



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/23677/2013

THE IMMIGRATION ACTS

Heard at Field House
On 22nd August 2014

Determination Promulgated
On 28th August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

MR SATISH HARICHARAN PARCHA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Syed-Ali of Immigration Chambers instructed by
Immigration Aid

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of India whose date of birth is recorded as 18th December 1985. He brought an appeal to the First-tier Tribunal heard by Judge Hodgkinson on 30th January 2014 against the decision of the Secretary of State of 24th May 2013 to refuse to vary his leave to remain in the United Kingdom as a Tier 1 (Entrepreneur)

having regard to paragraph 245DD of HC 395 (as amended) and to remove him from the United Kingdom by way of directions pursuant to Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The refusal is helpfully set out in part in the determination of Judge Hodgkinson and it is convenient to rehearse it here:

“...You have stated that you have access to at least £200,000 to invest in business in the United Kingdom in line with Appendix A of the Immigration Rules.

71. *Paragraph 245A and 46 of Appendix A of the Immigration Rules state that only specified documents will be accepted as evidence of this requirement. The specified documents are listed below. Applicants must provide the following document:*

- i) *a letter from each financial institution holding the applicant’s funds, to confirm the amount of money available to the applicant, or the two applicants if they have formed an entrepreneurial team.*

Each letter must also confirm each of the following details:

the name of the applicant, or both applicants if they have formed an entrepreneurial team.

As the bank documents from the Department of Post Government of India do not contain your name or that you have access to these funds they have been discounted from our calculations and therefore you are unable to demonstrate that you have access to funds as required.

We have therefore been unable to award points, in line with published guidance and Appendix A of the Immigration Rules.”

3. The Secretary of State had also refused the application on the basis that the requisite English language test certificate had not been submitted but the judge resolved that particular issue in the Appellant’s favour.
4. Judge Hodgkinson considered the arguments and before him much appeared to turn on evidential flexibility. Be that as it may he dismissed the appeal on all grounds finding that the requirements of paragraph 41-SD(a)(i) of Appendix A had not been satisfied. Indeed, it is of note at paragraph 20 of the determination that Mr Syed-Ali, who continues to represent the Appellant, accepted that not all of the requirements of that paragraph had been met.
5. Not content with that decision, by notice dated 12th February 2014 the Appellant made application for permission to appeal to the Upper Tribunal, which was eventually granted on a renewed application. There are a number of grounds but I can shorten matters because Mr Syed-Ali before me made plain that the basis upon which he pursues the Appellant’s appeal is that the requirement of the Rule simply cannot be met because of the law relating to trusts such that what is required of the

bank is so onerous that no bank reasonably can be expected to comply with what is required. In short therefore the Appellant's case is that the Rule is itself unfair.

6. Permission to appeal was initially refused in the First-tier Tribunal but that application was renewed before the Upper Tribunal and on 3rd June 2014 Upper Tribunal Judge Rintoul granted permission on the basis that paragraph 245AA, which deals with evidential flexibility, had not been considered. He considered that there was less merit in other grounds but gave permission nevertheless for them to be argued.
7. As it was Mr Syed-Ali did not pursue the point in relation to paragraph 245AA before me because he submitted that everything "fell into place" on a proper construction of trust law. It remains common ground that the letter from the bank did not contain all of the material information.
8. Mr Syed-Ali helpfully presented me with a skeleton argument and because there is the possibility that this matter may be taken further I set out within this determination rather more of his skeleton argument than I might otherwise have done.
9. The Secretary of State, represented by Mr Walker not surprisingly relies on the case of **Durrani (Entrepreneurs: bank letters; evidential flexibility) [2014] UKUT 00295** In fairness to Mr Syed-Ali he recognises the difficulties which face him arising from that particular decision; indeed he makes reference to it quite properly in his own skeleton argument.
10. The head note in the case of **Durrani** reads as follows:

"(1) The requirements listed in paragraph 41-SD(a)(i) of the Rules are to be construed reasonably and sensibly, in their full context. Approached in this way, the letters required from banks or other financial institutions are not designed to provide, and do not commit them to, any form of guarantee or assurance to any party. Rather, the function of the prescribed letters is to attest to the state of the relevant bank account on the date when they are written and to provide certain other items of information designed to confirm the authenticity of the application for entrepreneurial migrant status and its economic viability. There is no difficulty in the third party bank, with its customer's consent, expressing its understanding, based on the customer's instructions, that the use of specified funds in the customer's bank account/s is contemplated or proposed by the customer for the purpose of financing the applicant's proposed business venture. Accordingly, there is no substance in the argument that the relevant requirements contained in paragraph 41-SD(a)(i) produce an absurd result and must, therefore, be interpreted in some other manner.

