



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/28480/2013  
IA/28487/2013  
IA/28493/2013

THE IMMIGRATION ACTS

Heard at Newport  
On 28 April 2014

Determination Promulgated  
On 20<sup>th</sup> May 2014

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

AH  
RP  
IA

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mrs M Ahammed of RMS Immigration Ltd  
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

## **Background**

2. The appellants were born respectively on 1 September 1979, 10 October 1981 and 7 January 2005 and are citizens of Bangladesh. The first and second appellants are married and the third appellant is their daughter. On 5 May 2013, the first appellant made an application for further leave as a Tier 1 (Entrepreneur). He did so on the basis of being part of an “entrepreneurial team” with “MR”. The second and third appellants also sought further leave as dependents of the first appellant. On 21 June 2013, the Secretary of State refused the first appellant’s application for further leave to remain and made a decision to remove him by way of directions under s.47 of the Immigration Asylum and Nationality Act 2006. The applications of the second and third appellants were refused in line with that of the first appellant and decisions made to remove each of them under s.47 of the 2006 Act.

## **The Appeal**

3. The appellants appealed to the First-tier Tribunal. The appeal was heard by Judge Harmes. The sole issue under the Immigration Rules before Judge Harmes was whether the first appellant could establish that he (and his entrepreneurial partner, MR) possessed the funds, namely £50,000 as required by para 245DD and Appendix A of the Immigration Rules. Before Judge Harmes, the first appellant relied upon a mini-statement stamped 5 June 2013 in relation to a Santander Bank Account in the name of his entrepreneurial partner and also a one page statement for a Santander Bank Account covering the period 4 May 2013 to 4 June 2013 in the first appellant’s name. The first appellant gave evidence before Judge Harmes that these statements related to the same joint account (the account number and sort code were the same) and that the explanation as to why only one name was shown was that it reflected who had requested the particular statement.
4. Judge Harmes was not satisfied that the two statements satisfied the requirements of the Immigration Rules. Secondly, Judge Harmes concluded that there was no unfairness in the Secretary of State not requesting further documentation for the first appellant in order to provide him with an opportunity to meet the requirements of the Rules. Finally, Judge Harmes found that the Secretary of State’s decision did not breach Article 8 of the ECHR.
5. On 10 January 2014, the First-tier Tribunal (Judge Blandy) granted the appellants permission to appeal to the Upper Tribunal. Thus, the appeals came before me.
6. On behalf of the appellants, Mrs Ahammed accepted that the first appellant could not meet the requirements of the Rules in that the Rules required that the bank statements showed the names of both account holders, namely the first appellant and MR who comprised the entrepreneurial team. However, she submitted that the statements engaged the ‘evidential flexibility’ rule in para 245AA of the Immigration Rules. She submitted that it was obvious from the two documents that they related to the same bank account and that there was therefore some prospect of the first appellant submitting bank statements which complied with the Rules. She submitted that the first appellant’s case fell within the ‘wrong format’ element of

para 245AA which required that the first appellant have an opportunity to submit documents in the correct format. Secondly, she submitted that the appeal should have been allowed under Article 8 of the ECHR.

## Discussion

7. It was accepted before the Judge that the only issue under the Rules was whether the first appellant could establish that he (together with his entrepreneurial partner) had access to “not less than £50,000 (see Table 4 in Appendix A). Paragraph 52 of Appendix A provided, so far as relevant, as follows:

“Entrepreneurial teams: notes

52. Two applicants may claim points for the same investment and business activity in Tables 4, 5 or 6 provided the following requirements are met.

Requirements:

- (a) The applicants have equal level of control over the funds and/or the business or businesses in question;
- (b) The applicants are both shown by name in each other’s applications and in the specified evidence required in the relevant tables; ...”

8. The specified evidence, in this case bank statements, is set out in para 41-SD(a)(ii) which at the date of decision was as follows:

“(a) The specified documents to show evidence of the funding available to invest are one or more of the following specified documents;

.....

