Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/12584/2013
IA/12583/2013
IA/12582/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 December 2013	**On 8 January 2014**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

SUNETH ASIRI LAKMAL FERNANDO WARNAKULASOORIYA
CHANDRIKA DAMAYANTHI HERATH KANKANANGE
HIRUSHA NIMSHAN AMJAN WARNAKULASOORIYA

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr R Nalim, Counsel instructed by M K Suri & Co
For the Respondent: Ms Z Kiss, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The first appellant is a national of Sri Lanka, born on 27th October 1973. The second and third appellants are his wife and dependant child respectively.

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2. The appellant arrived in the United Kingdom on 27th November 2008 upon a valid student visa and obtained subsequent extensions of leave in that capacity up to 1 September, 2012. Thereafter, he sought leave to remain as a Tier 1 Migrant. The respondent refused to grant such leave by a decision of 4 April, 2013.

3. The appellant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Devittie on 21 September, 2013. The appeal was dismissed both under the Immigration Rules and also in respect of human rights.

4. Grounds of appeal were submitted against that decision and permission to appeal was granted on 31 October, 2012.

5. Thus it is that the matter comes before me in pursuance of that leave.

6. A number of documents were presented before the First-tier Tribunal Judge and are before me also.

7. Essentially, the application submitted on 30 August, 2012 is essentially to be that of a Tier 1 (Entrepreneur).

8. It is contended that that application was made during the currency of the then Immigration Rules which were amended on 31 January, 2013. The respondent took eight months to consider the application and it is contended that in all the circumstances the application should have been considered in the light of the Rules which applied at the time of the application. It is contended that at the time of the application the first appellant had submitted the necessary evidence to demonstrate that he met the requirements of the Immigration Rules, for example that the SOC code need not be supplied on the form.

9. Complaint is made that the respondent did not, in the event, operate her flexibility policy and should have requested those documents which were required to meet the new Rules in any event.

10. It is contended by the first appellant that the documents required under the Immigration Rules as at the time of the application were submitted. They are set out as six items under paragraph 6 of the grounds of appeal.

11. On 5 March 2013 the respondent requested by e-mail a number of other documents in the following terms:-

> "A bank statement on original headed paper from your client's 3rd party sponsor, confirming the amount of money available to him in the United Kingdom. Please refer to the published guidance for further details of the format in which this letter should be presented.

Original bank statements from your client's sponsor Mr Syed Ali Raza Bukhari. A more detailed contract that demonstrates what is actually involved in the work your client is doing on a day to day basis.

Without this evidence we will not be able to award points for access to funds required, and the application will have to be refused.

Please note that we are only able to accept the documents received within UK Border Agency within 7 working days of this email. We therefore strongly recommend that you send the documents by special next day delivery. No further extension will be given if the requested information is not provided within the seven days."

12. In response to that letter:

    (i) a bank letter on original headed notepaper from the bank confirming the money that is available in the United Kingdom;

    (ii) a declaration from the third party sponsor,

    (iii) legal representative's letter confirming the third party sponsor's signature.

    Also there were original bank statements and a Service Contract for Alpha Meridian College and a Service Contract for East London College.

13. The Reasons for Refusal Letter is a lengthy one dated 4 April 2013.

14. In summary, the respondent expressed two areas of concern. The first was that the appellant had to show that he had access to no less than £50,000 from a third party. It is contended that the documents which were submitted did not establish that fact and secondly were not in the format or form that was required under the Immigration Rules in any event.

15. It was the case for the appellant that his business was that of business development. It was noted by the respondent that, notwithstanding the many letters from the colleges and contracts from colleges, such did not establish or reflect the duties claimed to have been undertaken by the appellant in his business role.

16. It was thus for the first appellant to show that he was engaged in business activity, within the framework which appeared on the list of occupations in the Skilled National Qualifications Framework level as stated the Codes of Practice in Appendix J and to provide the specified evidence in paragraph 41-SD. It was for him to show that he was active in the job title which he had indicated as being part of his business, that is the management educational solutions limited.

17. The Judge found that the appellant had failed to produce evidence to show that the funds of his business partner were available to him and therefore did not satisfy the requirements of the Rules. Secondly, that the various contracts that had been presented by the appellant did not establish that he would engage in business as a business development manager. The Judge also considered Article 8 and found that that was not engaged.

18. It is manifest that the Immigration Rules, relating to bank statements and how they are presented and what evidence they are to contain, is extremely complex. The requirements are set out in paragraph 41-SD and all the paragraphs and sub-paragraphs relating thereto.

