



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/45142/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On 21st October 2015

Decision & Reasons Promulgated
On 3rd November 2015

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MR MATHANARAJ VIVEKANANTHARAJAH

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sharma (Counsel)

For the Respondent: Mr Wilding (Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge MacDonald which was promulgated on the 3rd June 2015.

Background

2. The Appellant is a citizen of Sri Lanka who was born on the 19th November 1981. On the 25th March 2013 the Appellant was granted leave to remain in the UK as a Tier 1 Entrepreneur which was valid until the 25th March 2016. On the 17th November 2014

the Appellant returned back to Heathrow, having been in Paris for 3 days on holiday. He was stopped by officers at the border and interviewed. As a result, his leave to remain in the United Kingdom was cancelled under paragraph 321 A of the Immigration Rules. The Appellant appealed to the First-tier Tribunal against that decision, and the appeal was heard by First-tier Tribunal Judge MacDonald at Taylor House on the 27th May 2015.

3. In his decision, Judge MacDonald decided that he did not have power to hear the appeal against the Immigration decision, on the basis that after the 20th October 2014, he found that there was no right to appeal against an Immigration decision under Section 82 of the Nationality, Immigration and Asylum Act 2002. However, he did consider that he had power to hear the appeal on human rights grounds but dismissed the Appellant's appeal on human rights grounds. It is that decision which the Appellant has now sought to appeal to the Upper Tribunal.
4. Permission to appeal was granted by First-tier Tribunal Judge White on the 24th August 2015 on the ground that the First-tier Tribunal Judge arguably made an error of law when finding that there was no right of appeal under the Immigration Rules and that it was arguable that there had been a procedural unfairness in that the Judge did not seek submissions at the end of the hearing from the parties concerning the jurisdictional issue.

Submissions

5. Mr Wilding on behalf of the Respondent at the start of the appeal clarified the Respondent's position, in that although it is now accepted that the First-tier Tribunal Judge had erred in finding that he did not have jurisdiction to consider the appeal under the Immigration Rules, Mr Wilding argued that such error was not material, on the basis that given the First-tier Tribunal Judge's findings regarding the inadequate explanation for the money in the Appellant's bank account and the First-tier Tribunal Judge's finding that the Appellant had manipulated the situation in order to obtain his Tier 1 Entrepreneur status, that even if the Judge had considered the appeal under the Immigration Rules, he would have also dismissed the appeal under the Immigration Rules.
6. Mr Sharma on behalf of the Appellant argued that the Judge had not made any findings that the Appellant had been fraudulent in obtaining his initial Leave to Remain, nor that material facts had not been disclosed. He argued that the findings made by the Judge were insufficient to conclude that the Judge would have dismissed the appeal under the Immigration Rules, had he properly considered it under the Rules. He further argued that it was perceived unfair that the Judge had decided the jurisdictional point without seeking submissions on the issue. However, he conceded that submissions had been made in respect of the appeal under the Immigration Rules and also in respect of Article 8, but that the Judge appears to have decided upon jurisdictional issue without seeking submissions, after the appeal was heard. He asked me to set aside the First-tier Tribunal Judge's decision.
7. In his submissions on behalf of the Respondent Mr Wilding argued that the relevant rule was paragraph 321 A (2) if the case had been considered under the Immigration

Rules, namely whether "false representations were made or false documents were submitted (whether or not material to the application, and whether or not to the holder's knowledge), or material facts were not disclosed in relation to the application for leave; or in order to obtain documents from the Secretary of State or a third-party required in support of the application".

8. Mr Wilding argued that the Appellant simply had not been a good witness and had not given a plausible explanation as to why £49,500 suddenly appeared by way of bank transfers from Mobile-Channel in his bank account, as was found by the First-tier Tribunal Judge at [42] and that the First-tier Tribunal Judge found that the Appellant had not invested £25,000 as claimed at the Heathrow interview and that he did not have an office and appeared to have very little by way of business. Mr Wilding also relied upon the finding of First-tier Tribunal Judge MacDonald at [44] when he found that "looking at the evidence before me I have little doubt that the Appellant manipulated the situation in order to obtain his Tier 1 Entrepreneur status".
9. Mr Wilding argued that in the second interview the Appellant had stated that the majority of the money had come from his parents, his sister, and friends and had accepted that most of the money from his father had gone back to him and that all of the money obtained from friends had gone back to them after 8 or 9 months, as he "had to pay back to them"
10. In his reply Mr Sharma asked me to bear in mind that for the purposes of paragraph 321A, the burden would have been on the Respondent to prove that false representations had been made or nondisclosure of material facts. He argued that even if money had been taken out of the Appellant's bank later, that did not in itself establish that it was not initially genuinely available. He argued that the requisite elements for paragraph 321A could not be inferred through the Judge's findings.

