



IAC-FH-CK-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/29619/2013
IA/27041/2013
IA/29241/2013

THE IMMIGRATION ACTS

Heard at Field House

On 3 October 2014

**Determination
Promulgated**

On 26 November 2014

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ASIM WAHAB
MUHAMMAD KAMRAN AMEEN
SANA ASIM**

Respondents

Representation:

For the Appellant: Mr P Duffy, Home Office Presenting Officer

For the Respondents: Mr S Bellara, Counsel

DETERMINATION AND REASONS

1. Although the appellant in these proceedings is the Secretary of State, I refer to the parties as they were before the First-tier Tribunal.

2. This appeal comes back before me following a hearing on 11 April 2014 which culminated in my finding that the First-tier Tribunal erred in law in its decision in respect of the appeals of these appellants. At that hearing I set aside the decision of the First-tier Tribunal and decided that the decisions needed to be re-made in the Upper Tribunal. The appeal was adjourned, with directions, for a further hearing. The error of law decision entitled "Decision and Directions" sets out the full circumstances and background to these appeals and my reasons for finding an error of law. The error of law decision is attached as an annex to this determination.
3. It is, nevertheless, helpful to quote directly some paragraphs of the error of law decision at this point to set the present decision in context. In the error of law decision I said as follows:
 - "2. ...the appellants are citizens of Pakistan, born on 10 December 1976, 11 June 2009 and 18 February 1986, respectively. The third appellant is the wife of the first appellant.
 3. The first appellant applied for leave to remain as a Tier 1 (Entrepreneur) Migrant. The date for that application is given in the notice of decision as 11 January 2014 although the application form itself is date-stamped 14 January 2014. The application was refused in a decision dated 28 June 2013. The basis of the refusal was that he had not established that he met what is described in the decision as the "genuineness test" at paragraph 245DD(h) of the immigration rules (HC 395 (as amended)). He had also not provided a Current Appointment Report, and the advertising material did not meet the requirements of the Rules (it did not show his name).
 4. The second appellant made a similar application, the date of which is given in the notice of decision as 13 January 2014, although again the application form has a date-stamp of 14 January 2014. His application was refused because the evidence provided did not meet the requirements of the rules in terms of advertising material (name not shown), and had not provided a Current Appointment Report.
 5. The third appellant's application for leave to remain was dependant on that of the first appellant and was correspondingly refused.
 6. In relation to all three appellants, at the same time as refusing to vary leave to remain, there were decisions to remove them under section 47 of the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act").
 7. The appeals of all three appellants were heard by First-tier Tribunal judge Afako who wrote two determinations, one for the first and third appellants and one for the second appellant. In relation to all three appellants he found that the decisions to remove them under section 47 of the 2006 Act were unlawful.
 8. In relation to the second appellant, at [7] of the determination Judge Afako concluded that the respondent had wrongly failed to explain why no points were awarded for funds held in a regulated financial institution or for disposable funds. In terms of 'evidential flexibility' he concluded

that this rendered unsafe the respondent's conclusion that it would have made no difference to the outcome of the application whether the appellant had been invited to provide further information in relation to advertising and directorship of the business.

