Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/03755/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13th January 2015	**On 21st January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR MD MOBASH-SHIRUL ISLAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Islam (Legal Representative)
For the Respondent: Mr E Tufan (Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge P A Grant-Hutchison, promulgated on 3rd October 2014, following a hearing at Glasgow on 18th September 2014. In the determination, the judge dismissed the appeal of Mr Md Mobash-Shirul Islam. The Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

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The Appellant

2. The Appellant is a male, a citizen of Bangladesh, who was born on 20th September 1985. He appeals against the decision of the Respondent Secretary of State dated 27th December 2013, refusing his application for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant under the points-based system, an application made on 26th November 2013. The basis of the refusal is that the Appellant is unable to qualify for 75 points as required under paragraph 41-SD and Appendix A of the Immigration Rules because he does not have access to £50,000 or to adequate maintenance.

The Judge's Findings

3. The judge had regard to the basic facts. These were that there were four bank statements from HSBC, Santander, Metro Bank, and the Halifax. The statement from the Metro Bank was the Appellant's company's account. The HSBC statement covered the period 13th November to 17th November 2013 and Santander covered 9th November 2013 until 18th November 2013, and they showed a sum of £18,509.42 (see paragraph 8(b)). The Santander statement showed balances of £13,123.08 and £10,353.25. The Appellant transferred monies from internal accounts. Altogether he had in excess of £50,000. He kept money in the Halifax and transferred it to the HSBC. He had £50,940 which included maintenance.

4. The judge had regard to four specific submissions from the Respondent Secretary of State. First, that the Appellant was obliged to produce evidence of funds held in his own. Second, the period of the accounts do not quite overlap. Third, the evidential flexibility policy cannot be applied because this is not a case of missing documents as it is the content which is wrong. Fourth, the Appellant cannot succeed under Article 8 because **Nasim** is authority for the proposition that this type of private life is at the weaker end of the range.

5. For the Appellant there were three basic submissions. First, that he owned 100% of the company and he was like a sole trader. Second, the total amount in the account was £50,940. There was no requirement that the maintenance monies should be held for any particular period. There was no requirement that the accounts should be segregated. Third, the Appellant succeeded in the terms of **Gulshan** and **Nagre** in that it would be disproportionate to refuse the appeal. This was because "In one and a half months' time the appellant will have been here for ten years. He should be given the right to reside in the UK" (see paragraph 10(c)).

The Judge's Findings

6. The judge held that in order to prove that the Appellant had access to £50,000 he had to lodge a bank statement from Metro Bank which shows a balance of £22,077.37 as being held as at 17th November 2013. However, "Unfortunately the account is in the name of Islam Limited and is not held by the Appellant as an individual". Although it had been submitted to the judge that the Appellant owns 100% of the company, a limited company "Has a separate persona and any money held by such an entity is

held under the different duties than monies held by an individual". Therefore, the Appellant could not obtain 50 points under the financial criteria (see paragraph 16).

7. Second, the judge had regard to Article 8. A specific reference was made to **Nasim** (at paragraph 21). It was said that

> "The right asserted by ... the Appellants, based on their desire, as former students, to undertake a period of post-study work ... lies at the outer reaches of cases requiring an affirmative answer to the second of the five '**Razgar**' questions ...".

The appeal was dismissed.

Grounds of Application

8. The grounds of application state that the judge erred in his finding at paragraph 16 that the fact that some of the funds relied upon by the Appellant amounting to £22,077.37 were held not held by the Appellant personally but in a bank account belonging to a limited company called Islam Limited meant that the application could not succeed. This is because paragraph 41-SD makes it clear that funds held by a limited company of which the applicant is a director can be taken into account.

9. On 27th November 2014 permission to appeal was granted.

10. On 4th December 2014, a Rule 24 response was entered to the effect that the Respondent's refusal letter was clear as to the reasons why the Appellant's application could not succeed.

Submissions

11. At the hearing before me on 13th January 2015, Mr Islam relied upon two essential points. First, he relied upon the Grounds of Appeal. He submitted that the judge had erred in taking the view that the funds in a limited company could not be taken into account, and this was clearly set out at paragraph 4 of the Grounds of Appeal.

