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UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBERS:
IA/35180/2013
IA/35216/2013
IA/35224/2013

THE IMMIGRATION ACTS

Heard at: Field House
On: 27 October 2014
Prepared: 6 November 2014

Determination Promulgated
On: 11 November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MUHAMMAD KAMRAN
MR SHAHZAD ALI
MRS NOUREEN AKBAR
NO ANONYMITY DIRECTIONS MADE

Respondents

Representation

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondents: Ms N Atreya, Counsel (instructed by Allied Law Chambers and Ashfords LLP)

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DETERMINATION AND REASONS

1. For the sake of convenience I shall refer to the appellant as "the secretary of state" and the respondents as "the claimants."

2. The claimants are nationals of Pakistan, born on 15th December 1985, 26th March 1983 and 10th January 1984 respectively. The first and second claimants were the entrepreneur team. The second and third claimants are husband and wife.

3. Their appeals against the decisions of the respondent dated the 8th August 2013 refusing their applications for leave to remain in the UK as Tier 1 (Entrepreneur) Migrants and dependants and to remove them from the UK were allowed by First-tier Tribunal Judge W L Grant in a determination promulgated on 14th August 2014.

4. He noted that the second and third claimants have a daughter, who was born on 22nd October 2012 and who is also a Pakistani national. Her claim for leave to remain as a child of a Tier 1 Migrant was similarly refused on 8th August 2013.

5. The secretary of state was not satisfied that the claimants met the funding requirements under Appendix A of the Immigration Rules.

6. Judge Grant noted that it was not in issue that the first and second claimants (the entrepreneur team) failed to meet the requirements set out at paragraph 41-SD as the bank statements they provided with their applications showed that the first claimant held in excess of £28,000 in his account in his sole name and that the second claimant held almost £28,000 in his account in his sole name.

7. They each provided a bank letter confirming the state of their respective accounts but the failure lay in the fact that neither letter confirmed that they each had access to one another's funds [8].

8. At paragraph 10 of his determination, the Judge noted that the claimants failed in respect of the specified evidence requirements requiring evidence of cross access to funds. He stated that 'the notes' required an equal level of control over funds or over the business in question, which they could show at the date of application [10].

9. He also found that on 17th December 2012 (which post dated the date of decision) each claimant had transferred his funds to a business bank account at Barclays in the name of their company. He noted that it "might be argued" by the secretary of state that she could not have known of this transaction "... but it can equally be argued by the [claimants] that they carried it out not as a result of the decision but pursuant to the declaration dated 12th December 2012 and the covering letter from

their solicitors "..... which the secretary of state *did* see". That letter stated that they were ready to invest their funds jointly into their business." [10]

10. He found from the documents that the business is a "genuine going concern." The claimants have shown an equal level of control over the funds, ".....and that the evidence in support pre-dates the decision."

11. He had also been asked in the alternative to find that the failure to comply amounted to "wrong format" under paragraph 245AA of the rules.

12. He set out the contents of paragraph 245AA and stated that he had a choice, either to allow the appeal outright or to allow it to the extent that it is referred back to the secretary of state to decide on the basis of the evidence which was not submitted to her even though it post-dated the application by a mere five days. He stated that in view of the fact that he had found that the company was a going concern, he intended to allow the appeals "outright."

13. He accordingly allowed the appeal of all three claimants under the rules [14-15].

14. On 1st September 2014, First-tier Tribunal Judge Page granted the secretary of state permission to appeal.

15. Mr Walker referred to the fact that the Judge had stated at paragraph 9 that he had been referred to "notes" by counsel (not Ms Atreya but other counsel) who represented the claimants before the hearing. The Judge "extracted paragraph 52" from the notes apparently relating to entrepreneurial teams. It differed in its wording from the relevant guidance applicable at the time. The guidance at the time was set out in the secretary's grounds of appeal.

16. Paragraph 52 stated that "two applicants may claim points for the same investment and business activity in tables 4, 5 or 6 providing (sic) the following requirements are met. Those requirements are that the applicants have an equal level of control over the funds and/or the business or businesses in question, and that the applicants are both shown by name in each other's applications and in the specified evidence required in the relevant table."

17. It was thus submitted that the extract at paragraph 9 "plainly post dates" the secretary of state's decision dated 8th August 2013 and differs in wording from the relevant guidance applicable at the time.

18. It was accepted that the relevant guidance, at A40, is in essence the same as that referred to in paragraph 9 of the determination. This is the policy guidance version applicable as at July 2013.

