



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/45452/2013

THE IMMIGRATION ACTS

Heard at Field House, London
On 11th July 2014

Determination Promulgated
On 12th August 2014

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

MR MUHAMMAD FAZLI RABBI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Mahmood of Sunrise Solicitors
For the Respondent: Mr E Tufon, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant, Muhammad Fazli Rabbi, appeals with permission against the decision of the First-tier Tribunal promulgated on 23rd April 2014 dismissing his

appeal against the Respondent's refusal to vary his leave to remain as a Tier 1 (Entrepreneur) Migrant.

2. On 27th September 2013, the Appellant applied for leave to remain as a Tier 1 (Entrepreneur) Migrant under the Points Based System. Essentially one point is in issue. He stated in his visa application form that he had £205,574 available for investment and that that sum was held by the Allied Bank in Pakistan. The money available was held in the account of the Appellant's brother Mr Fazal Mahmood (the third party). The documents submitted in support of the appeal included a letter dated 24th September 2013 from the branch manager of the Gulbahar Colony Peshawar, a branch of the Allied Bank in Pakistan confirming that
 - (a) PRs.35,323,442.93 was held by it (the Allied Bank) in the account of Fazal Mahmood.
 - (b) Mr Fazal Mahmood was the brother of the Appellant, and
 - (c) Mr Fazal Mahmood had stated that he intended to make the Rs.35,323,442.93 available to the Appellant for investment in the United Kingdom , and
 - (d) That sum could be transferred to the United Kingdom for investment by the Appellant.

The documents submitted also included a statement from Mr Fazal Mahmood dated 24th September 2013 confirming the foregoing. In their covering letter, Sunrise Solicitors (acting on the Appellant's behalf) indicated that the Appellant intended to carry on business as a "fresh food market" in the West Hull area.

3. On 12th October 2013, the Secretary of State refused the Appellant's application. She was not satisfied that the requirements of paragraph 245DD of the Immigration Rules, were fulfilled. Specifically, she was not satisfied that the Appellant qualified for any points under Appendix A. The matters which concerned her were as follows.
 - (a) Although the Appellant had provided the letters from the Allied Bank and Mr Mahmood to which I have referred to above, they did not state as required by paragraph 41-SD(d)(i)(iv) of Appendix A to the Immigration Rules, the amount of money available in Pounds Sterling, and
 - (b) The Appellant had not provided, as required by paragraph 41-SD9e)(iii)(1) and (iv), any advertising or marketing material or any contracts or other documents showing that he was trading.
4. In coming to his decision the Judge set out the requirements of paragraph 41-SD(d)(i)(iv) which specifically provides that where an applicant relies on money from a third party (as this applicant did), the declaration from the third party must contain "the amount of money available to the applicant from the third party in Pounds Stirling" (my emphasis).

5. The Judge made a finding that the Appellant was relying on money provided by a third party which did not specify the amount of money in Pounds Sterling, but did so in Pakistani Rupees. The Judge found therefore that the declaration was not a document which fulfilled the requirements of 41-SD and the upshot was that the Appellant did not qualify for the points required to fulfil the score for the attributes.
6. So far as the second part of the Respondent's refusal is concerned, the Judge made no finding on that, on the basis that it has always been the Appellant's claim that since his application is that he has access to funds of not less than £200,000, he is not applying under the provisions of Table 4(d) and therefore there is no requirement placed upon him to provide advertising or marketing material specified in 41-SD(d)(iii).
7. Having found against the Appellant under paragraph 41-SD(d)(i)(iv) of Appendix A to the Immigration Rules, the Judge dismissed the Appellant's appeal.
8. The Appellant sought and was granted permission to appeal. The grant of permission succinctly sets out what was before me and the relevant parts are reproduced here.

"The lengthy grounds seeking permission assert that the Judge erred in law in his application of Paragraph 245AA of the Immigration Rules. In essence, the Appellant had submitted a document to demonstrate that he had access to third party funds. That document did not state the sum involved in pounds sterling. In his equally lengthy determination, the Judge concluded that the deficiency in the document was such that it was not a specified document, and so there was no obligation on the Respondent to contact the Appellant or his legal representative to address the error under Paragraph 245AA, because that paragraph refers to the obligations and discretion afforded to the Respondent upon the submission of specified documents.

It is arguable that the Judge has erred in his conclusion that the absence of information from the documents in question was such that it was not a specified document. If that were a correct interpretation, Paragraph 245AA would be rendered otiose. Accordingly, permission to appeal is granted".

Thus the matter comes before me to determine whether the decision of the First-tier Tribunal discloses an error of law such that the matter needs to be set aside.

