



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04780/2015  
HU/04786/2015  
HU/04791/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 3<sup>rd</sup> November 2017

Decision & Reasons Promulgated  
On 23<sup>rd</sup> November 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MR T.H.L. (1<sup>ST</sup> APPELLANT)  
MRS H.C. (2<sup>ND</sup> APPELLANT)  
MISS S.Y.L. (3<sup>RD</sup> APPELLANT)  
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellants: Mr D Magne, Solicitor  
For the Respondent: Mr D Clarke, Senior Presenting Officer

**DECISION AND REASONS**

1. At the outset, I express my gratitude to the representatives for their respective submissions which were considered and extremely helpful. This appeal was one of

some quite significant complexity and which took a great deal of time to comprehensively assess and decide.

2. The Appellants appeal against the decision of First-tier Tribunal Judge White dismissing their appeals on human rights grounds following a refusal by the Respondent dated 19<sup>th</sup> August 2015. The Appellants appealed against the First-tier Tribunal's decision and were granted permission to appeal by Resident Judge Appleyard. The grounds upon which permission was granted may be summarised as follows:

- “1. The Appellants are all citizens of South Korea; the first and second Appellants being husband and wife and the third Appellant their child. They made application to the Respondent for leave to remain on Article 8 grounds and following refusal of that application they appealed. Following a hearing, Judge of the First-tier Tribunal P-J S White, in a decision promulgated on 6<sup>th</sup> February 2017, dismissed their appeals. Albeit that in so doing Article 8 fell to be considered the judge records at paragraph 10 of his decision that the appeal initially turned on the Appellants' ability to meet the requirements of the Immigration Rules under the points-based system for leave as a Tier 1 (Entrepreneur). The judge found the first Appellant was unable to satisfy the requirements of the Tier 1 Rules either in respect of the advertising material produced or in respect of the 'contracts' produced. He then focused on the issue of a potential breach of human rights. It was conceded that the appeal could not succeed under the Immigration Rules themselves and that it turned on Article 8.

2. The grounds seeking permission to appeal provide reasons for asserting that had the judge 'properly concluded' that the first Appellant's application met the requirements of the Immigration Rules in light of existing Home Office policies then he would have been bound to conclude that there was no justification in the removal of the Appellants pursuant to Article 8 of the ECHR. That final submission is not one I necessary accept but I do find that the grounds are all at least arguable.”

3. I was not provided with a Rule 24 response from the Respondent. However, I was addressed in oral submissions by Mr Clarke on her behalf.

### **Error of Law**

4. At the close of submissions I indicated my view that there was a material error of law in the decision such that it should be set aside, but that my reasons for so finding would follow. Those I shall now give shortly.

5. Before turning to those reasons I record that it was agreed between the parties that if Grounds 1, 4 and 5 of the Appellants' Grounds of Appeal were made out, those grounds would collectively revealed a material error of law in the determination which would require it to be set aside and redetermined. It was also agreed between the parties that Grounds 2 and 3 need not be looked at if I accepted Ground 4 as revealing an error of law.

