



(Immigration And Asylum Chamber)

Upper Tribunal

Appeal Number: IA/50849/2013

THE IMMIGRATION ACTS

Heard at: Field House  
On: 6 May 2015

Determination Promulgated on  
On: 3 June 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MR MD ZAKIR HUSSAIN  
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr S Hosein, Legal Representative (RMS International Ltd)

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Bangladesh, born on 22 July 1971. His appeal against the decision of the respondent dated 14 December 2013 to refuse his Tier 1 application to vary his leave to remain in the UK and to remove him from the UK by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006, was dismissed by First-tier Tribunal Judge C M Phillips in a determination promulgated on 2 September 2014.
2. Upper Tribunal Judge Reeds granted the appellant permission to appeal on the basis that it is arguable that it was incumbent on the Judge to make findings on the respondent's decision regarding paragraph 245DD(h) of the Rules rather than relying solely on the fact that his entrepreneurial team member had withdrawn her appeal.
3. The appellant had submitted a joint application together with Mrs Subarna Barua (Team member). At the hearing before the First-tier Tribunal the appellant's representative informed the Tribunal that the team member's application had also been refused.
4. Ms Barua had also sought to appeal but had subsequently withdrawn her appeal in order to lodge an application in a different category, namely, as the dependant unmarried partner of another person, not the appellant.

5. She had not attended the appellant's hearing to provide evidence because she had a baby. She had provided a letter dated 1 April 2014 expressing her support for the appellant's appeal, and stating that she wishes to continue her partnership with him. That letter, however, was written prior to her appeal (IA/51115/2013) being withdrawn on 11 June 2014. She was represented by a different representative at the time.
6. The Judge noted that the appellant's representative informed him that he did not have clear instructions from the former partner as to her position and therefore requested an adjournment to proceed with an appeal on the basis that the appellant was the sole applicant [6]. The application was refused as the appeal could be justly determined without an adjournment to present an application relying on different circumstances [6]. He allowed the representative to take instructions from the appellant, after which the representative informed the Tribunal that she had instructions to proceed with the appeal. The appeal then proceeded [7].
7. It was submitted before the First-tier Judge that this had been a joint application and both applications were refused for the same reasons. In that respect, I have been provided with the decision relating to Mrs Barua dated 14 November 2013. It is evident that her application was refused for the same reasons as the appellant's.
8. It was submitted on the appellant's behalf before the First-tier Tribunal that the appellant is willing to continue with his application. He has invested half the money and his partner has not withdrawn her half. He should thus have the option to continue as a Tier 1 entrepreneur migrant. His representative noted at the hearing before the First-tier Tribunal that he had also been refused for failing to provide non-mandatory information and therefore the refusal was defective [12].
9. Judge Phillips found that the appeal against the refusal of his application had been made and considered on the basis that the appellant had a business partner. He no longer has a business partner or entrepreneurial team member after she withdrew her appeal against the refusal of her application [22].
10. The issue of his team member was not dealt with in the appellant's witness statement. The appellant asserted in oral evidence that his former business partner has had a baby and will no longer be involved in the business but will continue to provide the capital [23].
11. The Judge found that in the absence of up to date evidence from Ms Barua that post dates the withdrawal of her "application," that the appellant's evidence is not sufficient and '...does not overcome the fact that he is seeking to change fundamentally the basis of his application, post decision and for the first time at the appeal' [23].
12. The appellant had not put forward a claim under Article 8 outside the rules. It was not contended that he met the requirements under Appendix FM or paragraph 276ADE. The Judge found that he had not met the requirements [24]. The evidence was that he had been in the UK on short term visas from 3 October 2008. He claimed to have made friends and created a social and business circle around himself. He relied on his positive

immigration history and the fact that he is an educated person with no adverse immigration or criminal antecedents [24].

