Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/11133/2013
IA/11141/2013
IA/11143/2013

THE IMMIGRATION ACTS

Heard at Field House
On 19 November 2013

Determination Promulgated
On 17 December 2013

Before

UPPER TRIBUNAL JUDGE LATTER
UPPER TRIBUNAL JUDGE DEANS

Between

MS NANDIN NERGUI
MR ORGILKHUU ZORIGT
MASTER KHUBILAI ORGILKHUU
(Anonymity order not made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms Townshend of Counsel
For the Respondent: Mr G Saunders, Home Office Presenting Officer

DETERMINATION AND REASONS

1) This is an appeal with permission against a decision by Judge of the First-tier Tribunal Whalan dismissing these appeals against refusals of further leave to remain. The appellants are a family from Mongolia. The first appellant applied for leave to remain

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as a Tier 1 (Entrepreneur) Migrant under the Points Based System and the second and third appellants applied as her dependants.

Decision of the First-tier Tribunal

2) The issue before the First-tier Tribunal was whether the first appellant was entitled to the 75 points claimed under Appendix A of the Immigration Rules. It was argued by the respondent that she had failed to submit advertising or marketing material and any contracts showing trading with her application to vary leave to remain. These documents were required under paragraph 41-SD(c)(iii) and (iv) of Appendix A.

3) The Judge of the First-tier Tribunal recorded that the first appellant and her husband, the second appellant, had decided to form a business marketing Mongolian cashmere products in the UK. They planned to design clothes in the UK and have them made up from cashmere in Mongolia. They would then be shipped to the UK for sale in the UK and other European countries. In June 2012 they were in negotiations with a supplier in Mongolia, whose business name was Special International LLC. The negotiations with this supplier were completed on 19 January 2013, only two days before the appellant's existing leave expired. Their applications for further leave to remain were submitted on 21 January 2013. The judge observed that the respondent accepted that the appellants satisfied all the relevant requirements of Appendix A except in respect of providing evidence of advertising or marketing material and one or more contracts showing trading. It was accepted, in particular, that the first appellant had available funds exceeding £50,000.

4) At the hearing before the First-tier Tribunal the first appellant produced copies of advertising materials dating from December 2012. However, according to the judge no contracts were produced showing trading by the company set up by the first and second appellants, which was called Enzo MGL Ltd. This company was not incorporated until around 18 January 2013, only a few days before the applications were lodged.

5) Before the First-tier Tribunal the appellants relied on the cases of Raju [2013] EWCA Civ 754 and Rodriguez (Flexibility Policy) [2013] UKUT 00042. It was argued that the respondent failed to follow her evidential flexibility policy, or otherwise to exercise the discretion of appropriate evidential flexibility, insofar as when the respondent realised that not all the required documents had been filed with the application, the first appellant should have been given a further opportunity to provide them.

6) The judge accepted this argument insofar as the advertising or marketing material was concerned. The judge noted that material of this nature had been prepared by the appellants in December 2012 but mistakenly omitted from the material submitted with the application. This was the result of the haste with which the application was assembled and filed after the incorporation of Enzo MGL Ltd. The judge found, however, that there were no contracts showing trading available at the time the application was made. This was because the company had been formed only two days

previously, and the judge further found that no such contracts were available at the date of the decision appealed against of 25 March 2013. According to the judge there was no contract showing trading in the documentary evidence. The first appellant therefore could not demonstrate compliance with this particular requirement of paragraph 41-SD of Appendix A. This was regrettable as she satisfied the other requirements but the Points Based Scheme required strict, technical adherence. Accordingly the judge concluded that the relevant requirements were not satisfied and the appeals were dismissed.

Application for permission to appeal

7) In the application for permission to appeal it was submitted that there was a contract which would have satisfied the relevant requirement. This was a letter of intent dated 19 January 2013 signed by the first appellant and by a representative on behalf of Special International LLC. This letter of intent was referred to by the first appellant in her oral testimony before the First-tier Tribunal. It was not, however, mentioned in the determination. The judge's failure to refer to this was a failure to consider relevant evidence.

8) It was further submitted in the application for permission to appeal that the respondent's evidential flexibility policy should have been applied to the letter of intent as it was applied to the advertising or marketing materials and the letter of intent should therefore have been taken into account by the judge. The letter of intent was provided in its original form at the hearing. The failures by the judge created a near certainty that significant issues were not properly addressed.

