Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30656/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 22 April 2015	**On 24 July 2015**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

MR XUAN ZHOU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr H Ndubuisi, Drummond Miller Solicitors
For the Respondent: Mr M Matthews, Home Office Presenting Officer

DETERMINATION AND REASONS

1) This is an appeal with permission against a decision by Judge of the First-tier Tribunal Knowles dismissing the appeal under the Immigration Rules. The appeal was considered by Judge Knowles without a hearing.

2) The appeal was brought against two decisions made by the respondent on 29 July 2014. The first decision was to refuse the appellant leave to remain as a Tier 1 (Entrepreneur) Migrant and the second was to give directions for his removal.

3) The reasons for refusal were fairly narrow in compass. As part of his application, made on 8 July 2014, the appellant had to show that he had access to funds of not less

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than £200,000. In order to demonstrate this, the appellant produced two certificates of deposit. The first was dated 30 June 2014 and was issued by the China Guangfa Bank (CGB) showing a balance in a deposit account of 2,030,000 Yuan. A letter from CGB confirmed that this sum was the equivalent of £186,404 and that the sum was freely transferable to the UK. The second certificate of deposit was dated 30 June 2014 and was issued by the Bank of China. This showed balances in the appellant's name of £10,107.65 Sterling and 24,173.55 in AUD.

4) The respondent accepted that the CGB certificate of deposit complied with the requirements of the Immigration Rules but was not so satisfied in respect of the certificate from the Bank of China. According to the respondent, this certificate showed that the money was held only until 1 October 2010 and was therefore not available at present and, in addition, the certificate did not confirm that the money could be transferred to the UK. The respondent therefore decided that the requirements of paragraph 41-SD(c) of Appendix A of the Immigration Rules were not satisfied.

5) The judge found that the respondent had made a mistake in stating that the Bank of China certificate showed that the sums stated were held only to 1 October 2010. The certificate was dated 30 June 2014 and appeared to be valid until 1 October 2014. The judge could find no reference in the Bank of China certificate to 1 October 2010. Accordingly this reason for refusal was not upheld by the judge.

6) Turning to the second ground of refusal, however, the judge found there was nothing in the Bank of China certificate to indicate that the sums stated in it were transferable to the UK. This was a requirement of paragraph 41-SD(c) of Appendix A. Accordingly the judge found that the appellant had not proved that he had access, within the meaning of the Immigration Rules, to a sum of not less than £200,000. Accordingly the appellant was not entitled to 75 points for attributes under Table 4 of Appendix A to the Immigration Rules.

7) The application for permission to appeal was made on several grounds. The first was that the judge decided the appeal on 26 November 2014, which was prior to the due date of 4 December 2014 for the submission of any further evidence or submissions. The appellant had been sent a notice by the Tribunal dated 7 October 2014 setting the date of 4 December 2014 as the date for further documents to be lodged. It was argued on behalf of the appellant that there was procedural unfairness by the judge deciding the appeal prior to the final submission date.

8) A further ground was that the judge did not consider an alleged failure by the respondent to consider paragraph 245AA of the Immigration Rules, which gives the respondent a discretion to request further documents in certain circumstances, such as where a document does not contain all the specified information required. It was pointed out that the certificate from CGB covered the major part of the appellant's funds, amounting to £186,404. The remainder, amounting to approximately £20,000, was held in the Bank of China but the document from the Bank of China did not

contain all the specified information and the respondent could have requested a further document in relation to this.

Submissions

9) In his submission at the hearing Mr Ndubuisi relied on both of these points. In particular he relied on paragraph 245AA(b)(iv), which applied where a specified document was submitted without specified information. The respondent did not consider this provision and nor did the Judge of the First-tier Tribunal. In support of his grounds, Mr Ndubuisi relied on the decision of the Upper Tribunal in Sultana [2014] UKUT 00540, at paragraphs 23-25.

10) For the respondent, Mr Matthews argued that even though the appeal was decided before the final date for lodging further evidence or submissions, this was not material. The appellant was required to provide documents in the correct format with the application and the document which was submitted with the application from the Bank of China was defective.

