



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

Appeal Numbers: IA/14436/2014
IA/16314/2014

THE IMMIGRATION ACTS

Heard at Sheldon Court Birmingham

On 25th November 2014

**Determination
Promulgated**

On 8th December 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**RAKESH BHATIA
RAJNI BHATIA
(ANONYMITY ORDER NOT MADE)**

Respondents

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer

For the Respondents: Mr Z Rasheed of Sterling Avram Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals against the determination of Judge of the First-tier Tribunal Pirotta promulgated on 14th July 2014.

2. The Respondents before the Upper Tribunal were the Appellants before the First-tier Tribunal and I will refer to them as the Claimants.
3. The first Claimant is a male Indian citizen born 16th June 1985 and is married to the second Claimant a female Indian citizen born 11th May 1984. The first Claimant applied for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) and the second Claimant applied as his dependant.
4. The applications were refused on 12th March 2014. In relation to the first Claimant, he was awarded the 95 points he had claimed under Appendices A, B and C but his application was refused on non-points scoring grounds, with reference to paragraph 245DD(h) and (i). The second Claimant's application was refused because the first Claimant's application had been refused.
5. The Claimants appealed and requested that their appeal be determined on the papers.
6. Judge Pirotta considered the appeals together on the papers and made the following findings in paragraphs 11 and 12 of her decision;

“11. The Secretary of State has awarded the 95 points necessary in the three categories yet has refused the applications. There is no explanation for this ambiguity and the decisions must be unlawful as the award of points to the requisite appendices as detailed in the refusal letter must lead to successful applications yet the decisions were to refuse the applications.

12. The appeals succeed in so far as the decisions were unlawful as they are contradictory and ambiguous, not supported by the evidence and the findings made by the Secretary of State, for which the necessary points were awarded.”

7. Judge Pirotta allowed the appeals under the Immigration Rules on the basis that they were not in accordance with the law, and directed that the decisions should be remitted to the Secretary of State for further consideration.
8. The Secretary of State applied for permission to appeal to the Upper Tribunal relying on the following grounds;

“The judge does not appear to have noted the substantive reasons for refusal given on pages 2 and 3 of the refusal letter (copy appended), which related to the ‘non-points scoring’ requirements of the relevant rule, namely 245DD(h) and (i). It is plain that to succeed in their applications the Appellants needed to satisfy all of the requirements of 245DD, not just those that related to the acquisition of points.

In these circumstances where the error of law is so clear and fundamental, the Tribunal is invited to set aside the determination of Judge Pirotta without an oral hearing for permission to appeal and relist the matter before another judge in the First-tier Tribunal.”

9. Permission to appeal was granted by Judge of the First-tier Tribunal V A Osborne in the following terms;
- “1. The Respondent seeks permission to appeal against the determination of First-tier Tribunal Judge Pirotta promulgated on 14th July 2014 by which she allowed the Appellants’ appeals to the extent of remitting them back to the Secretary of State for a further decision to be made.
 2. The First-tier Tribunal Judge found that as the Secretary of State’s representative had acknowledged that the first Appellant met the requirements of the Points-Based System in respect of his Tier 1 (Entrepreneur) application the decision to refuse his application was contradictory.
 3. Within the grounds of application it was pointed out on behalf of the Respondent that when the application was refused although full points have been awarded, the application also fell to be considered by virtue of the ‘non-points scoring’ requirements of the Immigration Rules namely paragraph 245DD(h) and (i).
 4. The notice of refusal had set out full reasons for refusing the application under the provisions of paragraph 245DD and in the circumstances it could not be said that the decision of the Secretary of State’s representative was in any way contradictory.
 5. I am satisfied that the Secretary of State’s representative considered all of the requirements under the Immigration Rules – both by virtue of the Points-Based System and paragraph 245DD and gave logical reasons for refusing the application based upon the assessment of the Appellant’s answers at interview with regard to the viability of his business plan and other proposals.
 6. In the circumstances I am satisfied the determination of the First-tier Tribunal Judge demonstrates an arguable error of law and accordingly permission to appeal is granted.”
10. The Tribunal issued directions that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside.
11. At the hearing before me Mr Mills relied upon the grounds contained within the application for permission to appeal, in submitting the judge had materially erred in law, and the decision should be set aside and remitted to the First-tier Tribunal to be considered afresh.
12. Mr Rasheed agreed that the judge had erred in law but submitted that the decision would have had to be remitted back to the Secretary of State in any event, as the Secretary of State had erred in awarding points, as those points should not have been awarded if the Secretary of State was not satisfied with the genuineness of the application as set out in 245DD(k). Therefore Mr Rasheed’s position was that although the judge had erred in law, the error was not material as the application would need to be considered again by the Secretary of State in any event.
13. Mr Mills responded by contending that 245DD(k) which I set out below, related to a points scoring requirement in Appendix A, not the non-points scoring requirement.

(k) If the Secretary of State is not satisfied with the genuineness of the application in relation to a points scoring requirement in Appendix A, those points will not be awarded.

14. Both representatives agreed that if a material error of law was found then the appropriate course of action would be to remit the appeal back to the First-tier Tribunal as the appeal had not been substantively considered.

My Conclusions and Reasons

15. As I announced at the hearing, I found that the judge erred in law for the reasons given in the grant of permission, when read together with the grounds contained within the application for permission to appeal. It does appear that the judge did not consider the non-points scoring reasons for refusal set out in pages 2 and 3 of the refusal decision.

16. I am not aware of any statutory power which enables the First-tier Tribunal to remit a decision to the Secretary of State, but if a decision is found to have been made not in accordance with the law, then the decision remains outstanding before the Secretary of State for a lawful decision to be made, but that is not the case here.

17. In my view it is appropriate to remit these appeals back to the First-tier Tribunal so that they can be substantively considered by a First-tier Tribunal Judge. In deciding to remit the appeals I have taken into account the Senior President's Practice Statement 7.2 which states;

7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that;

- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
- (b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

18. The appeals have not been substantively considered by the First-tier Tribunal and therefore remittal is appropriate.

19. The appeals are to be determined on the papers by a First-tier Tribunal Judge other than Judge Pirota. Mr Rasheed indicated that the Claimants may request that they have an oral hearing, and if an oral hearing is requested, then they must pay the appropriate fee and notify the Tribunal that an oral hearing is requested, which would then presumably take place at the Birmingham Hearing Centre.

Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it is set aside. The Secretary of State's appeal is allowed to the extent that Claimants' appeals are remitted to the First-tier Tribunal.

Anonymity

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

Signed

Date 1st December 2014

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

Because the determination of the First-tier Tribunal has been set aside so has the fee award. No fee award is made by the Upper Tribunal, and this must be considered by the First-tier Tribunal when the appeals are heard again.

Signed

Date 1st December 2014

Deputy Upper Tribunal Judge M A Hall