



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/24767/2014  
IA/24768/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 14<sup>th</sup> May 2015

Determination Promulgated  
On 24<sup>th</sup> June 2015

Before

THE HONOURABLE LORD MATTHEWS  
UPPER TRIBUNAL JUDGE DAWSON  
DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MR TAE HEE LEE  
MRS HYELIN CHOI

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr D Magne, Magne & Co Solicitors

For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction and Background**

- 1 The Appellants are citizens of South Korea. They are husband and wife whose dates of birth are 15 October 1975 and 30 September 1974 respectively. The Appellants applied for further leave to remain as a Tier 1 Entrepreneur and dependent spouse under the Points Based Scheme on 1 May 2014. An

immigration decision was made on 28 May 2014 refusing the Appellants' applications and proposing to remove them.

- 2 Their appeal was heard before Judge Powell of the First-tier Tribunal, who, in a determination promulgated on 27 January 2015, dismissed the appeals on immigration and on human rights grounds.
- 3 This matter comes before the panel for consideration as to whether or not there was a material error of law in the First-tier Tribunal Judge's determination

#### **Grounds for Permission to Appeal**

- 4 The Appellants submitted grounds for reconsideration. The Appellants submitted that the First-tier misunderstood the nature of the rules relating to specified documents when they assessed those documents submitted at the time of the application.
- 5 The grounds may be summarised as follows:
  - a. Regarding paragraph 15 of the Determination, the Appellants had produced an electronic bank statement duly endorsed by the bank which met the provisions of paragraph 41-SD(c)(ii)(7) of the Immigration Rules;
  - b. Regarding paragraph 16 of the Determination, the judge erred in assessing the requirement to provide accounts that were statutorily compliant and which turned on an interpretation of section 226A of the Companies Act 1985;
  - c. Regarding paragraph 17 of the Determination, the entrepreneurial activity does not involve trading online and therefore there was no need to adduce ownership of the domain under paragraph 41-SD(e)(iii)(1);
  - d. Regarding paragraph 18 of the Determination, the judge erred in finding that the Appellants needed to provide a contract 'for services' as the relevant rule only required a 'contract' and the lease provided described the general nature of services provided. It limited use of premises to D2 use as defined by the Town and Country Planning (Use Classes) Order 1987 and the Appellant's business is an entertainment business and the lease confirms the type of business he offers.

#### **Permission to Appeal**

- 6 In a decision dated 19 March 2015, First-tier Tribunal Judge Simpson granted permission to appeal for the following reasons:

*The Appellant's application was made on 1 May 2014 and the decision made on 28 May 2014. It is not immediately clear however which version of the Immigration Rules was referred to by the decision maker and/or the Judge and whilst it is acknowledged that Paragraph 41-SD is quite specific, i.e. all the required documents must be submitted*

*with the application, which documents are required, and in what form, can vary from one version to another. It is arguable that the version that ought to have been used given the date of application was not the version referred to in preparation of this decision.*

### **Rule 24 Response**

- 7 The respondent opposed the appeal by way of a response dated 30 March 2015 which states that the First-tier Tribunal “*directed itself appropriately*” and “*properly considered the version of the Immigration Rules in force at the date of decision [paragraph 6, First-tier Tribunal determination]: Odelola v Secretary of State for the Home Department [2009] UKHL 25 (20 May 2009)*”. The respondent requested an oral hearing.

### **Immigration Rules**

- 8 The immigration rules, so far as relevant, state as follows (the following excerpts of the rules reflect how they would have appeared on 13 May 2014 when captured for the National Archive database):

#### **Investment: notes**

41-SD. The specified documents in Table 4 and paragraph 41, and associated definitions, are as follows:

...

