



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

Appeal Number: IA/25136/2013

THE IMMIGRATION ACTS

Heard at : Field House

On : 15 July 2014

Determination

Promulgated

On: 8 August 2014

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

THAMEENTHIRA GUNARATNAM

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Hussin of A K Solicitors

For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Sri Lanka, born on 3 January 1985. He has been given permission to appeal against the determination of First-tier Tribunal Judge Eldridge, dismissing his appeal against the respondent's decision to refuse his application for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant.

2. The appellant entered the United Kingdom on 21 August 2010 with leave to enter as a Tier 4 General Student, valid until 30 November 2011. He was granted further leave to remain as a Tier 4 General Student until 25 December 2012. On 12 December 2012 he applied for further leave to remain as a Tier 1 (Entrepreneur) Migrant.

3. His application was refused under paragraph 245DD(b) of the immigration rules on the grounds that he was unable to meet the requirements to be awarded a minimum of 75 points under Appendix A. He was awarded zero points for available funds as he had not provided the specified evidence as listed under paragraph 41-SD to establish that he had access to the funding claimed. The third party declaration he had produced was not acceptable since it did not confirm that the declaration from all third parties was valid as per paragraph 41-SD(b)(ii). The decision to refuse to vary leave was accompanied by a decision to remove the appellant under section 47 of the Immigration, Asylum and Nationality Act 2006.

4. The grounds of appeal before the First-tier Tribunal asserted that there was only one "third party" and that that person had signed the declaration. The declaration had been validated by a recognised lawyer in Bangladesh and contained all the information required under the rules. If the respondent had had any concerns about the format of the document, she ought to have made enquiries to the appellant in accordance with the evidential flexibility provisions in paragraph 245AA of the rules. The grounds asserted further that the section 47 removal was unlawful and that Article 8 had not been considered.

5. The appellant appealed against that decision and, in accordance with his own request, his appeal was determined by the First-tier Tribunal on the papers, without an oral hearing. First-tier Tribunal Judge Eldridge dismissed the appeal on all grounds in a determination promulgated on 19 February 2014. He noted that paragraph 41-SD(b)(ii) did not require a declaration, as mentioned in the refusal letter, but a letter of confirmation concerning any third party declarations made. That letter had to be from a legal representative and had to provide specific information. Such a letter had not been produced, although there was a letter dated 7 September 2013 that post-dated the application by nine months and was therefore not admissible. The judge found that the appellant could not meet the requirements of the rules. He went on to consider the question of evidential flexibility but concluded that the relevant principles did not apply in the appellant's circumstances. He found that the appellant's removal would not breach Article 8 and he concluded that the section 47 removal decision was in accordance with the law. He accordingly dismissed the appeal on all grounds.

6. Permission to appeal that decision was sought on behalf of the appellant on the grounds that the judge had erred by finding that the evidential flexibility policy did not apply when in fact it did, given that the required document had been produced but in the wrong format. The grounds asserted further that the

respondent had accepted that there was a declaration and the judge was therefore wrong to find that there was none; that the respondent had wrongly referred to several third parties whereas there was only one; that the third party declaration had been properly signed and executed; and that the common law principles of fairness should have been applied.

7. Permission to appeal was granted on 11 April 2014.

8. At the hearing I heard submissions from both parties on the error of law. It became apparent that the relevant issue was in essence this: whether the production of a third party declaration containing the endorsement by Mr S M Aslam Advocate at the end of the document, as opposed to a separate letter from a solicitor as required under paragraph 41-SD(b)(ii), amounted simply to the submission of a document in the wrong format for the purposes of the evidential flexibility principles under paragraph 245AA(b)(ii) or whether there had been a complete evidential omission outwith the remit of the flexibility policy. It was Mr Jarvis' submission that it was the latter and that the judge had therefore not erred in law in concluding as such. Mr Hussin, however, submitted that it was the former, and in so doing relied upon a decision of Upper Tribunal Judge Perkins in a different appeal which involved the same issues and in which UTJ Perkins found that the evidential flexibility provision applied since the document was simply in the wrong format.

9. I have read UTJ Perkins' decision with care but find that it does not materially assist the appellant in this case because I do not have the benefit of viewing the documents which UTJ Perkins had before him. It seems to me that in the case before him it was accepted that the requirements of paragraph 41-SD(b)(ii) had been met in all respects but for there being a separate letter from the solicitor and that the only concern was that the document proving third party funds and the document proving that it was correctly signed had been conflated on to the same document. However, as Mr Jarvis submitted, in this appellant's case there is some ambiguity in what the advocate was confirming in his declaration.

10. Mr Jarvis submitted that it was in order to avoid any such ambiguities that the rule required a separate letter and I find merit in such a submission, in particular when considering the contents of Mr Aslam's endorsement at the end of the third party declaration. It is relevant to note that paragraph 41-SD(b)(ii) lists various requirements in the solicitor's letter including a requirement that the letter clearly shows the applicant's name and that of their team partner and the third party's name. Neither of those requirements is met in the appellant's case and further there is nothing in the endorsement clearly showing the registration or authority of the legal representative to practise. As such I do not agree that it can be said that the endorsement from Mr Aslam adequately meets the requirements under paragraph 41-SD(b)(ii) but for it being produced in a separate letter.

11. Whilst those were not points addressed by the judge and did not specifically form the basis of his finding that the evidential flexibility provisions


did not apply, they are relevant in so far as his entitlement to reach the conclusion that he did, on the absence of a separate letter from a solicitor, is concerned. It seems to me that the judge was accordingly entitled to conclude, for the reasons given at paragraphs 14 to 18 of his determination, that the absence of a separate letter from a legal representative, as required by paragraph 41-SD(b)(ii), was not a matter that fell within the evidential flexibility provisions of paragraph 245AA and that there had been no unfairness on the part of the respondent in refusing the application on the basis that she did.

12. For the sake of clarity, and in order to address the basis for the grant of permission, I would also add that I find no error in the judge's consideration of the requirement for a solicitor's letter when the refusal letter did not specifically refer to such a document. It is plain from the wording of the refusal letter and the reference to paragraph 41-SD(b)(ii) that the basis for the respondent's refusal was the absence of a separate solicitor's letter confirming the validity of the third party's declaration. Although not expressed in the clearest of terms, it is apparent that the respondent did not consider that the endorsement at the end of the third party declaration was sufficient to meet the requirements of paragraph 41-SD(b)(ii). I do not consider that anything material arises out of the reference to third parties in the plural.

13. In all of the circumstances I find that the judge was entitled to conclude that the appellant was unable to meet the requirements of the rules and that the evidential flexibility provisions of the rules did not apply in the appellant's circumstances. The decision that he reached was one that was open to him on the evidence before him and the grounds of appeal disclose no material errors of law in his decision.

DECISION

14. The making of the decision of the First-tier Tribunal did not involve an error on a point of law such that it should be set aside. Accordingly I do not set aside the decision. The decision to dismiss the appeal on all grounds stands.

Signed 

Upper Tribunal Judge Kebede

Dated: 22 July 2014