11) As to whether the respondent could have waived this requirement, in accordance with Sultana, Mr Matthews pointed out that the respondent's discretion was exercisable in accordance with a policy. Before the discretion would be exercised, the respondent must have a reasonable belief or significant information that the evidence could be obtained. How would the respondent know that the Bank of China could produce a document to say the funds were transferable? Mr Matthews acknowledged that he had not produced the relevant policy for the hearing but he said he could produce it following the hearing. Mr Ndubuisi had no objection to this course of action.

12) Mr Matthews continued that there was nothing to suggest the respondent did not consider the application in terms of the relevant Rules, as referred to in the decision. There was no reason to suppose the caseworker did not consider the application under paragraph 245AA. Mr Matthews referred to the decision of the Court of Appeal in Rodriguez [2014] EWCA Civ 2. There was no basis for saying the defect in the document could be cured and, on the basis of the appellant's subsequent evidence, this understanding was correct.

13) Furthermore, paragraph 245AA had a time limit of 7 days for compliance with a request to supply a further document. According to the appellant the document with the required information was only obtained during the appeal stage. Even if there was unfairness by deciding the appeal before the due date, this made no difference because of the terms of paragraph 245AA.

14) Mr Ndubuisi responded for the appellant. He submitted that the idea of flexibility was to allow information to be requested. There was no limit as to what the appellant was to provide to cure a defect provided he was given the opportunity to do so. Even if only 7 days were allowed for complying with a request, no request was ever made. There was no way of knowing whether the decision-maker had considered paragraph 245AA and whether the document would have been available

at that time or not. The CGB certificate showed a balance of £186,000 and the shortfall was of only £14,000. It was possible to make an inquiry when this proportion of the total amount was found to be available and in these circumstances an inquiry should have been triggered.

Discussion

15) I note that paragraph 245AA of the Immigration Rules is headed "Documents not submitted with applications". According to paragraph 245AA, where part 6A of the Rules or any appendices referred to therein states that specified documents must be provided then the Secretary of State will only consider documents that have been submitted with the application and will only consider documents submitted after the application where they are submitted in accordance with sub-paragraph (b). The relevant part of sub-paragraph (b) in respect of this appeal is (iv), which applies where a "document does not contain all of the specified information." In this appeal, of course, it was found that the documents from the Bank of China did not contain specified information as to whether the funds held were transferable to the UK. Sub-paragraph (b) further provides that where this provision applies, the Secretary of State may contact the applicant or his representative in writing and request the correct documents. The requested documents must be received at the address specified in the request within 7 working days of the date of the request.

16) Sub-paragraph (c) states that documents will not be requested where a specified document has not been submitted (for example an English language certificate is missing), or where the Secretary of State does not anticipate that addressing the omission or error referred to in sub-paragraph (b) will lead to a grant because the application will be refused for other reasons. Sub-paragraph (d) then allows for the missing information to be verifiable from either other documents submitted with the application, the website of the organisation which issued the document, or the website of the appropriate regulatory body, provided the Secretary of State is satisfied that the specified documents are genuine and the applicant meets all other requirements.

17) The case of Sultana concerned an appeal in which the specified documents had not been provided under Appendix FM-SE. There are similar provisions in Appendix FM-SE to the provisions in paragraph 245AA and it is clear from the decision that the relevant principles will apply to paragraph 245AA in a similar way to Appendix FM-SE. At paragraph 23 of Sultana it is pointed out that the effect of the amended version of paragraph 245AA is to create a discretion or "flexibility" in cases where specified information though not provided can be verified by other means. Amendments made to paragraph 245AA from 1 October 2013 were intended to provide some clarification of the operation of this provision but the examples given in the amendments were illustrative and not comprehensive.

18) For the purpose of this appeal it is the opening sentences of paragraph 24 of Sultana which are particularly significant. These state:

"Whatever the decision making context under the Immigration Rules, where discretionary powers of waiver and/or further inquiry are conferred, the possibility of a finding by a Tribunal that a decision by the primary decision maker was not in accordance with the law arises. This would be so, for example, where it can be demonstrated that the decision maker was not alert to the relevant power and that such error was material."

