IAC-AH-VP-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/30516/2013
IA/30521/2013
IA/30523/2013
IA/30527/2013
IA/30529/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 October 2014	**On 5 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE GIBB

Between

SOBIA SAFEER (FIRST APPELLANT)
SAFEER AHMED (SECOND APPELLANT)
HAFSA SAFEER (THIRD APPELLANT)
NAYAB SAFEER (FOURTH APPELLANT)
ADNAN PERWAIZ (FIFTH APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr R Singer, Counsel, instructed by Lee Valley Solicitors
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. These appeals first appeared before me at an error of law hearing on 1 September 2014. On that occasion the appellants were represented by Mr A Jafar, Counsel, and the respondent by Mr T Melvin, Home Office Presenting Officer. At that hearing I decided that there had been a material error of law in the judge's decision dismissing the appeals, and that the decisions needed to be remade. My error of law decision was as follows (with correction of an error in [i]).

   i. The appellants are a family, all of whom are citizens of Pakistan. The first and second appellants are a couple, and the third and fourth appellants are their children. The first and fifth appellants, having been in the UK as Tier 1 (Post-Study Work) Migrants, applied for further leave to remain as Tier 1 (Entrepreneur) Migrants. The children were listed as their dependants. The applications were refused on 10 July 2013. The appeals were then dismissed by First-tier Tribunal Judge Prior, in a determination promulgated on 25 April 2014.

   ii. Permission to appeal was refused by Designated Judge Baird on 14 May 2014, but was then granted by Upper Tribunal Judge King on 4 July 2014.

   iii. The grounds seeking permission to appeal argued that the judge had erred in law in requiring submission of a bank letter, and in requiring a joint account, with reference to paragraph 41-SD of Appendix A to the Immigration Rules. The second ground was that the judge had erred in relation to paragraph 245AA of the Immigration Rules, and the evidential flexibility policy. Reference was also made to the recent case of **Shebl (Entrepreneur: proof of contracts) [2014] UKUT 216 (IAC)**. In granting permission Upper Tribunal Judge King noted that it was not clear from the findings what the judge had held in relation to the issue of joint accounts. He also noted that both of the appellants were directors and had made declarations in favour of each other as to the use of the money in their accounts.

   iv. As I indicated at the hearing I decided, having considered the submissions made by both sides, that the judge had erred in law in a manner material to the outcome, and that there was a need to remake the decision.

   v. The Immigration Rules in this area are complex and difficult to understand. I have considerable sympathy with anybody faced with the task of attempting to understand them. Given the nature of the Rules it appears to me that the room for misunderstanding is considerable at every level: applicants, their advisors, the decision makers within the

Home Office, representatives for both sides at hearings and judges. This was illustrated by the difficulties in achieving clarity as to the actual requirements of the Rules at a lengthy hearing during which both representatives clearly did their best to offer assistance in this regard.

vi. The judge, in his determination, summarised the respondent's case at paragraph 11, and provided the reasons for his own decision at paragraph 14. Central to the judge's decision was the following statement.

vii. "What was required was a bank letter stating that the first and fifth appellants had contractual entitlement to the credit balance appearing in the bank statement produced for a joint account."

viii. The bank letter referred to in this sentence refers back to the summary of both letters of refusal, which referred to paragraph 41-SD(A)(i). This was quoted in part by the judge at the start of paragraph 11.

ix. What was accepted at the hearing before me, however, was that the requirement for a bank letter, at paragraph 41-SD(A)(i) was only applicable where funds were not held in the UK. Within paragraph 41-SD there is an alternative for money held in the UK only. This is set out at paragraph 41-SD(A)(ii). It was accepted at the hearing before me that the sum of £10,000 referred to in the first appellant's refusal letter was money held in the UK. It was therefore agreed that the bank letter referred to in paragraphs 11 and 14 of the judge's determination was not a requirement under the Immigration Rules. The same point applied in the fifth appellant's refusal letter. The sum of £25,000 referred to in that letter was also money held in the UK.

x. It is not clear whether the appellant's representatives at the hearing made a submission to the judge to the effect that the bank letter requirement was not applicable. In any event this is a matter that involved the judge's interpretation and application of the Immigration Rules, and within the sea of complexity and uncertainty it did at least appear to be clear that the bank letter requirement on which the refusal letters were primarily based, and that formed the basis of the judge's decision, was not one that was in fact applicable, given that the funds in question were held in the UK. For that reason I have decided that the determination contained an error on a point of law in relation to paragraph 41-SD.

xi. The judge dealt with the evidential flexibility submissions in brief terms. The reasoning referred to "non-compliance on the part of

the appellants with the mandatory requirements of the Rules". As will be clear from the above the bank letter issue was not an applicable mandatory requirement. On that basis the consideration of the evidential flexibility submissions must also be said to have proceeded on an erroneous basis.

xii. For these reasons I find that the grounds are made out. There was a material error of law on a point of law. The findings in relation to the Immigration Rules, and relevant policy, fall to be set aside, and the decisions need to be remade.

xiii. Both representatives were content that the remaking should take place in the Upper Tribunal. Neither suggested that the appeal should be remitted to the First-tier. I have considered the Practice Direction. Taking the views of the parties into account, and considering the terms of that direction, I decided that there was no justification to depart from the normal expected practice of a remaking taking place in the Upper Tribunal.

xiv. After some discussion about whether it was possible to proceed immediately to remaking the decisions I decided to adjourn for a remaking hearing. Neither side had with them the relevant Rules and policy on evidential flexibility. This is a complex area. Paragraph 245AA of the Immigration Rules was changed by HC 628 in September 2013. There was a version of the modernised guidance document in force between March 2013 and May 2013. What is needed, for the remaking to proceed on the correct basis, is an agreement as to the correct applicable version of paragraph 245AA, and the applicable version, if any, of the policy document. The potential significance is that the policy document which was the second Appendix to the **Rodriguez** decision in the Upper Tribunal included a requirement for caseworkers to make further enquiries if information was missing from a document in a Tier 1 (Entrepreneur) application.

xv. The other point that was given consideration was about whether the decisions were not in accordance with the law because of the approach in the refusal letters to the bank letter requirement in 41-SD(A)(i). The decisions also fail to mention paragraph 52 of Appendix A, which deals with the requirements where entrepreneurial teams are claiming points for the same investment and business activity. Paragraph 52 refers to Tables 4-5 and 6. Neither side had provided a copy of these tables. In essence it appeared that Table 4 was the only one relevant, and that it referred back in turn to paragraph 41-SD. What remained unclear was whether the terms of 41-SD(A)(ii) amounted to a requirement that an

entrepreneurial team could only succeed if the funds that they were relying on were in a joint account, rather than in separate accounts.

2. At the start of the hearing it was drawn to my attention that there was an error in the first paragraph of my error of law decision (corrected in the version above), about the nature of the relationships between the appellants. The correct position is that the first and fifth appellants are business partners, who put forward joint applications as Tier 1 (Entrepreneurs). The first and second appellants are a couple, and the remaining appellants are their children.

3. For the remaking hearing Mr Singer, for the appellants, provided a useful written submission document. This set out the relevant Immigration Rules as they were at the date of application (28 February 2013). The Rules set out were paragraph 245DD; Table 4 (referred to in paragraph 14 above); paragraph 41; paragraph 41-SD; and paragraph 245AA. In addition Mr Singer produced Appendix A to the Immigration Rules, and three versions of the Home Office guidance on PBS evidential flexibility. Version 1.0 was valid from 12 March 2013 (just after these applications were made, but well before the decisions were taken); version 2.0 was valid from 20 May 2013; and version 3.0 was valid from 12 September 2013. These decisions were refused on 10 July 2013, and the version in force at this date was therefore version 2.0.

4. I am grateful to Mr Singer for providing a comprehensive range of the relevant Rules and guidance, in compliance with the directions made after the error of law hearing.

5. In his written submissions Mr Singer made three points, namely that the decisions were not in accordance with the Immigration Rules; that they were not in accordance with the law; and that they were contrary to Article 8. He made the point that the decision maker should have acknowledged that the first and fifth appellants were an entrepreneurial team, submitting their applications at the same time.

6. Mr Singer's initial submissions at the hearing were concerned with evidential flexibility. He pointed to the discretion to contact the appellants or representatives for clarification or to request missing documents or information, in version 2.0 of the guidance. The missing letters, in which each of the entrepreneurial partners was asked to confirm the availability of funds to the other, were exactly the sort of thing that could have been provided if asked for. The idea in the refusal letters that the letters would not have made a difference to the outcome if they had been asked for was nonsense.

7. Following an examination of version 2.0 of the guidance Mr Walker, for the respondent, indicated that he agreed that there had been a relevant discretion under the guidance that appeared not to have been considered by the decision maker. On that basis he agreed that it would appropriate for the appeals, in being remade, to be

allowed to the limited extent that the decisions were not in accordance with the law. As a consequence of this agreement it became unnecessary to consider the matters raised in relation to the Immigration Rules, or Article 8.

8. As I indicated at paragraph 5 of my error of law decision the Rules in this area are highly complex. The agreed position at the hearing will have the effect of bringing these appeals to an end, but further decisions will need to be taken on the applications that were made back in February 2013. For the purpose of that consideration the decision maker is not restricted to evidence that was submitted at that time. The restriction on considering post application evidence only applies to the appeal process, and not to Home Office decision makers.

9. I emphasised to the appellants that it would be of great importance for them and their representatives to go through all of the requirements in the Rules and ensure that every evidential requirement was fully complied with. Any reconsideration should also take into account the points that were agreed at the error of law hearing, in relation to some aspects of the initial decisions. The decision maker, who has the unenviable task of applying these Rules, should also pay careful attention to the current Rules on evidential flexibility. The question of how things have moved on in relation to evidential flexibility was not discussed, because I was concerned with the dates of application and decision in these appeals. That is another matter where careful attention will need to be paid to the current applicable Rules by the decision maker, although if the appellants are careful to provide every item required in the specified evidence section it is to be hoped that there will be no missing items when the matter comes to be considered again.

10. I am grateful to both representatives for their assistance, and to a sensible and properly reached agreement that has enabled these appeals to be disposed of in an appropriate and just manner.

11. It was not suggested that there was any need for anonymity in these appeals. Since, in being remade, the appeals have been allowed, the question of fee awards arises. Neither side made any submissions on this issue. On the basis that the decisions were not in accordance with the law for failure to consider one of the respondent's own relevant published policies I have decided that it is appropriate to make whole fee awards in each appeal.

Notice of Decision

12. The appeals of all five appellants, falling to be remade since earlier decisions have been set aside, are allowed to the limited extent that the decisions were not in accordance with the law, and that the applications remain outstanding awaiting lawful decisions.

Signed Date **23 October 2014**

Deputy Upper Tribunal Judge Gibb

TO THE RESPONDENT
FEE AWARDS

Having decided to remake the decisions in the appeals by allowing them I have decided, for the reasons given above, to make whole fee awards in the sum of £140 for each appellant.

Signed Date **23 October 2014**

Deputy Upper Tribunal Judge Gibb