Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18089/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5th February 2015	**On 3rd March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR MUHAMMAD ZANIL ZAHID
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A. Maqsood, Solicitor
For the Respondent: Mr I. Jarvis, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Pakistan born on 26th July 1988. He appealed against a decision of the Respondent dated 3rd April 2014 to refuse his application for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant. His appeal was allowed at the first instance by Judge of the First-tier Tribunal Ross sitting at Richmond on 22nd October 2014. The Respondent appeals with leave against that decision. For the reasons which I have set out below, I have set the decision of the First-tier Tribunal aside and have remade the decision on the appeal in this case. Thus although the matter comes initially before me as an appeal by the Respondent,

for the sake of convenience I will continue to refer to the parties as they were known at first instance.

2. The Appellant entered the United Kingdom with leave as a Tier 4 (General) Student on 2nd October 2010 valid until 30th January 2012. On 13th March 2012 he was granted further leave to remain this time as a Tier 1 (Post-Study Work) Migrant valid until 13th March 2014. On 13th March 2014 before his last leave was due to expire he made the present application for leave to remain as a Tier 1 (Entrepreneur) Migrant the refusal of which has given rise to these proceedings.

The Application

3. The Appellant's application was that he and another citizen of Pakistan Mr Shoaib Irfan operated a business in the United Kingdom called Zash Solutions Ltd ("Zash"). Zash described itself as a company of IT and telecom specialists providing services to customers.

4. In order to succeed the Appellant and his team member had to be able to score 75 points under Appendix A for Attributes and provide the specified documents. This was broken up into three parts, 25 points for access to at least £50,000 by way of funds, 25 points for the funds to be held in a regulated financial institution(s) and 25 points for the funds to be disposable in the United Kingdom. The Appellant produced the following evidence in support of his application:

   (i) a bank statement from Barclays dated 13th March 2014 in the name of Mrs Sumaira Manzoor showing a balance of £42,327.32;

   (ii) a declaration from Mrs Manzoor dated 11th March 2014 stating that she had £40,000 in her account and would make it available to Mr Irfan and the Appellant and/or Zash. The money would remain available to them until it was transferred to them and/or their business.

   (iii) letters from Arthur & Co Solicitors attesting to Mrs Manzoor's signature and from Lennons Solicitors to the same effect.

   In order to reach the figure of £50,000 required under the Rules the Appellant produced evidence to show that £10,713.04 was held in the name of Zash and when added to the money held by Mrs Manzoor the total came to more than the £50,000 required.

5. After posting the applications for Mr Irfan and the Appellant the Appellant's solicitors Maxim Law wrote a letter to the Respondent on 13th March 2014 stating that Mrs Manzoor had not been able to obtain the specified bank letter from Barclays Bank as "Barclays has a policy of not issuing any customised letters as required by the Immigration Rules therefore no Barclays customer can obtain a letter outside the set templates of Barclays". The solicitors requested the Respondent to consider the alternative documents provided with the application under the evidential flexibility policy or to request or to contact Barclays directly for such a letter and obtain it under what was referred to as the Respondent's "statutory powers".

The Explanation for Refusal

6. The Respondent refused both applications of Mr Irfan and the Appellant on 3rd April 2014. Mrs Manzoor's bank statement was not acceptable as the account was not in the name of the Appellant as required by paragraph 41-SD(c)(ii)(4) of Appendix A which states:

> "The account must be in the applicant's own name only (or both names for an entrepreneurial team) or where it is a joint account with the applicant's spouse, civil partner or partner set out in paragraph 53 below, not in the name of a business or third party."

7. No letter from the financial institution in which Mrs Manzoor's funds were held was supplied to establish that those funds were accessible to the Appellant's business as specified under paragraph 41-SD(c)(i) of Appendix A. This latter provision states that the letter from the financial institution holding the funds must be an original document not a copy; be on the institution's headed paper; have been issued by an authorised official of that institution; have been produced within the three months immediately before the date of application; confirm that the institution is regulated by the appropriate body; state the applicant's name and his team partner's name where relevant; show the account number and state the date of the document and confirm the amount of money available from the applicant's own funds if applicable that are held in that institution; confirm that the third party [Sponsor] has informed the institution of the amount of money he intends to make available and that the institution is not aware of the third party having promised to make that money available to any other person; confirm the name of each third party and their contact details.