19. He submitted that in any event, even though the Judge relied on a later, and therefore not relevant document, the guidance extract (A40) makes it plain that both parties must be named in each other's application and in the evidence of funds.

20. He referred to the concession of counsel before the First-tier Tribunal, set out at paragraph 8 of the determination, that the claimants' financial evidence had not met the requirements of paragraph 41-SD of the rules.

21. It accordingly appeared that the Judge concluded that the 'declaration of intent to invest' dated the 12th December 2012 was enough to satisfy the rules. He accordingly went on to allow the appeals under the rules. Mr Walker contended that this was 'unlawful', given that the claimants themselves accepted that they had not met the rules.

22. Mr Walker further submitted that the document allegedly showing the transfer of funds to the company, Lincoln Education Ltd (dated 17th December 2012) had not been provided to the secretary of state before the decision was made, as noted by the Judge at paragraph 13 of the determination, and was thus not admissible by virtue of s.85A of the Nationality, Immigration and Asylum Act 2002.

23. Accordingly, he submitted that the Judge materially erred in placing reliance upon such a document "seemingly expecting the secretary of state to guess that the transfer had been made."

24. Mr Walker also referred to paragraph 13 of the determination where the Judge weighed up whether the matter should be referred back to the secretary of state to decide on the basis of the evidence "which was not submitted to her even though it post dated the application by a mere five days." That plainly showed that the evidence had not been available as at the date of application, in contravention of a specific requirement under the rule.

25. On behalf of the claimants, Ms Atreya submitted that the determination was lawful and in accordance with the substantive requirements.

26. She submitted that the Judge correctly referred to paragraph 52 of the entrepreneurial team's notes which existed at the date of decision. She produced the archived immigration rules from the UKBA website in August 2013 under the heading of Appendix A Attributes, where the relevant paragraph (52) is correctly set out.

27. Ms Atreya accepted that the relevant immigration rules are at paragraph 41-SD of Appendix A. The financial evidence submitted by the former representatives was in the form of two bank statements which did not name both members of the team.

The Judge found that they had an equal level of control of funds as at the date of application based on the bank statement declaration at A28 and paragraph 52 of Appendix A. The Judge found that the document dated 17th December 2012 was evidence of their declaration at A24 made on 12th December 2012.

28. Accordingly, she submitted that the claimants met the “substantial” requirements of the rules as at the date of decision. They were named in each other's applications. They submitted bank statements in each of their names and a declaration to confirm that they would have legal control of £50,000.

29. Ms Atreya also sought to rely in the alternative on unfairness in the interview process. The interview records of their interviews on 17th June 2013 were not disclosed. She submitted that the interview 'must have been concerned' with issues relating to access to £50,000 and/or the nature of the business being invested in.

30. She submitted that there has been unfairness caused to them and in particular the failure of the secretary of state to indicate that she was prepared to accept further evidence after application and before the decision as she had done in other cases.

31. Had the claimants known this they could have instructed their respective banks to add to their financial statements that both members had access to money in two different bank accounts totalling £50,000, which was presented to the secretary of state as two individual bank statements without both names of the teams on both statements.

32. Mr Walker submitted in reply that this contention has never been the subject of an application for permission to “counter appeal” against the decision of the secretary of state.

33. Ms Atreya also submitted that Article 8 (Private Life) had not been considered in the refusal decision. It had been raised in the grounds of appeal and referred to in witness statements. She submitted that there are good reasons why the claim should succeed under Article 8.

34. Following **Gulshan [2013] UKUT 640 (IAC)**, the claimants and dependants have entered and remained in the UK lawfully at all times. They have studied and worked here. They have never been a burden on public funds. They are contributors to the economy. They both have good character and no criminal convictions. There is evidence of genuine business activity. They are “genuine individuals” who have complied with the requirements of immigration control at all times.

35. Mr Walker submitted with regard to this submission that there had been no application for permission by way of any counter appeal.

Assessment

36. The First-tier Tribunal accepted that the claimants failed to meet the requirements of paragraph 41-SD of Appendix A of the rules. Paragraph 41 of Appendix A provides that an applicant will only be considered to have access to funds if the specified documents in paragraph 41-SD are provided, to show cash money to the amount required. Furthermore, paragraph 41-SD identifies the specified documents in Table 4 and paragraph 41. Neither of the proposed team members produced a letter confirming that they each had access to one another's funds.

