



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/23957/2013
IA/23946/2013

THE IMMIGRATION ACTS

Heard at Field House

On 15 May 2014

Determination

Promulgated

On 29th May 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

**MR MANISHKUMAR RAVJIBHAI PATEL (FIRST APPELLANT)
MRS MANISHKUMAR KAVITABEN PATEL (SECOND APPELLANT)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

NO ANONYMITY ORDER

Representation:

For the Appellants: Mr J Trussler (Counsel)

For the Respondent: Mr N Bramble (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The first appellant whose date of birth is 8 June 1981 is a citizen of India. The second appellant is his wife, her date of birth is 15 July 1985 and she is also a citizen of India.

2. This matter comes before me for consideration as to whether or not there is a material error of law in the decision made by First-tier Tribunal Judge Caswell who dismissed the appellants' appeals in a determination on the papers promulgated on 9 December 2013.

Background

3. The appellants were granted leave to enter the UK as Tier 4 (General) Students on 10 February 2011 until 7 July 2012.
4. On 6 July 2012 the appellants made a combined application for leave to remain in the UK as Tier 1 (Entrepreneur) Migrants under the points-based system (PBS) and for a biometric residence permit.
5. In a letter dated 5 June 2013 the respondent refused the application on the grounds that three letters from Allahabad Bank referring to the accounts belonging to Mr Rutul Maheshkumar Jani, Mr Tejesh Maneshkumar Pandya and Mrs Abada Mohammad Umar were found unsatisfactory as evidence to establish the requirements for an award of points for having access to funds as required. The respondent stated that she sought to verify the documents detailed using "standard procedures". The application was refused under paragraph 322(1A) and 245DD(a) of the Immigration Rules. Further, directions were made under Section 47 of the Immigration, Asylum and Nationality Act 2006.
6. In a short determination dated 2 December 2013 First Tier Tribunal Judge R Caswell dismissed the appeal under the Immigration Rules.
7. The substance of the determination is set out below :

"There are few documents before me for the appeal. On the evidence before me I cannot be satisfied that the appellants have shown the funds in the bank accounts are genuinely available for the purpose claimed. Although I have what appear to be bank letters from the Allahabad Bank, I do not have the statements themselves and I have nothing at all to show that the account holders have any connection with the appellants. It is noticeable that the grounds of appeal do not set out any grounds and simply say 'pls see enclosed'. From the papers before me nothing appears to have been enclosed. As I have set out, the only documents before me from the appellants are the bank letters which appear to have been sent in August 2013. The appellants have failed to explain the relevance of the statements, the relationship of the account holders to them, or the reasons why the sums in the account are available to them. The letters do not accompany bank statements and so are of very little limited relevance. On the evidence before me I find that the appellant has not shown that the statements are genuine or that she has the funds available to her which would entitle her to the 75 points claimed for

attributes. The respondent's decision is in accordance with the law and the Immigration Rules and I dismiss the appeal."

Grounds for Permission

8. In undated and unsigned grounds for permission it was argued that the Immigration Judge erred in law for the following reasons;
 - (1) The appellant was refused leave based on an allegation of deception in which case the burden shifts to the respondent to prove. The Immigration Judge materially erred in law in failing to apply the correct burden of proof. In the determination no reference is made to the burden on the respondent who was relying on the exclusionary grounds under paragraph 322(1A). (**JC (part 9 HC 395 - burden of proof) China [2007] UKAIT 00027**).
 - (2) The Immigration Judge erred by not considering the appellant's appeal under Article 8 ECHR. Reliance is placed on the Court of Appeal judgment in **Pankina v SSHD [2010] EWCA Civ 719** and **CDS (PBS: available: Article 8) Brazil [2010] UKUT 00305 (IAC)** and **MB (Article 8 - near miss) Pakistan [2010] UKUT 282 (IAC)**, **Chikwamba v SSHD [2008] UKHL 40** and **ZN (Afghanistan) [2010] UKSC 21**.

Permission to Appeal

9. The application for permission to appeal was considered initially by First-tier Tribunal Judge Easterman who refused to grant permission on 22 January 2014. His reasoning was that the matter had been determined by the judge with reference to minimal papers which included some letters from the Allahabad Bank. Judge Easterman took the view that the respondent was not suggesting that the documents were false but merely that they had been unable to verify them. No Article 8 case was put before the judge. It is for the appellants to show they meet the requirements of the Rules and the judge has given reasons why she believed on the very limited documents before her the applicants did not meet the Rules. He added, "*She has not looked at deception I suspect because she read the refusal in the same way that I did.*"
10. The appellant appealed to the Upper Tribunal in grounds of appeal dated 18 March 2014 relying on **Ahmed (General grounds of refusal - material non-disclosure) Pakistan [2011] UKUT 351 (IAC)** "*in order to have made false representations or submitted false documents so as to attract a mandatory refusal under part 9 of the Immigration Rules, an applicant must have deliberately practised 'deception', as defined at paragraph 6*". Failing to disclose a material fact is also classed as "deception". It follows that such a failure also requires dishonesty on the

part of the applicant or by someone acting on his behalf. Reliance is also placed on **AA (Nigeria) v SSHD [2010] EWCA**.

11. **Permission to appeal** was granted by Upper Tribunal Judge Chalkley on 10 April 2014 in the following terms,

“I have granted this application because it appears, from the very little information supplied by the respondent that the respondent is alleging that the third party bank documents supplied by the appellants in relation to their application were not genuine. The respondent does not, however, explain why she says the documents are not genuine, merely that they cannot verify the documents.