(c) The specified documents to show evidence of the funding available to invest, whether from the applicant’s own funds or from one or more third parties, are one or more of the following specified documents:

(i) A letter from each financial institution holding the funds, to confirm the amount of money available. Each letter must:

- (1) be an original document and not a copy,
- (2) be on the institution's headed paper,
- (3) have been issued by an authorised official of that institution,
- (4) have been produced within the three months immediately before the date of application,
- (5) confirm that the institution is regulated by the appropriate body,
- (6) state the applicant's name, and his team partner's name where relevant,
- (7) show the account number and,
- (8) state the date of the document,
- (9) confirm the amount of money available from the applicant's own funds (if applicable) that are held in that institution,
- (10) for money available from any third party (if applicable) that is held in that institution, confirm that the third party has informed the institution of the amount of money it intends to make available, and that the institution is not aware of the third party

having promised to make that money available to any other person,

(11) confirm the name of each third party and their contact details, including their full address including postal code, and where available landline phone number and any email address, and

(12) confirm that if the money is not in an institution regulated by the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA), the money can be transferred into the UK; or

(ii) For money held in the UK only, a recent personal bank or building society statement from each UK financial institution holding the funds, which confirms the amount of money available. Each statement must satisfy the following requirements:

(1) the statements must be original documents and not copies;

(2) the bank or building society holding the money must be based in the UK and regulated by the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA);

(3) the money must be in cash in the account, not Individual Savings Accounts or assets such as stocks and shares;

(4) the account must be in the applicant's own name only (or both names for an entrepreneurial team), not in the name of a business or third party;

(5) each statement must be on the institution's official stationery showing the institution's name and logo, and confirm the applicant's name (and, where relevant, the applicant's entrepreneurial team partner's name), the account number and the date of the statement;

(6) each statement must have been issued by an authorised official of that institution and produced within the three months immediately before the date of the application; and

(7) if the statements are printouts of electronic statements, they must either be accompanied by a supporting letter from the bank, on the bank's headed paper, confirming the authenticity of the statements, or bear the official stamp of the bank in question on each page of the statement

...

(e) If the applicant is applying under the provisions in (d) in Table 4, he must also provide:

(i) his job title,

(ii) the Standard Occupational Classification (SOC) code of the occupation that the applicant is working in, which must appear on the list of occupations skilled to National Qualifications Framework level 4 or above, as stated in the Codes of Practice in Appendix J,

(iii) one or more of the following specified documents:

- (1) advertising or marketing material, including printouts of online advertising, that has been published locally or nationally, showing the applicant's name (and the name of the business if applicable) together with the business activity or, where his business is trading online, confirmation of his ownership of the domain name of the business's website,
  - (2) article(s) or online links to article(s) in a newspaper or other publication showing the applicant's name (and the name of the business if applicable) together with the business activity,
  - (3) information from a trade fair, at which the applicant has had a stand or given a presentation to market his business, showing the applicant's name (and the name of the business if applicable) together with the business activity, or
  - (4) personal registration with a UK trade body linked to the applicant's occupation; and
- (iv) one or more of the following documents showing trading:
- (1) a contract. If a contract is not an original the applicant must sign each page. The contract must show:
    - (\_a) the applicant's name and the name of the business,
    - (\_b) the service provided by the applicant's business; and
    - (\_c) the name of the other party or parties involved in the contract and their contact details, including their full address, postal code and, where available, landline phone number and any email address; or
  - (2) an original letter from a UK-regulated financial institution with which the applicant has a business bank account, on the institution's headed paper, confirming that the business is trading

...

### **Investment and business activity: notes**

46. Documentary evidence must be provided in all cases. The specified documents in paragraph 46-SD must be provided as evidence of any investment and business activity that took place when the applicant had leave as a Tier 1 (Entrepreneur) Migrant or a Tier 1 (Post-Study Work) Migrant, and any investment made no more than 12 months (or 24 months if the applicant was last granted leave as a Tier 1 (Graduate Entrepreneur) Migrant) before the date of the application for which the applicant is claiming points.