8. The letter from Lennon Solicitors was not acceptable as it did not state either the Appellant's or Mr Irfan's name and did not confirm the number, place of issue and dates of issue and expiry of Mrs Manzoor's identity document. The Respondent rejected the monies held by Zash because of the wording of subparagraph (c)(ii) which I have quoted above.

9. If funds were held in a business bank account evidence that the funds had already been invested was required. The Appellant had not submitted the specified evidence as listed under paragraph 41-SD and 46-SD to establish that he had access to the funds he was claiming. Where monies invested in the business were in the form of a director's loan that must be shown in the relevant set of accounts together with a legal agreement between the applicant and company showing the terms of the loan (paragraph 46-SD(a)(iii)).

10. The Respondent considered her discretion under paragraph 245AA of the Immigration Rules whether to request additional documentation or exceptionally consider the application under that paragraph. This provides that where the Rules state that specified documents must be provided the Respondent will only consider documents that have been submitted with the application and will only consider documents submitted after the application in certain circumstances for example if the applicant has submitted specified documents: (i) in which some of the documents in

a sequence have been omitted for example if one bank statement from a series is missing; (ii) a document is in the wrong format for example if a letter is not on a letterhead paper as specified; (iii) a document is a copy and not an original; (iv) a document does not contain all of the specified information. In those circumstances the Respondent may contact the applicant or his representative in writing and request the correct documents. Documents will not be requested where the Respondent does not anticipate that addressing the omission or error will lead to a grant because the application will be refused for other reasons.

11. Under subparagraph (d) if the applicant has submitted a specified document in the wrong format, which is a copy or does not contain all of the specified information but the missing information is verifiable from other documents submitted with the application or an appropriate website the application may be granted exceptionally provided the Respondent is satisfied that the specified documents are genuine and the applicant meets all the other requirements. The Respondent decided against tasking for more information as it was not anticipated that addressing the omission or error in the documentation would lead to a grant of leave.

12. As the Appellant could not show access to funds the Respondent also refused to award any points for funds held in a regulated financial institution or funds disposable in the United Kingdom, the Respondent in effect taking the view that there were no monies available. As the Appellant had not demonstrated access to funds she was unable to accurately assess either of the two remaining Attributes.

The Appeal

13. The Appellant lodged an appeal against that decision but as Mr Irfan (according to Maxim Law) did not have a statutory right of appeal the solicitors wrote to the Respondent on 23rd April 2014 asking the Respondent to reconsider her refusal. The letter stated:

> "Following filling in of the application forms on 7th March 2013 there was change of circumstances within the above applicant's business i.e. Zash Solutions Ltd whereby the Appellant had to invest £10,000 in their business which they did on 12th March 2014 and with a view to this change, the specified documents in Appendix A were posted to you on 13th March 2014 after the applications had been posted that morning. There seems to be no record of these documents in the refusal letters and we attach a copy of those documents now for your attention. We understand that had this post been taken into account there would not have been an issue as to the investment of £10,000. We therefore request you to reconsider the evidence received in support of the above applications."

14. The letter submitted that the correspondence from Arthur & Co Solicitors and Lennons Solicitors did meet the requirements of Appendix A but if there was a minor error it was correctable under paragraph 245AA(b)(vi). The letter repeated the point that Barclay's policy was not to issue customised letters and their set templates did not include all the information required by Appendix A. The Respondent had not

exercised her discretion, the decision was not in accordance with the law and breached the Appellant's human rights.

The Hearing at the First Instance

15. The Judge heard evidence from the Appellant and his team member Mr Irfan. It was argued that the refusal letter had confused the requirements of the third party declaration and the legal representatives' letters. Notification of an allotment of shares of £10,000 in Zash was sent to the Respondent in the letter of 13th March 2014. Mr Irfan told the Judge that he had been issued with a residence card on 31st July 2014 valid until 31st July 2017 as a Tier 1 Entrepreneur. His first application had been rejected (as had the Appellant's) but he had made a second application although he had not provided any new documents relating to the third party funding. The day-to-day manager of the company was the Appellant.