(2) The question of whether a policy exists is one of fact. There is no evidence that some policy on evidential flexibility, independent and freestanding of paragraph 245AA, survived the introduction of that paragraph in the Immigration Rules."

11. For the sake of completeness I observe that the second point in the head note of **Durrani** is not material to this appeal. The first paragraph is taken from paragraph 12 of the main body of the determination.
12. Mr Syed-Ali's submissions are based on the fact that in the case where it is a third party that is providing the funds or part thereof rather than the applicant there is too onerous a requirement on the bank. Mr Syed-Ali relies on **Barclays Bank -v- Quistclose Investments Ltd [1970] AC 567** and also **Twinsectra Limited -v- Yardley and Others [2002] UKHL 12**.
13. In short Mr Syed-Ali submits that where a party borrows money from a bank or tells the bank that monies are to be used for a particular purpose and the bank then warrants that the money is to be used for that purpose there is a trust created at that stage in favour of, in this case, the applicant, a third party who becomes a beneficiary of that trust. The trustees would be the person in whose name the bank account is held and the bank.
14. Since no bank, in Mr Syed-Ali's submission, would be willing to be a party to such an arrangement it follows that no bank would be willing to give the undertakings required under the Rules.
15. Firstly I observe that Mr Syed-Ali did not come to me with any sufficient evidence in support of his contention that a bank would not be willing to provide that information and in fairness to Mr Syed-Ali he accepted that he did not have that evidence. I am not prepared to take judicial notice of what is being submitted by Mr Syed-Ali. It seems to me that it is a matter that requires some evidence, particularly because it may be that different banks have different policies, either within the same country or from country to country; I simply do not know.
16. Mr Syed-Ali submits that the point which he has raised with respect to trusts was not fully considered in the case of **Durrani** and in those circumstances he seeks to distinguish the finding in **Durrani**.
17. I consider myself bound by the case of **Durrani**. It seems to me that paragraph 12 in the case of **Durrani** in which the President of the Upper Tribunal stated:-

“Approached in this way, we consider it clear that the letters required from banks or other financial institutions are not designed to provide, and do not commit them to, any form of guarantee or assurance to any party”,

contemplates waiver on the part of the person in whose name the bank account is held. In those circumstances even if there is merit in the point that a trust is created there is no difficulty it seems to me on the part of the bank in supplying the information provided.

18. One has to look to the mischief. What is it that the Secretary of State is looking for? Primarily the Secretary of State is concerned to know that this is a genuine application. The Secretary of State of course has the assertion by the applicant that

monies will be available. Unfortunately there are some applicants who are not altogether or always truthful. In order that the Secretary of State might further or better be informed there is this additional requirement. It is to be remembered that the standard of proof both in this case and indeed for the Secretary of State is one of balance of probabilities and the Secretary of State has determined that she will be satisfied that the requirement of the Rule is met if the bank is willing to corroborate, for that is what it is, the assertion of the applicant that the money will be for a particular purpose. I see little difference between this requirement and the circumstances in which, from time to time, in civil proceedings previous consistent statements are not capable of corroborating that which is being asserted.

19. In all of the circumstances therefore I note the argument which has been put by Mr Syed-Ali but with the greatest of respect to him I do not see the merit in it.
20. I dictated this determination in front of the parties deliberately in order that Mr Syed-Ali would have the opportunity to raise with me at this point any matter which he felt that I had not adequately made mention of lest it be said, should he take the matter further, that he had not raised a point at this hearing.
21. Mr Syed-Ali confirmed at this point that I had made mention in this determination of all the points which he had raised before me. Generally he wished to reserve his position in relation to any other points but of course that will be a matter for any other jurisdiction which may in time come to consider this matter if it is thought appropriate or indeed if the matter is taken further.
22. In the circumstances I find that there was no error of law in the determination of the First-tier Tribunal and the appeal accordingly is dismissed.

Decision

The appeal to the Upper Tribunal is dismissed and the decision of the First-tier Tribunal shall stand

Signed

Date

Deputy Upper Tribunal Judge Zucker