9. Judge Afako concluded that the respondent's decision was not in accordance with the law, not only in relation to section 47 of the 2006 but also in terms, it would seem, of the decision making process. He found that the appellant's application was still outstanding before the Secretary of State.
 10. In relation to the first and third appellants he concluded that in considering the "genuineness" test, the respondent had wrongly failed to refer to the application of the first appellant's business partner, Mr Ameen. He also concluded that insufficient reasons had been given for concluding that there was no genuine commitment to the business by the first appellant, and no query had been raised as to the availability of funds. Again, it was decided that the decisions in respect of the first and third appellants were not in accordance with the law, in addition to [the] section 47 point, and that the applications were still outstanding before the Secretary of State, requiring to be considered afresh.
 11. Permission to appeal against the decision of the First-tier Tribunal was granted in respect of all three appellants, the grant of permission being contained in two decisions which are in identical terms."
4. At the hearing before me on 11 April 2014 it was conceded on behalf of the appellants that there was an error of law in the First-tier judge's decisions in respect of section 47 of the Immigration, Asylum and Nationality Act 2006 (see [17] of the error of law decision).
 5. As can also be seen from the error of law decision, in respect of the first appellant the Secretary of State concluded that he had not met the requirements of paragraph 245DD(h) of the immigration rules (HC 395 (as amended)); what can be described as the "genuineness test". The precise rules are set out in the error of law decision, but a very rough summary is to the effect that an applicant must establish that he genuinely intends and is able to establish himself in the business, or has done so, and genuinely intends to invest the relevant sums. The money must be genuinely available to the applicant. A number of factors are taken into account in making the assessment.
 6. Certain assertions in respect of the first appellant were made in that context in the notice of immigration decision dated 28 June 2013. However, as was pointed out in the error of law decision and canvassed at the previous hearing, in none of the respondent's bundles is there a complete copy of the interview record which took place with the first appellant, the copy provided being incomplete, with pages missing. Crucially, that included the questions and answers that formed the basis of the refusal of the first appellant's application on the "genuineness" ground.

7. In those circumstances, I made certain directions. What I had in mind is best illustrated by reproducing here [29] of the error of law decision as follows:

“I have given separate directions for the resumed hearing of this appeal. In summary, they require the respondent (Secretary of State) to provide a complete copy of the interview record that took place with the first appellant on 2 May 2013, including the manuscript record. In default of that complete record being provided, I shall proceed on the basis of the available evidence as to what was said, which will include the first appellant's witness statement. Both parties are to provide copies of the documentary evidence that it is said was submitted with each application.”

8. What is said at [29] is repeated in the specific directions at the end of the error of law decision, requiring the Secretary of State to provide a complete copy of the interview record that took place with the first appellant on 2 May 2013, including the manuscript record. As can be seen, directions were also given in respect of the appellants.
9. When the hearing came back before me on 3 October 2014, although directions had been complied with on behalf of the appellants, on behalf of the Secretary of State they had not. If I understood Mr Duffy correctly, it was the case that the file in respect of the first appellant had not been located. It was accepted that the directions had not been complied with by the respondent.
10. One of the reasons that the hearing could not be completed on the previous occasion was because of the lack of supporting evidence from the respondent in terms of what was said by the first appellant in the interview.
11. At this hearing on 3 October 2014 I canvassed with the parties the question of whether it would be appropriate, yet again, to adjourn the hearing, in the light of the respondent's failure to provide the information that I directed should be provided. Mr Duffy did not seek an adjournment and Mr Bellara resisted one. In the circumstances, I considered that it was appropriate to proceed with the hearing.
12. It is necessary at this point to home in on the issues that require resolution. In respect of the first appellant, the issue concerns the “genuineness test”, as already identified, and also that he had not provided a Current Appointment Report, as the rules require. The advertising material that he provided did not meet the requirements of the rules because it did not show his name. So far as the second appellant is concerned, the evidence provided did not meet the requirements of the rules in terms of advertising material, again because his name was not shown, and also in his case he had not provided a Current Appointment Report.

13. 'Evidential flexibility' is relevant to the failure to have met the immigration rules in terms of the advertising material and the Current Appointment Report. In the case of the first and second appellants, they had provided information in support of the application to the effect that they had been registered as directors of the company, but that information did not meet the requirements of the rules because it did not amount to a Current Appointment Report.
14. Here again, I refer to what I said in the error of law decision at [16]. It was accepted by Mr Avery at the last hearing that a request for further information in relation to directors of the company would not have been speculative, as the information provided did give the names of the first and second appellants as directors. At the hearing before me on 3 October 2014 Mr Duffy accepted that 'evidential flexibility' could be said to be applicable to the issue of the Current Appointment Report. Initially at least, he did not accept that that was so in terms of the advertising material, but I shall return to that in due course.
15. Paragraph 245AA, as it applied at the date of the decisions, provided as follows:

"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 they are submitted in accordance with subparagraph (b).

(b) 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 may 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 working 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 where the UK Border Agency does not anticipate that addressing the omission or error referred to in subparagraph (b) will lead to a grant because the application will be refused for other reasons.

