



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/31120/2014

THE IMMIGRATION ACTS

Heard at Field House
On 9 April 2018

Decision & Reasons Promulgated
On 26 April 2018

Before

**DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL**

Between

**MR SARWAR ALI MOHAMMED
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Chohan, Counsel instructed by SBM Solicitors

For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of India, applied on 31 May 2014 for leave as a Tier 1 (Entrepreneur) Migrant. The respondent refused his application on 24 July 2014. His appeal was heard by Judge Seelhoff of the First-tier Tribunal in December 2014 and on 6 January 2015 he sent a decision dismissing it. The appellant's application for permission to appeal to the Upper Tribunal failed before the First-tier Tribunal and the Upper Tribunal, but was eventually, granted by the Court of Appeal on a "Cart" judicial review, reference being made to the Supreme Court decision in **Mandalia**

[2015] UKSC 55 (a decision dealing with the respondent's evidentiary flexibility policy/rules).

2. The reason the respondent refused the appellant's application on 24 July 2014 was stated to be that he had failed to establish that he met the requirements of para 41-SD(d)(i) and (ii) of Appendix A of the Immigration Rules because no declaration had been supplied by the third party concerned to establish that there were funds available to him of £50,000 and no declaration from a legal representative had been supplied to establish that the letter of permission supplied was valid.
3. The appellant's grounds of appeal to the FtT submitted that all original documents had been provided with the application made by the appellant's Tier 1 (Entrepreneur) Team Member (Mr Khan), along with the covering letter, on 30 June 2014. It was pointed out that this was before the date of refusal of the appellant's Tier 1 application. Mr Khan's application was granted on 16 August 2014.
4. Before Judge Seelhoff the appellant's representative (Mr Ahmed) conceded that the appellant could not meet the requirements of the relevant Rules because the lawyer declarations in respect of any third party funds required under para 41-SD(d)(ii) of Appendix A did not exist at the time he applied for leave to remain - they were not signed until 13 and 19 June 2014 respectively, i.e. two and three weeks after the date of application. Mr Ahmed's submission was that the appellant's appeal should nevertheless be allowed because the decision was clearly unfair as the Home Office were aware that the applications concerned entrepreneurial team members and that each application referred to the other. The appellant's letter of 23 June 2014 had put the Home Office on notice that the original documents were in the post and would be provided. Mr Ahmed submitted that that letter - combined with the fact that Mr Khan named the appellant when he submitted his own application - should have been sufficient for the two files to be linked. He relied on para 245AA of the Rules which require that an appellant send missing documents when requested within 7 working days of a request.
5. Judge Seelhoff was not persuaded by the submission based on fairness, reasoning at paras 16-18 as follows:
 - "16. The terms of the policy at paragraph 245AA of the Immigration Rules require that an Appellant send missing documents where requested within seven working days of a request, but also state that requests will only be made for originals where copies have already been provided or where a document is missing from a series. The Respondent did give the Appellant an opportunity to provide the missing documents despite the fact that the third party funding declarations witnessed by the lawyers had not been enclosed with the original application even in copy form. Accordingly under the wording of paragraph 245AA it was not even necessary for the Respondent to have made this request. The Appellant was unable to provide those documents within the seven days provided for under the rules. I consider that the Respondent attempted to be fairer than the policy required her to be.

17. In respect of fairness I also consider that the Appellant has not done all he could to draw to the attention of the Respondent the fact that the original documents had been submitted with his partner's application. Any sensible applicant would have ensured that a letter went to the caseworker with conduct of his case to advise her that the original documents had now been submitted albeit with another application. The cover letter to Mr Khan's application may have named the Appellant, but it did not give his application reference and it did not include a request that the original documents be linked to this Appellant's file. I consider that the Appellant bears significant responsibility for the documents not being linked to his file. The Respondent has to deal with a significant number of applications and not all applications of the same type pass across the desk of the same caseworker. I consider that there was a fundamentally unreasonable expectation that the documents would be linked in this case.
 18. Assessing the case in the round it is clear that at the date of application the Appellant was not entitled to expect his application to be granted. The Appellant was not entitled to expect the Respondent to contact him to request additional evidence as he could not possibly have provided a copy of the lawyer declarations with his applications as they did not exist. In that situation it is difficult to see how the Respondent's decision could be said to be procedurally unfair given that not all the mandatory evidence required under the rules existed at the date of application. In these circumstances it is hard to see how the Respondent could be criticised for not doing more than she could."
6. The grounds seeking permission to appeal argue that by virtue of the appellant having filled in the mandatory fields in the application form (requiring information relating to team member application details when there is a two member team making the Tier 1 application), the respondent was under an obligation to consider the two applications together and to link up the information provided in the team member's application. The material fact was that there was only one set of original documents.
 7. Mr Chohan's submissions before me were to similar effect. He highlighted the fact that because of the need to produce originals, some of the documents had to be re-done in Pakistan. If the respondent had properly applied the evidential flexibility rules she would have accepted that there was satisfactory evidence (i) that there was £50,000 available in a regulated bank; and (ii) that the account holder had that money. The lawyer's declaration served only to confirm that the account holder was who he said he was.
 8. Ms Everett submitted that the judge had not erred in law because the appellant failed to provide the documents required. Having promised to send the original documents, he did not produce them. They were only provided with the team member's application. In any event, the lack of a lawyer's declaration was a requirement of the Rules that was plainly not met. The details given by Mr Khan in his application were insufficient to alert the respondent of the appellant's pending application.