13. The Judge accepted that he had established private life here which engaged Article 8. The Judge then had regard to “the balancing/proportionality exercise” that had to be carried out in accordance with s.117A(3) of the 2014 Borders Act. He directed himself in accordance with authority. He also had regard to the public interest requirements [25–26].
14. The Judge found that he had not shown any circumstances constituting compassionate or compelling factors rendering the decision under Article 8 disproportionate.
15. At the hearing on 6 May 2015, Mr Hosein referred to the approach and findings of the First-tier Judge. He submitted that the Judge should have dealt with the decision of the respondent based on the reasons for refusal rather than on the basis that the erstwhile team member had withdrawn her appeal. The Judge had not considered the evidence presented by the appellant at the date of hearing. He submitted that the appellant had submitted a Tier 1 Entrepreneur application together with his team member at the time. He has accordingly fulfilled Appendix A and his business partner confirmed that she is willing to continue her partnership.
16. The Judge also failed to consider that the appellant had invested half of his funds and after that the Home Office refused his application because of the “genuineness” (ground 3c). He submitted that the respondent treated the applications individually and made separate refusal decisions.
17. On behalf of the respondent, Mr Tufan submitted that the team member’s application had been refused on the same grounds. By withdrawing her appeal subsequently against that decision, she “ipso facto doesn’t challenge the decision.”
18. The finding in respect of the team member was that she had not raised £25,000 from a combination of her own and her husband’s savings, raising concerns over the genuineness of the funds. The respondent found that she had not genuinely had access to at least £50,000 which she intended to invest in her business.
19. Mr Tufan submitted that the letter relied on by the appellant from Ms Barua was dated 1 April 2014. In that letter she stated that she is a team member of the appellant and that her application was refused and she appealed against the Home Office decision. She said that she wanted to continue her partnership with him.
20. However, that letter was written prior to her withdrawal of the appeal on 11 June 2014. The question raised therefore was whether, even though the appellant continued his appeal on the basis of his access to £25,000, he still had access to the rest of the money? Ms Barua however did not deal with the issue raised against her that she did not have access to that money and accordingly there was no evidence in any event that the appellant had access to the capital required. There had been no evidence provided by the

sponsor intimating that that money would continue to be available to him once she had withdrawn her appeal.

21. Accordingly the respondent's findings against her remain unchallenged. Even if the Judge had gone into the substantive issues, the appeal could not have succeeded as there had been no challenge to the respondent's assertion that the team member's funds were not genuinely available.
22. Mr Tufan submitted that there had been no Article 8 submissions.

### Assessment

23. I have set out Judge Phillips' findings in detail. He found that there was no evidence from the appellant's former business partner after the date of the withdrawal of her appeal (which occurred in June 2014). It was made clear by the appellant's representative before Judge Phillips that they did not have clear instructions from Ms Barua as to her current position.
24. In the circumstances there was no evidence before the Judge that the appellant's evidence in itself could lead to a conclusion that the capital was available from Ms Barua to invest in his business.
25. The Judge was entitled to come to that conclusion based on the lack of evidence. There was no appeal against the refusal of Ms Barua's application, namely that the capital was not genuinely available to invest in the business.
26. The appeal was bound to fail on that basis. In those circumstances the Judge was not required to make further findings as to whether the appellant had genuinely established a business.
27. Although no submissions were made by Mr Hosein relating to the private life claim, I note that the grounds of appeal before the First-tier tribunal contended that the Judge failed to consider the claim for private life. However, the Judge had regard to the claim under Article 8 outside the rules and found that he could not meet the requirements of Appendix FM or paragraph 276ADE[24].
28. The Judge had regard to authorities such as Huang and Razgar. He also properly had regard to the provisions of s.117B(1-3) of the 2014 Act. Nor had the appellant shown circumstances which were compelling factors rendering the decision to refuse his application disproportionate.
29. The decision of the Judge was in accordance with the law and the immigration rules.

### Notice of Decision

The decision of the First-tier Tribunal Judge did not involve the making of any material error on a point of law. The decision shall accordingly stand.

The appellant's appeal is dismissed.

No anonymity direction is made.

Signed

Date: 29/5/2015

Deputy Upper Tribunal Judge Mailer