46-SD. The specified documents in paragraphs 45 and 46 are as follows:

- (a) The applicant must provide all the appropriate specified documents needed to establish the amount of money he has invested from the following list:
  - (i) If the applicant's business is a registered company that is required to produce audited accounts, the audited accounts must be provided;

(ii) If the applicant's business is not required to produce audited accounts, unaudited accounts and an accounts compilation report must be provided from an accountant who is a member of a UK Recognised Supervisory Body (as defined in the Companies Act 2006);

(iii) If the applicant has made the investment in the form of a director's loan, it must be shown in the relevant set of accounts provided, and the applicant must also provide a legal agreement, between the applicant (in the name that appears on his application) and the company, showing:

(1) the terms of the loan,

(2) any interest that is payable,

(3) the period of the loan, and

(4) that the loan is unsecured and subordinated in favour of third-party creditors.

(iv) If the applicant is claiming points for investing £50,000 from a Venture Capital firm, Seed Funding Competition or UK Government Department, and has not been awarded points in a previous application for having those funds available, he must provide a letter as specified in paragraph 41-SD(c)(iii) (except that the letter does not need to have been produced within the three months immediately before the date of the application) as evidence of the source of those funds.

(b) Audited or unaudited accounts must show the investment in money made directly by the applicant, in his own name or on his behalf (and showing his name). If he has invested by way of share capital the business accounts must show the shareholders, the amount and value of the shares (on the date of purchase) in the applicant's name as it appears on his application. If the value of the applicant's share capital is not shown in the accounts, then share certificates must be submitted as documentary evidence. The accounts must clearly show the name of the accountant, the date the accounts were produced, and how much the applicant has invested in the business. The accounts must be prepared and signed off in accordance with statutory requirements,

### **Error of Law hearing**

### **Submissions**

9 Prior to the hearing a bundle was submitted on behalf of the Appellants dated 4 May 2015. The bundle contained a Skeleton Argument and contained 53 pages of evidence and tabulated analysis of that evidence. Mr Magne sought permission to adduce that bundle of evidence and explained its tardiness was due to his being abroad and only discovering recently, via a subject access request, that part of the evidence submitted by the Appellants to the Home Office with their application was lost. Mr Magne submitted that due to these facts, the appeal should be allowed outright. Mr Magne further sought permission to amend his grounds to raise this point as the subject access bundle arrived on 28 March 2015

after the grounds of appeal were filed on 9 February 2015. We shall come to this later.

- 10 Mr Magne relied on his grounds of appeal and enlarged upon them as follows.
- 11 Regarding paragraph 15 of the Determination, he submitted that the judge erred in considering the bank letter, as the letter submitted met the terms of rule 41-SD(c)(ii)(7) (the version extant at date of decision on 26/06/14). In reply to our query, he confirmed that the bank letter did not meet rule 41-SD(c)(ii)(4).
- 12 Regarding paragraph 16 of the Determination, he accepted that the Appellants must meet rules 41 and 46 if the funds are invested. He further accepted that rule 46-SD(b) requires that audited or unaudited accounts be provided which must be prepared and signed off in accordance with statutory requirements but the Appellants had not done so. Mr Magne submitted that this omission was understandable due to section 396 of the Companies Act 2006, which required that individual accounts comprise a balance sheet as at the last day of the financial year and a profit and loss account. Mr Magne did not seek to take us to section 226 of the Companies Act 1985 referred to in the grounds of appeal (presumably as that section of the 1985 Act was repealed by the Companies Act 2006 on 6 April 2008). He submitted that section 396 dictates that a company accounts require a balance sheet and a profit and loss account, which cannot be met by the Appellants because the business had not completed a year at the time of the application and consequently the rule was impossible to meet and could not therefore be imposed upon the Appellant. He also accepted, however, that there may be pre-existing companies which have existed for over a financial year which would be able to submit such accounts.
- 13 Regarding paragraph 17 of the Determination in relation to advertising he submitted that rule 41-SD(e)(iii)(1) states that one must provide confirmation of ownership of a domain name only if one is trading online; however, as the Appellant proposed to run a dance company, this requirement did not apply to him. Mr Magne expanded upon his grounds and submitted that the advertising material provided by the Appellants consisted of a letter containing a screen capture of a single page from the Appellant's website (the "About Us" page) which had been pasted into the body of the letter. Mr Magne highlighted that answer G25 on the Tier 1 application form showed the Standard Occupational Code applied for was "3414 Dancers and choreographers". He submitted that the screen capture demonstrated that the Appellant had written a musical and that the screen capture showed links at the top of the website to pages marked "Academy" which also suffice to meet the advertising requirement. He further noted that the Respondent's Refusal Letter commented that the website was not live but submitted that no evidence had been provided that this was so.
- 14 Regarding paragraph 18 of the Determination, Mr Magne submitted that the lease contract should be analysed against rule 41-SD(e)(iv)(1), as it was at the