(d) If the applicant has submitted a specified document:

- (i) in the wrong format, or
- (ii) that is a copy and not an original document,

the application may be granted exceptionally, providing the UK Border Agency is satisfied that the specified documents are genuine and the applicant meets all the other requirements. The UK Border Agency reserves the right to request the specified original documents in the correct format in all cases where (b) applies, and to refuse applications if these documents are not provided as set out in (b)."

16. It is clear enough from the terms of paragraph 245AA that, as then drafted, it did not cover a situation where there was missing information from an application. In this case, the missing information in the circumstances of the first and second appellants was their names on the advertising material. Mr Bellara referred me to the terms of paragraph 245AA as it now is, introduced after the dates of the applications of these appellants and after the dates of the decisions. The 'new' 245AA provides as follows:

"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 Entry Clearance Officer, Immigration Officer or the Secretary of State will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with subparagraph (b).

(b) If the applicant has submitted specified documents in which:

(i) Some of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing);

(ii) A document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or

(iii) A document is a copy and not an original document; or

(iv) A document does not contain all of the specified information;

the Entry Clearance Officer, Immigration Officer or the Secretary of State may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received at the address specified in the request within 7 working days of the date of the request.

(c) Documents will not be requested where a specified document has not been submitted (for example an English language certificate is missing), or where the Entry Clearance Officer, Immigration Officer or the Secretary of State does not anticipate that addressing the omission or error referred to in subparagraph (b) will lead to a grant because the application will be refused for other reasons.

(d) If the applicant has submitted a specified document:

(i) in the wrong format; or

(ii) which is a copy and not an original document; or

(iii) which does not contain all of the specified information, but the missing information is verifiable from:

(1) other documents submitted with the application,

(2) the website of the organisation which issued the document, or

(3) the website of the appropriate regulatory body;

the application may be granted exceptionally, providing the Entry Clearance Officer, Immigration Officer or the Secretary of State is satisfied that the specified documents are genuine and the applicant meets all the other requirements. The Entry Clearance Officer, Immigration Officer or the Secretary of State reserves the right to request the specified original documents in the correct format in all cases where (b) applies, and to refuse applications if these documents are not provided as set out in (b)."

17. In fact, Mr Duffy accepted that the new 245AA is in terms that are identical to an evidential flexibility *policy* that, he stated, ran in tandem with the rules as previously set out. Thus, the *policy* did include within its terms provision for a request for further information where there was missing information from the evidence provided.
18. As I have said, his initial submission was that even so, evidential flexibility would not have rescued the applications because of the missing information in relation to the advertising material. He submitted that although that is the sort of information that could have been requested, there was no basis from which the Secretary of State could have concluded that requesting the information would have made any difference. The advertising material did not have the appellants' names on it and that was a situation that could not be rectified. As I understood his initial submissions, they were to the effect that one could not 'read across' information from other documentary sources, thus triggering the need for a request for further information.
19. However, at the hearing before me on 3 October 2014, when I explored the advertising material with the parties in a little more detail, it emerged that there was in fact information in that material from which the first and second appellants could be identified. Thus, the 'Gumtree' advert, at page 21 of the bundle submitted for the hearing on 3 October 2014 in response to directions, contains mobile phone numbers. Those two mobile phone numbers can be identified as belonging to the first and second appellants, as can be seen from their application forms for further leave to remain. In addition, the address of 76 Blythswood Road, Ilford, Essex, shown on the

Gumtree advert, is the same address as given by the second appellant on his application form. Similarly, on the 'vivastreet' advert (page 22), the second appellant's mobile phone number can be seen. There is a second mobile phone number, although on the copy of the advert provided in the appellants' bundle, it is incomplete.