9) Permission to appeal was granted on the basis that there was no reference in the determination to the letter of intent, which might qualify as the requisite contract, and to this extent there was an arguable error of law.

Submissions

10) At the hearing before us Ms Townshend referred to a skeleton argument for the appellants. She submitted that there were two grounds in the skeleton argument which she would be pursuing. The first of these was the failure to consider the letter of intent as a contract showing trading. The second was the failure to consider the appellants' Article 8 rights. The letter of intent was clearly provided in the appellant's bundle at page 250. The judge was mistaken to say that no contract was available.

11) Ms Townshend acknowledged that the letter of intent and the advertising material was not submitted with the original application. The advertising material was, however, taken into account by the judge under the evidential flexibility policy. If the judge had had taken the contract into consideration then it would also have benefited from the evidential flexibility policy.

12) Ms Townshend then referred to a witness statement, at B28 of the appellant's bundle, lodged for the purpose of the appeal to the Upper Tribunal. This witness statement was by Florence Iveson, who was Counsel for the appellants before the First-tier Tribunal. Ms Townshend sought to rely on the witness statement as showing that at the hearing before the First-tier Tribunal the respondent had conceded that documents were available to satisfy the relevant requirements but erroneously were not submitted with the application. All the appellants' documentary evidence was accepted and there was no cross-examination in respect of it. The only issue was the issue of evidential flexibility. The judge applied the policy of evidential flexibility to the advertising material but not to the contract.

13) Ms Townshend pointed out that Ms Iveson's statement also included submissions she had made in relation to Article 8. It was pointed out to Ms Townshend that no issue arising from Article 8 was raised in the application for permission to appeal. Ms Townshend replied that Article 8 was referred to in her skeleton argument. The judge did not consider the issues under Article 8 even though Article 8 was relied upon in the original grounds of appeal and argued in submissions before the judge.

14) Ms Townshend continued that there was no argument that the relevant documents were not available. The only argument related to evidential flexibility. Had the judge considered the contract then he would have applied the same reasoning to it as to the advertising material. The judge, however, disregarded the letter of 19 January 2013 from Special International LLC.

15) Ms Townshend then sought to address us on issues in relation to Article 8. Mr Saunders said he had not had proper notice of any argument under Article 8 because it was not included in the application for permission to appeal. The only notice was at paragraph 37 of the skeleton argument. Ms Townshend pointed out that this had been sent 14 days previously. She further submitted that as a public body, the Tribunal had a duty to consider human rights issues.

16) We decided to listen to the submissions which Ms Townshend was seeking to make in respect of Article 8 and to reserve our determination on whether we would allow the application for permission to appeal to be varied to include such arguments. It was pointed out to Ms Townshend that if she was relying on a "near miss" argument, then the Supreme Court was due to pronounce on this issue shortly. The view of the Court of Appeal was that a "near miss" argument by itself was insufficient for an appeal to succeed under Article 8.

17) Ms Townshend submitted that the extent to which the first appellant had been able to comply with the requirements of the Immigration Rules was a matter which ought to be taken into account in the balancing exercise. Both the documents omitted from the application were available and the appellants had simply forgotten to submit them. This was a very unfortunate mistake. The appellants have been in the UK for seven years and their child was born here. The second appellant worked as a manager for Royal Mail and had completed a Master's degree in the UK. The appellants were

taking steps to set up a business. This all had to be weighed with the mistake of failing to include one document with the application. The appellants had been found before the First-tier Tribunal to be clear and credible witnesses. Their evidence was not challenged. It was disproportionate not to allow the appeal on the basis of one document having been omitted from the application.

18) Ms Townshend referred to a Rule 24 notice lodged by the respondent questioning whether the letter of intent amounted to a contract. Ms Townshend submitted that the letter of intent was a contract. It included the names of the business and the other party and was for the supply of cashmere products. There was no evidence before the First-tier Tribunal to show that this was not a contract and it had been put to the first appellant that it was a contract when she was giving evidence before the First-tier Tribunal. This was confirmed by the witness statement by Florence Iveson.