My Findings on Error of Law and Materiality

11. As was properly conceded by Mr Wilding on behalf of the Respondent, the First-tier Tribunal Judge did err in finding that he did not have jurisdiction to consider the appeal under the Immigration Rules. Section 15 of the Immigration Act 2014 had come into force on the 20th October 2014 and had amended Section 82 of the Nationality, Immigration and Asylum Act 2002 so that an Appellant could appeal only where the Respondent had refused a protection claim, human rights claim or decided to revoke a protection status. However, as a result of the Savings Provisions at Articles 9 to 11, of the Immigration Act 2014 (Commencement Number 3, Transitional and Savings Provisions) Order 2014, as at the date of the decision on the 18th November 2014, Section 15 had only reduced the grounds of appeal in respect of foreign criminals as defined by Section 117D of the Nationality, Immigration and Asylum Act 2002 in respect of decisions on or after the 20th October 2014 and their families if liable to deportation and in respect of students and their families who have made an application for Tier 4 Leave on or after the 20th October 2014. The appeal rights of the Appellant is a Tier 1 Entrepreneur, by that date had not been altered, and the rights of appeal for Tier 1 Entrepreneurs were not reduced until the 2nd March 2015. Therefore, as at the date of the decision, the Appellant still did have a

right to appeal under the Immigration Rules, and as was properly conceded by the Respondent, the Judge erred in this regard.

12. It is also clear that the Judge erred in deciding the jurisdictional issue, after the appeal had already concluded, without hearing any submissions from the parties in respect of the same. Given that this issue had clearly concerned the Judge after the hearing, he should have called the parties back for a further hearing or at the least invited written submissions in respect of the issue. His failure to do so, clearly amounts to an error of law.
13. However, it is significant in this case that the procedural unfairness in terms of not inviting further submissions on the jurisdiction point, which the Judge had not raised during the hearing, occurred after the appeal hearing had concluded. During the appeal hearing, the Appellant had been given every opportunity to explain his case both under the Immigration Rules and in respect of Article 8. The jurisdictional issue had not arisen until after the appeal hearing had concluded. Submissions were therefore made by and on behalf of the Appellant at the original appeal hearing in respect of both the case under the Immigration Rules and the position in respect of Article 8.
14. Although it was argued by Mr Wilding on behalf of the Respondent that the error was not material, I disagree with that submission. The Judge's error in respect of jurisdiction clearly is material, in that if he had not made the error he would have considered the appeal under the Immigration Rules not simply in respect of Article 8. I therefore set aside the decision to the extent that First-tier Tribunal Judge MacDonald did not consider the application under the Immigration Rules and remake the decision on that aspect of the case.
15. However, I preserve the findings of fact made by First-tier Tribunal Judge MacDonald, as these are not infected by the error and he had the benefit of hearing the oral evidence of the appellant and the submissions made in respect of the case under the Immigration Rules. I do not consider that the case needs to be remitted back to the first tier tribunal for rehearing, given the findings that First-tier Tribunal Judge MacDonald made. I preserve the findings of First-tier Tribunal Judge MacDonald at [42] that the bank account produced had not been adequately explained and that as at the 3rd November 2014 the Appellant's business only had £207.30 in the bank account. I further preserve his finding that there was "no plausible explanation as to why £49,500 suddenly appears by way of bank transfers from Mobile-Channel as shown on page 18" and found further the Appellant had not invested £25,000 as claimed at the Heathrow interview and that the appellant did not have an office and appeared to have very little by way of business.
16. I further preserve the finding at [44] that "looking at the evidence before me I have little doubt that the Appellant manipulated the situation in order to obtain his Tier 1 Entrepreneur status".
17. I further find that the Appellant's answer in his second interview that "yes had to pay back to them" at question 18 when asked whether or not he had returned the money to his friends, established that in fact the money was not properly under his control

and should have been declared as such. Nor am I satisfied on the evidence presented that the money available from his father was genuinely available to him to be used for investment purposes, rather than simply being used as a means of showing sufficient money in an attempt to satisfy the requirements of the Immigration Rules, given that the money from his father has also been repaid to him. Insufficient evidence has been produced to show that that money was repaid simply as a result of a subsequent illness befalling the father.

18. Given these findings and the specific finding that the Appellant had manipulated the situation in order to obtain his Leave to Remain, I dismiss the appellant's appeal under the Immigration Rules as it stood to be refused under paragraph 321A (2) of the Immigration Rules on the basis of false representations were made and material facts also would not disclose, in that I do not accept the reasons set out above, that all the £50,000 said to have been available to him was in fact available for the purposes of investment by him and that he made false representations of such money was genuinely available and failed to disclose material facts that this money had been lent by the parties, which money, I find had to be repaid and that the intention was that it would be repaid after the appellant had obtained his visa, rather than being used for investment purposes in his business. His answer in the second interview that he had to repay his friends, cannot realistically mean otherwise in respect of the money from them. I therefore dismiss the appeal under the Immigration Rules.

Notice of Decision

The decision of First-tier Tribunal Judge MacDonald does contain a material error of law, and is set aside to the extent that it did not consider the appeal under the Immigration Rules;

I remake the decision, dismissing the appellant Mr Vivekanantharajah's appeal under the Immigration Rules;

The First-tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Chamber) Rules 2014 and no application for an anonymity order was made before me. No such order is made.

Signed

Dated 22nd October 2015



Deputy Upper Tribunal Judge McGinty