview Limited ceased to trade on 30 September 2012. The application was made on 11 January 2013 and the decision made by the Secretary of State on 5 February 2013. At the time the decision was made, the limited company had ceased to trade because the business had effectively been carried on by way of a partnership because that was the way Londis, the well-known chain of grocery stores operated the franchise. They were not prepared to operate with a limited company and insisted on the partnership. However the partnership had only been operating for a matter of two months or so prior to the application being made and there were no partnership profits or no partnership accounts ready to indicate what the partnership business was generating. However, it was exactly the same business that was generating funds whether it is under the guise of a limited company or under a partnership.
6. The accounts then which are found at page 99 onwards deal with the period which begins on 1 November 2011 and continues until its dissolution on 30 September 2012, a period of some eleven months. It is apparent from the partnership accounts that the sponsor is the director and his brother, Mr Hasan Aybakar is the secretary and the shareholding is distributed as to 95 to the sponsor and 5 to the company secretary, Mr Hasan Aybaker - see page 101. The accounts themselves are prepared

by Zek and Company Accountants of Lordship Lane. They are not apparently members of the ACCA or one of the other branches of accountancy professionals but there is nothing to suggest that they are not accountants who have dealings with the revenue as we will later see.

7. What it shows is that the turnover of the business in 2012 was £192,000 and that the operating profit generated by that over that eleven month period was £22,907. That was featured in another page of the bundle, page 109, where we see a computation of corporation tax straddling two years and it is based on 20% of the sum of £22,907 which we have seen as the operating profit. The paper trail continues because on page 128 of the bundle there is a company short tax return form from HMRC prepared by the sponsor covering the period 1 November 2011 to 30 September 2012 in which the figure of £22,907 was the chargeable gain as the profit before other deductions and reliefs are shown. In addition, there is the figure of £4,581.40 which was the taxation payable at the rate of 20% for the relevant period. Accordingly, there is evidence at page 129 of a chargeable gain and that is itself reflected in a further document at page 88 of the bundle which is an acknowledgment of the company tax return from HMRC in relation to corporation tax as it covers Catview Limited and it shows the same figure of £4,581.40 being the amount of money which was payable. It follows that that there is evidence that the company Catview Limited was able to generate a profit of something in the region of £22,907 during that period and that, on dissolution, this was treated as having been distributed according to the shareholdings as to 95% to the sponsor which is the sum of £21,761.65. That is described by the judge as director's remuneration but in fact it looks as if it is a capital sum which was distributed when the company ceased to operate. Quite what happened to that money is not entirely clear since the business continued to operate. Had it been withdrawn from the business then the business, when continued as a partnership, would have been in debt to a further amount of £22,907. I surmise that what in fact occurred was that this sum, which was the retained profit, was put back into the business and therefore whilst it was a sum of money which was of value to the appellant, may not have been income that he was able to extract from the business.
8. I need to say little more about the accounts save that there is a balance sheet which we see at page 104. The balance sheet is instructive in that it is clear that the company has very little by way of assets. It does not have any property and consequently when there was an assessment of its assets the assets feature as equipment - £1,999, a motor van - £8,296 and the rest is formed by way of stock and cash in hand. Its total assets are about £70,000 of which cash in hand forms a sizeable part. It follows that, whilst the whole shareholding of the sponsor amounted to 95% share of the business, it is very much a share of the continuing business rather than a capital rich business.
9. The question of what happened to the business after the company was dissolved is seen in pages 77 to 78 of the bundle which is a partnership agreement. The partnership agreement is dated 1 October 2012 and follows the day after the

dissolution of the company and it is dealing with a partnership as between the sponsor and his brother, Hasan and it indicates on page 78 that the distribution of the partnership assets and drawings is, as between the sponsor, 95% and Hasan, 5%. In other words the distribution is the same as it was when the limited company was operating. It suggests to me that the company should continue in exactly the same way in practical terms as it did when it was a limited company. The business should continue in the same form but the means by which it was to continue its business was as a partnership rather than as a limited company. The partnership agreement was witnessed by the present representative of the sponsor in these proceedings which is Kuddus Camaz Solicitors LLP and the agreement was in fact witnessed by one of the partners. I am not prepared to say that this was not a genuine partnership agreement which properly represented the contributions made as between the sponsor and his brother and I have no reason at all to believe that this was a sham transaction or that the solicitors would have been involved in anything other than a genuine creation of a partnership. It was on this basis that the application was made for entry clearance on behalf of the appellants.

10. There was however a document prepared by a second company which was dated 15 January 2013 which indicated that although the business of Catview Limited which traded as Broadway Supersaver was held by the sponsor as to 95% in shares, the business used to be carried on as Broadway Market Supersaver. When the sponsor had been appointed a partner on 1 April 2008 he only had a 51% interest in the partnership, not 95%. That obviously created a problem as far as the judge was concerned although it has since been partly resolved by evidence from the sponsor in the form of a witness statement which is found between pages 7 and 16 of the bundle. In the evidence it suggests that the sponsor injected some £40,000 worth of capital. In page 169 of the bundle the sponsor's brother confirms that the sponsor injected some £40,000 which he had initially provided to purchase the business and it was agreed because of this, that as the sponsor had provided the lion's share, this should be reflected in the fact that he was to hold 95% of the shares. His statement was not available to the Immigration Judge but it comes as evidence which is provided as a result of the determination.