19) For the respondent Mr Saunders said that he had no objection to the Tribunal having regard to this witness statement but he did not regard it as a complete record. The Presenting Officer who appeared at the previous hearing had made no record of any concession to the effect that the letter of intent was a contract. At this juncture a brief examination of the record of proceedings from the hearing before the First-tier Tribunal showed no apparent concession in respect of the letter of intent.

20) We invited Mr Saunders to continue his submission. He contended that the letter of intent was not a contract but an intention to enter into a contract. The Rules specifically required the submission of one or more contracts showing trading. In relation to the evidential flexibility policy, the judge made it clear that in his view there was a distinction between the advertising material and the letter of intent. The letter of intent would not be an evident omission, such as a missing document in a sequence of bank statements. There was no indication of any intention to send the missing documents with the application.

21) It was put to Mr Saunders that the evidential flexibility policy at the relevant dated was expressed in paragraph 245AA of the Immigration Rules. Mr Saunders was not in a position to confirm this but he submitted that the relevant documents must be sent with the application in accordance with paragraph 41-SD of Appendix A.

22) In relation to Article 8, Mr Saunders submitted that the evidence as to private and family life was already known. The first appellant was a student and now sought to remain as a post-study migrant. It might be argued that this was a "near miss" where the first appellant had only failed in respect of certain technical requirements of the Immigration Rules. In this area of the Rules, however, all the requirements could be categorised as technical requirements.

23) It was pointed out to Mr Saunders that the respondent's refusal decision of 26 March 2013 contained a removal decision under section 47 of the 2006 Act. Mr Saunders was asked whether this decision had been withdrawn as it was not in accordance with the

law. Mr Saunders replied that it did not appear to have been withdrawn but he acknowledged that it was unlawful.

24) In response to Mr Saunders, Ms Townshend submitted that the requirements of the Immigration Rules had clearly been met. The letter of intent was an offer to supply cashmere and it was accepted. There was consideration of £40,000. It was an agreement between two parties. The purpose of the relevant Immigration Rules was to enable people to start up a business from the beginning. Ms Townshend said there was now a further contract which she sought to rely on.

25) Ms Townshend was reminded that our function at this stage was to identify whether there was an error of law in the decision of the First-tier Tribunal. Ms Townshend submitted that there was such an error in the application of the evidential flexibility policy. She referred to the letter of 19 May 2011 from Mr Oppenheim of UKBA, attached as Appendix A to the case of Rodriguez. This was a case of human error which came within the terms of the letter from Mr Oppenheim. There was a legitimate expectation that the first appellant would be given an opportunity to remedy this error.

26) Ms Townshend further submitted that in relation to Article 8 the first appellant was seeking to establish a *bona fide* business and this had not been challenged. She had the required funds and she met the Rules and all requirements. She had been in the UK lawfully since 2006. The purpose of the Rules in relation to entrepreneur migrants was to encourage people like the appellant.

Discussion

27) The first issue we have to consider is whether the Judge of the First-tier Tribunal made an error of law by failing to refer to the letter of intent of 19 January 2013. We note that the finding by the judge was that there were no contracts showing trading, either at the date when the application was submitted or at the date of decision. At paragraph 21 of the determination the judge made express reference to documents referred to at paragraph 23 of the first appellant's witness statement and found that these did not include any contract showing trading. We note that the letter of intent was specifically referred to at paragraph 23 of the witness statement as outlining the terms of the proposed business. The Judge of the First-tier Tribunal clearly had regard to this and did not accept that the letter of intent was a contract showing trading. This was a finding which the judge was entitled to make and in so doing the judge did not make an error of law. The application for permission to appeal was drafted on the basis that the judge had failed to have regard to the letter of intent but the specific reference by the judge to paragraph 23 of the first appellant's witness statement, where the letter of intent is referred to, together with the judge's finding as to the absence of any contracts showing trading, satisfies us that the judge did not fail to have regard to the letter of intent.

