



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

Appeal Number: IA/02712/2014  
IA/02713/2014  
IA/02714/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 13 November 2014**

**Determination Promulgated  
On 24 November 2014**

**Before**

**Deputy Upper Tribunal Judge Pickup**

**Between**

**Vijaybhai Thumar  
Pallaviben Thumar  
Amanta Thumar  
[No anonymity direction made]**

**Appellants**

**and**

**Secretary of State for the Home Department**

**Respondent**

**Representation:**

For the appellants: Not represented

For the respondent: Mr C Avery, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellants are all citizens of India.
2. These are their appeals against the determination of First-tier Tribunal Judge Turquet, promulgated 26.6.14, dismissing their linked appeals

against the decisions of the Secretary of State, dated 11.12.13, to refuse their applications made on 13.9.13 for leave to remain as a Tier 1 Entrepreneur and dependants under the Points Based System (PBS) of the Immigration Rules, and to remove them from the UK by way of directions under Section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 23.6.14.

3. First-tier Tribunal Judge Parkes refused permission to appeal on 16.7.14. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Kopieczek granted permission to appeal on 7.10.14.
4. Thus the matter came before me on 13.11.14 as an appeal in the Upper Tribunal.

### **Error of Law**

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Turquet should be set aside.
6. In granting permission to appeal, Judge Kopieczek considered it arguable that the First-tier Tribunal Judge erred in the assessment of whether funds in the second appellant's account were in the control of the first appellant, with reference to paragraph 1A(f) of Appendix C, "having regard to the fact of this being a joint application and in the light of the evidence from the first and second appellants that was put before the First-tier Tribunal.
7. "I have strong reservations about any argument based on legitimate expectation relating to previous grants of leave. Similarly, it does not seem from the original grounds of appeal to the First-tier Tribunal that article 8 of the ECHR was relied on, and even if it was, I again have strong reservations about whether any such ground could independently have succeeded. Nevertheless, I do not rule out any of the grounds in this grant of permission."
8. Judge Kopieczek gave directions that no later than 7 days before the Upper Tribunal appeal hearing the appellants were to file and serve a complete copy of any policy guidance relied on together with a skeleton argument including a detailed explanation of, "the funds required by the appellants in terms of maintenance, and how it is said that that requirement is met in terms of the monies held in the relevant account, and with reference to the immigration rules that applied at the date of the application and decision."
9. Not only did the appellants fail to comply with these directions, in that no such document or skeleton argument has been filed with the

Tribunal, but neither any appellant nor any representative attended the appeal hearing before me on 13.11.14, for which notice was sent out on 20.10.14 to the home address at 38 Selkirk Road, London SW17 OES, the same address that appears in the application for permission to appeal filed with the Tribunal in July 2014. In accordance with Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008, as amended, I am satisfied that reasonable steps have been taken to notify the appellants of the hearing listed before me and that in absence of any explanation for the non-attendance of the appellants or a representative, I conclude that it is in the interests of justice to proceed with the hearing.

10. In my view, the grant of permission misunderstands the nature of the application. This was not a joint Tier 1 entrepreneur application, but rather a Tier 1 entrepreneur application by the first appellant, with his wife and child as dependants, not entrepreneurs.
11. Paragraph 1A(f) of Appendix C requires the Tier 1 applicant to demonstrate that the (maintenance) funds were “under his own control on the date of the application and for the period specified,” (a consecutive 90 days). These maintenance funds are in addition to the £50,000 investment fund.
12. The first appellant has to be able to demonstrate that he, not someone else, can adequately maintain himself and his dependants. To do that the Rules require a certain minimum level of maintenance funds which must be held under his control. Whilst the evidence was that the second appellant, the dependant wife of the first appellant, had sufficient funds (£2,700) in her own Halifax account for the period of 3 months prior to the date of application, those funds were under her control and not that of the first appellant.
13. The appellants’ case was that the funds in the second appellant’s account were de facto under his control and that he used it for savings. It was said that he had the password for the account and sometimes paid money into it. At §14 the First-tier Tribunal did not find it credible that the first appellant would put money into his wife’s account rather than keeping it in his own account or opening a separate business account.
14. Irrespective of that finding, the requirement is that the funds must be under the first appellant’s own control. By way of logical comparison, provision is made for joint-entrepreneur applications, but in such case the bank account has to be in the names of both applicants. It makes no sense that an application by one prospective entrepreneur, even with dependants, should have a less strict requirement and permit necessary funds to be held in the name of another. Further, and more significantly, paragraph 1B(iii)(1) specifically requires that the statements must show,

inter alia, the name of the applicant. These statements do not show his name and thus cannot meet the requirements of the Immigration Rules.