6. It was further accepted by the parties that the assessment of Article 8 ECHR and its consideration of the public interest and what that would require in respect of firm and fair immigration control would depend upon the extent and manner in which the Immigration Rules governing the Tier 1 Entrepreneur points-based system Rules were met. Mr Clarke accepted that it was the proportion to which the Rules were met that could be taken into account in gauging the public interest and that this was appeal not a near-miss scenario. Mr Clarke helpfully stated that, in the Secretary of State's view, a near-miss scenario arose when an individual appealing contended that their ability to "almost meet the rules" formed a basis for the *engagement* of Article 8 ECHR. This was not that situation, as both parties agreed.
7. I will summarise the Grounds of Appeal before dealing with them in turn.
  - (a) Under Ground 1 the Appellants in essence contended that the First-tier Tribunal Judge had erred in failing to apply the principles of *Devaseelan v Secretary of State for the Home Department* [2002] UKIAT 00702 (STARRED) in failing to have regard to the previous findings of the Upper Tribunal in a decision promulgated on 23<sup>rd</sup> June 2015 (comprised of a panel of judges including the Honourable Lord Matthews, Upper Tribunal Judge Dawson, and myself).
  - (b) Ground 2 focused upon the First-tier Tribunal Judge's alleged errors in respect of not accepting the Appellant's evidence of contracts in the form of membership forms for want of specificity.
  - (c) Ground 3 argued in similar terms that the First-tier Tribunal Judge had erred in his consideration of whether the contract stipulated a duration or not.
  - (d) Ground 4 focused upon an alternative form in which paragraph 41-SD(e)(iv)(2) was met in the form of a letter from Barclays Bank which was said to have been submitted with the application on 16<sup>th</sup> July 2014 and appeared at page 364 of the Appellants' bundle before the First-tier Tribunal.
  - (e) Ground 5, finally, focused upon whether the First-tier Tribunal erred in failing to consider whether the Appellants had provided a solicitor's certification which contained the relevant information and whether this matter should have been assessed in light of the fact that there was no prohibition on the consideration of new evidence and in respect of evidential flexibility as well.
8. Turning to Ground 1, Mr Magne carefully set out the evidence regarding advertising which had been submitted, including the Appellant's website at page 235 of the Appellants' bundle, his evidence of domain registration on 20<sup>th</sup> February 2014 at page 249 of the Appellants' bundle, an invoice for his web design at page 241 of the Appellants' bundle dated 25<sup>th</sup> April 2014 and then made reference to this evidence against paragraph 41-SD(e)(iii) of Appendix A of the immigration rules in respect of advertising material, and whether the Appellant's website was sufficient to demonstrate continuous advertising for the period 11<sup>th</sup> July 2014 till relevant date. Mr Magne highlighted that a previous application had been made by the Appellants

on 1<sup>st</sup> May 2014 which was refused on 28<sup>th</sup> May 2014 in relation to the previous iteration of paragraph 41-SD(e)(iii) and the Appellants' business activity. Mr Magne submitted that the Upper Tribunal had made findings of fact at paragraph 31 of the aforementioned decision of 23<sup>rd</sup> June 2015 such that the First-tier Tribunal had erred in failing to take those matters into account.

9. Mr Clarke on the other hand argued that the rule which the Upper Tribunal considered in June 2015 was a previous version of 41-SD(e)(iii) and that the current version of the rule contained further wording which had not appeared in the previous version and thus the Upper Tribunal's views on the previous rule were not binding and did not form a starting point nor need any consideration by the First-tier Tribunal.

10. The previous version of paragraph 41-SD(e)(iii) states as follows:

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

(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' website. ...”

11. The version of 41-SD(e)(iii) in force at the date of the impugned and appealed decision, however, reads as follows:

“(e) If the applicant is applying for leave to remain, and has, or was last granted, leave as a Tier 1 (General) Migrant or a Tier 1 (Post-Study Work) Migrant, he must also provide the following evidence that he meets the additional requirements set out in Table 4:

(iii) one or more of the following specified documents covering (either together or individually) a continuous period commencing before 11<sup>th</sup> July 2014 or 6<sup>th</sup> April 2015 (as applicable), up to no earlier than three months before the date of his application:

(1) advertising or marketing material, including printouts of online advertising, that has been published locally or nationally

(a) showing the applicant's name (and the name of the business if applicable) together with the business activity...

...”

12. The additional requirements set out in Table 4 which a Tier 1 (Post-Study Work) Migrant must provide, which corresponds to the Appellant's last leave, are as follows:

"Table 4: Applications for entry clearance or leave to remain referred to in paragraph 36

**Investment and business activity**

An applicant who is applying for leave to remain and has, or was last granted leave as a Tier 1 (Post-Study Work) Migrant will be awarded no points under (d) above unless he meets the additional requirements in (1) and (2) below.

