



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/41060/2014

THE IMMIGRATION ACTS

Heard at Field House
On 10 August 2015

Determination Promulgated
On 14 August 2015

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MISS KOOMUDINI FERNANDO KUMARUGE WATTE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Kannangara, Counsel

For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

Background

1. The Appellant is a citizen of Sri Lanka. She appeals against the Respondent's decision dated 30 September 2014 refusing her further leave as a Tier 1 (Entrepreneur) and directing her removal from the UK.

2. The Appellant's appeal was dismissed by First-Tier Tribunal Judge Kelly in a decision promulgated on 29 April 2015 ("the Decision") on the basis that:
 - a. She had not demonstrated that she and her business partner had available funds of not less than £50,000 ("issue one")
 - b. She could not meet the requirements of paragraph 41-SD(e)(iii) relating to evidence of marketing and trading ("issue two")
 - c. She could not meet the maintenance requirements of paragraph 1A of Appendix C ("issue three")
3. Permission was granted by First-Tier Tribunal Judge Shimmin on 25 June 2015 on the basis that it was arguable that the Judge had used the incorrect date for the relevant bank statements and had failed to consider paragraph 245AA of the Rules. He also permitted the Appellant to argue her other grounds even though he considered them to be less meritorious. The matter comes before the Upper Tribunal to determine whether the First-tier Tribunal decision involved the making of an error of law.

Submissions

4. Mr Kannangara prefaced his submissions by saying that at the date of hearing before the First-Tier Tribunal, the Home Office Presenting Officer did not have all of the documents which accompanied the application on her file. His submission before the Judge is recorded at [12]. He submitted that this must be so as the documents recorded as being on the Respondent's file at [9] did not include mandatory documents (see paragraph 7 of the grounds) and there had been no refusal on the basis of the Appellant's failure to produce those. The Appellant had mistakenly said in evidence that she had submitted an invoice from Vistaprint in relation to business cards which could not have been supplied as the printout (although not the invoice itself) post-dated the application. The Judge had held that against her in rejecting at [17] her evidence in relation to what documents were supplied as "not reliable".
5. In relation to issue one, Mr Kannangara submitted that the Judge had erred in dismissing the appeal on the basis that the Appellant could not show that she had did not have access to the £50,000 required for the purposes of paragraph 245DD in accordance with Table 4(d)(v) of Appendix A. Her case is that she had invested £4344 of funds from the business into a car. At paragraph [18] of the Decision, the Judge found that she had not produced any evidence of the investment because an invoice evidencing the purchase was not referred to in the application form.
6. Mr Kannangara submitted that, although it was the Appellant's case that the invoice was with the documents accompanying the application, the specified document to evidence the investment was the accounts. She had completed the sixth column in the Table 3a1 at page 30 of the application to say that she was providing the "un-audited accounts" to evidence this (in accordance with paragraph 46-SD(a) of Appendix A to the Rules). I was shown the accounts relied

on at pages 7-13 of the Appellant's bundle. This was referred to as "the Appellant's accountant's report for period ending 30th June 2014" at paragraph 10 of the Decision. I pointed out that the evidence which the Appellant gave to the Judge was at [11] and clearly stated when she was asked what evidence was provided of the purchase that she "provided the relevant invoice with her application". In response, Mr Kannangara pointed to paragraph 6 of the Appellant's statement at page 1 of her bundle which stated that she had submitted both the invoice and the accountant's report.

7. On that basis, Mr Kannangara submitted that the Judge had erred in law in failing to make a finding whether the accountant's report was submitted and, since that could only be in the Appellant's favour since it was referred to in the application form, in finding that this was the specified evidence that she had invested £4344 in the business. She was therefore only required to have the balance of £50,000 in available funds. The Respondent had not disputed that the amounts held in the Sri Lanka savings bank would make up the remainder. The Judge noted at [11] the funds available amounted to £48,894.57. The Respondent's refusal in relation to this issue was based only on a lack of evidence of the investment and the refusal letter had failed to consider the accountant's report.
8. Issue two concerns the specified documents required to show that the business was actively trading. Since the Appellant had leave previously as a Tier 1 Post Study Work Migrant, she had to show under Table 4(d)(iv) of Appendix A that since 11 July 2014 and up to the date of the application she was continuously engaged in relevant business activity. This had to be demonstrated by documents specified at paragraph 41-SD(e)(iii) in the form of specified advertising and marketing material and (iv) in the form of contracts for service or bank account documents. The Judge accepted at paragraph [23] that the contract with Senara Ltd met the specified document requirement under (iv) because it was dated 3 January 2014 with a start date of 3 January 2014 (before 11 July 2014) and related to a continuous period to 6 January 2015. However, the Judge did not accept that there was specified evidence to meet 41-SD(e)(iii). This is dealt with at paragraph [22].
9. Mr Kannangara submitted that the fact that the business was actively trading was established by the contract and the Judge's finding at [23] that there was a contract running from January 2014 to January 2015. There was also evidence that the company had been formed in October 2013. The Appellant only had to show that there was a business which had started before 11 July 2014 and was continuing to the date of the application. In relation to marketing materials, the Appellant sent screenshots of the website dated 19 and 20 July 2014. She also sent business cards which she had printed in November 2013 (although it was accepted that she had not submitted the invoice to show when they were printed). She had also sent an invoice in relation to the purchase of a domain name and a hosting package dated 27 October 2013. Mr Kannangara submitted that on the basis of that evidence coupled with the contract which the Judge accepted as showing the business was trading as at January 2014, there was

evidence to satisfy paragraph 41-SD(e)(iii). In the alternative, the Respondent should have applied paragraph 245AA(d)(iii) of the Rules on the basis that the missing information was verifiable from other documents with the application.

