Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/11397/2014
IA/11394/2014

THE IMMIGRATION ACTS

Heard at : Field House
On : 23 March 2015

Determination Promulgated
On : 25 March 2015

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

HARSHAD GIRISH CHINCHANIKAR
SHWETA HARSHAD CHINCHANIKAR

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Sharma instructed by H & M Solicitors
For the Respondent: Ms L Kenny, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants, husband and wife, are citizens of India born on 10 November 1978 and 2 April 1981 respectively. They have been given permission to appeal against the decision of the First-tier Tribunal dismissing their appeals against the respondent's decision to refuse to vary their leave to remain and to remove them from the United Kingdom.

2. The first appellant (hereinafter referred to as "the appellant") arrived in the United Kingdom on 25 September 2005 with a student visa valid until 28

February 2007. He was granted further leave to remain on the Science and Engineering Graduate Scheme (SEGS) until 22 February 2008, followed by leave to remain as a Highly Skilled Migrant until 24 September 2009. On 5 September 2009 he applied for leave to remain as a Tier 1 General Migrant and was granted leave until 24 September 2012. On 5 September 2012 he applied for indefinite leave to remain as a Tier 1 (General) Migrant. His application was refused on 11 December 2013. His wife's application as his dependant was refused in line with his application.

3. The appellant's application was refused under paragraph 322(2) of the immigration rules on the basis that he had employed deception and made false representations as part of his application for leave to remain as a Tier 1 General Migrant on 5 September 2009. In that application the appellant had claimed and been awarded points for previous earnings on the basis of contracted work said to have been undertaken for RJ Techno Limited, which was in addition to his earnings from other employment. The legal representatives who had submitted the appellant's application at the time were later found to have been involved in (and successfully prosecuted for) facilitation of unlawful immigration practices and money laundering involving the use of bogus companies and company bank accounts in order to falsely uplift the earnings of visa applicants, and one of the bogus companies was RJ Techno Limited. The respondent was therefore satisfied that the documents the appellant had submitted in relation to his employment with that company were counterfeit and refused his application under paragraph 245CD(b) of the rules. The respondent also considered the immigration rules relating to family and private life but concluded that the appellant met the criteria of neither.

4. The appellant appealed against that decision. His appeal was heard in the First-tier Tribunal on 28 November 2014 by Designated First-tier Tribunal Judge Manuell. Before the judge it was argued on behalf of the appellant that he had not known of the fraudulent activities of Mr Sorthia for whom he had been employed and that he had believed that he was in genuine employment and that RJ Techno Ltd was one of Mr Sorthia's companies from which his salary was drawn. The judge did not find the appellant's claim to be credible and considered his evidence to be a "tissue of lies". He considered that the appellant had conspired with Mr Sorthia to submit a fraudulent application and that his application was accordingly correctly refused under paragraph 322(2) and 245CD(b) of the rules. He dismissed the appeal under the immigration rules, as well as on Article 8 grounds.

5. Permission to appeal was sought on behalf of the appellant on three grounds: that the judge had breached the appellant's right to a fair hearing by preventing his solicitor from completing submissions in support of his case (such ground being supported by a witness statement from the appellant's legal representative Ms Manjit Hayre of H & M Solicitors); that the judge had erred by considering there to be no bank statements for the relevant periods of the claimed salary, when such evidence was available before him; and that the judge had erred in his approach to Article 8 outside the immigration rules.

6. Permission to appeal was granted on 26 January 2015 in relation in particular to the first ground on the grounds of arguable procedural unfairness.

Appeal hearing and submissions

7. At the hearing before me the appellant was in attendance but was not required to give oral evidence. Mr Sharma advised me that his instructing solicitor Ms Hayre was on her way to the Tribunal and was willing to submit to cross-examination, but Ms Kenny informed me that she intended only to make submissions in response to Ms Hayre's statement. I heard submissions on the error of law.