- (1) Since before the specified date below and up to the date of his application, the applicant must have been continuously engaged in business activity which was not, or did not amount to, activity pursuant to a contract of service with a business other than his own and, during such period, has been continuously:

- registered with HM Revenue & Customs as self-employed, or
- registered with Companies House as a director of a new or an existing business. Directors who are on the list of disqualified directors provided by Companies House will not be awarded points.

...

The specified date in (1) and (2) above is:

- 11<sup>th</sup> July 2014 if the applicant has, or was last granted, leave as a Tier 1 (Post-Study Work) Migrant.

..."

13. The specified date is clearly 11<sup>th</sup> July 2014 and the access to funds referred to is not less than £50,000 as the applicant was previously granted leave as a Tier 1 (Post-Study Work) Migrant.
14. In respect of these competing versions of the Rules, with respect to Mr Clarke, I prefer Mr Magne's submissions. This is because the previous iteration of the rule does indeed discuss the topic of advertising or marketing material and business activity, as does the new rule. The key distinction, as far as I can see, is that of the "continuous" nature of the advertising. It is also fair to note that the previous iteration of the rule says that the printouts of online advertising should be "published" locally or nationally. Clearly, the word publication implies that the advertising material, in this case, and before the Upper Tribunal on a previous occasion in terms of the online advertising, needed to be "live" or "published", in order for it to be assessed in the first place by the Respondent. Given that the application was made on 1<sup>st</sup> May 2014 and was refused on 20<sup>th</sup> May 2014 and given

that the new version of 41-SD(e)(iii) requires there to be continuous advertising of the business activity from 11<sup>th</sup> July 2014 up to shortly before the date of application, whilst I do not find that the First-tier Tribunal was bound by the previous finding that there was business activity in respect of the online advertising, I do find that the submission in relation to *Devaseelan*, particularly in relation to paragraph 41 of that reported and starred determination, does apply to the instant scenario for the following reasons.

15. Paragraph 41 of *Devaseelan*, which appears at page 78 of the supplementary Appellants' bundle, states as follows:

"41. ...

- (6) **If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator, and proposes to support the claim by what is in essence the same evidence as that available to the Appellant at that time, the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and make his findings in line with that determination** rather than allowing the matter to be re-litigated."

(Emphasis appears in the original text)

16. In my view, that *dicta* clearly applies here, given that the First-tier Tribunal had before it an Appellant who was relying upon facts that were not materially different in that the Appellant was relying upon the online advertising which he had previously relied upon in his previous application and had proposed to support his appeal by what was in essence the same evidence as that available to him in the previous appeal and therefore the First-tier Tribunal should at least have had regard to the issue of the business activity having been made out, notwithstanding that it did not have a "continuity" finding attached to it, that being the key distinction between the previous rule and the current rule.
17. As such, although the First-tier Tribunal Judge was not referred to this finding by Mr Magne in his submissions before it, the First-tier Tribunal's decision inadvertently reveals a wholly unforced material error of law in omitting regard to the finding as described in the Upper Tribunal's decision at paragraph 31 concerning paragraph 41-SD(e)(iii) and the issue of whether the evidence satisfied that requirement. Thus, I do find that Ground 1 has established an error in law in the First-tier Tribunal's determination.
18. Given the acceptance by the parties that I would not need to consider Grounds 2 and 3 if I were satisfied on Ground 4, I consider that ground next to see where it may lead.
19. Having considered this Ground at length, I do find that there has been an error of law in the decision, albeit an entirely unforced and inadvertent one, yet again. In respect of this ground Mr Magne submits in essence that although the First-tier

Tribunal considered subparagraph (1) of paragraph 41-SD(e)(iv) in relation to contracts for service to establish that the business is “trading”, the Tribunal did not consider subparagraph (2) of paragraph 41-SD(e)(iv) in the alternative in relation to whether the business’ trade was corroborated by original letters from a UK-regulated financial institution establishing trading (during the period of 11<sup>th</sup> July 2014 to no earlier than three months before the date of his application). For ease of reference, paragraph 41-SD(e)(iv) states as follows:

“(e) If the applicant is applying for leave to remain, and has, or was last granted, leave as a Tier 1 (General) Migrant or a Tier 1 (Post-Study Work) Migrant, he must also provide the following evidence that he meets the additional requirements set out in Table 4:

(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 or 6 April 2015 (as applicable), up to no earlier than three months before the date of his application:

(2) one or more original letters from UK-regulated financial institutions with which the applicant has a business bank account, on the institution’s headed paper, confirming the dates the business was trading during the period referred to at (iv) above...