37. The Judge noted that they had failed in respect of the specified evidence requirement.

38. To qualify for leave to remain as a Tier 1 (Entrepreneur) Migrant under paragraph 245DD of the rules, an applicant "must meet the requirements listed below." One of those requirements is that he must have a minimum of 75 points under paragraphs 35 to 53 of Appendix A.

39. The claimants were unable to meet that requirement.

40. Their applications were made on 12th December 2012. Five days later, each transferred his funds to a business bank account at Barclays in the name of the company. This constituted post decision evidence which had not been provided to the secretary of state before making the decision. Accordingly, it was not admissible by virtue of s.85A of the 2002 Act.

41. The Judge stated at paragraph 10 that it can be argued by the claimants that they carried out this transaction not as a result of the decision but pursuant to their declaration dated 12th December 2012 and the covering letter from their solicitors which the secretary of state saw. That letter stated that they were ready to invest their funds jointly into their business.

42. However, that was simply a declaration of a possible future intent. The fact remains that they had not provided proper evidence that each had access to one another's funds.

43. Before the First-tier Tribunal, it was contended at paragraph 2 of the skeleton argument produced, that the claimants had provided a declaration with the application. The bank letter supplied "had only missing the information of 'having access to each other's accounts', which duly comes under the cover of 'wrong

format.'" It was therefore contended that the secretary of state 'violated' the flexibility policy in such matters.

44. I have had regard to paragraph 245AA. I find that it is inapplicable in the circumstances. The secretary of state will only consider documents submitted after the application is made where the applicant has submitted specified documents in the first place. If he has, the secretary of state may contact him and request the correct documents. An example of such document is that it is in the wrong format.

45. However, the required specified documents had not been submitted. Accordingly, paragraph 245AA did not operate to the advantage of the claimants in these circumstances. In any event, this was clearly not a case in which the document was simply "in the wrong format". Nor did it fall under any of the other sub-paragraphs of paragraph 245AA(b).

46. I have had regard to the skeleton argument before the First-tier Tribunal. There was no submission with regard to Article 8. The only reference to Article 8 was in the witness statement of Mr Kamran at paragraph 6, where he "invited" the Tribunal to assess the matter on Article 8 grounds.

47. However, he did not rely on any additional factors apart from asserting that he is under stress as a result of the decision; that his immigration status is at stake; that "the whole savings is also involved therein;" and that it has severe implications on his private life in the UK. However, there is no detail provided nor any evidence produced relating to the alleged severe implications. In the case of Mr Shazad Ali, he has provided the same assertions at paragraph 6 of his witness statement.

48. The claimants were represented at the hearing. There is no indication that these submissions were made to the First-tier Tribunal Judge regarding Article 8. The grounds of appeal at paragraph 7 simply placed reliance on Article 8 as creating positive obligations.

49. However, even if it is accepted that the Judge erred in failing to consider an Article 8 claim, I find that the error was not material in the circumstances. In **Patel and Others v Secretary of State for the Home Department [2013] UKSC 72**, the Court focused attention on the nature and purpose of Article 8 and in particular, recognised the limited utility of that article in private life cases where they are far removed from the protection of individual's moral and physical integrity.

50. Nor are the claimants' human rights enhanced by their not committing criminal offences or by not relying on public funds. The only significance is that in cases concerning their proposed removal from the UK, this precludes the secretary of

state from pointing to any public interest justifying removal, over and above the basic importance of maintaining a firm and coherent system of immigration control.

51. There was accordingly no realistic prospect of their appeals being upheld under Article 8 of the Human Rights Convention.

52. I accordingly find that the decision of the First-tier Tribunal involved the making of an error on a point of law. I accordingly set aside that decision.

53. In re-making it, I find that the claimants have failed to meet the requirements set out at paragraph 41-SD and were accordingly not entitled to be awarded 75 points under Appendix A. They did not show as at the date of application or decision that they had an equal level of control over the funds and/or the business in question.

54. The submission of evidence after the date of decision that each appellant transferred his funds to a business bank account at Barclays in the name of their company, constituted inadmissible evidence under the 2002 Act.

55. I also find that for the reasons given, the claimants have not shown that they are entitled to any benefit from paragraph 245AA of the Immigration Rules.

56. Finally, for the reasons already given, I find that the decision of the respondent with regard to their removal constituted a proportionate interference with their Article 8(private life) claims.

Decisions

The decision of the First-tier Tribunal involved the making of an error on a point of law.

Having set aside the decision, I re-make it and substitute a decision dismissing the claimants' appeals.

No anonymity order made.

Signed

Deputy Upper Tribunal Judge Mailer

Dated: 6th November 2014