16. At paragraph 13 of his determination the Judge directed himself that he might only consider evidence which was submitted in support of and at the time of the application. "However it is well established that the period of the application is not closed until the decision has been made". (I pause to note here that in stating this the Judge appears to have overlooked the Supreme Court decision of **Patel**). The Judge held that the further documents referred to were sent to the Respondent even though the Respondent had no record of having received them.

17. In relation to Mrs Manzoor's bank statement the Judge stated at paragraph 15 of his determination:

> "I consider that this does comply with the Rules because in respect of English bank accounts there is no requirement to specifically state that the money is available to the applicant and in any event Barclays Bank are not prepared to make this declaration which is in the circumstances entirely meaningless since they did not know what is in the mind of a client in relation to the investment of funds, their role is purely to look after the money for her until she decides to spend it."

18. In relation to the balance of £10,000 which the Appellant had to show the Judge wrote at paragraph 16:

> "The remaining £10,000 balance is held in the bank account in the name of Zash Solutions Ltd. The Appellant has now submitted accounts from his accountant showing that this money was invested in the company by way of shares. Since Zash Solutions Ltd is the name of the company which the Appellant is intending to run as an entrepreneur in the UK I consider that the Appellant has now satisfied the requirements of the Rules and the appeal is allowed."

The Onward Appeal

19. The Respondent appealed against this decision arguing that the Judge had made a material misdirection of law. The case of **Durrani [2014] UKUT 295** had held that there was 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 accounts is contemplated or proposed by the customer for the purpose of financing the applicant's proposed business venture. Accordingly there was no substance in the argument that the relevant requirements contained in paragraph 41-SD(a)(i) produce the same result and must therefore be interpreted in some other manner.

20. The Judge had erred in finding that a letter from Barclays Bank would be entirely meaningless and was not required as the funds were to be held in a UK bank account. Further the Judge had considered evidence in the form of accounts from a firm of accountants that were not submitted with the application. He was prevented from doing this by Section 85A of the Nationality, Immigration and Asylum Act 2002 which provides that the Tribunal may consider evidence adduced by an Appellant only if it was submitted in support of and at the time of making the application to which the immigration decision related. It applies where the immigration decision appealed against concerned an application of a kind identified in the Immigration Rules as requiring to be considered under the points based system. There is an exception for evidence which is adduced to prove that a document is genuine or valid.

21. The application for permission came on the papers before First-tier Tribunal Judge Nicholson on 18th December 2014. In granting permission to appeal he wrote:

> "Exception 2 of Section 85A restricted the Judge to consideration of evidence adduced by the Appellant in support of and at the time of making the application. Since it is arguable that at paragraph 16 the Judge considered (and placed material reliance on) a letter from accountants which was not submitted with the application it is arguable that the Judge erred in law. Permission is accordingly granted on this ground. I do not refuse permission on the remaining grounds."

Directions were sent to the parties following this grant which stated that the parties should prepare for the forthcoming hearing on the basis that if the Upper Tribunal decided to set aside the determination of the First-tier Tribunal any further evidence including supplementary oral evidence that the Upper Tribunal might need to consider if it decides to remake the decision should be available to be considered at that hearing.

The Error of Law Stage

22. When the matter came before me I had to decide in the first place whether there was an error of law such that the decision of the First-tier should be set aside and the decision remade. For the Respondent reliance was placed on the decision of **Durrani** the evidential requirements had to be complied with as set out in the Rules. There was nothing perverse about the requirements in the Rules as to what the documentation from the bank should provide. If the provisions of Appendix A were perverse the remedy would be by way of judicial review not an appeal to the Tribunal.

23. In reply for the Appellant it was conceded that paragraph 41-SD did require a letter from the bank and not just a bank statement. However there was a difficulty in obtaining such a letter from the bank. The case of **Durrani** had been raised at the hearing but it was distinguishable from the present case as the Appellant could have relied on the provisions of paragraph 245AA. The same documentation was again provided by Mr Irfan in his application in July 2014 when he was granted Tier 1 leave to remain. He had used the same letter from Barclays that the Appellant had produced (and which the Respondent had rejected) which said they could not provide the kind of information required by the Rules. It was therefore open to the Judge find an inconsistency in the Respondent's decision making that Mr Irfan could be found to meet the Rules whereas the Appellant could not.

