



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/43735/2014  
IA/43739/2014  
IA/43742/2014  
IA/43748/2014  
IA/43750/2014  
IA/43753/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 9<sup>th</sup> December 2015

Decision & Reasons Promulgated  
On 13<sup>th</sup> January 2016

Before

THE RIGHT HONOURABLE LORD BOYD OF DUNCANSBY  
UPPER TRIBUNAL JUDGE FRANCES

Between

MRS UMMUL KHAIR SHAHINA KHAN  
MR MOHAMMED ASIFUDDIN KHAN  
MR MOHAMMED AMEENUDDIN KHAN  
MR MOHAMMED HAMEEDUDIDN KHAN  
MR MOHAMMED NASEERUDDIN KHAN  
MISS AMINA KAUSER KHAN  
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellants: Miss S Akinbolu, Counsel, instructed by Burney Legal Services  
For the Respondent: Mr S Walker, Home Office Presenting Officer

## **DECISION AND REASONS**

1. This is the appeal of Mrs Ummul Khair Shahina Khan and her five dependants. The first Appellant was born on 6<sup>th</sup> June 1964 and is a citizen of India. She applied for leave to remain as a Tier 1 (Entrepreneur) Migrant which was refused in a decision dated 17<sup>th</sup> October 2014. The remaining five appellants are her dependants. We shall therefore refer just to the first Appellant as the Appellant throughout this decision.
2. The Appellant's appeal against the refusal of leave as a Tier 1 (Entrepreneur) Migrant was dismissed by First-tier Tribunal Judge Coll on 14<sup>th</sup> June 2015. The judge did not accept that the Appellant satisfied the requirements of paragraph 41-SD(e)(iv)(1) or 41-SD(e)(iv)(2) and she dismissed the appeal under the Immigration Rules.
3. Permission to appeal was granted by First-tier Tribunal Judge Pooler on 15<sup>th</sup> September 2015 on the basis that it was arguable that the judge should have considered the contracts by reference to the Upper Tribunal decision in Shebl (Entrepreneur – proof of contracts) [2014] UKUT 00216 (IAC). It was also arguable that the judge failed to consider whether the Respondent should have exercised her discretion to ask for documents in relation to advertising.
4. Permission was refused on the ground that the Appellant was unable to provide a letter from her bank. The Appellant has not challenged this point because it relates to paragraph 41-SD(e)(iv)(2) which is an alternative to paragraph 41-SD(e)(iv)(1). The Respondent was satisfied that the Appellant had £50,000. The question was whether she was required to show further funds in the sum of £200,000 because she was unable to show that her business was trading.
5. Essentially the issue on appeal is whether the Appellant can show that her business was trading and that she had provided sufficient documentation of contracts for services.

### **Submissions**

6. Miss Akinbolu relied on a skeleton argument dated 6<sup>th</sup> October 2015. She submitted a relevant copy of the Immigration Rules paragraphs 41 and 41-SD and a copy of the case of Shebl. Miss Akinbolu submitted that the judge had repeated the errors made by the Secretary of State in refusing the application on 17<sup>th</sup> October 2014.
7. In this particular case two types of contract had been provided. The Appellant had provided a franchise contract (page E45 of the Appellant's bundle) which was between First-Class Learning and the Appellant. The original was supplied and this in itself amounted to a contract for services sufficient to satisfy the Immigration Rules. Both the Respondent and the judge had made an error in finding that this was not a contract for services and therefore could not be relied upon.

8. Secondly, the Appellant provided study agreements and invoices which also amounted to a contract for services. There were original copies of the study agreements, invoices and the enquiry forms. Taken as a whole this amounted to an offer, acceptance and consideration which constituted all the elements of a contract. The documents did not state duration because they were in fact rolling contracts which provided for monthly payments and one month's notice to terminate. So the specific requirements of 41-SD were met because it was clear from looking at the documents as a whole that the Appellant's name appeared and the duration of the contract was in effect renewable on a monthly basis.
9. The judge had erred in law in concluding at [21] page 10 of the decision that she could not infer from these documents the existence of a contract. The fact that each of the individual documents would not satisfy the specified requirements in the Rules was not relevant because looking at the documents as a whole those specified requirements were in fact met.
10. The judge also erred in failing to consider or make findings on the advertising material. Had she done so she would have concluded that the requirements were satisfied. The judge erred in effect in stating at [23] that