date of decision. He alleged that the judge had erred in considering the rules at the date of hearing, not at the date of decision. It was submitted that the rule at date of hearing required a “contract of service” whereas the rule at the date of decision merely asks for a “contract”. Pursuant to that issue, he submitted that the lease submitted covered trading as one of the primary purposes of a small business is a lease and thus leasing premises constitutes trading. He referred to the terms of the sub-lease, specifically page 6, which mention the terms of “Permitted Use” for an entertainment establishment and according to class D2(d) of the Town and Country Planning (Use Classes) Order 1987, a dance hall is amongst those permitted uses.

- 15 In response to our queries, he confirmed that the bank card for the company account submitted showed both the name of the applicant and the company and that it met the rules. Mr Magne submitted that if the account was in the Appellants’ name, he would not need to show the funds were invested, as he is the Director, but would still need to meet rule 46. He went on to say that rule 45 governs 46-SD and whether those requirements are met and that if rule 46-SD fell aside the Appellant would still need to meet the requirements of paragraph 41.
- 16 Mr Whitwell submitted that paragraph 14 of the Determination demonstrated that the judge had spent a great deal of time determining what documentation was submitted. He submitted that the Appellants were attempting to re-argue the appeal.
- 17 Regarding paragraph 15 of the Determination, he submitted that the Appellant had already conceded that he did not meet the rule. Mr Whitwell submitted that the bank statement was insufficient to meet rule 41-SD(c)(i) as the judge found.
- 18 He submitted *inter alia* that the Appellant’s submissions took a very wide view of the rules, trading and business activity.
- 19 Regarding paragraph 16 of the Determination, he submitted that the Companies Act referred to accounts that were to be submitted at the end of the financial year, as opposed to full year accounts. He acknowledged that the company was incorporated a few months earlier in January 2014 before the application.
- 20 Regarding paragraph 17 of the Determination, he submitted that the website screen capture did not provide details of a dance school and teaching but referred to shows and musicals that the Appellant puts on and that the webpage was merely a biography. He suggested that from reading the website one would not infer one could take dance classes from the Appellant. He accepted that there was no evidence to show that the website gateway was faulty or unavailable and that consequently this criticism of the webpage could only be taken so far.



- 21 Regarding paragraph 18 of the Determination, Mr Whitwell submitted that it was not clear that the judge was applying the rules at the date of hearing as opposed to the date of application. He submitted that the contract provided was in fact a sub-lease which simply showed the relationship between landlord and tenant. It did not purport to show the level of trading or that the Appellant had an ongoing client base. He further submitted that the Town and Country Planning (Use Classes) Order 1987 did not assist the Appellant as it shows that the premises can be used for any of the permitted uses, which includes an ice rink or a cinema also.
- 22 He submitted that even if the Appellant were able to establish that the bank account statement met the rules he would still need to meet the advertising and trading requirements, which he could not do.
- 23 Regarding the allegation that Home Office had lost the Appellant's documentation, he contended that simply because the Appellant alleges documents were sent which do not appear in the respondent's bundle, it does not necessarily mean they were ever sent in the first place. He did, however, acknowledge that one document allegedly submitted by the Appellant was mentioned in an internal GCID note, which contradicted his stance, but none of the other documents were mentioned in that note and on balance, it had not been shown that the documents were in fact submitted.
- 24 In reply to our query regarding rule 41-SD SD(e)(iii)(1) and whether the Appellant needed to submit confirmation of his ownership of the domain name, Mr Whitwell conceded that as the business did not trade online the judge had erred in this regard.
- 25 In reply, Mr Magne submitted that rule 41-SD(c)(i) was not the sole path to success as one could meet 41-SD(c)(ii) in the alternative.

