



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Numbers: IA/13163/2015

IA/17370/2015

IA/15030/2015

THE IMMIGRATION ACTS

Heard at Field House, London

Decision & Reasons Promulgated

On the 13th July 2016
2016

On the 25th July

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MR YASIR ALI

MR SANDEEP RAI HARSH

MRS PRIYANKA SINGH

(Anonymity Direction not made)

Claimants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant in the Upper Tribunal

Representation:

For the Claimants: Mr Solman (Counsel)

For the Secretary of State: Mr Norton (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Samimi promulgated on the 7th January 2016, in which he

allowed the Claimants' appeals the Secretary of State's refusal of the application for leave to remain in the United Kingdom under the Immigration Rules as two Tier 1 (Entrepreneur) Migrants and a dependant under the Points Based System. Mr Harsh was the dependant spouse of Mrs Singh in respect of the application.

2. In the Grounds of Appeal it is argued, inter alia, that the Judge failed to give reasons or adequate reasons for findings on material matters and that at [7 and 8] of the decision, the First-tier Tribunal Judge made a finding that the Secretary of State had failed to apply her discretion in the Claimants' case by requesting additional information under Paragraph 245DD(j) of the Immigration Rules. It is said that the Judge came to this conclusion on the basis that the Claimants had submitted their applications on the 4th April 2013 and the 3rd May 2013 respectively and the decision had been made on the 24th February 2015, and that additional information had been provided which the Judge could not take into account by virtue of Section 85A(4) of the Nationality, Immigration and Asylum Act 2002. It is argued that the reasons for the Claimants' refusal still has not been resolved following the hearing and that the Judge failed to consider that the onus is on the Claimants to provide all necessary documents and information to satisfy the Immigration Rules, when they submitted their applications, and the Judge was incorrect by allowing the appeals under Paragraph 245DD(j) of the Immigration Rules.
3. Permission to appeal has been granted by First-tier Tribunal Judge Heynes on the 24th May 2016, in which he noted that the Grounds of Appeal complained that the Judge wrongly took into account evidence not submitted with the application and failed to resolve all the issues between the parties and he found that the grounds were clearly arguable.
4. It was on that basis that the case proceeded before me in the Upper Tribunal.
5. In his oral submissions to the Upper Tribunal, Mr Norton argued that there was a Robinson point in that the Judge had allowed the appeal under the Immigration Rules, despite having simply found that the decision was not in

accordance with the law, so that the appeal should not have been allowed under the Immigration Rules and that at most the Judge could therefore have said that the decision was not in accordance with the law.

6. However, Mr Norton further argued that there was nothing within Paragraph 245DD(j) of the Immigration Rules to reverse the burden of proof on the Claimants and that a reservation of a right to request further information was not an obligation on the Secretary of State to request further evidence from Claimants to fill gaps in the evidence that they had submitted in support of their application. He further argued that it was clear from the statements that the Claimants submitted that further evidence had been submitted by them post-decision.
7. In his submissions on behalf of the Claimants, Mr Solman sought to argue that the First-tier Tribunal Judge had dealt with most of the issues raised within the refusal letter between paragraphs 6 and 7 of the decision. He argued that when the Judge referred to the question regarding whether or not the appeal should have been allowed under the Immigration Rules was not argued within the refusal letter, but he argued that in any event, the finding of the Judge that the case should be allowed under the Immigration Rules, should be read in accordance with the previous paragraph where it was said that the decision was not in accordance with the law and that it was clear that the Judge had not intended to allow the appeal outright under the Immigration Rules. He specifically conceded that the Judge had not intended to allow the appeal outright under the Rules.
8. Mr Solman argued that the Secretary of State was under a duty to consider whether or not to request further documents under Paragraph 245DD(j) of the Immigration Rules, which he had failed to do. He further argued that when read as a whole, the reasons given by the Judge as to why the discretion ought to have been exercised, were clear. He further argued that the Judge had not taken account of new evidence, as the Judge had not actually allowed the appeal on the basis of new evidence, but simply found that the decision was not in accordance with the law.

9. Both parties agreed that if there was a material error of law the case should be remitted back to the First-tier Tribunal for rehearing de novo before any First-tier Tribunal Judge other than First-tier Tribunal Judge Samimi.

My Finding on Error of Law and Materiality

10. Although within [7] of the decision First-tier Tribunal Judge Samimi had noted that the Claimant had produced a number of post-decision documents in the form of an accountant's report, advertising as well as business website, he duly noted that pursuant to Section 85A(4) of the Nationality, Immigration and Asylum Act 2002, the Tribunal could not have regard to "any new evidence". However, Judge Samimi went on to state that "However, I note that the Appellants had applied for leave to remain in the UK as Tier 1 (Entrepreneur) Migrants on 4.4.2013 and 3.5.2013 respectively. The Respondent made a decision on 24.2.15. I find that the Respondent ought to have exercised a discretion in order to request the additional information (paragraph 245DD(j) of the Rules and Policy Guidance).".
11. In my judgement, it is wholly unclear having considered the decision of First-tier Tribunal Judge Samimi, as to why he felt that the Secretary of State ought in such circumstances to have exercised a discretion in order to request any additional information under Paragraph 245DD(j) of the Rules. Although he states that the applications had been made in April and May 2013, and the decision was in February 2015, he has not explained why this in itself should lead to further additional evidence having been requested, if the evidence submitted in support of the application was insufficient to establish that the Claimants' met the criteria of the Immigration Rules in respect of Tier 1 (Entrepreneur) Migrants. I find that there is clearly inadequate reasoning in this regard.
12. Further, the terms of Paragraph 245DD(j), as at the date of the decision, in which it was stated that the "Secretary of State reserves the right to request additional information and evidence to support the assessment" I find is simply a reservation of a right to request additional information, and does not

impose a duty on the Secretary of State to request additional information in every single case where the Claimants have not submitted the requisite documentary evidence necessary in order to establish compliance with the Immigration Rules, as at the date of the decision. This is not a case in which it is said that the Claimants have submitted specified documents, but some of the documents in the sequence had been omitted; or that a document was in the wrong format; or a document was a copy rather than an original; or did not contain all of the specified information for the purpose of Paragraph 245AA of the Immigration Rules, where the Secretary of State may then contact the applicant or his representative in writing and request the correct documents, and criticism can rightly be made if that has not been done. The more generalised "reservation of a right" under Paragraph 245DD(j), in my judgement simply allows the Secretary of State to request any further evidence, but does, given the fact this is a reservation of a right and the breadth of the discretion in this regard, mandate that all gaps in the evidence have to be notified to a Claimant, in order for those gaps to be remedied, prior to a decision being reached.

13. However, even if I am wrong in that regard, the inadequacy of the reasoning as to why in the judgement of First-tier Tribunal Judge Samimi, what he believed to be discretion should have been exercised, such that the decision was not in accordance with the law, has not been adequately explained, and in itself amounts to a material error of law. This in itself is sufficient to set aside the decision of First-tier Tribunal Judge Samimi in its entirety, and as was agreed by both representatives, this being in my judgement, a material error of law, it does mean that the case should be remitted back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Samimi.

Notice of Decision

The decision of First-tier Tribunal Judge Samimi does contain a material error of law and is set aside;

The case is remitted back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Samimi.

Signed

Handwritten signature in black ink, appearing to read "RFMcGinty".

Deputy Upper Tribunal Judge McGinty

Dated 17th July 2016