



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/37803/2014
IA/37797/2014

THE IMMIGRATION ACTS

Heard at Field House
On 27 October 2015

Decision and Reasons Promulgated
On 21 December 2015

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

SAMIULLAH SAMIULLAH
FAUZIA HAMEED

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I. Khan of Lincolns Solicitors
For the Respondent: Mr T. Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appealed against the respondent's decision dated 03 September 2014 to refuse the first appellant leave to remain as a Tier 1 (Entrepreneur) Migrant with the second appellant as his dependent. The respondent was not satisfied that the first appellant satisfied the evidential requirements contained in paragraph 41-SD(c)(i)

(letter from financial institution holding the funds) or paragraph 41-SD(c)(ii)(4) (bank statement for money held in the UK) of Appendix A of the immigration rules.

2. In a decision promulgated on 30 April 2015 First-tier Tribunal Judge Hodgkinson dismissed the appeal for the following reasons:
 - (i) The appellants' legal representative (Mr M. Iqbal, counsel instructed by Accident Lawyers) conceded that not all the specified documents had been provided and the appellants could not therefore satisfy the requirements of the immigration rules.
 - (ii) Although the judge accepted that the appellant was a credible witness who ran a business in the UK he concluded that the appellants right to private and family life was not engaged on the particular facts of this case and that there were no compelling or exceptional circumstances that rendered the decision disproportionate under Article 8 of the European Convention.
3. The appellants were granted permission to appeal to the Upper Tribunal. They seek to appeal the First-tier Tribunal decision on the following grounds:
 - (i) The First-tier Tribunal Judge erred in not considering whether the appellants did in fact meet the requirements of the immigration rules despite the incorrect concession made by their previous representative.
 - (ii) The First-tier Tribunal should have considered the relevant provisions contained in paragraph 41-SD and the evidence submitted with the application. It is argued that the appellants met the requirements of those provisions and the respondent considered the wrong provisions.

Decision and reasons

4. After having considered the grounds of appeal and oral arguments I am not satisfied that the First-tier Tribunal decision involved the making of an error on a point of law.
5. The appellant applied to vary his leave to remain to that of a Tier 1 (Entrepreneur) Migrant with his wife as his dependent. He was required to show that he had access to funds of not less than £50,000 for the purpose of Table 4 of Appendix A. Paragraph 41-SD of Appendix FM sets out the requirements for specified evidence needed to support of the application. The appellant submitted the following evidence with the application:
 - (i) A declaration of availability of third party funds made by the appellant's brother (Abdul Razique) stating that there was an available balance of £28,549.80 in his account.
 - (ii) A "customer snapshot" in his brother's name from the Bank of Montreal confirming the balances in various accounts.
 - (iii) A copy of his brother's passport.

- (iii) A letter from Standard Chartered Bank (not on headed notepaper albeit endorsed with a stamp) confirming that the appellant's other brother (Bari Dad) had 6,000,000 rupees available in his account.
 - (iv) A declaration of availability of third party funds made by the appellant's brother and accompanying affidavit.
6. The appellant was therefore relying wholly on third party funds held in accounts outside the UK. At the date of application the relevant evidential requirements for the purpose of paragraph 41-SD of Appendix FM were as follows:
- (1) A letter in a specified format and providing specified information from each financial institution holding the funds, to confirm the amount of money available (paragraph 41-SD(c))
 - (2) If the applicant was using money from a third party, he also had to provide all of the following specified documents in addition to those specified in sub-paragraph (c) (paragraph 41-SD(d)):
 - (i) An original written declaration from every third party that they have made the money available to invest in a business in the United Kingdom containing a list of specified information.
 - (ii) A letter from a legal representative who is independent from the third party containing a list of specified information.
7. The respondent refused the application on the ground that the appellant had failed to produce a letter from the Bank of Montreal to confirm the level of the funds and he therefore didn't meet the requirements of paragraph 41-SD(c)(i). It is clear from the evidence that was submitted with the application that this document was missing. Although the appellant later gave evidence at the appeal to say that he had difficulties in obtaining such a document there is no evidence to suggest that any representations were made with the original application to ask the respondent to consider exercising discretion in relation to that matter.
8. The respondent also refused the application on the ground that the bank statement produced did not meet the requirements of paragraph 41-SD(c)(ii)(4) of Appendix FM. I agree with Mr Khan's submission that the respondent was wrong to consider that paragraph because it is clear from the wording that sub-paragraph (c)(ii) relates to "money held in the UK only" and therefore didn't apply in this case because the appellant was relying on third party funds held outside the UK.
9. However, what is clear is that the evidence submitted in support of the original application fell far short of what was required. The appellant did not produce a letter from the Bank of Montreal as required by paragraph 41-SD(c)(i) and the respondent could hardly be criticised for failing to exercise discretion if she had not been asked to do so. It seems that the application also fell short in the absence of letters from legal representatives in both countries that contained the specified information required to meet the requirements of paragraph 41-SD(d)(ii) of Appendix FM.

10. Due to the evidential restrictions contained in section 85A of the Nationality, Immigration and Asylum Act 2002, as it applied at the date of the hearing, the First-tier Tribunal was constrained from considering any evidence that was not submitted with the original application. As such the concession made by the appellant's representative at the hearing was properly made because it seems clear that not all the specified documents were included with the original application.
11. Mr Khan argued that the respondent should have considered the evidential flexibility requirements and cited the recent Supreme Court decision in *Mandalia v SSHD* [2015] UKSC 59. That case related to the application of the previous Home Office policy relating to evidential flexibility but at the date of this application the policy had been incorporated into the immigration rules by way of paragraph 245AA. The rule only obliges the respondent to contact the applicant in certain circumstances, which only includes missing documents from a series or if a specified document is not quite in a certain format. Paragraph 245AA does not oblige the respondent to contact the applicant where specified documents are simply missing.
12. For the reasons given above the concession that the appellant could not meet the strict evidential requirements of the immigration rules was properly made by the appellant's representative at the hearing and the First-tier Tribunal Judge was entitled to rely on that concession. There is no challenge to the First-tier Tribunal's findings in relation to Article 8.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

The First-tier Tribunal decision shall stand

Signed



Date 10 December 2015

Upper Tribunal Judge Canavan