Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/23538/2014
IA/23539/2014
IA/23540/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination & Reasons Promulgated**
On 17 December 2014	**On 28 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

MR OMONIYI OLUWASEUN OLAYINKA MAKU
MRS JANE ADESUKYI MAKU
MISS OLUWATOFUNMI AUDREY MAKU
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr F Abe, Legal representative, Atlantic, Solicitors
For the Respondent: Miss J Isherwood, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are all citizens of Nigeria who applied on 11th April 2014 for leave to remain under the Tier 1 (Entrepreneur) route.

2. The Respondent refused the application on 13th May 2014. The subsequent appeal to First-tier Tribunal Judge Oliver was allowed in a determination promulgated on 8th October 2014.

3. The judge noted that the respondent refused the application on 13th May 2014 because the evidence submitted of his access to £55,000 in funds showed that the money was already in an account in the name of "The Director, Elta Spring Limited" and accordingly the funds fell to be considered as "invested". In this situation the applicant had to submit the specified documents listed under paragraph 46-SD of Appendix A. None of that evidence had been submitted. Accordingly the £51,360 had been discounted from the Respondent's assessment of the funds that he had claimed to have access to.

4. The judge noted the evidence of the first Appellant, Mr Maku (who I shall refer to as the Appellant), and his wife who had submitted a corroborative statement.

5. The Home Office Presenting Officer had argued that because the funds had been credited to the business account on 9th April 2014 they were in fact "invested" by the time of the application on 11th April 2014 and therefore needed to satisfy the separate criterion and specified documents required for funds under the investment route. The company had a legal entity separate from the Appellant and the funds were therefore not his to dispose of as he pleased.

6. The judge noted that in some circumstances there would be a considerable difference between the availability of funds placed, where the money was placed and the availability of money "utilised" in a separate entity; for example where the money had been wholly or partly invested in a completely separate enterprise. In this case the Appellant was the sole director of the company and the money had not been in any way "utilised". It was, in reality, totally accessible, certainly for the purposes of the entrepreneurial aim, even if it was also "invested". It is in the current account of the investment vehicle and is therefore loan capital repayable on demand. In those circumstances the judge found that the Appellant could satisfy the requirements by submitting the specified documents under paragraph 41-SD.

7. The grounds of application submit that the judge failed in his understanding of Rule 41-SD. It was also said that Rule 46-SD applied the terms of which were set out. The grounds say it is plain the Appellant had invested for the purpose of the Immigration Rules and that the judge acted unlawfully in finding otherwise.

8. The grounds were found to be arguable and thus the matter came before me on the above date.

9. Before me Miss Isherwood for the Home Office relied on the grounds but also submitted that it was fundamental that all the documents had to be lodged at the time of application, and while not a point taken in the grounds it was taken under the refusal letter dated 13th May 2014 where it was said that the applicant had supplied "none of the above evidence". Being a points-based application the Tribunal could only consider evidence submitted at the time of making of the application. The fact that there were missing documents was confirmed by the front sheet on the Home Office bundle which noted what documents had been annexed. On this basis the judge had been wrong to allow the appeal. Miss Isherwood submitted that, allied to what was said in the grounds of application the judge had fallen into material error and the decision should be set aside and the appeal dismissed.

10. For the Appellant Mr Abe submitted that all necessary documents had been provided in the original application. Mr Abe indicated that it was not feasible to produce audited accounts because the business had been trading for less than four months before the application. A letter from the accountant was provided. In short there was no error of law in the judge's decision which should stand.

11. I reserved my decision.

Conclusions

12. The Secretary of State noted that paragraph 45 of Appendix A of the Immigration Rules states that where an applicant is relying on funds which have already been invested, the specified documents listed under paragraph 46-SD must be submitted. A significant part of the argument put forward by Miss Isherwood was that the documents under Rule 46-SD had not been lodged. Judge Oliver focused on the issue of whether or not the money could be said to be "invested" or merely "utilised". Looking at what is stated in paragraph 10 of his determination he was saying that given the Appellant was a sole director of the company, it was totally accessible and the Appellant could satisfy the requirements by submitting the specified documents under paragraph 41-SD. He was therefore not requiring the Appellant to produce documents under 46-SD. He was finding that the Appellant satisfied Rule 41-SD because Appellant was showing he had the money in cash, that he had permission to use the money and it was held in a UK regulated financial institution that was available to the Appellant.

13. It is a clear inference from the judge's findings that he was accepting the evidence of the Appellant (and his wife) that he had lodged the necessary documents under paragraph Rule 41 - SD and that this fundamental requirement had been complied with. There was sufficient evidence to allow him to do so and it is notable that the grounds of application do not suggest otherwise.

14. What the grounds do say is that the failure of the Appellant to produce the documents under Rule 46 means that the appeal should have been dismissed - plainly the judge's interpretation of the rules was otherwise. It seems to me that it is

worthwhile noting the heading to Rule 46 which reads "**Investment and business activity: notes**".

15. It is clearly anticipated by the Secretary of State in Rule 46 that this section is intended to cover the situation where there has been investment and business activity and the narrative goes on to say evidence must be provided of any investment and business activity that did take place. Such a requirement is entirely logical - the Secretary of State demands to know that the way the investment and business is being conducted reaches the appropriate standard. Either the documents produced will reflect that in which case the application is likely to be granted or if they do not then it likely to be refused. Each case will be fact sensitive and will depend on what documents are actually produced which in turn will depend on what actual investment and business has taken place. If there has been no such investment and business it follows that that there will be no documents to be produced as clearly no such documents will exist.

16. What the judge was finding in this case that there was no evidence before him that that there had been such investment and business; from what was said to me in submissions it is not suggested by the Secretary of State there was any such trading which would have compelled the lodgement of documents under the section. The judge was taking the view that by lodging the appropriate documents with the application the Appellant had satisfied the evidential requirements of paragraph 41-SD and no more was required of him.

17. On the basis of the evidence submitted to him these findings were entirely open to the judge and it follows that there is no error in law in the judge coming to such a conclusion. The decision must stand.

Decision

18. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

19. I do not set aside the decision.

Signed Date

Deputy Upper Tribunal Judge J G Macdonald