



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/29222/2014

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly
On 11 February 2015

Decision Promulgated
On 16 February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

LAKMINI KUMARI PREMARATHNA JAYASEKARA MUDIYANSELAGE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Khan of Bukhari Chambers

For the Respondent: Ms C Johnstone Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.
2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Herwald promulgated on 22 October 2014 which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 14 November 1983 and is a national of Sri Lanka.
4. On 6 March 2014 the Appellant applied for leave to remain as a Tier 1 (Entrepreneur) Migrant under the Points Based System.
5. On 3 July 2014 the Secretary of State refused the Appellant's application and made directions for her removal under section 47 of the Immigration, Asylum and Nationality Act 2006. The refusal letter gave a number of reasons:
6. Under the heading of Non Points Scoring Reasons for Refusal the Respondent did not accept that the Appellant genuinely had £50,000 available for investment; that there were concerns about the credibility of the contracts the Appellant had produced as evidence of the establishment of his business; the Appellant's previous educational and business experience did not show evidence of working in the field of her proposed business. The Respondent was not satisfied on the basis of the evidence produced that the Appellant was a genuine entrepreneur who intended to run a genuine business. Under Points Scoring the Respondent therefore did not award any of the points claimed for funds.

The Judge's Decision

7. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Herwald ("the Judge") dismissed the appeal against the Respondent's decision. The Judge found :
 - (a) The Appellant had to show that she genuinely intended and was able to establish a business within the next 6 months and that the money for it was genuinely available.
 - (b) Taking into account those factors which he was entitled to consider under 245DD(i) he was not satisfied that the Appellant was able to establish the business within the next 6 months.
 - (c) In relation to the contracts produced by the Appellant he accepted that Miss Kahn had a company but found the level of work done by the Appellant for the company was of some concern and she was not in court to provide evidence in support of the Appellant's claim.
 - (d) The other contract in relation to Mr Ahmad for whom the Appellant was to provide a service engine optimisation strategy. The Judge noted that the company did not have a website at the time of the contract the Respondent were entitled to doubt the genuine nature of the contract. Mr Ahmad was not at court to be cross examined.
 - (e) The other contracts post dated the application.
 - (f) The Judge did not find it credible that working full time the Appellant could carry out the business plan that she had produced.

- (g) All of the Appellant's previous experience had been in international development.
 - (h) The Judge did not find the offer of £50,000 from a friend was credible or genuine.
8. Grounds of appeal were lodged First-tier Tribunal Judge R A Cox gave permission to appeal stating:
- "On the face of things the Judge appears to have undertaken a thoroughgoing analysis of the case and reached a reasoned conclusion. However I am just persuaded that the grounds have arguable merit."*
9. At the hearing I heard submissions from Mr Khan on behalf of the Appellant that enlarged on the grounds of appeal dated 31 October 2014 and his skeleton argument which he relied on:
- (a) The business in issue was embryonic and the Appellant had 6 months to develop it but the judge erred in evaluating it on the basis that it was fully functional.
 - (b) The Judges comment at paragraph 12 (f) in relation to a matter that was not in dispute suggests that the judge did not give proper weight to the evidence before him.
 - (c) The Appellant did have relevant experience for the services she was offering and did have experience in web development.
 - (d) The suggestion that the Appellant should evidence that her blogs had benefited Ms Khans business was unfair as that information was in the hands of her customer.
 - (e) It was unfair to suggest that the blog was poorly written the Judge was merely showing his own lack of understanding of technical language.
10. On behalf of the Respondent Ms Johnstone submitted that :
- (a) She relied on the Rule 24 notice served by the Respondent.
 - (b) The Appellant was simply attempting to reargue the case.
 - (c) The Upper tribunal was not there to review the judge's findings unless the findings were irrational or perverse.
 - (d) The Judge made clear findings about why he did not find the offer of funding was credible or genuinely available and these findings were open to him.

Legal Framework

11. In order for the application to be successful an applicants for a Tier 1 visa must satisfy the requirements of paragraph 254DD (a)-(k) which include what is referred to

as the non points scoring part of the application where the Respondent assesses the genuineness and viability of the business proposals. The provisions at 245DD read:

(h) Except where the applicant has, or was last granted, leave as a Tier 1 (Entrepreneur) Migrant, a Businessperson or an Innovator and is being assessed under Table 5 of Appendix A, the Secretary of State must be satisfied that:

(i) the applicant genuinely:

(1) intends and is able to establish, take over or become a director of one or more businesses in the UK within the next six months, or

(2) has established, taken over or become a director of one or more businesses in the UK and continues to operate that business or businesses; and

(ii) the applicant genuinely intends to invest the money referred to in Table 4 of Appendix A in the business or businesses referred to in (i);

(iii) the money referred to in Table 4 of Appendix A is genuinely available to the applicant, and will remain available to him until such time as it is spent for the purposes of his business or businesses.

(iv) that the applicant does not intend to take employment in the United Kingdom other than under the terms of paragraph 245DE.