...”

20. This omission was entirely due to Mr Magne’s omission in failing to make submissions upon the point before the First-tier Tribunal although the evidence was before it. As Mr Clarke rightly pointed out, there can be no culpability in respect of Judge White’s assessment of this Rule, given that he was not referred to it. However, as I am required to consider whether there is any perversity in the decision, I do find that there is an unforced inadvertent perversity which has arisen as a result of the determination containing what is a potential material error of fact in that the letter from the financial regulated institution at page 364 of the bundle has not been considered by Judge White and was potentially a means by which the Rule could have been met (I will say no more on whether this rule is met by this evidence, as I shall turn to it shortly).
21. The importance and implication of this is that the judge’s consideration of contracts for service in the First-tier Tribunal’s determination at paragraphs 17 to 19 is only one means by which trading could have been established and, as such, the omission to consider the alternate form of trading in the form of confirmation from a UK-regulated financial institution is a material omission such that the decision is erroneous in this regard.
22. Turning finally to Ground 5, Mr Clarke pragmatically accepted that there was no finding made by the First-tier Tribunal in respect of whether the Appellant had

provided a solicitor's certification in respect of the third party funds from the Appellant's brother which met the requirements of paragraph 41-SD(d)(ii).

23. As such, given my findings in respect of Grounds 1, 4 and 5, I do find that these grounds collectively reveal a material error in law such that the determination should be set aside as it is feasible, as Mr Clarke rightfully accepted, that the resultant assessment of the public interest may have been quite different if the Immigration Rules in respect of qualifying for a Tier 1 (Entrepreneur) Migrant visa were met. In light of those findings I do not go on to consider Grounds 2 and 3 as a material error of law has been discovered. The decision of the First-tier Tribunal is thus set aside.

### **Remaking the Decision**

24. In light of my decision that there was a material error of law, which I announced to the parties at the close of their submissions, I indicated that I would go on to remake the appeal in respect of the remaining and discrete issues of the assessment of the advertising material pursuant to paragraph 41-SD(e)(iii)(1) and in respect of the trading requirement pursuant to paragraph 41-SD(e)(iv)(2) and in respect of the solicitor's certification in respect of the third party funds available from the Appellant's brother and whether this evidence should have been called out for by virtue of evidential flexibility – in light of the information missing from the solicitor's letter of 14<sup>th</sup> July 2015 which was the name of the 1<sup>st</sup> Appellant, which could have been found elsewhere, in the declarations for example, which missing information would have possibly resulted in the Appellant meeting the Rules in this respect in relation to paragraph 41-SD(d) and when using money from the third party.
25. Taking these remaining issues in turn, firstly, in my view, the Appellant has established on the evidence before me that he has met paragraph 41-SD(e)(iii) in relation to establishing he has provided advertising or marketing material commencing before 11<sup>th</sup> July 2014, up to no earlier than 20<sup>th</sup> April 2015 (i.e. three months before the date of his application on 20<sup>th</sup> July 2015). Specifically, I note that the Appellant's previous application of 1<sup>st</sup> May 2014 was refused on 28<sup>th</sup> May 2014 in relation to whether the printouts from the Appellant's website made mention of the services he provided. As observed above, it must follow that the Appellant provided evidence of online advertising dated *prior* to his application of 1<sup>st</sup> May 2014, which the Respondent considered and in her so considering refused the application on 20<sup>th</sup> May 2014 because she was not satisfied with the content of the website printouts. Ergo, it must follow that the website was in existence prior to 1<sup>st</sup> May 2014 so that the Appellant could produce a printout of that website submitted with his first application.
26. In accordance with paragraph 41 of *Devaseelan* (supra), I have due regard to the finding of the Upper Tribunal at paragraph 31 of its decision of 23<sup>rd</sup> June 2015 in relation to the advertising material referring to the relevant business activity for the Appellant's company which formed my starting point, so far as it goes. That finding in conjunction with the relevant evidence, that being the printout from the website of