12. Second, the judge had erred in that submissions had been made that the Appellant was very short of completing the twelve year long residence period in the UK, and so discretion should have been exercised in his favour. Indeed, as of now the Appellant had completed ten years of lawful residence. He had entered, as his witness statement of 18th September 2014 makes clear at paragraph 2, on 27th December 2004 and by 27th December 2014 last year, he had been in the UK for ten years.

13. For his part, Mr Tufan submitted that if the Appellant had not completed ten years' lawful stay, then there was no "near miss" principle to be applied, and the judge had no discretion but to say that the Appellant could not succeed on the basis of a ten year Rule. That decision could not be said to be "not in accordance with the law".

14. Second, as far as paragraph 41-SD was concerned the refusal letter makes it quite clear that the requirements in Appendix A for attributes are conjunctive and not

disjunctive, as Mr Islam for the Appellant appears to be implying, in that all the requirements have to be satisfied, which they could not be done.

15. In reply, Mr Islam submitted that the Rules stood disjunctively in that it was necessary only to comply with paragraph 41-SD(a) or paragraph 41-SD(b) or paragraph 41-SD(c). The Appellant satisfied the requirements of paragraph 41-SD(a). Mr Islam submitted that paragraph 41-SD(a) makes it clear that the phrase "funding being available" refers to funds available to (i) the applicant; (ii) the entrepreneurial team ... OR (iii) the applicant's business. Mr Islam submitted that the fact that the applicant's limited company business had the funds was just as good as the applicant himself having the funds because paragraph 41-SD(a) so stipulated. He stated that the fund was available in the business in the UK. The Appellant was registered as a director of this business. His application at Companies House showed the address of the registered office. It also showed the Appellant's name. The Appellant was a director. Accordingly, the Appellant successfully met the requirements.

No Error of Law

16. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law, such that I should set aside the decision and remake the decision (see Section 12(1) of TCEA 2007). It is unfortunate that Mr Islam did not have with him a full copy of the Rules at paragraph 41-SD. He was referring simply to the Grounds of Appeal, at paragraph 4, which only set out paragraph 41-SD(a).

17. On this basis, Mr Islam made the submission that an applicant under the Rules only had to specify either the requirements at (a), or at (b) or at (c). To this, Mr Tufan replied that the requirements were conjunctive and not disjunctive as Mr Islam suggested.

18. I am of the view that the requirements are indeed conjunctive and have to be read together. On that basis, the Appellant cannot succeed. Whereas it is true that paragraph 41-SD(a) specifies the meaning of "funding being available" in terms of the reference to either the applicant, or the entrepreneurial team, or the applicant's business, there is still an additional requirement to provide "specified documents to show evidence of the funding available to invest" (at paragraph 41-SD(c)).

19. This is the manner in which the "funding being available" is to be proved and demonstrated. In this respect, there is a long list of some ten requirements. The Appellant could not succeed because as the refusal letter makes clear,

> "The bank statements you have supplied for HSBC and Santander are not acceptable as your statements do not show the required amount over the same period, as HSBC Bank statements end on 17th November 2013 whilst the Santander Bank statements end on 18th November. You therefore do not have sufficient evidence that you have access to funds of £50,000 as the required funds are not shown on the same account within the same date".

That leaves the question of the Appellant and his long residence in the UK. He cannot succeed on this basis either. The judge had submissions on this basis at paragraph 10(c) where it was put to him that "In one and a half months' time the Appellant will have been here ten years".

However, this is tantamount to an argument of "near miss" which has been roundly rejected by recent jurisprudence (see Miah). The fact that by the end of December he had been here ten years cannot go in his favour because the determination of Judge P A Grant-Hutchison was promulgated on 3rd October 2014, and at that stage the Appellant could not succeed under the ten year long residence Rule.

It is not possible therefore to argue that the judge had erred in law.

Notice of Decision

20. There is no material error of law in the original judge's decision. The determination shall stand.

21. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss **13th January 2015**