11. In paragraph 23 of the determination the judge comments upon the figures that I have mentioned and then says

“The respondent has raised the issue that the only independent evidence of the sponsor's income was a tax return showing that he earned £9,077 for the last financial year but that there is no independent evidence of the claimed profit of the business of £33,907 last year. I do not find the appellant has satisfactorily addressed the concerns of the respondent. “

9. In my judgment that was not a sustainable finding given the fact that the accounts which were prepared by an accountant reflected first that there was a generation of income, secondly that this resulted in a profit, thirdly that the profit gave rise to a liability for taxation, fourthly that tax was paid or at least there was a liability for tax

which was acknowledged by the Inland Revenue and fifthly it indicated that the distribution available between shareholders was as to 95% to the sponsor and 5% to his brother. Consequently, unless these accounts are in sham, and an expensive sham which resulted in a liability for corporation tax, then unless these documents are a sham, they show a business that was operating. Indeed it is difficult to see how that business did not operate since it has got premises with a business on it. It follows a train of business activity for example in the year ending April 2009 it generated a turnover of £200,000, in the tax year ending April 2010 it generated a turnover of £209,000 and in the tax year ending April 2011 it generated a turnover of £222,000. All of these figures suggest that it was a perfectly normally operating business.

12. The judge then goes on to deal in paragraph 24 of the determination with the fact that the sponsor then owned 95% of the shares in the business but that satisfactory evidence of this had not been provided. As I have already pointed out there were accounts which showed the ownership of shares as to 95% to the sponsor and 5% to his brother. There was evidence of a partnership agreement which followed the dissolution of the company on 30 September 2012 which indicated that the partnership which was to take over the business was to be held in a similar ratio and the partnership agreement was either prepared by professionals or it was actually prepared by the solicitors who witnessed the partnership agreement. Accordingly, to say that there was no satisfactory evidence as to ownership is simply not correct. There is an issue as to how circumstances came about that the sponsor's 51% interest was transformed into a 95% shareholding but that does not indicate that the transactions with which I have dealt were sham or that there was not a bona fide and entirely lawful division as to ownership when Catview Limited stopped to trade.
13. It was said by the judge that the letter of Zek and Company which stated that the sponsor's share ownership was 95% and that his previous shareholding was 51% was unsupported by any evidence. The judge said there has been no indication on what basis the accountants made that statement. In my judgment they made that statement on the basis of their knowledge as accountants. As such there is no reason to suggest that the documentary evidence in relation to the accounts and the ownership of the shares should be considered to be suspect, at least without first putting the appellant on notice. It is true that there was no statement from the brother and no explanation given as to why he should give up all but 5% of his interest in the business but that does not mean to say that the accounts did not properly reflect what the legal situation was.
14. In paragraph 25 of the determination the judge refers to the fact that there were profits of £22,907 and the sponsor's share of that was £21,761.65. The judge said that there was no supporting evidence of receipt of that amount by the sponsor. There is minimal evidence of income derived from the profits received by the sponsor and the P60s do not support the assertion that this was income which he received in his hands. Whilst in my judgment the judge was wrong in challenging the accounts as being satisfactory evidence of the financial operations of this business, there is a

doubt in my mind as to what income the dissolution of the company generated in terms of this sum of money. If it was simply distributed to the shareholders then it occurs to me that it would have resulted in the current business carried on by a partnership having a shortfall of £22,907. If that were the case then it would, on its face, have been a business which was not able to operate in the same way as it had operated previously. If, on the other hand, the £22,000 worth of 'retained' profits was simply paid back into the partnership, then there was not income sufficient to form the basis for the assertion made on behalf of the appellant that he had available to him not only his directors remuneration of £11,000 odd but, in addition, 95% of the retained profits from the business in the sum of £21,761.

15. This is a point which was only raised by me in the course of the hearing. I do not consider that it is fair to conclude the determination of this appeal without ascertaining what occurred to the retained profits and whether they should properly be aggregated with the appellant's other income in order to establish that he meets the requirements of the immigration rules. With the passage of time it should now be possible to follow the paper trail. In these circumstances I am going to adjourn the hearing of this appeal so that this issue can be resolved, having found that there was an error of law.

I DIRECT

1. The re-making of the decision is adjourned to the First Available Date after 16 May 2014.
2. The principal appellant is to serve and file no later than 16 May 2014 all such documentary evidence upon which she intends to rely (which may include a witness statement from the partnership accountant or another accountant) dealing with
 - (a) whether the sum of £21,761 being 95% of the profit generated by the company by the time of its dissolution should be treated as income in the hands of the sponsor such that his other income at the date of the decision should be aggregated with that sum;
 - (b) whether the sum of £21,761 was taxable in the hands of the sponsor and, if not, how it could then be treated as income which should be aggregated to his other income/remuneration;
 - (c) if taxable, whether tax was paid;
 - (d) on what basis the appellant puts her case that the sponsor's financial position at the material time satisfied the requirements that the appellants needed to meet in order to gain entry clearance under the Immigration Rules.
3. If the appellants fail to comply with the above requirements, the Tribunal will infer that the failure amounts to an acceptance that the sum of £21,761 should not properly

have been treated as forming part of the sponsor's income for the purposes of calculating the amount the sponsor was required to establish in order for the appellants to secure entry clearance under the Immigration Rules. In that event, the appellants' appeal will be dismissed.

4. The hearing will take place at Field House, time estimate 45 minutes, before me. The evidence will be restricted to the issue identified above. No interpreter.

ANDREW JORDAN
UPPER TRIBUNAL JUDGE