15<sup>th</sup> July 2015 giving the Appellant's name, business email and business activity and the invoice from LCN.com for one year's domain hosting dated 20<sup>th</sup> February 2014 and in particular the invoice at page 241 from SEO Image Company, which invoices the Appellant for the creation of his internet website on 25<sup>th</sup> April 2014, collectively establishes that the Appellant's website was live before 1<sup>st</sup> May 2014 till date and he has thus continuously advertised his business in the form of providing advertising or marketing material, in other words, printouts of his live website which were published or "live", which show his name, the name of his business and his business activity from before 1<sup>st</sup> May 2014 till date.

27. Turning to the next issue in respect of paragraph 41-SD(e)(iv)(2) and the production of documents showing "trading" covering the same continuous period commencing 11<sup>th</sup> July 2014 up to no earlier than 20<sup>th</sup> April 2015, I note the evidence provided for the purposes of this rehearing by Mr Magne, which includes three screen captures from his office law firm computer. These screen captures show on the first page the contents of his "documents" tab, which contains a folder entitled "clients" and a subfolder with the title "L" and a subfolder further bearing the 1<sup>st</sup> Appellant's initials and the designation "dm 493" and a subfolder within that entitled "leave to remain application" and yet a further subfolder within that entitled "copy of application". I further note that that subfolder contains a scanned file which purports to be a copy of the application submitted by the Appellants which Mr Magne had scanned and which was sent to the Respondent on 20<sup>th</sup> July 2015. I accept this reflects a scanned copy of the application that was sent to the Respondent. On the 364<sup>th</sup> page of that scanned application which corresponds to the 364<sup>th</sup> page of the Appellants' bundle before me, appears a letter from Chris Mullings, Barclays Business Manager, dated 16<sup>th</sup> July 2015 (three days before the date of application), which although not mentioned in Mr Magne's covering letter for the application does appear in the soft copy of the application which he has scanned and saved to his office computer in order to retain a record of what was submitted. Mr Magne is an Officer of the Court and for the sake of completeness, I indicate that I accept his word that this soft copy reflects a contemporaneous scanned copy of the application prior to it being submitted. That original document was not returned to the Appellants by the Respondent and its present location is currently unclear, but a copy was placed before me which I am just able to read.
28. As such, I am prepared to take the copy of the letter from Barclays Bank at page 364 into account. In relation to that letter and whether it meets the requirements of paragraph 41-SD(d)(iv)(2), I find that it is a letter from a UK-regulated financial institution with which the 1<sup>st</sup> Appellant has a business bank account and I do find that it appears on the institution's headed paper given that I can discern a familiar Barclays eagle in the top left-hand side and given that the footer to the letter contains the name Barclays Bank PLC and that it is authorised by the Prudential Regulation Authority and the Financial Conduct Authority and gives a Financial Services registration number and also reflects that it is registered at the office address 1 Churchill Place, London E14 5HP which is the headquarters for Barclays Plc. The letter further states in terms that: "The company opened its bank account with Barclays on 24/01/2014, started trading straight away and continues to trade to this

date”, the date on the letter being 16<sup>th</sup> July 2015. The contents of the letter thus confirm that the 1<sup>st</sup> Appellant’s business traded before, during and after the relevant period, that relevant period being 11<sup>th</sup> July 2014 to 20<sup>th</sup> April 2015. As such, I find that this letter to be satisfactory evidence of trading which meets paragraph 41-SD(d)(iv)(2).

