IAC-FH-KH-V4

Upper Tribunal
(Immigration and Asylum Chamber)

Ejifugha (Tier 4 – funds – credit) Nigeria [2011] UKUT 00244 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 March 2011	**09 May 2011**

Before

LADY STACEY

SENIOR IMMIGRATION JUDGE STOREY

Between

CHIKE CASIMIR EJIFUGHA

First Appellant

OGECHI NKECHI EJIFUGHA

Second Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellants: No appearance

For the Respondent: Mr P Nath, Home Office Presenting Officer

The requirement in paragraph 11 of Appendix C of the Statement of Changes in the Immigration Rules HC 395 (as amended) is that the funds be “available”. It is unhelpful to try to paraphrase that.

Funds required by paragraph 11 of Appendix C can take the form of a credit card limit.

DETERMINATION AND REASONS

1. The first and second appellants are husband and wife. They are both citizens of Nigeria. The first appellant has appealed against a decision to refuse to grant further leave to remain in the UK as a Tier 4 (General) Student Migrant under the points-based system (PBS). The second appellant has appealed against a refusal to grant leave to remain in the United Kingdom as the first appellant’s spouse. Her claim is dependent on the success of the first appellant’s claim.

2. The appellants completed forms in respect of the application for leave to remain on 06.04.10. They submitted them to the respondent who refused them by letter dated 14.06.10. The reason for refusal was that the first appellant had claimed 10 points under Appendix C of the Immigration Rules HC 395 (as amended) but the documents he provided did not demonstrate that he had been in possession of the required funds for 28 days prior to his application. Therefore the respondent decided that the appellant had not met the requirements of the Rules and decided to refuse his application under paragraph 245ZX(d) of the said Rules. The second appellant's application was refused as it was dependent on the first appellant's application.

3. The respondent set out the funds required in terms of the Immigration Rules applicable to a person studying at an Inner London establishment with one dependant. The course fee having been paid, the sum required was £2,666. The respondent noted that the documents submitted with the application showed that in the period 06.03.10 to 02.04.10 the first appellant was in possession of no more than £2,300.07.

4. The appellants lodged notices of intention to appeal to the First-tier Tribunal (hereafter "FtT") in which the first appellant sought to argue that the decision was erroneous in that it failed to take account of statutory maternity pay (SMP) available to the second appellant, and on grounds of the health of the baby born to the first and second appellants on 20.04.10 and on grounds relating to errors of fact, it having been noted from the decision that the course fees referred to were thought to be for the first year of the course. The first appellant had in fact been granted leave to enter as a student in 2007 and had been studying in the UK since.

5. The Tier 4 application form filled in by the first appellant includes at paragraph 9 the following:-

" The student must have £800 for each calendar month of their course up to a maximum of two months. Please state what this amount is ."

The first appellant filled that in as £1,600. Paragraph L24 of the same form is in the following terms:-

" Please tick to confirm the documents submitted as supporting evidence to show the student has access to the required amount of money for maintenance and funds ."

The first appellant ticked the box for "personal bank or building society statements".

6. The form completed by the second appellant at paragraph K13 is in the following terms:- "The dependent must have £533 for each calendar month of the main applicant's course up to a maximum of two months. Please state what this amount is." The second appellant filled it in as £1,066.

Paragraph K23 of the same form is in the following terms:-

" Please tick to confirm the documents submitted as supporting evidence that the dependant have (sic) access to the required amount of money for maintenance and funds ."

The second appellant did not tick any of the boxes.

7. The FtT heard the case on 7.10.10. The appeals had initially come before an Immigration Judge to be decided on the papers. He declined so to determine the appeals, observing that the appellants had filed further documentary evidence not intimated to the respondent and further, that the case of Pankina [2010] EWCA Civ 719 which had been decided after the respondent's refusal of the claim had potential application. Directions were given for a skeleton argument from the respondent, which was lodged together with copies of the UKBA based PBS (maintenance) funds policy document dated 23

July 2010 and a copy of two cases, FA and AA (PBS: effect of Pankina) Nigeria [2010] UKUT 00304 (IAC) and CDS (PBS – "available" – Article 8) Brazil [2010] UKUT 00305 (IAC). By that skeleton argument the respondent noted that the appellant's wife had a balance in her Halifax account of £390 on 2 April 2010 making their joint funds £2,590.07 at the highest balance in the one month relevant period. In light of the judgment in the Pankina case the respondent submitted that the required maintenance level of £2,666.00 was not met on any one day (that being the requirement in the guidance issued after Pankina) in the month preceding the application date.

8. The FTT found that the SMP on which the appellant sought to rely was a total sum of £4,987 due to be paid monthly until December 2010. He found, correctly, that the whole amount cannot be taken into account because it is paid in instalments and the full amount would not have been paid until 12 December 2010.

9. The Immigration Judge found that, by taking into account the sum in the first appellant's bank account together with the sum in the second appellant's bank account for any one day in the 28 days prior to the application, the highest sum they had was £2,590.07. As it was agreed that the sum required in terms of the Rules was £2,666.00, the appellants were short by £75.93.

10. The first appellant produced a letter from his bank, Santander, which the FTT described as undated and which stated that he had a credit limit on his card of £2,000. The Immigration Judge found that he could not take the sum available under the card into account as the burden was on the appellants to show that they "held" the required level of funds at the closing balance on any one day during the one month period prior to the date of application.

11. On examination of the documents lodged on behalf of the appellant, the letter referred to by the FTT is properly described as a credit card statement summary. Although undated it gives the account summary as at 08.04.10 and states that the credit limit is £2,000 and the amount available to spend as at 08.04.2010 is £1,285.77.