28) We know turn to the judge's application of the evidential flexibility policy. In this regard the appellant sought to rely on Mr Oppenheim's letter of 19 May 2011. The letter referred to "…a validation stage being trialled whereby applicants are contacted where mandatory evidence is missing and given the opportunity to provide it…" The policy set out in Mr Oppenheim's letter, however, has been subject to change. The decision appealed against was made on 25 March 2013 and it is necessary in considering whether the evidential flexibility policy was followed to look at the policy at this time. At the hearing we asked the parties to identify the terms of the evidential flexibility policy as it existed at the time of the refusal decision. Neither party was wholly able to assist us. It is our understanding, however, that the evidential flexibility policy at the relevant time was expressed in paragraph 245AA of the Immigration Rules. This was a point which was made to the parties at the hearing. This provision is expressed in the following terms:

"**245AA Documents not submitted with applications**

(a) Where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the UK Border Agency will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where sub-paragraph (b) applies.
(b) The sub-paragraph applies if the applicant has submitted:
    (i) a sequence of documents and some of the documents in the sequence have been omitted (for example if one bank statement from a series is missing);
    (ii) a document in the wrong format; or
    (iii) a document that is a copy and not an original document, the UK Border Agency will contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received by the UK Border Agency at the address specified in the request within 7 workings days of the date of the request.
(c) The UK Border Agency will not request documents where a specified document has not been submitted (for example an English language certificate is missing), or whether the UK Border Agency does not anticipate that addressing the omission or error referred to in sub-paragraph (b) will lead to a grant because the application will be refused for other reasons."

29) The Judge of the First-tier Tribunal decided that the advertising material which was omitted from the application fell within the evidential flexibility policy. In our view, if there was an error of law made by the Judge of the First-tier Tribunal, it was to accept that the advertising material fell within the terms of the policy, as set out in paragraph 245AA. The advertising material was not part of a sequence, or a document in the wrong format, or a document that was a copy and not an original. It was indeed a specified document which had not been submitted, and therefore fell within sub-paragraph (c) of paragraph 245AA, in terms of which there was no requirement on the respondent to request such a document. However, as the appeal was dismissed, the error made by the judge in this regard did not affect the outcome under the Immigration Rules.

30) Before us Ms Townshend sought to argue that the judge failed to consider the appeal under Article 8. It was pointed out to her that this was not part of the application for permission to appeal to the Upper Tribunal. She nevertheless responded that we had a duty to consider this argument. We would, of course, accept that under section 6 of the Human Rights Act 1998, a Tribunal must not act in a way which is incompatible with a Convention right.

31) The difficulty for the appellants, however, in relying on Article 8, is in showing disproportionate interference with their Article 8 rights by the refusal decision. The case under Article 8 set out at paragraph 37 of the skeleton argument for the appellants is that the first appellant has been in the UK for seven years and has a young child who was born in the UK. Her husband has worked in the UK for the entirety of his stay. The first appellant's qualifications were gained in the UK and it is asserted that these would be most helpful to her in the UK. She has invested time and money in educating herself in the UK and in setting up her own business. If it were not accepted that she complied with the Rules at the time of her application, given her ability to comply with the Rules now, it would be a disproportionate interference with her private and family life to prevent her from setting up a business in the UK due to the inflexibility of the Immigration Rules. It is then submitted at paragraph 38 that immigration policy was presumably not intended to prevent entrepreneurs from investing money and setting up a business in the UK.

32) As has been pointed out in a number of authorities, it is not the purpose of Article 8 to permit appellants to circumvent the requirements of the Immigration Rules. We note that very shortly after the hearing of this appeal, the Supreme Court issued the anticipated judgment in Patel [2013] UKSC 72 addressing the "near-miss" argument. Lord Carnwath expressed support for the approach of the Court of Appeal in Miah [2013] QB 35 to the "near-miss" argument but pointed out that "the context of the rules may be relevant to consideration of proportionality…" He added that "a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit." He further stated, at paragraph 57: "It is important to remember that article 8 is not a general dispensing power." For our part we see nothing which would have entitled the appellants to succeed under Article 8 where they did not meet the requirements of the Immigration Rules. As the Judge of the First-tier Tribunal observed, it is regrettable that what appears to be a viable business proposal should not meet the requirements of the Rules but that is the position in these appeals and the judge made no error by not relying upon Article 8 to circumvent the requirements of the Rules.

Conclusions

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

34) We do not set aside the decision.

Anonymity

35) The First-tier Tribunal did not make an anonymity direction and we do not consider there is a need for an order to this effect.

Signed Date

Upper Tribunal Judge Deans