15. The grounds of application for permission to appeal to the Upper Tribunal raise article 8 ECHR. However, that was not a ground of appeal to the First-tier Tribunal and was evidently not raised at the First-tier Tribunal appeal hearing. In Sarkar v Secretary of State for the Home Department [2014] EWCA Civ 195, the Court of Appeal stated:

“Finally, I think it is important to bear in mind that this court will allow an appeal against a decision of the Upper Tribunal only if it is satisfied that it involved a material error of law. The most that can be said of the decision in the present case is that the Tribunal failed to consider the merits of the appellants’ article 8 claim. However, there was no evidence before the Tribunal capable of support the findings of fact necessary to enable their argument to succeed. I find it difficult to see, therefore, how it can be said that any such error was material since, if the Tribunal had considered that ground of appeal, it would have been bound to reject it.”

16. The grounds of application for permission to appeal state only in the most cursory of terms that the First-tier Tribunal Judge erred in failing to consider the appellants’ case under article 8 ECHR in line with CDS (Brazil) [2010] UKUT 00305 (IAC). The grounds assert that this is a case “where the private life deserves respect and the public interest in removal is diminished especially since there has been no prior issues and the basis of refusal falls on a technicality.” It is further said that the appellant has already expended his own savings on the business.
17. However, CDS (Brazil), now somewhat dated, has been followed by a line of other and more recent cases pointing out that article 8 has limited utility in private life cases that are far removed from the protection of an individual’s moral and physical integrity. In the circumstances the relevance of CD (Brazil) to the present case is rather limited.
18. In Nasim and others (Article 8) [2014] UKUT 25 (IAC) it was stated, “it is important to emphasise that the appellant in CDS (Brazil) was faced with a hypothetical removal, which would have prevented her from completing the course of study for which she had been given leave.” The panel pointed out that, “the essential elements of the private life relied on will normally be transposable, in the sense of being capable of replication in their essential respects, following a person’s return to their home country.”
19. The first appellant has no legitimate expectation of being able to remain in the UK except and only in accordance with the Immigration Rules for doing so. He has failed to demonstrate that he meets the Rules and that is a very significant factor in any Razgar proportionality balancing exercise between on the one hand the private life rights of the appellants

and on the other the legitimate and necessary aim of the state to protect the economic well-being of the UK through immigration control. The family life will be able to continue uninterrupted in India and such associations and friendships as they may have developed in the UK can be maintained through modern communications from India and perhaps occasional visits. After all that is the sort of relationship many families now have with their family members as children and siblings take advantage of mobility to relocate across the world. There is nothing in the circumstances of the appellants that one could describe as sufficiently compelling and insufficiently recognised in the Immigration Rules so as to justify, exceptionally, permitting leave to remain outside the Rules under article 8 private life on the basis that the decision would produce a result that was disproportionate or otherwise unjustifiably harsh.

20. In the circumstances, I am not satisfied that the appellants can raise article 8 at this stage, where it was not raised or addressed before the First-tier Tribunal they can be taken to have abandoned it as a ground of appeal. However, even if article 8 is engaged in this case, which I do not accept that it is, for the reasons set out above I find that the decision of the Secretary of State is entirely proportionate and not disproportionate to the appellants' rights under article 8 ECHR.

### **Conclusion & Decision**

21. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal of each appellant remains dismissed on both immigration and human rights grounds.



Signed:

Date: **21 November 2014**

Deputy Upper Tribunal Judge Pickup

## **Anonymity**

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

## **Fee Award**

**Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeals have been dismissed and thus there can be no fee award.



Signed:

Date: **21 November 2014**

Deputy Upper Tribunal Judge Pickup