29. Finally, turning to the third and final issue in respect of paragraph 41-SD(d)(ii), I pause to note that the refusal letter of 19<sup>th</sup> August 2015 does not mention a specific subparagraph in relation to the missing information from the solicitor’s letter. However, I take judicial notice of the fact that paragraph 41-SD(d) of Appendix A relates to third party funds and contains requirements listed therein in its subparagraphs in relation to a letter from a legal representative at subparagraph (ii) of 41-SD(d), specifically that the letter must show the applicant’s name (see paragraph 41-SD(d)(ii)(4)).
30. For ease of reference, paragraph 41-SD(d)(ii) states as follows:

“(d) If the applicant is applying using money from a third party, which is either held by the third party or has been transferred to the applicant less than 90 days before the date of the application, he must provide all of the following specified documents, in addition to the specified documents in (c) above:

(ii) A letter from a legal representative who is independent from the third party or third parties, confirming the validity of signatures on each third-party declaration provided, which confirms that the declaration(s) from the third party or parties contains the signatures of the people stated. It can be a single letter covering all third-party permissions, or several letters from several legal representatives. It must be an original letter and not a copy, and it must be from a legal representative permitted to practise in the country where the third party or the money is. The letter must clearly show the following:

(1) the name of the legal representative confirming the details,

(2) the registration or authority of the legal representative to practise legally in the country in which the permission or permissions was or were given,

(3) the date of the confirmation letter,

(4) the applicant's name (and the name of the applicant's team partner’s name where relevant) and, where (b) applies, that the applicant is a director of the business named in each third-party declaration,

(5) the third party's name (which cannot be the legal representative themselves or their client),

(6) that the declaration from the third party is signed and valid, and

(7) if the third party is not a Venture Capitalist Firm, Seed Funding Competition or UK or Devolved Government Department (or intermediary public body authorised to award funds from that Department), the number of the third party or their authorised representative's identity document (such as a passport or national identity card), the place of issue and dates of issue and expiry.

31. In respect of the letter in question not carrying the 1<sup>st</sup> Appellant's name, I do find that the evidential flexibility policy applies in respect of this omission, given that the solicitor's letter submitted in respect of the third party funds from the Appellant's brother contains the requisite identified features *but for* the Appellant's name and, given that this missing information was not only available elsewhere in the application but was also covered by the Respondent's evidential flexibility policy of August 2015, which appears at page 490 of the Appellants' bundle and which, I find, should have been applied in light of my previous findings that the other subparagraphs of the entrepreneurial Rules were met (see the Supreme Court judgment of *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59 at paragraph 31 in particular for illustration of the principles of evidential flexibility).
32. Given my findings, which, in effect, are a substitution for paragraphs 14 onwards of the First-tier Tribunal's decision, I go on to consider Article 8 in the following terms.

### **Article 8 Consideration**

33. As already mentioned above, it was agreed by the parties that if the Rules governing the applicant's entrepreneurial visa were met, this would have an impact upon the public interest in respect of Article 8 ECHR. I am grateful to Mr Clarke for his sensible submission that *if* the Rules were met, the public interest in respect of an Article 8 assessment outside the Rules under the European Convention on Human Rights would only carry "nominal" weight. I thus turn to the *Razgar* questions and consider them as follows.
34. For ease of reference, those questions raised in the House of Lords' decision of *R (on the application of Razgar) v Secretary of State for the Home Department* [2004] UKHL 27 state as follows at paragraph 17 of Lord Bingham's judgment:
- “(i) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
  - (ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
  - (iii) If so, is such interference in accordance with the law?

