



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/49590/2014**

Appeal Numbers:

IA/49622/2014

THE IMMIGRATION ACTS

Heard at Field House

**Decision &
Promulgated
On 26 April 2016**

Reasons

On 13 April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

**(1) LEKHNATH GAIRE
(2) PARU SILWAL GAIRE
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Miss S Pinder, Counsel, instructed by Paul John & Co Solicitors

For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal brought in relation to a decision of First-tier Tribunal Judge Miles which was promulgated on 18 August 2015. The two appellants are Mr Lekhnath Gaire and his wife, Mrs Paru Silwal Gaire, both of whom are citizens of Nepal. The appeal arises from the first appellant's claim for leave to remain as a Tier 1 (Entrepreneur) Migrant under Rule

245DD HC 365; and the second appellant's dependency claim is parasitic upon her husband's. A combined refusal letter was issued on 20 November 2014 against which an appeal was filed. That appeal was heard in August 2015 and was dismissed. The appellants now appeal to the Upper Tribunal.

2. The basis of refusal is clear from the terms of the refusal letter, which makes reference to the credibility of the appellant's business plans, his lack of business experience and his immigration history. Following an extensive summary and assessment of the evidence, in paragraph 22 of the decision, the Judge broadly accepts the testimony of the first appellant in relation to these three main evidential issues.
3. However the Judge proceeded to dismiss the appeal, a decision which turned upon the consideration and assessment of the viability (ie profitability) of the first appellant's business in the context of the contracts relied upon. The Judge, at paragraph 23, expressed "real doubts about the genuine viability of this enterprise", notwithstanding that many perfectly viable businesses are non-profitable during their early years of trading. However, neither in the refusal letter, nor in argument before the First-tier Tribunal, did the Secretary of State take any point on the profitability of the first appellant's business.
4. The difficulty with the Judge's approach was two-fold. First, it was not in accordance with the reasoning of the Secretary of State in the refusal letter. Secondly, the issue of profitability was not put to the first appellant during the course of his evidence, nor was the appellants' representative invited to address that matter in closing submissions. Put shortly, the issue of profitability, as distinct from viability more generally, had not been challenged by the Secretary of State, was not 'in play' in the appeal, and the parties (particularly the appellants) were not afforded the opportunity of dealing with the point.
5. It is a basic principle of fairness and natural justice that appellants need to know clearly and unambiguously the nature of the case which they have to meet. It is trite law, but was succinctly articulated by Lord Mustill in **R v Home Secretary ex parte Doody [1994] 1 AC 531 at 560** (in a passage endorsed in an immigration context by the Court of Appeal in **R(Q) v Secretary of State for the Home Department [2003] EWCA Civ 364 at para 70**):

"Since the person affected cannot usually make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer."
6. In this instance, regrettably, the proceedings before the First-tier Tribunal did not give effect to this principle of fairness. As a consequence the appellants were disadvantaged in that the first appellant was not able to meet this argument whether by oral testimony, by the filing of additional documentation (with or without an adjournment) or through submissions by his representative directed to this discrete matter.

7. The errors of law identified and argued by Miss Pinder on the appellants' behalf both orally in front of me this morning and more particularly in her detailed written grounds must succeed. The procedural unfairness which I have set out leads inevitably to the conclusion that the Judge's decision was not in accordance with law. The Judge's finding on profitability is irrational in that it was unknown to the first appellant or his representative that the issue was up for adjudication. This appeal must be allowed, and the matter remitted for a rehearing as there needs to be a determination *de novo* by a different First-tier Tribunal judge.
8. As a rehearing is inevitable, I have been circumspect in expressing any view on the evidence, or any inferences which may be drawn from it, save as has been strictly necessary to dispose of this appeal.

Notice of Decision

- i. Both appeals are allowed and the decision of the First-tier Tribunal is set aside.
- ii. Both matters are remitted to be re-heard together before a different First-tier Tribunal judge.

No anonymity direction is made.

Signed *Mark Hill*

Date

25 April 2016

Deputy Upper Tribunal Judge Hill QC