Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/07920/2013
IA/07926/2013
IA/07933/2013

THE IMMIGRATION ACTS

Heard at Field House
On 13th September 2013

Determination Sent
On 18th October 2013

Before

UPPER TRIBUNAL JUDGE RENTON

Between

SHAMSUDDIN NASRUDDIN MITHANI
SHABANA MITHANI
ZIYAAN MITHANI

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Z Malik, Counsel instructed by Nationwide Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellants are Shamsuddin Mithani, his wife Shabana Mithani, and their son Ziyaan Mithani. They are all citizens of India. They were born respectively on 25th

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December 1975, 9th March 1975, and 21st May 2003. The main Appellant, Shamsuddin Mithani, was first granted leave to enter the UK as a student on 28th January 2008. He was then granted successive periods of leave to remain as a Tier 4 (General) Student and as a Tier 1 (Post-Study Work) Migrant until 2nd September 2012. The remaining Appellants were granted leave to enter and to remain as his dependants. On 30th August 2012, the main Appellant applied for further leave to remain as a Tier 1 (Entrepreneur) Migrant with the other Appellants as his dependants. Those applications were refused for the reasons given in a Notice of Decision dated 26th February 2013. The Appellants appealed, and their appeals were heard by First-tier Tribunal Judge Morris (the Judge) sitting at Hatton Cross on 24th June 2013. She decided to allow the appeals under the Immigration Rules for the reasons given in her Determination promulgated on 16th July 2013. The Respondent sought leave to appeal that decision, and on 31st July 2013 such permission was granted.

Error of Law

2. I must first decide if the decision of the Judge contained an error on a point of law so that it should be set aside.

3. The issue before the Judge was whether the Appellant scored sufficient points for Attributes under Appendix A of HC 395. The Respondent's case was that although the main Appellant had access to funds of at least £50,000, he did not meet the requirements of sub-paragraphs (iii) and (iv) of Table 4 of Appendix A. No documents had been submitted to show that the main Appellant had registered with HMRC as self-employed, nor had he submitted the specified evidence set out in paragraph 41-SD to show that he was engaged in business activity.

4. The Judge allowed the appeal because she found that the Respondent should have requested further documentation from the Appellants pursuant to paragraph 245AA(b) of HC 395. Alternatively, the Respondent should have sought and considered further documents under her Evidential Flexibility Policy. Further, the Judge found that the main Appellant was engaged in business activity from documents contained in the Appellants' bundle amounting to contracts which post-dated the date of decision.

5. Ms Everett argued at the hearing and in the grounds that the Judge had erred in law in reaching her conclusion. The Judge had relied upon evidence which she was not entitled to consider under the provisions of Section 85A Nationality, Immigration and Asylum Act 2002. Further, the Judge had erred in law by allowing the appeal under the Immigration Rules on the basis that the Respondent had not applied her Evidential Flexibility Policy. The decision of the Judge should have been that the Respondent's decision was not in accordance with the law.

6. In response, Mr Malik accepted that the finding of the Judge should have been that the Respondent's decision was not in accordance with the law. However, he argued that the Judge was entitled to take into account post-decision evidence under the

provisions of Section 85A(4)(c) of the 2002 Act. This provides that post-decision evidence can be adduced to prove that a document is genuine or valid, using the Oxford English Dictionary definition of valid as “legally acceptable”.

7. I do find an error of law in the decision of the Judge so that it should be set aside. It is clear from paragraph 16(iii) of the Determination that the Judge relied upon documentation contained in the Appellants’ bundle which post-dated the date of decision to decide that the main Appellant was engaged in business activity which is an essential requirement of Table 4 for the purpose of establishing that the main Appellant scored 25 points under Appendix A: Attributes. I do not agree with the submission of Mr Malik that the exception contained in Section 85A(4)(c) can be applied in this case. The documents in question are business contracts and were not produced to establish the genuineness or validity of another document.

8. I also find that the Judge erred in law in applying the provisions of paragraph 245AA(b) of HC 395. It cannot be said that the single invoice produced by the Appellant was a sequence of documents. Finally, if the Judge was correct in finding that the Respondent had failed to apply her own Evidential Flexibility Policy, the Judge erred in law in allowing the appeal under the Immigration Rules whereas she should have found that the Respondent’s decision was not in accordance with the law.

9. I therefore set aside the decision of the Judge. I decided to remake that decision on the basis of the evidence before the Judge.

Re-Made Decision

10. I heard further submissions from the representatives. Ms Everett was content only to say that she relied upon the contents of the Notice of Decision. She argued that the Evidential Flexibility Policy had no application in a case such as this as it was not the responsibility of the Secretary of State to correct omissions in the Appellant’s documentation.

11. In response, Mr Malik asked me to make a finding that the decision of the Respondent was not in accordance with the law as the Evidential Flexibility Policy had not been applied. Alternatively, he pointed out that the Judge had made no decision upon the Appellant’s Article 8 rights and therefore the appeal should be remitted to the Judge for such a finding.

12. I dismiss the appeal under the Immigration Rules.

13. Excluding post-decision evidence, I find that the main Appellant failed to submit with his application documents sufficient to show that he was registered with HMRC as self-employed and that he was engaged in business activity. The documents which were submitted are referred to in the Notice of Decision and they are clearly insufficient. Further, I find that the provisions of paragraph 245AA(b) of HC 395 has no application to documents of this nature and therefore that the Appellants cannot

rely upon this provision. Likewise, I find that the Evidential Flexibility Policy has no application to a case such as this. The Appellant had provided few of the specified documents and the Policy does not operate so as to impose an obligation on the Respondent to provide further opportunity to do so.

14. Finally, there is no provision for me to remit the appeal to the Judge for consideration of the Appellant's Article 8 rights. There is no evidence before me of any family or private life of the Appellants in the UK and therefore I find that such rights are not engaged by the Respondent's decision. All the parties to this appeal were given a Direction to the effect that they should prepare for the 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 decided to remake the decision, could be so considered at the hearing.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I remake the decision in the appeal by dismissing it under the Immigration Rules and on human rights grounds.

Anonymity

The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I have not been asked to vary that order and do not do so.

Signed Date

Upper Tribunal Judge Renton