19) It is then stated at paragraph 25:

"Where a decision is challenged on the basis of an unlawful failure to exercise a discretionary power of further inquiry or waiver or an unlawful exercise of such power, Judges will be guided by considering the purpose underlying powers of this kind. We consider that such powers are to be viewed as dispensing provisions, designed to ensure that applications suffering from minor defects or omissions which can be readily remedied or forgiven do not suffer the draconian fate of refusal. In such cases, the blunt instrument of immediate, outright and irrevocable rejection is softened to accommodate applicants whose applications suffer from insubstantial imperfections which can be easily and swiftly rectified or excused. Furthermore, in our estimation, discretionary powers of further enquiry and waiver promote the values of fairness and common sense whilst simultaneously minimising unnecessary dominance of an emphasis on bureaucratic formality. They also fortify the overall integrity of the United Kingdom Immigration system …"

20) In the circumstances of this appeal there is a strong argument that paragraph 245AA should have been invoked to remedy the omission in the document provided by the appellant from the Bank of China. As Mr Ndubuisi pointed out, of the £200,000 which the appellant had to show was available to him, the respondent was satisfied with the documentary evidence in respect of £186,000 held in CGB. The balance of £14,000 was vouched by the certificate from the Bank of China, which did not contain all of the specified information. In the context of a requirement to show a balance of £200,000 in total, the incomplete certificate in respect of £14,000 would appear to have suffered from precisely the type of minor defect or omission which the appellant should have been given an opportunity to remedy under paragraph 245AA.

21) Furthermore, as Mr Ndubuisi submitted, there was no indication that the decision-maker applied his or her mind to the application of paragraph 245AA. Mr Matthews asked me to presume that this would have been done, but given the terms of the refusal decision and the significance of this decision for the appellant, it is difficult to make a presumption to the effect that the decision-maker applied their mind to paragraph 245AA.

22) I have seen the policy document submitted by Mr Matthews after the hearing, to the lodging of which Mr Ndubuisi had no objection. It is headed "Points-based system – evidential flexibility" and is said to be valid from 12 August 2014. It states that if there are minor errors or omissions on specified documents submitted with a valid application but there is enough evidence to show the application would otherwise be granted, the decision-maker may contact the migrant or representative, as appropriate, for clarification or to request missing documents and/or information. The policy guidance then addresses the effect of a number of changes to the relevant Rules. These changes were in force before the making of this application for leave.

The policy guidance sets out the process for requesting additional information. There is little further in the policy guidance to indicate more precisely when discretion should be exercised.

23) In a covering letter, which in effect amounted to an additional submission, Mr Matthews acknowledged that the guidance did not expressly refer to sub-paragraph (b)(iv). Mr Matthews then submitted that the respondent's position was that "case workers still require to have reason to believe that a document could be provided which contains all the specified information". Mr Matthews then submitted that the case worker had no reason to believe that such a document could be provided and accordingly was correct not to request further information.

24) I note that this submission has not been the subject of comment by the appellant but it is in very similar terms to the submission made by Mr Matthews at the hearing. It seems to me that there are certain weaknesses in Mr Matthews' argument. The first of these has already been mentioned – there is nothing to show that the decision-maker ever applied his or her mind to paragraph 245AA. It is not known therefore whether the decision-maker concluded that there was no reason to believe that such a document could be provided. Furthermore, I was unable to ascertain where this test appeared in the respondent's policy document governing the exercise of discretion.

25) The appellant had in fact provided a document with his application containing the specified information in respect of over 90% of the funds which the applicant had to show were available. The specified information was only lacking in respect of the document relating to the remainder of the funds, which amounted to less than 10% of the total. It might have been assumed that where the applicant had provided the specified information in respect of more than 90% of the funds, it would have been feasible for the applicant, were the request made, to supply the specified information in respect of the remaining amount.

26) A stronger point was made by Mr Matthews in his submission at the hearing. This was that the specified information required from the Bank of China was not provided at the time of the application and did not become available until during the appellate process some time later. Mr Matthews argued that the information could not therefore have been provided within the 7 days allowed under paragraph 245AA. Essentially Mr Matthews was contending that even if there was a failure by the respondent to exercise discretion, this failure was not material.