### **Discussion and Reasons**

- 26 At the end of the hearing we indicated that we reserved our decision, which we now give along with reasons.
- 27 We heard submissions from both representatives on the issue of error of law in the First-tier Tribunal Judge's Determination. We have read the Determination prepared by First-tier Tribunal Judge Powell with great care and in great detail. We are however satisfied that the Determination must stand as it is not infected by error that would materially affect the outcome of the appeal for the following reasons.
- 28 Regarding paragraph 15 of the Determination, rule 41-SD(c) requires evidence of funding available to invest to be evidenced in three alternate ways listed in sub-paragraphs (i)-(iii). It is clear that the Appellant cannot meet 41-SD(c)(i) as a

letter was not filed as the judge observed. However, it is true to note that the judge failed to note the alternative methods by which the Appellant could evidence funding available to him under 41-SD(c)(ii) or (iii). We consider those matters ourselves. Rule 41-SD(c)(iii) is not applicable in this scenario. Rule 41-SD(c)(ii) might conceivably have been relevant however Mr Magne did not seek to persuade us that the bank statement submitted was a “personal” one and accepted that the statement was that of the company. Consequently, the Appellant is unable to meet the terms of rule 41-SD(c) regarding evidence of funding available to invest and there is no material error found within this section of the Determination.

- 29 Regarding paragraph 16 of the Determination, rule 46-SD(b) requires that audited or unaudited accounts be provided which must be prepared and signed off in accordance with statutory requirements, which Mr Magne confirmed had not been done. It is true that section 396 of the Companies Act 2006 requires individual accounts comprising a balance sheet as at the last day of the financial year and a profit and loss account; however section 394 concerning the duty to prepare individual accounts states inter alia that “*The directors of every company must prepare accounts for the company for each of its financial years...*”. We understand from this that company accounts must be prepared at the end of each financial year. In short, if the company was incorporated in January 2014 and it had not completed a financial year, there cannot be a statutory compliant account that could be submitted. Consequently, we do not read rule 46-SD(b) as requiring a newly established company that has been in existence for less than one financial year to provide accounts which could be statutorily compliant.
- 30 As a matter of judicial notice, we observe that small private limited companies, similar to that of the Appellant, do not need undertake an audit of their annual accounts unless the articles of association or the shareholders require it. We have not been shown any evidence to that effect and consequently, we find that the Appellant’s company is not one that is required to produce audited accounts under rule 46-SD(a)(i). However, given that conclusion, the Appellant equally has not supplied *unaudited* accounts and an accounts compilation report as both required by rule 46-SD(a)(ii), as observed by the judge at paragraph 16 of the Determination. Consequently, no material error arises in relation to this ground.
- 31 Regarding paragraph 17 of the Determination, Mr Whitwell was right to concede that the Appellant was not required to produce confirmation of ownership of the domain name for his business under rule 41-SD(e)(iii)(1) as it does not trade online. Mr Magne was right to address us concerning the business activity of the Appellant because whilst the judge accepted that the website screen capture stated the Appellants name and business address the advertising material also needs to state the business activity. We were given the original copy of the advertising material which was on the Home Office’s file and which is legible. The information given on the Appellant’s application form at question G25 is that the standard occupational classification (SOC) code that most closely fits the

work he intends to do is that of Dancers and Choreographers (3414). Mr Whitwell is correct to suggest that the webpage screen capture reads as a biography. This is true and natural given that the webpage printed is an "About Us" page. Mr Magne submits that the Appellant has written a musical for the stage. This is true and quite a commendable achievement. What Mr Magne failed to draw to our attention was the following passage which appears in the webpage: "...it is Mr Lees' intention to...open this new show on stages in the UK". It appears to us that this does state the Appellant's business activity, in terms which match the SOC code for Dancers and choreographers as stated in the application form. After all, writing a musical for the stage and opening that show on stage would involve dance and choreography. Therefore, although the judge did not have the benefit of a legible copy of the advertising material, we observe that it does just manage to refer to the relevant business activity for this entertainment company.