20. In the circumstances, it does seem to me that a request for further information, that is to say the missing information being the appellants' names from those advertisements, would not have been speculative. The evidential flexibility policy which it was accepted on behalf of the respondent ran in tandem with the evidential flexibility as set out in the rules, in my judgment could, and should, have been applied in respect of not only the failure to meet the rules in terms of the Current Appointment Report, but also in terms of the advertising material.
21. There remains therefore, the issue of the 'genuineness' test, referred to above. In my error of law decision at [29], I stated that in default of the respondent providing a complete record of the interview that took place with the first appellant, and on which the lack of the genuineness of the business enterprise was assessed, I would proceed on the basis of the available evidence as to what was said, which would include the first appellant's witness statement.
22. In the notice of decision in respect of the first appellant it is stated that in the interview on 2 May 2013, when asked about set-up costs for the business, he produced a sales forecast instead and did not have much knowledge of the business plan which he helped in developing. In addition, it is stated that as a financial and accounting technician it is imperative that he would be on top of the financial planning in the business.
23. Aside from the bare fact of the respondent not having supported those assertions with evidence as to what was said, in the first appellant's witness statement dated 17 December 2013, he stated at [12] that when in the interview he was asked about set-up costs he did mention those costs in accordance with the business plan and did provide detail as to how the amount of the set-up costs would be distributed under various heads. His statement continues that theirs is a genuine business and the funds are available to them.
24. There is nothing to undermine either firstly, the first appellant's account of what he said at the interview, and secondly, his assertions as to the genuineness of the business.
25. In those circumstances, I am satisfied that the first appellant has established that he meets the requirements of paragraph 245DD(h). As will by now be clear, that was not a paragraph of the rules that was in issue so far as the second appellant is concerned.

26. It is as well to state, for the avoidance of any doubt, that my conclusion in relation to the 'genuineness' test so far as the first appellant is concerned is not a conclusion that flows from a desire to 'admonish' or 'punish' the respondent for failing to comply with directions. The simple fact is that the respondent was required to make good the assertions or objections under the immigration rules in relation to this aspect of the rules so far as the first appellant is concerned. I have come to the view that I have on this issue, simply on the basis of the evidence that has been put before me.
27. In terms of 'evidential flexibility' Mr Duffy did refer in passing to the decision of the Upper Tribunal in Durrani (Entrepreneurs: bank letters; evidential flexibility) [2014] UKUT 00295 (IAC), but as I have indicated, he did accept that there was a policy of evidential flexibility running in tandem with the immigration rules as they then were. However, the decision in the appeals with which I am concerned should not be seen as casting any doubt on what was said in Durrani at [15] on this issue, it not being a matter about which I heard any detailed submissions, and in respect of which my decision does not call for any reasoned judgment in the circumstances of this appeal.
28. The result of my assessment of the evidence and the applicable immigration rules therefore, is that the first appellant has established that he meets the requirements of the rules in terms of paragraph 245DD(h). In respect of both appellants I am satisfied that the Secretary of State should have sought further information from them under the terms of the evidential flexibility policy, in relation to the Current Appointment Report and advertising material. The failure to have done so renders the Secretary of State's decision not in accordance with the law in respect of both appellants, and correspondingly in relation to the third appellant.
29. The question of 'funds' under the immigration rules, not having been assessed because of the perceived failure by the appellants to meet the other requirements of the rules, will need to be considered as part of the new decision on the applications.
30. In summary therefore, the appeals of each appellant are allowed on the basis that the decisions of the Secretary of State are not in accordance with the law. The appeals are allowed to the limited extent that there remains outstanding before the Secretary of State applications which require a lawful decision. As I have indicated, and for the avoidance of doubt, the 'genuineness' aspect of the immigration rules is resolved in favour of the appellants.
31. In the circumstances, no separate consideration is required in respect of the section 47 decisions in respect of which the First-tier judge erred in law, as already explained, and whereby his decisions in that regard have also been set aside.

Decision

32. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal is set aside and the decisions in the case of each appellant are re-made, allowing the appeals of each appellant on the basis that the decisions of the Secretary of State are not in accordance with the law. The appeals are allowed to the limited extent that there remains outstanding before the Secretary of State applications which require a lawful decision.