- (ii) For money held in the UK only, a recent personal bank or building society statement for each UK financial institution holding the funds, which confirms the amount of money available to the applicant (or the entrepreneurial team if applying under the provisions in paragraph 52 of this Appendix). The statements must satisfy the following requirements:

- 1 The statements must be original documents and not copies;
- 2 The bank or building society holding the money must be based in the UK and regulated by the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA);
- 3 The money must be in cash in the account, not Individual Savings Accounts or assets such as stocks and shares;
- 4 The account must be in the applicant’s own name only (or both names for an entrepreneurial team), not in the name of a business or third party;

- 5 Each bank or building society statement must be on the institution's official stationery and confirm the applicant's name and, where relevant, the applicant's entrepreneurial team partner's name, the account number and the date of the statement, and the financial institution's name and logo,;
- 6 The Bank or building society statement must have been issued by an authorised official of that institution and be produced within the three months immediately before the date of the application; and
- 7 If the statements are printouts of electronic statements, from an online account, they must either be accompanied by a supporting letter from the bank, on company headed paper, confirming the authenticity of the statements, or bear the official stamp of the bank in question and on each page of the statement;..."

(The relevant provision, with some modifications, is now found in para 41-SD(c)(ii) of Appendix A.)

9. As those provisions make plain, the first appellant was required to show that both he and his entrepreneurial partner had an "equal level of control" over the funds relied upon (para 52) and the account relied upon must be in both the name of the first appellant and his entrepreneurial partner (see para 41-SD(c)(ii)(4)) and the relevant bank statements must confirm both the appellant's name and that of his entrepreneurial team partner see para 41-SD(c)(ii)(5)).
10. As Mrs Ahammed accepted before me, neither bank statement relied upon by the first appellant met those requirements.
11. As a consequence, Judge Harmes was correct to conclude that the first appellant could not meet the requirements of the Immigration Rules. Although the Judge referred to the provisions of para 41-SD(b)(i) that deals with "third party" funds at para 18 of his determination (no doubt because the respondent also had wrongly done so in her decision letter), he set out at para 17, para 41-SD(a)(ii) the application of which was fatal to the first appellant's claim under the Rules.
12. Given her concession on the application of the Rules (rightly made), Mrs Ahammed relied upon para 245AA of the Rules which from 6 September 2012 set out the respondent's so-called 'evidential flexibility' policy. As at the date of decision, namely 21 June 2013 para 245AA provided as follows:

"245AA. Documents not submitted with the application

- (a) Where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the UK Border Agency will only consider documents which have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with sub paragraph (b).

- (b) If the applicant has submitted
  - (i) A sequence of documents and some of the documents in the sequence have been omitted (for example, if one bank statement from a series is missing);
  - (ii) A document is in the wrong format; or
  - (iii) A document that is a copy and not an original document,

The UK Border Agency may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received by the UK Border Agency at the address specified in the request within 7 working days of the date of the request.

- (c) The UK Border Agency will not request documents where a specified document has not been submitted (for example an English language certificate is missing), or where the UK Border Agency does not anticipate that addressing the omission or error referred to in sub paragraph (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) that it is a copy and not an original document,

The application maybe granted exceptionally, providing the UK Border Agency is satisfied that the specified documents are genuine and the applicant meets all the other requirements. The UK Border Agency 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)."

13. Paragraph 245AA has been subject to amendment subsequently. In particular, paragraph 245AA(b) has been subject to some linguistic rearrangements and from 1 October 2013 (therefore after the date of decision in this case) so as to add an additional "(iv)" to paragraph 245AA(b). That adds an additional instance where the UK Border Agency may write to an applicant and request the correct document. From 1 October 2013, para 245AA(b)(iv) provided:

"A document does not contain all of the specified information".

14. Initially, Mrs Ahammed placed reliance upon para 245AA(b)(iv). However, it is clear that that provision has no application to this appeal as it was not in force at the time of the decision on 21 June 2013.