"The oral evidence produced today by the first Appellant about the documentation submitted with her application would amount to new material in that it would be a different way of presenting the original application. It follows that I could not allow the Appellant to give oral evidence in her PBS claim today."
11. The judge also erred in failing to take into account the Appellant's explanation set out in her statement and the documents which were before her.
12. Miss Akinbolu accepted that the invoices at E18 - E22 of the Appellant's bundle were not before the Respondent. What was before the Respondent was advertising material and flyers. However, the Respondent was not satisfied that these predated 11<sup>th</sup> July 2014 because no date appeared on the flyers and the earliest evidence of advertising was on the Morden Library website where courses were advertised as starting from 12<sup>th</sup> July 2014.
13. It should therefore have been obvious to the Respondent that there was other information predating that which was before her and had she wanted to clarify when the flyers were sent out she could have requested such information from the Appellant. Had she done so she would have received the invoices which appeared at pages E18-E22 of the bundle. It was obvious from those invoices that the flyers and business cards and other advertising material which were before the Respondent had in fact been in existence prior to 11<sup>th</sup> July 2014.
14. There was also evidence before the judge of emails with First Learning, about the franchise contracts which dated as early as January 2014 and emails with the print

companies in relation to the flyers, the business cards and the owner of the website. There was sufficient history available, had the Secretary of State asked, to show that Appellant had been trading and had advertising material prior to 11<sup>th</sup> July 2014. The Appellant therefore met the requirements of the Rules and the judge erred in law in dismissing her appeal.

15. Mr Walker stated that it was unfortunate that there was no Presenting Officer before the First-tier Tribunal because the originals of the flyers and leaflets were in the bundle and the invoices that had been submitted on appeal corresponded with those flyers. There were also copies of standing orders and cheques which were before the Respondent and the originals of the study agreements. Mr Walker accepted that the judge had made an error in her assessment of the evidence.

#### Relevant law and Immigration Rules

16. Paragraph 41-SD(e) provides:

- ‘(iv) one or more of the following documents showing trading which must cover (either together or individually) a continuous period commencing before 11 July 2014 up to no earlier than three months before the date of his application:
- (1) one or more contracts for service. If a contract is not an original the applicant must sign each page of the contract. Each 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, landline phone number and any email address; and
  - (2) one or more original letters from UK-regulated financial institutions which the applicant as a business bank account, on the institution’s headed paper, confirming the date the business was trading during the period referred to at (iv) above.’

17. In Shebl (Entrepreneur: proof of contracts) [2014] UKUT 216, the Tribunal held

- “5. The Secretary of State’s position is that the Immigration Rules envisage a contract included in a single document, and that a series of documents that together show all material required by the Rules does not constitute “a contract”. We can see no proper basis for that assertion. The intention behind the Rules is that the claimant be able to show that he is genuinely trading. It strikes us as inconceivable that the entrepreneur route was to be confined to the types of trading in which contracts are made by single documents. Paragraph 41-SD very properly specifies that there must be documentary evidence sufficient to show genuine contracts, and

containing sufficient information to enable the Secretary of State to check the matter with the other parties for the contracts if she chooses to do so. But there is a world of difference between requiring contracts to be evidenced by a proper paper trail and requiring each contract to be contained in a single document. In our judgment the Rules require the former, but not the latter.”

18. In order to meet the requirements of Table 4, paragraph 41-SD(e)(iii) in its relevant parts, requires the appellant to provide:

‘(iii) one or more of the following specified documents covering (either together or individually) a continuous period commencing before 11 July 2014 up to no earlier than three months before the date of his application:

- (l) Advertising or marketing material, including printouts of online advertising that has been published locally or nationally, showing the applicant's name (and the names 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.’

19. Paragraph 245AA of the Immigration Rules provides:

‘(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).'