8. Mr Sharma, in his submissions, expanded upon the grounds of appeal and relied upon the decisions in BW (witness statements by advocates) [2014] UKUT 568, KD (Inattentive Judges) Afghanistan [2010] UKUT 261 and Kalidas (agreed facts - best practice) Tanzania [2012] UKUT 327 in submitting that the appellant had been deprived of a full and fair hearing owing to the perception given by the judge that the appeal was to be allowed and that no further submissions were therefore required from the appellant's representative, Ms Hayre. He submitted further that, whilst the judge was correct in his observation that the appellant's bank statements were not before him, the fact was that the bank statements had been submitted to the respondent and were in the respondent's possession and that it was therefore erroneous for adverse findings to be made against the appellant owing to the absence of the documents. The judge had accordingly failed to consider material issues. With regard to the third ground, the judge had erred in his cursory approach to Article 8, and in particular in his finding that the appellant had accepted that medical treatment would be available to him in India and that deception was an insurmountable obstacle to a grant of leave outside the rules.

9. Ms Kenny relied upon Judge Manuell's response to the allegation made by the appellant's representative and submitted that there had been no procedural unfairness. She accepted that the appellant's bank statements had been in the respondent's possession but not included in the appeal bundle, but she submitted that the documents could have made no material difference to the judge's decision, given his overall findings on the evidence. She submitted further that the appellant could not have succeeded on Article 8 grounds outside the rules in any event.

10. Mr Sharma responded by way of reiterating the points already made.

Consideration and findings

11. In my view there are no errors of law in the judge's decision requiring it to be set aside.

12. The first ground relies upon the statement made by Ms Manjit Hayre of H & M Solicitors, who represented the appellant at the hearing before Judge

Manuell. According to Ms Hayre she was prevented from making submissions by the judge who told her not to "waste her breath and energy", which she understood to be an indication that he had sufficient evidence and information to allow the appeal. She states that she would otherwise have addressed the reasons given for the appeal being refused and would have made submissions under Article 8. Mr Sharma informed me that his instructions were that the judge's comments had apparently been made to assist Ms Hayre as she had a cold and was losing her voice, although that is not suggested in her statement.

13. Judge Manuell has responded to Ms Hayre's statement and categorically denies having told her not to "waste her breath and energy". He states that he gave no indication of what his decision would be and that she was given a full opportunity to make submissions and indeed did so, as his record of proceedings shows.

14. I have carefully considered the judge's written record of proceedings and it is apparent that Ms Hayre did indeed make submissions before the judge and there is nothing to indicate that she was prevented from doing so or from completing her submissions. Whilst the record indicates that no submissions were made with respect to Article 8, it is relevant to note that neither party examined the appellant in relation to such a claim and that the respondent made no submissions in that regard. Ms Hayre has not produced a contemporaneous note of the proceedings to confirm that the judge prevented her from continuing her submissions. Mr Sharma submitted that neither was there any such note from the respondent, but it seems to me that that does not detract from the fact that if Ms Hayre felt that the proceedings were not being conducted fairly, or if she curtailed her submissions because of an implied indication by the judge, it would be reasonable to expect her to have made a note of that at the time. There is nothing in the judge's notes or his findings to indicate, or to give the impression, that he was satisfied with the evidence to the extent that he was minded to allow the appeal and it cannot be said that any procedural unfairness arose as a result of Ms Hayre being under such a mistaken impression. It is plain that Ms Hayre was given the opportunity to make any relevant submissions before the judge and that the judge considered those submissions in the light of the evidence before him in making his decision. Accordingly I find that the first ground is not made out.

15. Mr Sharma accepted that, contrary to the assertion in the second ground, the appellant's bank statements were not before the judge when he made his decision. The ground of appeal was, however, pursued before me on the alternative basis that the judge had erroneously found against the appellant in that regard when the respondent had the bank statements and had failed to produce them. The relevant question therefore appears to me to be whether any procedural unfairness arose as a result of the bank statements not being disclosed by the respondent. In response to that question I find merit in Ms Kenny's submission, that the bank statements would have made no material difference to the judge's

decision and that the entries showing funds deposited from R J Techno Ltd did not assist the appellant's case, given the judge's overall findings.