Upper Tribunal Judge Kopieczek

5/11/14

ANNEX



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/29619/2013
IA/27041/2013
IA/29241/2013

THE IMMIGRATION ACTS

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On 11 April 2014

**Determination
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Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ASIM WAHAB
MUHAMMAD KAMRAN AMEEN
SANA ASIM**

Respondents

Representation:

For the Appellant: Mr C. Avery, Home Office Presenting Officer

For the Respondents: Mr S. Bellara, Counsel

DECISION AND DIRECTIONS

1. The appellant in these proceedings is the Secretary of State. However, for convenience I refer to the parties as they were before the First-tier Tribunal.
2. Thus, the appellants are citizens of Pakistan, born on 10 December 1976, 11 June 2009 and 18 February 1986, respectively. The third appellant is the wife of the first appellant.

3. The first appellant applied for leave to remain as a Tier 1 (Entrepreneur) Migrant. The date for that application is given in the notice of decision as 11 January 2014 although the application form itself is date-stamped 14 January 2014. The application was refused in a decision dated 28 June 2013. The basis of the refusal was that he had not established that he met what is described in the decision as the “genuineness test” at paragraph 245DD(h) of the immigration rules (HC 395 (as amended)). He had also not provided a Current Appointment Report, and the advertising material did not meet the requirements of the Rules (it did not show his name).
4. The second appellant made a similar application, the date of which is given in the notice of decision as 13 January 2014, although again the application form has a date-stamp of 14 January 2014. His application was refused because the evidence provided did not meet the requirements of the rules in terms of advertising material (name not shown), and had not provided a Current Appointment Report.
5. The third appellant’s application for leave to remain was dependant on that of the first appellant and was correspondingly refused.
6. In relation to all three appellants, at the same time as refusing to vary leave to remain, there were decisions to remove them under section 47 of the Immigration, Asylum and Nationality Act 2006 (“the 2006 Act”).
7. The appeals of all three appellants were heard by First-tier Tribunal judge Afako who wrote two determinations, one for the first and third appellants and one for the second appellant. In relation to all three appellants he found that the decisions to remove them under section 47 of the 2006 Act were unlawful.
8. In relation to the second appellant, at [7] of the determination Judge Afako concluded that the respondent had wrongly failed to explain why no points were awarded for funds held in a regulated financial institution or for disposable funds. In terms of ‘evidential flexibility’ he concluded that this rendered unsafe the respondent’s conclusion that it would have made no difference to the outcome of the application whether the appellant had been invited to provide further information in relation to advertising and directorship of the business.
9. Judge Afako concluded that the respondent’s decision was not in accordance with the law, not only in relation to section 47 of the 2006 but also in terms, it would seem, of the decision making process. He found that the appellant’s application was still outstanding before the Secretary of State.
10. In relation to the first and third appellants he concluded that in considering the “genuineness” test, the respondent had wrongly failed to refer to the application of the first appellant’s business partner, Mr Ameen. He also concluded that insufficient reasons had been given for

concluding that there was no genuine commitment to the business by the first appellant, and no query had been raised as to the availability of funds. Again, it was decided that the decisions in respect of the first and third appellants were not in accordance with the law, in addition to section 47 point, and that the applications were still outstanding before the Secretary of State, requiring to be considered afresh.

11. Permission to appeal against the decision of the First-tier Tribunal was granted in respect of all three appellants, the grant of permission being contained in two decisions which are in identical terms.

Submissions

12. Mr Bellara, who appeared before me as well as before the First-tier Tribunal, accepted that there was an error of law in the First-tier judge's decisions in terms of the section 47.
13. It was also accepted that in seeming to allow the appeals outright, as distinct from allowing them on the basis that the decisions are not in accordance with the law, the First-tier judge also erred in law.
14. Mr Bellara submitted that as between the first and second appellant this was a team application and that in relation to the first appellant the decision in terms of 'genuineness' was made without reference to the application of the other team member, the second appellant.
15. It was however, accepted that in relation to both applications there was a failure to provide a Current Appointment Report from Companies House, and that there was a defect in the content of the advertising material. However, it was submitted that the judge was correct to conclude that the Secretary of State should have applied the evidential flexibility policy.
16. Mr Avery submitted that the issue in relation to funds was irrelevant, the primary issue being the two documents that were not provided. As I understood his submissions, they were to the effect that there was no requirement on the Secretary of State to seek further information under the evidential flexibility policy, and the policy had been considered by the decision maker. There were clear issues with the documents that were submitted. In the light of the guidance of the Court of Appeal in Rodriguez [2014] EWCA Civ 2, the judge's approach was correct. On the other hand, it was also said by Mr Avery that a request for further information in relation to directors of the company would not have been speculative as the information provided did give the names of the directors.