10. In relation to issue three, Mr Kannangara submitted that the Judge had, at [24] erred in finding that because the Sri Lanka Savings Bank was dated 24 July 2014, it could not show that the amount in that account could supplement any shortfall in the Barclays Bank account for the relevant period. The letter of 24 July 2014 showed that the money was available from 3 October 2013 to 3 October 2014 and therefore satisfied the requirements in the Rules.
11. Mr Bramble in reply fairly accepted that the Judge had erred in relation to issue three as the letter from the Sri Lanka Savings Bank did show that the funds were available from 3 October 2013 to 3 October 2014. He submitted however that this was not material as the Appellant had failed in relation to other requirements. He made the same submission in relation to paragraph 245AA of the Rules. The requirement for “evidential flexibility” applied only where addressing the error would make a difference and not where the application would be refused for other reasons.
12. In relation to issue two, Mr Bramble submitted that the Judge had not erred. The requirements in paragraph 41-SD(e)(iii) and (iv) were cumulative not alternatives. Although the Judge had accepted that the contract met the requirements of paragraph 41-SD(e)(iv) therefore this did not affect her findings in relation to paragraph 41-SD(e)(iii) the requirements of which were not met. The findings were clearly set out at [22] and the Judge was entitled to reach those findings on the evidence which she found had been submitted. The invoice from Vistaprint was not with the application and the Judge was right to disregard it.
13. In relation to issue one, Mr Bramble pointed out that the investment of funds was in fact £3344 not £4344 because a car belonging to the Appellant’s business partner had been traded in as part payment (see [15] of the Decision). Mr Bramble also pointed out that it was not shown in the accountant’s report as an investment of funds into the business but only as a tangible asset.
14. In reply, on issue three, Mr Kannangara submitted that the evidence submitted did meet the requirement of paragraph 41-SD(e)(iii) because it showed a website which had been set up within the previous 3 months and an invoice which showed that the website and hosting package had been purchased in October 2013 as well as advertising material in the form of business cards.
15. I reserved my decision in relation to whether the Judge had made an error of law. I asked Mr Bramble whether, if I found an error of law, he was asking me to remit to the Secretary of State to consider Paragraph 245AA. He indicated that he did not consider that was necessary as Paragraph 245AA had been considered in the reasons for refusal letter but not applied but he had no objection to that course if I considered that it was necessary for the Secretary of State to take into account

documents which had not been considered. Mr Kannangara indicated that he did not consider it necessary for any further evidence to be given and was content for me to re-make the Decision based on the material before me. He did not have any objection to remittal to the Secretary of State based on a need to consider paragraph 245AA if that arose on the basis of my decision.

Decision and reasons

16. After having considered the grounds of appeal and oral arguments I am satisfied that the First-tier Tribunal Decision involved the making of an error of law in relation to issue three. However, that is not material since I am not satisfied that the Decision involved the making of an error of law in relation to issues one and two. The outcome of the appeal would therefore be the same and I do not therefore set aside the Decision. I set out my reasons below.
17. The Judge clearly erred in finding that the Appellant could not satisfy the maintenance requirements on the basis that the Sri Lanka Savings Account letter was dated 24 July 2014. That clearly showed that the Appellant had the funds in that account available to her from October 2013 to October 2014 and was therefore sufficient evidence that the Appellant met the requirements of Appendix C to the Rules in relation to maintenance.
18. In relation to issue one, I am prepared to accept that the Appellant did submit the accountant's report which is noted as being "un-audited accounts" in the application form (see [6] above) and I accept that the Judge failed to mention that at [18] when dealing with the investment of £4344. However, even if the accountant's report could satisfy paragraph 46-SD(a)(ii) of Appendix A to the Rules (the accountant's credentials are not clear), it does not show the investment of the funds. The car is shown only as a tangible asset and there is no evidence in the accounts of the investment having been made. Of course, the invoice in relation to the purchase of the car could have supplemented the report to provide that evidence but the Judge, who heard evidence from the Appellant, was entitled to find that the invoice was not submitted with the application form and certainly it does not appear on the face of any of the documents that it was. The Appellant cannot therefore meet the requirements of Table 4(d)(v) of Appendix A to the Rules and there is no error of law in the Decision in that regard.
19. In relation to issue two, the requirements of paragraph 41-SD(e)(iii) are clear and are in addition to those at paragraph 41-SD(e)(iv). Notwithstanding the acceptance by the Judge that the contract met the requirements of paragraph 41-SD(e)(iv) therefore, she was still required to consider whether the other material met the requirements of paragraph 41-SD(e)(iii). I can find no error in the reasoning at [22] of the Decision nor any error in the finding that on the basis of that reasoning the Appellant had not satisfied paragraph 41-SD(e)(iii) of Appendix A to the Rules.

DECISION

The First-tier Tribunal Decision did involve the making of an error on a point of law in relation to the issue of maintenance. That error is not however material as the Appellant's appeal failed on other issues and there is no error of law in the Decision in that regard.

I therefore do not set aside the Decision

Signed

A handwritten signature in black ink, appearing to read 'E. Smith', written in a cursive style.

Upper Tribunal Judge Smith

Date: 12 August 2015