16. The bank statements show two deposits of funds from R J Techno Ltd on 26 May 2009 and 27 June 2009, together with a third deposit on 26 July 2009 which it is reasonable to infer, given the figure stated, emanates from the same source. The first two deposits are consistent with the payslips produced at E1 and E2 of the respondent's appeal bundle. However the deposit of what is claimed to be salary payments is entirely consistent with the *modus operandi* of the scam detailed in the witness statements of Sonal Rajshakha and DC Laura Curry, whereby funds were circulated between the clients of Migration Gurus and the 15 bogus companies including R J Techno Ltd, ending up in the personal bank accounts of the MG clients to provide evidence of earnings in support of their Tier 1 applications. I refer in particular to pages A37 to A41 of the respondent's bundle in that regard. Contrary to Mr Sharma's assertion that the appellant's claimed employment for R J Techno Ltd, in May to July 2009, was prior to the fraudulent activities referred to in the witness statements and therefore not part of the fraud, it is plain that it occurred precisely during the relevant period. Whilst Judge Manuell, not having sight of the bank statements, did not go on to make specific findings in that regard, it is plain from his findings at paragraphs 12 and 13 that he accepted, and gave weight to, the evidence produced by the respondent in regard to the fraud, such evidence consisting of those witness statements. Having heard detailed oral evidence from the appellant he concluded, for various reasons set out in those paragraphs including the absence of a contract of employment and P60 certificate, as well as the timing of his employment with Mr Sorthia and his lack of enquiry about the identity of his employer, that he was involved in the fraud.

17. Accordingly there is no reason why the entries in the bank statements would have made any material difference to the conclusions properly reached by the judge. On the totality of the evidence before him he was perfectly entitled to find that the appellant was knowingly involved in the fraud and that he conspired with Mr Sorthia to submit a fraudulent visa application. The judge's decision, to uphold the respondent's refusal under paragraph 322(2), was therefore one that was entirely open to him on the evidence before him.

18. Turning finally to the third ground, it is submitted that the judge's assessment of the appellant's Article 8 claim was cursory and that the test of exceptionality applied was the wrong test. However it seems to me that whilst the judge's Article 8 assessment is brief, he took all relevant matters into account and that whatever test he applied, the claim was bound to fail.

19. There was no question that the appellant could succeed within the rules and the judge therefore went on to consider whether there were any other circumstances justifying a grant of leave outside the rules. In so doing, he took account of all the relevant evidence. At paragraph 16 he considered

the medical evidence produced by the appellant. The grounds assert that he erred by considering the appellant's evidence to have been that he could access medical attention for his condition in India, when that was not in fact his evidence, and that that error materially affected his findings. However it is clear that the judge, in making such a comment, was referring to paragraph 45 of the appellant's statement of 15 September 2014 where the appellant stated that "*I have been told that although there may well be treatment for all the above in India, my medical history is known here...*", which certainly lends itself to such an interpretation. The judge was accordingly entitled to consider that the appellant's evidence was as he stated. The judge went on to consider the appellant's claim, in the same paragraph in his statement, that his life would be in danger if he left the United Kingdom in the middle of his medical treatment, but properly concluded that there was no evidence to support such a claim. There is certainly no such evidence within the medical reports produced by the appellant, at pages 20 to 74 of his appeal bundle and neither is there any evidence to indicate that relevant medical treatment would not be available and accessible in India. Accordingly it seems to me that the judge was perfectly entitled to conclude as he did in that regard.

20. Furthermore, it is not the case, as is asserted, that the judge considered the appellant's fraud to be determinative of the claim outside the rules. On the contrary he clearly took account of all the evidence and all the appellant's circumstances including, as already stated, the medical evidence. He was, in any event, entitled to place considerable weight upon the deception when considering the public interest in the appellant's removal from the United Kingdom and when considering proportionality under Article 8.

21. As regards the reference by the judge to "exceptional circumstances", it is plain that he was thereby simply concluding, after a consideration of all the evidence, and as consistent with the relevant case law, that there did not exist any particular circumstances justifying a grant of leave outside the immigration rules. His conclusion, that no such circumstances existed, was one that was properly open to him on the evidence before him. Accordingly the third ground of appeal also fails.

22. Taken as a whole, the judge's determination contains a detailed and thorough assessment of the appellant's circumstances and the evidence, together with clearly and cogently reasoned findings properly open to him on the evidence before him. The grounds of appeal disclose no errors of law in his decision.

DECISION

23. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.

Signed Date: **23 March 2015**

Upper Tribunal Judge Kebede