My decision

9. Although Mr Chohan initially queried why the appellant's previous representative (Mr Ahmed) had conceded the appellant could not succeed under the Immigration Rules, he subsequently accepted that this was correct. I find in any event that the judge was plainly right to conclude that the appellant failed to meet the requirements of the Rules since there were specified documents, namely lawyer's declarations, that were missing from his application. The relevant rule permits of no discretion. It states:

“(d) If the applicant is applying using money from a third party, he must provide all of the following specified documents (in addition to the specified documents in (c) above):

(ii) A letter from a legal representative (who is independent from the third party or third parties), confirming the validity of signatures on each third-party declaration provided, which confirms that the declaration(s) from the third party or parties contain the signatures of the people stated. It can be a single letter covering all third-party permissions, or several letters from several legal representatives. It must be an original letter and not a copy, and it must be from a legal representative permitted to practise in the country where the third party or the money is. The letter must clearly show the following:

- (1) the name of the legal representative confirming the details;
- (2) the registration or authority of the legal representative to practise legally in the country in which the permission or permissions was or were given;
- (3) the date of the confirmation letter. ...”.

10. The appellant's case hinges therefore on whether the judge was right to conclude that the appellant was still entitled to succeed in his appeal on the footing that the respondent had failed to apply her evidentiary flexibility rules to the circumstances of his case. I am mindful when considering this matter that a very senior judge was persuaded that there was at least an arguable error in the judge's treatment of this issue.

11. However, having had the opportunity to consider the matter in more detail on the basis of full submissions from both parties, I am not persuaded that there was any error on the part of the judge. In my judgement much of the argument on both sides regarding the application of the evidentiary flexibility rules (and in particular whether the respondent should have linked the appellant's and his team partner's application and seen that the evidence contained in the team parties' application was relevant to both applications) has not been to the point. Even if the respondent had linked the two applications and made her decision on the appellant's application with full regard to the evidence sent with the team partner's application, this would not have made any difference to the fact that the appellant's application did not

include all the specified documents. The appellant's application was made on 31 May 2014. Mr Khan was able to succeed under the Rules because the lawyer's declarations attesting to the bona fides of the bank declaration were dated 13 and 19 June, i.e. prior to the date of his application. The appellant, by contrast, had not produced any lawyer declarations except for those dated 13 and 19 June i.e. ones dated after the date of his application.

12. So far as concerns the evidentiary flexibility rule it did not and cannot assist the appellant's case. First of all, the respondent did operate this rule, by writing to the appellant on 13 June 2014 requesting that he send third-party funding documentation. Secondly, even assuming that the appellant can be taken to have responded (as he claims he did by arranging with his team partner for his third party documentation to accompany the letter's application), his response was to submit lawyer declarations post-dating his application. As was stated by Rafferty LJ in **MQ v SSHD** [2015] EWCA Civ 726, for any application of the evidential flexibility provisions to succeed, documents have to be in existence at the date of application.
13. Paragraph 245AA (headed "Documents not submitted with applications) does provide at subparagraph (a) for consideration of documents submitted after the application "if submitted in accordance with subparagraph (b)"; but the four circumstances specified in subparagraph (b) all relate to documents in existence at the time of application.

Notice of Decision

14. For the above reasons I conclude that the FtT judge did not materially err in law in concluding that the appellant could not succeed in his appeal. Accordingly the judge's decision must stand.
15. No anonymity direction is made.

Signed:

Date: 25 April 2010