- 32 Regarding paragraph 18 of the Determination, we agree with Mr Whitwell that it does not appear from that that the judge was referring to an incorrect version of the rule, particularly given the affirmation at paragraph 6 of the Determination that the rules at the date of decision are those to be applied. We note that the contract provided was in a sub-lease which in truth simply shows the relationship between a landlord and tenant. We do not think that the level of trading or an ongoing client base are necessary or minimal requirements for a contract to show trading. As stated at rule 41-SD(e)(iv)(1)(b), the contract must show "*the service provided by the applicant's business*".
- 33 We do not find that the Town and Country Planning (Use Classes) Order 1987 assists the Appellant at all. It shows the types of use for which the premises leased may be used, but this use is not confined to a dance hall and can also include a cinema, concert hall, bingo hall or casino, or even a swimming bath or skating rink. This clearly is insufficient as a contract to demonstrate trading because it does not demonstrate any service provided by the applicant's business other than payment of rent for premises rented for a class D2 purpose.
- 34 Consequently, we find that the judge erred in his consideration of the bank statement (at paragraph 15) and in his consideration of the requirement for confirmation of ownership of the domain name for the advertising material (at paragraph 17).
- 35 However, we do not find that the judge erred in respect of his consideration of the failure to submit unaudited accounts given that the rules required those documents be submitted (at paragraph 16) or in respect of the assessment of the sub-lease as contractual evidence of trading given that it does not specify the services offered by the Appellant (at paragraph 18).
- 36 In relation to the Mr Magne's application seeking permission to amend the grounds to raise the issue of documents allegedly lost by the Respondent, we

decline to entertain the application it in view of its lateness. However, even had we considered the application we would not have been persuaded by the material in any event. The reasons for this are that we agree with Mr Whitwell's submission that simply because documents do not appear in the Respondent's bundle, it does not necessarily follow that the documents were sent in the first place. Although one document allegedly submitted was mentioned in an internal GCID note, no other documents were mentioned in that note and on balance, we do not find that the Appellant has discharged the burden of proving that the documents were in fact submitted. Even if we are wrong in finding that the documents were not shown to be sent, we find that the documents themselves taken at face value do not assist the Appellant in his argument that the rules were met in their entirety at the time of application.

37 In conclusion, although we have found an error in the judge's assessment at paragraph 17 of the Determination; it is not material to the outcome of the appeal given the failure to meet the Immigration Rules identified at paragraphs 15, 16 and 18 of the Determination.

38 Consequently, the decision concerned did not involve the making of an error on a point of law such that it should be set aside under section 12 of the Tribunals, Courts and Enforcement Act 2007.

39 We observe in postscript that it is of course open to the Appellants to lodge a fresh application, armed with the correct specified evidence (should they be so advised) after their statutorily extended leave under section 3C of the Immigration Act 1971 has expired in accordance with the analysis of Upper Tribunal Judge Gill in *Patel, R (on the application of) v Secretary of State for the Home Department (s.3C(4): simultaneous application – withdrawal) (IJR) [2015] UKUT 273 (IAC)*.

40 Such an application from the Appellants, even though they would be overstayers, would nonetheless be considered substantively should it be lodged within a 28-day period of overstaying calculated from the end of any extension of their leave under sections 3C or 3D of the Immigration Act 1971 in accordance with the immigration rules.

### **Notice of Decision**

41 We therefore dismiss the appeal.

42 The Determination shall stand.

### **Anonymity**

The First-tier Tribunal made no anonymity direction. There has been no request for anonymity and the Upper Tribunal makes no anonymity order.

**TO THE APPELLANT/RESPONDENT  
FEE AWARD**

The appeal is dismissed. There is no fee award.

Signed  
Lord Matthews  
Upper Tribunal Judge Jordan  
Deputy Upper Tribunal Judge Saini