(i) In making the assessment in (h), the Secretary of State will assess the balance of probabilities. The Secretary of State may take into account the following factors:

(i) the evidence the applicant has submitted;

(ii) the viability and credibility of the source of the money referred to in Table 4 of Appendix A;

(iii) the viability and credibility of the applicant's business plans and market research into their chosen business sector;

(iv) the applicant's previous educational and business experience (or lack thereof);

(v) the applicant's immigration history and previous activity in the UK;

(vi) where the applicant has already registered in the UK as self-employed or as the director of a business, and the nature of the business requires mandatory accreditation, registration and/or insurance, whether that accreditation, registration and/or insurance has been obtained; and

(vii) any other relevant information.

(j) The Secretary of State reserves the right to request additional information and evidence to support the assessment in (h), and to refuse the application if the information or evidence is not provided. Any requested documents must be received by the Secretary of State at the address specified in the request within 28 working days of the date of the request.

(k) If the Secretary of State is not satisfied with the genuineness of the application in relation to a points-scoring requirement in Appendix A, those points will not be awarded.

Finding on Material Error

12. Having heard those submissions I/we reached the conclusion that the Tribunal made no material errors of law.
13. I am satisfied that the Judge made clear throughout this determination that he understood the issues under appeal and had directed himself appropriately as this was set out at paragraphs 2-3 and summarised again at paragraph 16(a). He repeated that he understood the standard of proof was the balance of probabilities.
14. The Judge made clear that he understood that he was assessing an 'embryonic' business but he was nevertheless entitled to make that assessment on the basis of the evidence provided at the date of the application.
15. The Appellant's claim was that she had set up a company called LJ Communications (Pvt) Limited and produced two contracts as evidence of the genuine nature and viability of her company. The grounds and skeleton argument suggest that the Judge did not assess this evidence fairly. I am satisfied that the detailed findings made by the Judge at paragraphs 16(a)-(e) in relation to the genuine nature and viability of the business were ones that were open to him and he gave detailed and cogent reasoning for the conclusions that he arrived at.
16. The Judge was entitled to comment adversely on the fact that given the burden of proof and the fact that the genuine nature of the contracts accompanying her application was put in issue in the refusal letter neither of the named individuals who had entered into contracts with the Appellant had attended court in support of her claim that these were genuine business contracts; given that the Appellant claimed that she was paid to produce blogs for Ms Khans business I find it reasonable that the Judge questioned what evidence there was of the benefit to Ms Khan of such blogs in terms of their financial impact on her business as that is relevant to the credibility of the contract; the Judge also found it was not credible that the Appellant would provide search engine optimisation strategy for a Mr Ahmad's company when it did not even have a website or indeed a registered domain name 6 months after the contract was signed; I am satisfied that having directed himself properly that this was an embryonic business the Judge was entitled to ask how when she was working full time she could properly carry forward what she set out in her business plan or indeed carry out the market research and it was open to him to conclude that even for an embryonic business he would have expected for it to be viable that it had progressed more (paragraph 16(j))
17. It is suggested that the Judge assessed her previous experience unfairly. Paragraph 10 of the grounds suggests that the Judge was not entitled to find 'There was no suggestion that she had studied computers or anything like that.' This was not a finding made by the Judge but was part of a summary of the Appellant's claim in that she confirmed that she had come to the United Kingdom to study international development management. The finding that the Judge made in relation to the relevance of the Appellant's past experience which he was entitled to make under the Rules

to take into account was at paragraph 16(k) under the heading of Findings that her educational experience was in the field of English and then international development not in web content development. This was a finding open to him.

18. The Judge's assessment of the genuine availability of the funds is challenged in the grounds and the skeleton argument. The Judge made a number of detailed findings as to why he did not find the offer of funding to be genuine at paragraphs 16(l) –(u): he found it incredible that a friend of only 8 years (not 'a very long time' as suggested in the skeleton argument) would risk a quarter of her entire assets given the careful plans she was making to retire in 11 years and where no interest was to be paid; he was entitled to ask what she would do if unable to repay the loan and when the Appellant gave evidence that she would seek the help of her parents ask why they were not her first port of call; he was entitled to question why the friend had not seen her in the United Kingdom or sought to inspect her business; he was entitled to comment on the lack of any written agreement in relation to the offer of funds or indeed any agreement as to terms. I am satisfied that it was open to the Judge to find that the offer of funds was not genuine against these findings.
19. There are one or two unnecessary comments in the decision such as describing the business plan as 'magnificent' (16(j)) or the suggestion that the 'casual observer' might find the Tier 1 scheme 'bizarre and odd' in not requiring the funds to be deposited in a bank but I am satisfied that these in no way impacted on the conclusions drawn.
20. The challenges in the grounds are an attempt to reargue the evidence that I am satisfied the Judge assessed in great detail in determining whether the Appellant's business was genuine and viable.

CONCLUSION

21. **I therefore found that no errors of law have been established and that the Judge's determination should stand.**

DECISION

22. **The appeal is dismissed.**

Signed

Date 15.2.2015

Deputy Upper Tribunal Judge Birrell