The documents may well not be genuine, but the respondent does not give any reason for having reached this conclusion. It is, therefore, properly arguable that the First-tier Judge may *have erred in law by simply accepting an allegation that the documents were not genuine without requiring the Secretary of State for the Home Department to discharge the burden on her.*”

Hearing

12. At the hearing before me submissions were made by Mr Trussler and by Mr Bramble, the details of which are set out in the Record of Proceedings and which I have taken into account. In summary, Mr Trussler submitted that there was no evidence either before the Tribunal or presently available to support the respondent’s case that the documents were not genuine. It was unclear what financial documents were before the First-tier Tribunal Judge who gave no reasons why the documents submitted were not reliable. The bank letters produced were dated August 2013 and incorporated a declaration that funds were available to be paid out to the appellants.
13. Mr Bramble confirmed that the Reasons for Refusal Letter relied on paragraph 322A and accepted that the body of the determination referred to the documents as being “not genuine”. He accepted that the Tribunal did not engage with 322(1A) which amounted to an error of law. The question was whether or not this error was material. The application was also refused under paragraph 245DD(a) requiring evidence of access to the required funds. The appellants had the opportunity to furnish further evidence for the Tribunal to consider but elected a paper determination ; the Tribunal made a decision on the limited evidence before her. Mr Bramble submitted that the Tribunal found that the appellants failed to show that the funds were available/accessible to them as required under 245AA. This part of the decision should stand. The onus remains on the appellants to show that they meet the requirements of the Rules. No other evidence has been adduced simply the bank letters.

14. Mr Trussler responded that the evidence of the bank letters showed that funds were available to the appellants. The Tribunal ought to have given reasons not to accept those documents. The fact that the word “genuine” is used by default brings into play paragraph 322(1A). He argued that the judge erred by failing to engage with that paragraph.

Discussion and Decision

15. The relevant provisions are set out in paragraph 245D-Tier 1 (Entrepreneur) Migrants. Reference is made to Appendix A which sets out the Attributes required.. Paragraph 41 states an applicant will only be considered to have access to funds if: (a) the specified documents to show cash money to the amount required; (b) the specified documents to show that the applicant has permission to use the money to invest in a business in the UK and (c) the money is either held in a UK regulated financial institution or is transferable to the UK. Paragraph 41-SD; (a) the specified documents to show evidence of the money available to invest are one or more of the following specified documents; (1) a letter from each financial institution holding the funds, to confirm the amount of money available to the applicant (or the entrepreneurial team). Each letter must: (i) be an original document and not a copy, (ii) be on the institution’s official headed paper, (iii) have been issued by an authorised official of that institution, (iv) have been produced within three months immediately before the date of the application, (v) confirm the institution is regulated by the appropriate body, (vi) state the applicant’s name and his team’s partner’s name if the applicant is applying under paragraph 52, (vii) state the date of the document, (viii) confirm the amount of money available from the applicant’s own funds that are held in that institution, (ix) confirm the amount of money provided to the applicant from any third party that is held in that institution, (x) confirm the name of each third party and their contact details, including their full address including postal code, land line phone number and any email address and (xi) confirm if the money is not in an institution regulated by the FSA, the money can be transferred into the UK. The paragraph also requires where an applicant is using money from a third party that he must provide all of the following specified documents set out in paragraph (b) to include an original declaration from every third party that they have made the money available containing specified information and a letter from a legal representative confirming the validity of signatures on each of the third party declarations.
16. Paragraph 322(1A) sets out mandatory grounds on which leave to remain and variation of leave to enter are to be refused, where false representations or false documents have been submitted.
17. I am satisfied that the respondent in the Reasons for Refusal Letter relied on paragraph 322(1A). Accordingly the burden of proof lies on the Secretary of State to show that documents are not genuine, to the

required standard, if that is what is alleged. There was some argument before me as to whether or not the respondent was in fact suggesting that the documents were false or rather that they had been unable to verify them. It is not sufficient for an unsubstantiated allegation to be made and accepted at face value without more in the event that paragraph 322 is relied on. The word “genuinely” is used in the determination when considering whether the evidence of the bank letters establishes that the funds are genuinely available. There is no enquiry into evidence to support a claim or allegation that the documents are genuine or not. The Tribunal made no reference to either paragraph 322 nor that the burden and standard of proof lay on the respondent in this regard. I find that this amounts to an error of law.

18. The Tribunal determined the appeal on the papers and the evidence (the three bank letters) produced by the appellant was minimal. I am satisfied that the Tribunal correctly found that there were no accompanying statements and no evidence of any connection between the account holders and the appellants and concluded that the appellants failed to show evidence which would entitle them to the 75 points claimed for Attributes. Clearly the issue of verification comes into play concerning paragraph 245 and the genuineness of the documents comes into play specifically under paragraph 322(1A). I have already decided that there was an error of law and that the decision under paragraph 322(1A) cannot stand, however, I am satisfied that the decision under paragraph 245 can remain as it is correctly reasoned on the available evidence. The appellants failed to show that they meet the requirements of paragraph 245D as regards the specified documents. Although the outcome is the same I find that the error is material to the extent that the decision under paragraph 322A stands to be remade.
19. The ground under Article 8 was not pursued before me and is dismissed.
20. I find that there is an error of law in the judge’s determination. I set aside that determination. I remake the decision as follows.

Decision

21. The appeal under paragraph 322(1A) is allowed.
22. The appeal under paragraph 245DD is dismissed. The decision therein shall remain.
23. The appeal under Article 8 ECHR is dismissed.

Signed
Deputy Upper Tribunal Judge G A Black

Date 28.5.2014

No anonymity order was made or requested.
There is no award for repayment of fees.

Signed
Deputy Upper Tribunal Judge G A Black

Date 28.5.2014