My assessment

17. The concession by Mr Bellara before me in relation to the section 47 removal decisions was correctly made given that since 8 May 2013 and

the coming into force of section 51 of the Crime and Courts Act 2013, it is not longer unlawful for the Secretary of State to make simultaneous refusal to vary and section 47 removal decisions. In this respect the First-tier judge erred in law and that part of his decisions must be set aside.

18. However, it seems to me that the acceptance that the judge was wrong to allow the appeals outright goes too far in that although Judge Afako did state that the appeals in each case were allowed, he had previously indicated that his view was that the decisions were not in accordance with the law, and he did go on to state that the applications were thus still outstanding. I do not consider that his determination does mean, or have the effect that, the appeals were allowed outright.
19. As regards the first appellant, the notice of decision states that when asked about set up costs for the business the appellant produced a sales forecast instead and did not have much knowledge of a business plan which he had helped in developing. In addition, it was said that as a financial and accounting technician it is imperative that he would be on top of the financial planning in the business. That assessment relates to paragraph 245DD(h) of the immigration rules. So far as relevant, the rule provides as follows:

“(h) Except where the applicant has, or was last granted, leave as a Tier 1 (Entrepreneur) Migrant, a Businessperson or an Innovator and is being assessed under Table 5 of Appendix A, the Secretary of State must be satisfied that:

(i) the applicant genuinely:

(1) intends and is able to establish, take over or become a director of one or more businesses in the UK within the next six months, or

(2) has established, taken over or become a director of one or more businesses in the UK and continues to operate that business or businesses; and

(ii) the applicant genuinely intends to invest the money referred to in Table 4 of Appendix A in the business or businesses referred to in (i);

(iii) that the money referred to in Table 4 of Appendix A is genuinely available to the applicant, and will remain available to him until such time as it is spent by his business or businesses.

...

(i) In making the assessment in (h), the Secretary of State will assess the balance of probabilities. The Secretary of State may take into account the following factors:

(i) the evidence the applicant has submitted;

(ii) the viability and credibility of the source of the money referred to in Table 4 of Appendix A;

(iii) the viability and credibility of the applicant's business plans and market research into their chosen business sector;

(iv) the applicant's previous educational and business experience (or lack thereof);

(v) the applicant's immigration history and previous activity in the UK;

(vi) where the applicant has already registered in the UK as self-employed or as the director of a business, and the nature of the business requires mandatory accreditation, registration and/or insurance, whether that accreditation, registration and/or insurance has been obtained; and

(vii) any other relevant information.

(j) The Secretary of State reserves the right to request additional information and evidence to support the assessment in (h), and to refuse the application if the information or evidence is not provided. Any requested documents must be received by the Secretary of State at the address specified in the request within 28 working days of the date of the request.

(k) If the Secretary of State is not satisfied with the genuineness of the application in relation to a points-scoring requirement in Appendix A, those points will not be awarded.

(l) The Secretary of State may decide not to carry out the assessment in (h) if the application already falls for refusal on other grounds, but reserves the right to carry out this assessment in any reconsideration of the decision.

(m) The applicant must, unless he provides a reasonable explanation, comply with any request made by the Secretary of State to attend for interview."

20. Although the applications of the first and second appellants were related, I consider that the First-tier judge was wrong to conclude that because the application of the first appellant was not assessed with reference to that of the second appellant, this necessarily meant that the decision in relation to the first appellant was unlawfully made, as the judge appears to have decided. It is perfectly rational to conclude that one of the team has a genuine intent and ability to pursue the business enterprise but that the other does not. It was seemingly the first appellant's answers in interview which led the respondent to conclude that he had not met the requirements of the rules in this respect.

21. Again, with reference to the first appellant, I note that in his witness statement he refutes the assertion in the notice of decision to the effect

that his answers in interview on 2 May 2013 indicated the he could not meet the 'genuineness' test in the rules. However, the First-tier judge did not resolve that evidential issue by making any findings on the point.