24. The Sponsor obtained a (post decision) letter addressed to her dated 24th April 2014 from Barclays Bank, Chesham Branch which stated that "We are unable to provide details to yourself of the customer's intentions of what they will do with the funds held in their own bank account". The Judge had exercised his discretion under paragraph 245AA which the Respondent could have exercised to admit the evidence.

25. Having heard these submissions I found that there was an error of law in the Judge's determination such that it fell to be set aside. The Judge had relied on documents produced after the date of the application which he was not permitted to do. He was wrong in law to find that the bank account of Mrs Manzoor complied with the Rules as he mistakenly believed that there was no requirement to state that the money was available to the applicant, alternatively such a requirement was meaningless. The case of **Durrani** had effectively dealt with that argument and it was not in my view distinguishable on its facts from the instant case before the Judge. I therefore set aside the decision at first instance and enquired whether in those circumstances it was intended that the Appellant would give any oral evidence. The Appellant's solicitor stated that oral evidence would not be of much assistance in this case and the matter would proceed by way of submissions.

The Re-hearing

26. I heard submissions first from the Appellant's representative then from the Respondent then finally from the Appellant's representative. Confirmation that Mr Irfan had been granted a residence card was contained in the Appellant's bundle. The Appellant had drawn the Respondent's attention to the fact that Barclays could not provide the specified information and therefore discretion should have been exercised under paragraph 245AA. That was the only explanation how the Appellant's Tier 1 team member, Mr Irfan , could have been granted. The Appellant did not know the process under which discretion had been exercised in favour of Mr Irfan and the Tribunal was requested to adjourn the case in order for the Respondent to provide documents showing how Mr Irfan's application had been allowed. I declined to adjourn. Directing myself that the test was one of fairness, I considered that the Appellant had had ample time to obtain any further evidence he might need (including making requests of the Respondent). The decision in favour of Mr Irfan had been known for a very long time.

27. The Presenting Officer argued that the Appellant's submissions had no weight whatsoever. The letter from Barclays Bank dated 24th April 2014 postdated the refusal by 21 days. The letter was therefore not admissible, see the case of **Raju**. The argument as to the effect of paragraph 245AA was also wrong. Discretion would only be exercised to grant an application where information could be verified from somewhere else. None of the information required in this case was verifiable and even if the Respondent had tried to exercise discretion that would not have been possible. If the Respondent had asked for information from Barclays she would have received the same response that Mrs Manzoor had received. Paragraph 245AA did not require the Respondent to go on a Fact-Finding Mission for the benefit of the Appellant (see **Rodriguez** in the Court of Appeal).

28. It was evident from the wording of the refusal letter that the Respondent had had regard to her discretion under paragraph 245AA but had decided not to ask for further documentation.

29. The argument that Mr Irfan was granted leave but the Appellant was not was only relevant in the context of any claim under Article 8. The Appellant had to show something compelling about his case. The allegation was that his team member had been granted leave on the same facts as his case. However there could only be a finding that the Respondent's decision was not in accordance with the law if it could be shown that there was systemic inconsistency by the Respondent in decision making, see the case of **Nasim**. Given the very large number of applications which the Respondent had to deal with during the course of a year it was inevitable that some inconsistency was bound to occur within the system and that was recognised by the judicial authorities. To show a systemic inconsistency the Appellant would have to make a freedom of information request as was done in the **Nasim** case. In **Nasim** the Appellant's Counsel had referred to the cases of two people who had been granted leave where an Appellant had not. That was held not to place a burden on the Respondent to show that the decision was rational. It did not expose systemic inconsistency.

30. In conclusion the Appellant's representatives stated that the letter from Barclays Bank of 24th April 2014 was not enclosed with the application but was sent to the Respondent. The document was admissible under Section 85A by reason of subsection (4)(c) which states that evidence postdecision may be considered if adduced to prove that a document is genuine or valid. Discretion in the Appellant's case should have been exercised in the same manner as was exercised in the team member's Mr Irfan's case. It was not just that the two cases were alike, they were in fact the team members which enabled this case to be differentiated from decisions such as **Nasim**. Here it was not about two totally independent cases but about the same application. No submissions were made in relation to Article 8.