The Hearing Before Me

9. Before me Mr Mahmood submitted that the Judge had made two material errors.
 - (i) Paragraph 245AA(b) was incorrectly applied, and
 - (ii) Following on from that the Judge had failed to make a finding that the Respondent should, at the very least, have considered whether or not to exercise the discretion available to her under paragraph 245AA. The failure to consider whether or not to exercise that discretion amounted to an error of law and therefore the Judge should have found that the Respondent's decision was

not in accordance with the law and remitted the matter to the Respondent for consideration of the exercise of her discretion.

10. Mr Tufon on behalf of the Respondent sought to defend the determination. He sought to rely on the Tribunal decision in *Kiran Fyyaz* [2014] UKUT 00296 (IAC). He submitted that following paragraph [29] of that judgment the Appellant's application ought to fail but did concede that if I were to find against him then the matter should be remitted to the SSHD to decide whether to exercise her discretion.

Has the Judge Erred?

11. I am satisfied that the determination of the First-tier Tribunal Judge which I am bound to say is a very carefully constructed one, discloses an error of law which is material. I say this for the following reasons. The Judge carefully sets out at length in [19] and [20] of his determination the requirement of paragraph 245AA. He sets that out under the heading,

"245AA. Documents not submitted with applications

- (a) Where part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the Entry Clearance Officer, Immigration Officer or Secretary of State will only consider documents that have been submitted after the application where they are submitted in accordance with subparagraph (b).
- (b) If the applicant has submitted:
- (i) A sequence of documents and some of the documents in the sequence have been omitted (for example, if one bank statement from a series is missing);
 - (ii) A document in the wrong format; or
 - (iii) A document that is a copy and not an original document, or
 - (iv) A document does not contain all of the specified information,
- the Entry Clearance Officer, Immigration Officer or the Secretary of State may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received at the address specified in the request within 7 working days of the date of the request.
- (c) Documents will not be requested where a specified document has not been submitted (for example an English language certificate is missing), or where the Entry Clearance Officer, Immigration Officer or the Secretary of State does not anticipate that addressing the omission or error referred to in subparagraph (b) will lead to a grant because the application will be refused for other reasons.
- (d) If the applicant has submitted a specified document:
- (i) in the wrong format, or
 - (ii) that is a copy and not an original document, or

- (iii) which does not contain all if the specified information, but the missing information is variable from
 - (1) other documents submitted with the application,
 - (2) the website of the organisation which issued the document, or
 - (3) the website of the appropriate regulatory body;

the application may be granted exceptionally, providing the Entry Clearance Officer, Immigration Officer or the Secretary of State is satisfied that the specified documents are genuine and the applicant meets all the other requirements. The Entry Clearance Officer, Immigration Officer or Secretary of State reserves the right to request the specified original documents in the correct format in all cases where (b) applies, and to refuse applications if these documents are not provided as set out in (b)."

12. For reasons set out in [20] the Judge said,

"Mr R's failure to submit a declaration which specified the amount of money available in pounds sterling was not the omission of 1 or more documents in a sequence. Nor was it a document "in the wrong format" or a copy rather than an original. Not can it properly be categorised as a document which did not "contain all of the specified information." It simply gave the amount of money in the wrong currency. The case did not therefore fall within paragraph 245AA(b). There was therefore no obligation on the Secretary of State to make contact with either Mr R or his solicitors to request a document giving the amount in sterling. I have in mind, additionally, that paragraph 245AA(b) does impose an *obligation* on the Secretary of State (or other decision maker) to make contact in any of the cases specified. It merely confers a *discretion* to do so. But irrespective of that, the case was not, for the reason which I have given above, one in which there was that discretion."

13. I disagree with that assessment. In my judgment what the error amounted to was a relatively minor one in terms of presentation. In substance the sum of Pakistani Rupees 35,223,442.93 equates with £205,574. It seems to me that this is precisely the sort of error or omission which the Respondent must have had in mind when she quite properly reserved to herself under the Immigration Rules, a discretion contained in paragraph 245AA(b)(iv), which allows her to contact an applicant or his representative in writing, and request the correct documents.
14. In the appeal before me the Respondent has not exercised the discretion contained in 245AA(b)(iv) because she has not even considered whether or not to exercise her discretion. In my judgment that means that the requirements of the Immigration Rules have not been met by the Respondent and thus the decision to refuse this application is not in accordance with the law.
15. Therefore I allow the Appellant's appeal because I find the Respondent's decision is not in accordance with the law. The matter will now be remitted to the Respondent to consider this application in accordance with paragraph 245AA(b)(iv) above.

DECISION

Appeal allowed to the extent that the matter is remitted to the Secretary of State for consideration of her discretion in paragraph 245AA of the Immigration Rules

No anonymity direction is made

Signature
Judge of the Upper Tribunal

Dated