19. Part of the problem, as identified by the appellant in his statement, was that he was required under those Rules to obtain from the bank a letter confirming that the money the third party has in the bank will be available to him for his application. The bank refused to write such a letter, stating that it was a private agreement between the third party and the appellant. A number of documents were submitted with the application including bank statements to show funds of £50,000. Also a letter from the bank to confirm that the funds were available in the United Kingdom and a declaration from the third party confirming that the money was available to the appellant. He could not see that he could do much more. He contended therefore that a refusal on the basis as specified in the Reasons for Refusal Letter was both unreasonable and unfair. I need not spend much time looking at this matter because Ms Kiss, who represents the respondent, most fairly conceded that that requirement demanded of the first appellant was for an institutional rather than a personal investor and therefore should not have been applied against the appellant. To that extent therefore the findings of the Judge were incorrect.

20. Ms Kiss ,however, submits that it is not material to the outcome of the case because the evidence that is relied upon by the appellant as to the amount of funds in the bank is far from clear.

21. The appellant's solicitors, under cover of a letter of 13 March 2013, sought to produce a bank letter confirming the amount of money available to the sponsor in the United Kingdom together with original bank statements and declarations from the third party. Leaving aside the evidential difficulties, which paragraph 85A will present to the production of further evidence after the application was made, it is clear from those documents, submits Ms Kiss, that they really do not show £50,000 in the sponsor's account in any event for any period other than for a period of nine days from 4 December 2012 to 13 December 2012. There is little to assist the appellant in that regard.

22. However she submits that, notwithstanding the request made by the respondent, no documentation by way of contract has been provided to justify the nature of the work which the appellant claims that he undertakes in the United Kingdom such as to fund his application for leave to remain. Thus, at C4 of the respondent's bundle, is a

contract dated 20 August 2012 from the East London College. It is a contract for the post of a part-time lecturer. It provides that the lecturer shall attend during standard hours, at a location specified and in other places where the college may reasonably direct.

23. At C8 of the respondent's bundle is the schedule to be read with the agreement. There is nothing, she submits, other than that the appellant was employed as a lecturer. There is no indication of any business development or consultancy role in that document.

24. The appellant has also produced a contract from the Alpha Meridian College. Again the job description in terms for that contract of employment commencing on 14 September 2012 is as a lecturer. It specifies the times working and teaching. Once again there is no reference to any business management or consultancy in that particular contract.

25. She invites me, therefore, to find that the Judge was perfectly entitled, on a factual basis, to find that there was nothing within the contracts to support the claimed work. These were documents provided on 13 March 2013 in pursuance to the request made by the respondent.

26. It is contended, however, that there was before the respondent a Service Contract which had not been properly taken into account. That is to be found at page 20 of the appellant's main bundle of documents and is a contract made on 23 August 2012 between Oxbridge Solutions Limited and Management Education Solutions Limited. It speaks of providing IT marketing consultancy services from 1 November 2012 to 30 April 2013.

27. That contract gives very little by way of detail precisely what is involved in the services that are to be provided and how they are to be provided.

28. Mr Raza Nalim, who represents the appellant, invites me to find that the document at least should have put the respondent on enquiry to have asked for further details if not satisfied with what was in the contract. He relies upon the flexibility policy.

29. It seems to me, however, that that is a reliance which is misguided because it was demonstrated by the request of 5 March 2013 that evidence was requested concerning what was actually involved in the work that the appellant was doing on a day-to-day basis. In making that request it seems to me that the respondent acted entirely fairly. The documents, however, that were produced, namely the Service Contract for Alpha Meridian College and that for East London College did nothing to assist the appellant's case whatsoever.

30. I find therefore that the approach taken by the First-tier Tribunal Judge that the appellant had not properly or clearly disclosed the nature of his business, role and

responsibilities was entirely well-founded. In those circumstances I detect no material error of law in the decision relating to the Immigration Rules themselves.

31. It is contended, however, that the Judge erred in the approach taken to Article 8 of the ECHR by failing to consider that the Immigration Rules had changed and had failed to consider the private and family life of the appellants.

32. So far as the change in the Immigration Rules is concerned, albeit that there may have been certain changes of requirement, the reality of both the old Rule and the new was the same, namely that there should be clear evidence adduced as to the nature and substance of the business of the appellant. Thus, I detect little material change as between the old Rule and the more recent Rule in the practical application of the evidence to the issues.