Findings

31. The Appellant and his team member had to show that they had access to £50,000 in funds in order to be granted leave to remain as Tier 1 Entrepreneurs. The Appellant proposed to do this by showing a sum in excess of £40,000 held by Mrs Manzoor and a sum in excess of £10,000 in the business, Zash.

32. The difficulty was that the documentation submitted by the Appellant with his application went nowhere near to showing either of these two sources of funds. The £40,000 held by Mrs Manzoor was held in a Barclays Bank account but there was no indication that the money was available to the Appellant. The requirement that evidence should be produced to show that money is available to a would be Tier 1 Entrepreneur is not irrational. The mischief it is aimed against is that an applicant might show that a third party has funds without there ever being any possibility that the applicant would be able to use those funds for the applicant's business.

33. Banks are reluctant to spell out the terms on which their customers are holding money but as the case of Durrani points out it is not impossible for them to do so. The requirement in the Rules is neither absurd nor irrational. It was acknowledged that the bank statement submitted with the application did not satisfy the requirement of the Rules but neither did the letter dated 24th April 2014 from Barclays. There were two problems with it, firstly it was too late because it postdated the decision and secondly it still did not give the information required by the Rules.

34. The Respondent (who only had the bank statement from Barclays before her) decided that there was little to be gained from writing to request further information as the original application fell so far short of what was required. There was indeed no purpose to be served. The Respondent was aware of her discretion but it was open to her not to request further documentation or consider the application outside the Rules. There was nothing unlawful about the Respondent's decision.

35. The Judge was wrong in law to find that Mrs Manzoor's bank statement complied with the Rules. It was not impossible for Barclays to find out what was in the mind of one of their clients. They could simply ask Mrs Manzoor what was her intention with the money and she could have instructed them that her intention was to make the £40,000 plus available to the Appellant and his team member.

36. If the Appellant could not show that he had the £40,000 available, whether he could show the remaining £10,000 or not was beside the point. In fact he could not show that either since the information that he relied on from his accountants itself postdated the application and was therefore not admissible. Similarly the Respondent was under no obligation to request further documentation in relation to that sum. Even if Zash had £10,000 in its bank account it still had to show how that money had got there whether by way of a director's loan or otherwise and that information had to be supplied at the time of making the application not after the decision.

37. The Appellant relied on the fact that his team member was granted leave to remain but he was not. It was argued that the team member was granted on the basis of the same facts as the Appellant. However it is well settled that a Respondent's decision is not to be taken as an acceptance of any particular fact contained in an application. For example if an applicant is granted asylum at an earlier date by the Respondent without a Tribunal hearing it is not to be taken that any particular finding as to the credibility of the applicant has been made. Where Mr Irfan was granted but the Appellant was not, it does not follow that the Respondent has considered the same facts and matters in arriving at the two different decisions. There might be many

reasons why Mr Irfan was granted and the Appellant was not relating to Mr Irfan's personal circumstances which it is not open to the Tribunal to speculate about.

38. I do not consider that just because two separate decisions were arrived at in this case the decision to refuse the Appellant is perverse. It may be for example that the decision in favour of Mr Irfan was a generous one (granting an application outside the Rules) but that would not mean that the Respondent was bound to exercise the same generosity in relation to the Appellant. The Appellant did not have any form of legitimate expectation that his application would be granted by the Respondent once Mr Irfan's was. Both team members had to be able to show that they could both comply with the requirements of the Rules. Otherwise one could have the situation where simply because somebody is a team member they must be granted even if they clearly do not meet the Rules, where the first team member has been granted. Each case must be decided on its own facts and on the particular facts of this case the Appellant could not meet the Immigration Rules.

39. No arguments were made to me regarding Article 8. This must be right since the Appellant had only been in the United Kingdom a relatively short time, he had no established family life and his status in this country was precarious as a student and post-study migrant with limited leave. Even if Article 8 was engaged in this case it would clearly be proportionate to the legitimate aim pursued to remove the Appellant. I therefore dismiss the Appellant's appeal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside.

I remake the decision in this case by dismissing the Appellant's appeal against the Respondent's decision to refuse leave.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 2nd day of March 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As I have set the decision of the First-tier aside as it made a material error of law, I have set aside the fee award made at the first instance such that no fee is payable by the Respondent in this case.

Signed this 2nd day of March 2015

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Deputy Upper Tribunal Judge Woodcraft