27) It seems to be acknowledged in the application for permission to appeal, at paragraph 17, that the Bank of China would not provide a letter containing the specified information at the time the application was made. It appears that a letter containing the specified information was not provided until after the appeal was lodged against the respondent's decision. Accordingly, it does seem there was a possibility that if a further document had been requested by the decision maker at any time before the refusal decision was made on 29 July 2014 the appellant would not have been able to supply the specified information. As the application of

paragraph 245AA was not considered by the First-tier Tribunal, however, no finding was made on this question.

28) The position is that the specified information was not requested by the decision-maker. It is argued that there is nothing to suggest the decision-maker ever applied his or her mind to the application of paragraph 245AA(b)(iv). The question of whether had a further document containing the specified information been requested by the decision maker it would have been available at that time was not in practice resolved.

29) It is argued with considerable justification that the respondent did not act in accordance with the law by failing to consider whether the specified information should be requested under paragraph 245AA(b)(iv). In these circumstances I do not consider it is for me to speculate as to whether if the information had been requested it could have been provided. The essential point is that there is nothing to show that the respondent's discretion to request further information was ever exercised and nothing to show that the policy relating to the exercise of this discretion was followed. To this extent the respondent's decision was not in accordance with the law.

30) There is the further question of whether it was unfair for the judge to decide the appeal before the date of 4 December 2014 for lodging further documentary evidence or submissions. It is indicated at paragraph 17 of the application for permission to appeal that the appellant had a letter from the Bank of China containing the specified information prior to the judge's decision of 26 November 2014 but this had not been lodged because the appellant had been notified by the Tribunal that he had until 4 December 2014 to lodge it. In addition it appears that on 29 November 2014 (not December, as stated in the application for permission to appeal) the funds were transferred from the Bank of China to a bank in the UK and the appellant intended to produce evidence of this before the final submission date of 4 December.

31) It should be recognised that the admissibility of documentary evidence in the appeal was restricted by s 85A(3) of the 2002 Act, as acknowledged at paragraph 11 of the application for permission to appeal. Any letter from the Bank of China intended to supply specified information not before the decision-maker would appear not to fall into any of the provisions in s 85A(4) which allow evidence to be considered notwithstanding the restriction on admissibility. Accordingly, the judge might not have been able to allow the appeal outright on the basis of a letter from the Bank of China obtained after the refusal decision was made. Nevertheless it is on the face of it unfair that the appellant was denied a final opportunity to lodge further documentary evidence, which the appellant was preparing to do.

32) A further ground raised by the appellant in the application for permission to appeal was reliance upon Article 8, which it was said the Judge of the First-tier Tribunal failed to consider properly, but Mr Ndubuisi did not pursue this at the hearing. Although the appellant has been in the UK since 2003 he has had only limited leave, first as a student and then as Tier 1 (Post Study Work) Migrant, and his private life

would therefore carry little weight under s 117B(5) of the 2002 Act. It is difficult to envisage how any omission by the Judge of the First-tier Tribunal in not considering Article 8 would materially have affected the outcome of the appeal.

33) The position is that the Judge of the First-tier Tribunal erred in law by (a) deciding the appeal before the final date for further evidence and submissions and (b) failing to consider whether the respondent should have exercised the discretion to request further information under para 245AA. By reason of these errors the decision of the First-tier Tribunal should be set aside. Having considered the application of paragraph 245AA to the circumstances in this appeal, I am satisfied that the apparent failure by the respondent to exercise her discretion under this provision in accordance with the relevant policy means that the respondent's decision was not in accordance with the law. Accordingly the application for leave remains outstanding before the respondent for a valid decision to be made in with regard to the discretion contained in paragraph 245AA and the appeal is remitted to the Secretary of State for this purpose.

Conclusions

34) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

35) I set aside the decision.

36) I re-make the decision in the appeal by finding that the decision of the respondent of 29 July 2014 is not in accordance with the law. The application remains before the Secretary of State for a valid decision to be made.

Anonymity

37) The First-tier Tribunal did not make an anonymity order. I have not been asked to make such an order and in the circumstances of this appeal I see no reason of substance for doing so.

Fee Award Note: This is not part of the determination

In the light of my decision to re-make the decision in the appeal I have considered whether to make a fee award. Although the decision appealed against was not in accordance with the law, the evidence and submissions on which the appellant relied to challenge the decision were brought forward as part of the appeal and not as part of the original application. I therefore make no fee award

Signed Date

Judge of the Upper Tribunal