33. It is contended that the Judge failed to have regard to the interests of all parties. The first appellant had come as a mature student and had completed his studies and his family had come to join him. He had invested a great deal of money into the business which he would lose if he had to return to his home country. He argued that it was wholly disproportionate to subject himself and the second and third appellants to such an upheaval all for the sake of some lack of detail he provided about his business. It was submitted that the Immigration Rules were unduly complicated and that in those circumstances it was unreasonable to uphold the detail against the appellants in all the circumstances. It was submitted that family life should be respected, particularly having regard to what was said in **Huang [2007] UKHL 11 (2007) 2HC167**, in particular by reason of paragraph 54 thereof.

34. It was submitted that had the Judge looked at matters as a whole it would have followed that removal was disproportionate.

35. Ms Kiss invited my attention to the decision of **Miah & Others v SSHD [2012] EWCA Civ 261**. In that case the Court of Appeal considered the "near-miss argument". It was argued that the more the appellant effected substantial compliance with the Rules the less it could be said that immigration policy requires his removal. The Secretary of State however contended that the public interest in maintaining immigration control requires that the Rules be complied with and that an assessment of the degree of non-compliance with the Rules plays no part in the assessment required by Article 8.

36. The Court of Appeal upheld the contention that there is no near-miss principle applicable to the Immigration Rules. Rather.the Secretary of State, and on appeal the Tribunal, must assess the strength of an Article 8 claim. The requirement of immigration control is not weakened by the degree of non-compliance with the Immigration Rules.

37. It seems to me however, and I so find, that the near-miss argument is not one that is necessarily applicable to the circumstances of this case. The Immigration Rules

require the appellant to submit proper details as to the monies available to him and the nature of the work that he intends and is carrying out. The appellant has failed to provide all relevant material in any event. Such documents as have been supplied more recently serve to undermine rather than strengthen that position.

38. In terms of private and family life, there is a paucity of material presented in any event. The statement of the appellant merely indicates that he has invested £12,000 in his business and will probably go bankrupt if not granted a visa, because he will have to pay back the third party money that he has used and spent. He contends that he is a genuine entrepreneur.

39. There is a statement from the second appellant dated 19 September 2013. She and the third appellant joined the first appellant in April 2011. They now have a small baby, Oneesha, born in October 2012. On any reading therefore they have been but a short time in the United Kingdom. The third appellant was born on 5 April 2003.

40. She speaks in terms of it having been very stressful and of the financial implications for the refusal of the application. She does not however specify any particular family or personal difficulties which will arise. No doubt she is much occupied with looking after the children and there is no indication that she is working.

41. I find that this is a situation in which the appellants as a family would be returning to Sri Lanka. There is little indication that the best interests of the third appellant would not be served otherwise than being with his parents. There is no indication that he has arrived in any particular significant stage in his development or in his education such that relocation, if returned to Sri Lanka, would adversely affect him or his situation.

42. The first appellant came to the United Kingdom on the basis of being a student and seemingly has completed that for which he came. It may well be that in time he will make a positive contribution to society both in the terms of the business that he develops and the money which he pays into the economy.

43. The second appellant describes at paragraphs 4 and 5 what it is that her husband,d does. It is unfortunate that the first appellant has not clarified those matters, even to date.

44. The appellants do not meet the Immigration Rules through no fault other than themselves. I detect no unfairness in the procedures or in the treatment of them by the respondent. I see nothing disproportionate in their return.

45. Complaint is made that the Judge failed to adequately consider the issues of Article 8, in particular the best interests of the child. There may be criticism of the Judge in that respect in that it would seem that the Judge focused in paragraph 7 of the determination more upon the first appellant, than the other appellants.

46. Clearly, my task is not to substitute what I may think of the facts from those of the Judge unless there be a material error in the approach. Clearly the Judge was in a degree of error in not specifically considering the interests of the second and third appellants but even if that had been done, there is nothing as I have indicated in the statements or evidence presented that would provide any significant platform to mount a successful Article 8 claim.

47. In all the circumstances therefore I do not find that the Judge has fallen into material error in the approach taken to the facts of this particular case. I find that it was properly open to the Judge and indeed adequate reasons were given why the first appellant did not meet the strict requirements of the Immigration Rules. I find the Judge had considered, albeit more generally, Article 8 of the ECHR. I do not find that there are any matters which the Judge has omitted which could have been presented to the Judge or should have been asked for by the Judge that would have made only a small difference to the outcome of the decision.

48. In all the circumstances therefore the appeal is dismissed. The original decisions of the Judge shall stand, namely that the appeal is dismissed under the Immigration Rules and dismissed on human rights grounds.

Signed Date

Upper Tribunal Judge King TD