15. As a result, Mrs Ahammed focussed her attention upon paragraph 245AA(b)(ii) and submitted that the first appellant's bank statements were in the "wrong format" because they omitted the name of the other account holder.
16. Mr Richards, on behalf of the Secretary of State submitted that the absence of both account holders' names was not a defect in "format". He submitted that the Secretary of State was not required to request additional documentation, in these circumstances, by virtue of para 245AA.
17. It is, of course, plain that as from 1 October 2013, paragraph 245AA(b)(iv) provides for the precise situation in which the first appellant was placed, namely that the document (bank statements) he submitted did not "contain all the specified information". However, that provision was not in force at the time of the respondent's decision on 21 June 2013 and the only basis upon which Mrs Ahammed puts the first appellant's case on 'evidential flexibility' was that the document was in the "wrong format".
18. As an evidential tool, it is difficult to take into account the subsequent addition of para 245AA(b)(iv) to interpret the meaning of "wrong format" before the former's introduction into the Rule. Even before its inclusion, I am satisfied that a document cannot be said to be in the "wrong format" simply because the joint account holders names were not both included. The ordinary and natural meaning of the word "format" is that it has something to do with the arrangement or presentation of the information set out in, for example, a document. In other words, "format" essentially relates to how the document is presented or arranged, i.e. its "look". Generally, the omission of information will not alter the "look" or format. It may well be, however, that an absence of information may change the format of the document, for example where the document is not set out on the institution's official stationery so that it does not include the financial institutions' name and logo (see, for example para 41-SD(a)(ii)(5)). That said, the absence of one or two joint account holders' names on a bank statement cannot, in my judgment, convert a bank statement otherwise in the correct format into one which is in the "wrong format". In the future, para 245AA(b)(iv) will cover this situation but, for the reasons I have given, it cannot assist the first appellant in these appeals.
19. For these reasons, para 245AA did not apply to the first appellant.
20. Before the Judge, Mrs Ahammed also relied upon the decisions of the Upper Tribunal in Thakur (PBS Decision - Common Law Unfairness) Bangladesh [2011] UKUT 00151 (IAC) and Naved (Student - Fairness - Notice of Points) Pakistan [2012] UKUT 0014 (IAC). Judge Harmes set out the relevant headnotes of these two decisions at paras 21 and 22 of his determination. At para 23 he went on to distinguish those cases as having no application to the first appellant for the following reasons:

"In the context of this appeal the appellant has not been prejudiced by any inherent unfairness outside his control, as was the case in both of the above cases. In Thakur the appellant had not had an opportunity because of factors outside his control. In Naved he did not know of the Grounds for refusal that he faced. Both situations

required an overall consideration of fairness to redress the balance. That is not the case here. An obligation on the respondent to assist every appellant who does not comply with the technicalities of the Immigration Rules is too onerous and unworkable. I find that in the context of this decision and the particular circumstances of this appellant he has not been prejudiced by having to comply without more assistance from the respondent.”

21. Although the grounds of appeal to the Upper Tribunal did not refer to, or rely upon, the decisions in Thakur and Naved, for completeness I should add that I am in complete agreement with Judge Harmes’ view expressed in para 23 that neither decision can assist the first appellant. There are undoubtedly complexities in the Points Based System and the requirements of the Rules; however, the requirement that both account holders’ names should be included on any bank statements is clearly set out in Appendix A and the basis upon which, therefore, the first appellant could not succeed under the Rules was not something of which the first appellant could have no knowledge. The omission was, therefore, of his own making and was not outside his control such that fairness required the Secretary of State to notify him of the omission..
22. For these reasons, I reject the first appellant’s reliance on para 245AA and, to the extent that he continued to do so, upon the common law principle of fairness.
23. Finally, Mrs Ahammed submitted that the Judge should have allowed the appeal under Article 8 because he had not applied the decision in Razgar v SSHD [2004] UKHL27. That is a submission which is without any merit.
24. Judge Harmes dealt with Article 8 of the ECHR at paras 26, 40 and 43. At paragraph 27, he set out the five stage questions identified by Lord Bingham of Cornhill in Razgar at [17]. At paras 30-34, he set out the factors in favour of the appellants’ continued residence in the UK and at paras 35-38 the factors in favour of removal and the public interest. At paras 39-40, he balanced the need for effective immigration control against the appellants’ circumstances. Judge Harmes concluded that the legitimate aims of the economic well-being of the country and the protection of the rights and freedoms of others outweighed any interference with the appellants’ family life (given that they would return to Bangladesh as a family) and their private life in the UK. In her oral submissions, Mrs Ahammed offered no reasoned basis upon which it could be argued that the Judge erred in law in carrying out that balancing exercise. The grounds of appeal to the Upper Tribunal do not do so either simply stating that the Judge “totally failed to consider the claim for private life under Article 8” in the light of the authorities of Razgar and Huang v SSHD [2007] UKHL 11. The Judge simply did not fall into that error and, in my judgment, Judge Harmes was entitled to reach the conclusion that the appellants had failed to establish a breach of Article 8.

**Decision**

25. For these reasons, the First-tier Tribunal's decision to dismiss the appellant's appeal on all grounds did not involve the making of an error of law. The decision stands.
26. The appellants' appeals to the Upper Tribunal are dismissed.

Signed

A Grubb  
Judge of the Upper Tribunal

Date: