Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23383/2013

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham	**Determination Promulgated**
On 14 July 2014	**On 4 August 2014**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ROBERTSON

Between

FIRAZ HUSSAIN WASTI
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Iqbal, Counsel, instructed by Nationwide, Solicitors LLP.
For the Respondent: Mr D Mills, Senior Presenting Officer

DETERMINATION AND REASONS

Immigration History

1. The Appellant is a male citizen of Pakistan, whose date of birth is 12 April 1983. His appeal against the decision of the Respondent to refuse his application for leave to remain as a Tier 1 (Entrepreneur) migrant was dismissed under the Immigration Rules and under Article 8 ECHR by First-tier Tribunal Judge Ferguson (the Judge),

the reasons for which are contained within his determination promulgated on 12 March 2014.

2. The only issue in dispute before the Judge was whether the Appellant, who relied on third party funds in support of his application, needed to provide a letter from the bank of the third party, confirming, pursuant to the provisions of paragraph 41-SD(a)(9) and (10):

> "(9) …the amount of money provided to the applicant from any third party (if applicable) that is held in that institution; and
>
> (10) …the name of each third party and their contact details, including their full address including postal code, landline phone number and any email address".

3. As stated at [2] of the determination, the funds in question, £50,000, were to be provided by a "…Mr Mohammed Usman Nawaz Choudhry, a family friend. In support of his application Mr Wasti provided a declaration from Mr Choudhry that he had made money available to Mr Wasti to invest in his business. A bank statement from Barclays bank showed that a sum in excess of £50,000 was held in an account in Mr Choudhry's name between 22 February 2013 when it was paid into his account and 24 February, the last day for which the statement was available".

4. The Judge decided that the provisions of paragraph 41-SD(i)(9) and (10) did apply to third party funds and dismissed the appeal. The appeal before me is against that decision. The application for permission to appeal was refused by the First-tier Tribunal. The application was renewed to the Upper Tribunal on four grounds, namely that the Judge did not have jurisdiction to make credibility findings because the Respondent had explicitly chosen to reserve the right to assess whether the application was a genuine application; that the Judge erred in finding that the Barclays bank statement submitted did not meet the requirements of paragraph 41-SD; that the Judge misapplied the provisions of paragraph 41-SD because the Appellant was relying on third party funding so he was not required to provide a bank letter; and he did not give his "finding on the issue of construction or scheme of paragraph 41-SD(a) and 41-SD(b)", which was said in the grounds to be a "clear law point" that "requires an interpretation". Whilst in the grant of permission by the Upper Tribunal ground 2 is referred to as having arguable merit, this must be a reference to ground 2 of the grounds of application before the First-tier Tribunal, which were stated to be essentially the grounds relied on in renewal of the application to the Upper Tribunal. It also appears that permission was granted on all grounds because 'Overall the grounds raise arguable issues as to whether the lead (sic) First-tier Judge was entitled in law to reach the conclusions that he did for the reasons given".

5. At the outset of the hearing, I asked Mr Iqbal to frame his submissions so that he took into account the Upper Tribunal decisions in **Fayyaz (Entrepreneurs: paragraph 41-SD(a)(i) – "provided to") [2014] UKUT 00296 (IAC)**, **Durrani (Entrepreneurs: bank letters; evidential flexibility) [2014] UKUT 00295** (IAC) and **Akhter and another (paragraph 245AA: wrong format) [2014] UKUT 00297 (IAC)**, all of which dealt with the provisions of paragraph 41–SD of Appendix A, with the provisions of

paragraph 41-SD, including construction or scheme of that paragraph, considered initially in **Fayyaz**.

6. Mr Iqbal in fact handed up **Fayyaz** but also the unreported decisions **Arshad Iqbal and others IA/20442/2012**, the terms of the grant of permission by the Court of Appeal against that decision as **AI and others (C5/2013/2317),** and the unreported decision **Shahzad IA/16789/2013**. As to the grant of permission against **AI and others**, it is stated therein that the issue as to whether an Appellant who is relying on third party funding must comply with the provisions of paragraph 41–SD (a) or (b) or both (i.e, whether the provisions are alternative or cumulative requirements) was a 'compelling reason to grant permission to appeal so that there was an authoritative ruling on the proper interpretation of rule 41-SD', although it was not considered that this ground of appeal had a strong prospect of success. The unreported determination **Shahzad** was provided by Mr Iqbal to establish the differing views taken by tribunals as to the interpretation of paragraph 41-SD of Appendix A. Mr Iqbal also provided a copy of the provisions of paragraph 244DD and paragraphs 35 to 43 of Appendix A, with the provisions of paragraph 41-SD set out in tabular form. Mr Iqbal confirmed that these documents had been provided to the Upper Tribunal in **Fayyaz**.

7. **Fayyaz** was heard and determined by the Upper Tribunal as a reported decision to provide guidance on the approach to be taken on issues of interpretation of paragraph 41-SD. The Upper Tribunal considered whether to defer the determination of the appeals before them until the outcome of the decisions of the Court of Appeal in **AI (Pakistan)** and **UT (India)**, but gave reasons for proceeding at [5] of **Fayyaz**. In the wake of **Fayyaz**, Mr Iqbal was asked in the context of his submissions, to state clearly which arguments had already been put to the Upper Tribunal in **Fayyaz**, and rejected.

8. Having appeared to have taken on board my requirement that he frame his submissions to take into account the conclusions in **Fayyaz**, Mr Iqbal nevertheless proceeded to take me through his grounds of application before the First-tier Tribunal. When asked, however, if the submissions contained therein had been made to the Upper Tribunal in **Fayyaz**, he stated that they had. Mr Mills at this point, submitted that I should decide that his submissions had no prospect of success, were without merit and that no further submissions should be made.

9. I asked Mr Iqbal if there was anything within his grounds of application before the First-tier Tribunal which had not been put to the Upper Tribunal in **Fayyaz**. He said that he wished to take me through paragraphs 31 and 34 of the grounds, in which were set out the relevant questions from the Tier 1 (Entrepreneur) application form, his point being that an analysis of the application form, coupled with the table of the provisions of Paragraph 41-SD (both of which documents he had also provided to the Upper Tribunal) suggested that there was no need, if the third party funds were in a bank account in the UK, for the Appellant to provide a letter from the bank and he only needed to provide a bank statement. When asked again if this submission had been made to the Upper Tribunal in **Fayyaz**, he stated that it had, but that the Upper Tribunal had not reached conclusions on it within its determination. My understanding of Mr Mills' submission on this point is that the Upper Tribunal had heard submissions and if the panel chose not to give weight to them it was a matter

for them. Mr Iqbal accepted that if reliance was to be placed on **Fayyaz**, it would be 'as a brick wall' to his submissions.

10. My real concern is that Mr Iqbal's submission on the basis of the provisions of the application form that a Tier 1 (Entrepreneur) needed to complete was, as I stated during the hearing, simply a request by him for a finding that the provisions of an application form for further leave to remain should override the requirement within the Immigration Rules for specified evidence to be adduced to establish the availability of funds. However, this submission had already been made to, considered and decided by the Upper Tribunal in **Fayyaz**. He stated that the Appellant was unfortunate as to the timing of his appeal and he really wanted a way in which an onward appeal could be facilitated. However, the conclusions in **Fayyaz** are clear and the purpose of reported cases is to provide guidance to ensure consistency of decision making, even if they do not have the authority of starred decisions. Mr Iqbal had provided the same Table of requirements and made the same arguments linking the provisions of paragraph 41-SD to the application forms that have to be completed by Tier 1 (Entrepreneur) applicants before the Upper Tribunal. The provisions of the Rules and the application forms as a whole will have been considered in detail in **Fayyaz.** As the provisions of the application form were referred to in his submissions to lend weight to his submissions regarding the interpretation of the Immigration Rules, it is highly unlikely that the Upper Tribunal in **Fayyaz** would have overlooked them. As all matters had been comprehensively considered in **Fayyaz**, it follows that my decision on the issues raised in the grounds in relation to the interpretation of paragraph 41-SD will be in line with **Fayyaz**, and the related cases **Durrani** and **Ahmed and others**, if I find that the Judge materially erred in law in his determination.