### **Discussion and Conclusion**

20. We are of the view that the judge has erred in law in two respects. Firstly, in finding at [21] page 10 of the decision that she could not infer the existence of a contract for services from the franchise contract, study agreements, standing orders and other documents relating to the provision of services. We are of the view that the judge failed to properly direct herself in accordance with Shebl and also in accordance with the Immigration Rules which provide for a contract for services to be evidenced by more than one document.
21. In Shebl the Tribunal held that the requirement to prove the existence of contracts in paragraph 41-SD of Appendix A to the Immigration Rules does not itself require the contracts in question to be contained in documents. There is a need, however, for such contracts to be evidenced in documentary form.
22. Looking at the whole of the documentation which has been pointed out by Miss Akinbolu today, such evidence was before the Respondent, when she made her decision, and before the First-tier Tribunal Judge. That evidence was sufficient to satisfy the Immigration Rules. It was clear from the evidence that the Appellant was trading and was and had supplied sufficient documentation of a contract for services. Accordingly, we find that paragraph 41-SD(e)(iv)(1) of the Immigration Rules is satisfied.

23. The second point relates to advertising. We find that the judge made an error of law in failing to take into account the Appellant's oral evidence and her statement. Section 85A of the 2002 Act did not render this evidence inadmissible. Ahmed and Others (PBS – admissible evidence) [2014] UKUT 365 (IAC) did not prevent the judge from taking into account the Appellant's statement and oral evidence.
24. In looking at whether the decision maker had made the correct decision on the evidence before her the judge is entitled to hear from the Appellant on that point. Had she done so the judge would have been aware that the advertising material before the Respondent was such that there were a number of original flyers and copies from the Morden Library website.
25. The Morden Library website although printed out on 4<sup>th</sup> August 2014 related to courses from 12<sup>th</sup> July 2014 onwards. The flyers at E2 – 17 of the Appellant's bundle were not dated and therefore could be said to satisfy paragraph 245AA(4) which provides that “if the Appellant has submitted specified documents in which a document does not contain all the specified information the Secretary of State may contact the Appellant or his representative and request the correct documents”.
26. Miss Akinbolu submitted that it is clear from the evidence which was before the Respondent that the flyers were missing specified information, namely the date, but given the Morden Library event and the activities advertised therein, that maths tuition from First Class Learning provided by the Appellant was available from 12<sup>th</sup> July 2014, the flyers were likely to have predated that. Had the Respondent contacted the Appellant she would have provided the invoices which appear at E18 – E22 of the bundle showing that the flyers, business cards, banners, wall sign, posters and letterheads were all provided before 11<sup>th</sup> July 2014.
27. On the evidence which was before the judge the Appellant satisfied the Immigration Rules. We find that the judge made an error of law in failing to taking into account the Appellant's evidence and also in finding that the Respondent had properly exercised her discretion under paragraph 245AA. We find that the missing material was covered by paragraph 245AA(b)(iv) and that had the Respondent requested such material it could have been provided and the application could have been allowed.
28. Therefore, the judge had erred in law at [23] – [25] in finding that the Respondent had considered the evidential flexibility policy under paragraph 245AA and was not obliged to exercise it in the Appellant's favour.
29. Accordingly, we set aside the First-tier Tribunal Judge's decision dated 14<sup>th</sup> June 2014 and remake it. We find that the Appellant has satisfied paragraph 41-SD(e)(iv)(i) of the Immigration Rules and that she had provided sufficient advertising material to satisfy paragraph 41-SD(e)(iii) of the Immigration Rules. It was clear from this evidence that the Appellant was actively trading. She therefore only needed to show

access to £50,000 which was accepted by the Respondent. The Appellant satisfied the requirements of Appendix A and was entitled to the points in relation to access to funds.

30. We allow the Appellant's appeal and set aside the First-tier Tribunal's decision and remake it, allowing the Appellant's appeal under the Immigration Rules.

**Notice of Decision**

The appeal is allowed under the Immigration Rules.

No anonymity direction is made.

**J Frances**

Signed

Date 8<sup>th</sup> January 2016

Upper Tribunal Judge Frances

**TO THE RESPONDENT**  
**FEE AWARD**

As we have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of £140.

**J Frances**

Signed

Date 8<sup>th</sup> January 2016

Upper Tribunal Judge Frances