22. In relation to both appellants, the Secretary of State's grounds note that the judge referred to additional evidence produced at the hearing by the appellants, in the form of documents from Companies House. At [3] of the determination in relation to the second appellant, the judge stated that he accepted that this was a document that was in existence at the time of the application, and appears to have taken that evidence into account. There is however, no finding in the case of either appellant in terms of whether that evidence was submitted with the application. If it was not, it was not evidence that could be taken into account under the immigration rules, in the light of section 85A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). In apparently taking this evidence into account I am satisfied that the First-tier judge erred in law.
23. Furthermore, I also consider that he erred in law in his conclusions in relation to the respondent's assessment of funds held in a regulated financial institution and funds disposable in the case of the second appellant. That application was refused for want of the specified evidence in relation to advertising and a Current Appointment Report. The decision notice states in relation to the requirements of 'funds held in regulated financial institution' that "As you have been awarded 0 points for Applicant has access to funds as required, you have been awarded 0 points for all other attributes. We have therefore been unable to award points, in line with the published guidance and Appendix A of the Immigration Rules." The same reason is given under the heading 'Funds disposable in the United Kingdom'.
24. It was not correct therefore, for the First-tier judge to state that no reasons had been given for awarding no points in relation to 'funds held in a regulated financial institution' and 'funds disposable in the United Kingdom'. The reasons were that no points had been awarded in relation to 'access to funds'. The requirements of funds held in a regulated financial institution and funds disposable relate to "The money" being held in one or more regulated financial institutions" and "The money" being disposable in the UK, to quote from the applicable Table 4 in Appendix A. The respondent concluded that the applicant did not have access to those funds and it was logical therefore to conclude that no points should be awarded in respect of the other, in a sense, subsidiary, requirements.
25. In terms of evidential flexibility, in the case of the second appellant, the judge concluded that there was merit in the argument about the need for the respondent to have requested further information (see [8] and [9]), but there was no analysis of the immigration rules in terms of

paragraph 245AA and the extent to which the rule could be said to have been applicable.

26. In summary, I am satisfied that the First-tier judge erred in law in relation to each of the appellants in the respects to which I have referred. Those errors of law are such as to require the decisions to be set aside in each case, and for the decisions to be re-made.
27. This is not a case where it is appropriate to remit the appeals to the First-tier Tribunal for the re-making of the decisions. In this case that is more appropriately done in the Upper Tribunal.
28. However, that process cannot be completed at this stage for at least two reasons. Firstly, I do not have before me evidence as to precisely what documentary evidence was submitted with the applications. The potential application of the 'evidential flexibility' rule cannot be assessed without this information. In addition, in none of the respondent's bundles is there a complete copy of the interview record that took place with the first appellant. The copy that has been provided is incomplete in that there are missing pages, crucially including the question and answer that formed the basis of the refusal of the first appellant's application on the 'genuineness' ground.
29. I have given separate directions for the resumed hearing of this appeal. In summary, they require the respondent (Secretary of State) to provide a complete copy of the interview record that took place with the first appellant on 2 May 2013, including the manuscript record. In default of that complete record being provided, I shall proceed on the basis of the available evidence as to what was said, which will include the first appellant's witness statement. Both parties are to provide copies of the documentary evidence that it is said was submitted with each application.
30. The appellant is to provide a skeleton argument which includes the relevant immigration rules applicable at the date of these applications and decisions, and includes the provisions of paragraph 245AA as in force at the date of the decisions. That is likely to require some research into what changes to the rules there have been, so that information is provided to me of what the rules were at the relevant time.

DIRECTIONS

1. No later than 14 days before the next date of hearing, the following are to be provided:
 - (i) The respondent (Secretary of State) is to provide a complete copy of the interview record that took place with the first appellant on 2 May 2013, including the manuscript record.

- (ii) Both parties are to provide copies of the documentary evidence that was submitted with each application.
- (iii) The appellants are to provide a skeleton argument which includes the relevant immigration rules applicable at the date of these applications and decisions, and includes the provisions of paragraph 245AA as in force at the date of the decisions.

Upper Tribunal Judge Kopieczek

20/06/14