11. Mr Iqbal stated that he had no further submissions to make and Mr Mills relied on the Rule 24 response.

12. As to the various grounds of appeal, the first was that the Judge had made credibility findings at [21] – [23] which he was not entitled to make because the Respondent had explicitly chosen to reserve the right to assess whether the application was a genuine application. The Rule 24 response was that the Judge made sustainable findings of fact. I find that the Judge's reference to the intention of the Rules being to "…assist the Secretary of State to be satisfied that the applicant genuinely intended to invest funds in the business and that the money was genuinely available to the applicant and would remain available to him until such time as it was spent by the business" was in the context of the submissions made before him by the Appellant's representative, a Ms Masood, which are recorded by him at paragraph [13]. He cannot be criticised for seeking to deal with the submissions made on behalf of the Appellant that the provisions of paragraph 41-SD must be interpreted in the light of the purpose of the Rule. It seems to me that he has dealt appropriately with this submission at [21] – [23] and has not improperly exercised jurisdiction which he did not have.

13. Ground two was put simply at paragraph 18 of the grounds of application before the First-tier tribunal as:

"a) Since the Appellant is relying on money from a third party so (sic) paragraph 41-SD (a) does not apply, rather paragraph 41-SD (b) applies; and

"b) In the alternative, if paragraph 41-SD (a) applies then the requirements under paragraph 41-SD (a) cannot be met, hence absurd."

14. These were followed by five detailed reasons to support this submission.

15. What is submitted in the grounds of application is that the Judge erred in failing to consider and make a finding on the construction and scheme of paragraph 41-SD (a) and 41-SD (b). This however, is incorrect. At that hearing, Ms Masood provided to the Judge a copy of **Arshad Iqbal and others IA/20442/2012**, in which an analysis of the provisions was set out and Ms Masood argued for a different interpretation. The Judge made it clear that it was an unreported determination and therefore not binding on him and would not be the final analysis on the issue within his determination. However, his view was that there was no reason given by Ms Masood as to why what was said to be the 'plain meaning of the rule' should not be followed. He specifically found that nothing Ms Masood had submitted "...showed that the rule should be read differently." In particular, he found that the words "provided to" (in paragraph 41-SD(a)(i)(9)) do not plainly mean money transferred to the applicant by a third party, as opposed to money in the account of the third party but provided to the Appellant for his business [20]. This is consistent with the interpretation of the provisions by the Upper Tribunal in **Fayyaz** (see headnote)

16. It is clear that the submissions made by the Appellant's representative were considered by the Judge and he reached conclusions on those submissions that were open to him. The fact that the grounds of application to the First-tier Tribunal have amplified on the submissions made to the Judge does not mean that the Judge was wrong not to have considered them; they were not before him in their amplified form. At one point in the submissions, Mr Iqbal submitted that the Judge had erred in law because he had relied on an unreported determination. However, the Judge specifically states that he will not be relying on it in the final analysis but the determination clearly set out the plain meaning of the Rule. He then took into account the submissions made on the Appellant's behalf by Ms Masood in reaching his conclusions. I find that there is no error of law in the Judge's determination in relation to the interpretation of the relevant provision of paragraph 41-SD (i)(9). The absurdity argument was not put to the Judge and he cannot have erred in failing to consider it. Ground two is not made out.

17. I find that there is no material error of law in the determination of Judge Ferguson

18. For completeness, I would add that each of the submissions Mr Iqbal sought to make by reliance on the grounds of application before the First-tier Tribunal were considered by the Upper Tribunal in **Fayyaz** and **Durrani**; there is no need to re-examine in detail arguments which have already been conclusively dealt with in those reported decisions and no good reason was provided by Mr Iqbal as to why I should depart from the guidance in those cases if I found there to be an error of law in the determination such that the decision must be set aside. The absurdity argument was rejected in **Fayyaz** at [27] and the lack of application of paragraph 41-SD (a) to third party funds due to the particular wording of paragraph 41-SD (a) (6)

and 41-SD (a) (9) was rejected at [28]. In **Durrani**, the Upper Tribunal considered at [9] and [11 – 15], the application of these provisions to funds held by third parties in UK banks which were to be made available to the applicant and found that such provisions did apply.

Decision

19. I find that there is no material error of law in the determination of Judge Ferguson and his decision must therefore stand.

Anonymity

20. The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No request has been made for an anonymity order and pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I find no reason to make an order.

Signed Date

M Robertson
Sitting as Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

In light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (procedure) Rules 2005 and section 12(4) (a) of the Tribunals Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011). As the appeal has been dismissed, no fee award is made.

Signed Date

M Robertson
Sitting as Deputy Judge of the Upper Tribunal