- (iv) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
- (v) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

35. In respect of the first question I do find that there is interference with the exercise of the 1<sup>st</sup> Appellant's right to respect for his private life, given that the Appellant has maintained a lawful presence in the United Kingdom since his entry on 22<sup>nd</sup> December 2010 until the dismissal of his appeal by the Upper Tribunal on 23<sup>rd</sup> June 2015 and given that there was an application made within 28 days of permissible overstaying on 20<sup>th</sup> July 2015.
36. In respect of the second question, the interference will in my view have consequences of gravity as to potentially engage the operation of Article 8 and will have more than a technical interference as it will result in the applicant being in a position where he would have no option but to leave the United Kingdom despite having established a business.
37. In respect of the third question of whether the interference is in accordance with the law, I note the Upper Tribunal's decisions in *Mostafa (Article 8 in entry clearance)* [2015] UKUT 00112 (IAC), in particular paragraphs 18 to 24, and I also note the Upper Tribunal's reported decision in *Adjei (visit visas - Article 8) (Rev 1)* [2015] UKUT 0261 (IAC), which confirm that where the Tribunal considers whether a person satisfies the requirements of the Immigration Rules and needs to decide upon the person's human rights, the requirements of the Rules will illuminate the Article 8 balancing exercise and, as stated by Upper Tribunal Judge Southern at paragraph 13 of *Adjei*, in citing *Mostafa*:
- "If a person's circumstances do satisfy the Immigration Rules and they have not acted in a way that undermines the system of immigration control, a refusal [of entry clearance] is liable to infringe Article 8."
38. On that note and in respect of the third question, the decision is in accordance with the law.
39. In respect of the fourth question, I pause to first give regard to the public interest as mandated by section 117B of the Nationality, Immigration and Asylum Act 2002. The maintenance of effective immigration controls is in the public interest. It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, which the 1<sup>st</sup> Appellant can do. Furthermore, it is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, and I have received no indication that these Appellants

are not so. I record that little weight should be given to a private life that is established by a person at a time when the person is in the United Kingdom unlawfully, however the overstaying here has been less than 28 days. I also acknowledge that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

40. However, having taken the above into account, in my view, the interference in the Appellants' private lives is not a necessary one, given that the immigration rules governing Entrepreneurs and their dependents are met. Thus, in my view, whilst the decision demonstrates the lawfulness in pursuing firm and fair immigration control, I accordingly give that public interest a "nominal" weight as accepted was possible by Mr Clarke and also given my view that the interference is unnecessary.
41. Although it may be feasible in theory to stop there, I do not do so but go on to consider the fifth question to complete my assessment and in keeping with the reported decisions of the Upper Tribunal.
42. In terms of my independent proportionality assessment, I find that the decision is disproportionate and infringes Article 8. As noted above, the Appellants' circumstances do satisfy the immigration rules governing Tier 1 Entrepreneurs, when combining the uninfected analysis and undisputed findings by the First-tier Tribunal at paragraphs 9 to 13 of the previous decision, alongside my analysis and above findings concerning the three remaining issues under the rules. The consequence of this is that the rules are met and consequently, notwithstanding section 117B of the 2002 Act, the public interest is given "nominal" weight and the interference is unnecessary in any event. Having noted the Appellant's immigration history and his lawful presence, notwithstanding the 28 days of permissible overstaying, he has not acted in a way that undermines the system of immigration control. Thus, I do find that, balancing the competing interests of the Appellants and the nominal public interest in firm and fair immigration control in respect of removing those without leave to remain, the effect of the impugned decision is disproportionate and the Appellants rights would be infringed were they to be removed for the reasons given.

### **Notice of Decision**

43. Given my findings above that the immigration rules are in fact met, the appeal is allowed on the basis of the Appellants' private lives under Article 8 ECHR.

### **Anonymity**

44. The First-tier Tribunal did not make an anonymity order and I was not asked to make one either and do not see any reason to do so. However, given that a child is involved in these proceedings, I have sought to abbreviate the names of the Appellants to avoid unnecessarily discussing the identity of the child, directly or indirectly.

### **Fee Award**

45. I do **not** make a fee award as my decision is based upon the evidence as presented before me and the submissions made today, a great many of which were not made by Mr Magne before the First-tier Tribunal.

Signed

Date

Deputy Upper Tribunal Judge Saini