12. At the hearing before us the appellant stated that he relied on his written grounds. Mr Nath for the respondent proceeded on the basis that the live question before us concerned the correct construction of the Immigration Rules as they relate to money available by way of a loan arranged on a credit card. He began by describing the question as one concerning the availability of funds and in particular whether they were "actively" available. He conceded, however, that the word "actively" was an unwarranted gloss on the statutory requirements.

13. He argued that the Immigration Rules require the funds to be available and that funds such as those on which the appellant sought to rely can be taken away at any time and are therefore not available funds. He said that they were in the nature of a privilege rather than a loan which was agreed with a binding legal document in which funds were payable, for example monthly. He argued that while the bank statement made clear that funds could be spent, there was no formal contract between the parties. In a brief reply, the appellant argued that the funds were available to him and that they should therefore be seen as fulfilling the requirements of the Rules.

Our Assessment

14. We are persuaded that the FtT (First-tier Tribunal) materially erred in law. In light of the case of Pankina , referred to above, the FtT was required to interpret the words of the Immigration Rules without any reliance on the guidance currently published by the respondent. In terms of paragraph 245ZX of the Immigration Rules, an applicant such as the first appellant was required to satisfy sub-

paragraph (d) to the effect that he must have a minimum of ten points under paragraphs 7 to 13 of Appendix C. Paragraph 10 states that a Tier 4 (General) Student must score 10 points for funds. Paragraph 11 is in the following terms:- " 10 points will only be awarded if the funds shown in the table below are available to the applicant and the applicant provides the specified documents to show this. Notes to accompany the table appear below the table ." [Emphasis added]. In this case it is not in dispute that the figure has been properly calculated as £2,666.00. The question before the FtT is whether funds to that extent were available on any one day in the month prior to the application, and it is that word that has to be interpreted.

15. We have come to the view that the FtT erred in law in finding that it was necessary that the appellant "held" the funds. There is no such requirement in the terms of paragraph 245ZX of the Rules read together with Appendix C as it applies to Tier 4 (General) Students. The FtT wrongly relied for its conclusion on criteria contained in the policy guidance. In light of that error we set aside the decision of the FtT.

16. Having set aside the decision of the FtT, we turned to re-make the decision. In the case of PO (Points based scheme: maintenance: loans) Nigeria [2009] UKAIT 00047 which was decided before the case of Pankina , it was held that in order to comply with the Immigration Rules an applicant must comply with the guidance. The appellant in that case had less than the required sum in his account but had an overdraft facility available. It was argued that a person may meet the requirements of the Rules and guidance read together even if he could not show possession of the required sum of money but could instead rely on an agreement under which he can draw that sum of money from a lender. The Upper Tribunal were unable to accept that submission. The application itself had been made at a date at which the guidance made no reference to loans. The relevant wording in the guidance was, in relation to bank statements, that "the balance must always be at least £2,800 or £800 as appropriate." The Upper Tribunal described that provision as "simple and readily intelligible." The Upper Tribunal found that documents which failed to show a balance at the required level simply are not evidence of the requirements of the points-based scheme.

17. We are of the opinion that PO has been overtaken by the decision in the Pankina case. It is now established that policy guidance is not part of the Rules. We are bound simply to construe the Immigration Rules. We are fortified in that decision by the case of FA and AA (PBS: effect of Pankina) Nigeria [2010] UKUT 00304 (IAC) which was decided after Pankina . In that case the principal appellant was a student and her husband's application was dependent on hers. For cultural reasons the couple's money was in a bank account in the husband's name alone. The Upper Tribunal found that once it is established that the policy guidance does not have the status of the Immigration Rules for the purpose of immigration appeals there is no reason why in a particular case an appellant cannot establish that she has funds available to her from a bank account in her husband's name. The evidence in the case was that the husband consented to the money in his bank account being used for his wife's expenses and studying and that he had paid fees to the institution. The Tribunal held that she was therefore able to demonstrate that she had funds available to her.

18. Further, In the case of CDS (PBS – "available" – Article 8) Brazil [2010] UKUT 00305 (IAC), a case decided on the same day as FA and AA by the same Tribunal, it was held that funds are "available" to a claimant at the material time if they belong to a third party but that party is shown to be willing to deploy them to support the claimant for the purpose contemplated.

19. We find that there is no proper distinction to be made between the situation of the appellant who has funds available to him from his bank and that of the appellants in the cases referred to above who

had funds available from third parties. Mr Nath, for the respondent, was correct to state that this loan arrangement is not formally constituted by a loan agreement and has no particular term during which it runs. We do not agree with him, however, that that is of relevance to the categorisation of the arrangement. It remains an arrangement whereby the appellant can, if he so wishes, draw down funds for use by himself and his family. Had the appellant so wished he could have withdrawn funds to the extent of over £1,200 and placed them in an account and then shown the respondent evidence of those funds in the account. We take the view that, in those circumstances, it cannot be argued that he has not shown that he has funds available to him in the context of the Immigration Rules. We mention simply for completeness that the form supplied by the respondent for completion by the appellant, as outlined above, makes reference to “access” to funds. While we are bound to have regard only to the Rules, we note that the appellant argues in his written grounds that it is not made clear that funds must be in a bank account and in light of the wording in the form we are inclined to agree that he may be correct.

20. We were not asked to reconsider the decision made by the FtT on Article 8 grounds and therefore have not done so.

21. To summarise:

The FtT materially erred in law and we set aside its decision.

The decision we re-make is to allow the appellants’ appeals.

Signed Date

The Hon. Lady Stacey

(Sitting as a Judge of the Upper Tribunal)