



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

**Appeal Number IA/27724/2013
IA/27725/2013**

THE IMMIGRATION ACTS

**Heard at Field House
On 9 September 2014**

**Decision & Reasons promulgated
On 14 May 2015**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

**(1) Mohammad Rashedul Hasan
(2) Mahmuda Akter**

(Anonymity orders not made)

Appellants

and

Secretary of State for the Home Department

Respondent

Representation

For the Appellant: Mr M Biggs of Counsel instructed by JS Solicitors.

For the Respondent: Mr S Whitwell, Home Office Presenting Officer.

DECISION AND REASONS

1. These are linked appeals against the decisions of First-tier Tribunal Judge Froom promulgated on 6 May 2014 dismissing the Appellants' appeals against decisions of the Respondent dated 17 June 2013 to refuse them variation of leave to remain in the UK and to remove each of them pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.

Background

2. The personal details of the Appellants and their immigration histories are summarised in the decision of the First-tier Tribunal (paragraphs 1 and 4), and it is unnecessary to reproduce those matters here or otherwise set out any further detail other than is incidental for the purposes of this document. Suffice to say at this stage that the Second Appellant is the wife of the First Appellant and her appeal, as was identified by Judge Froom, "*is entirely dependent*" on the First Appellant's appeal. In the circumstances I adopt Judge Froom's stylisation of the First Appellant as 'the Appellant'.
3. The Appellant's appeal was primarily concerned with a decision to refuse his application for leave to remain as a Tier 1 (Entrepreneur) Migrant.
4. In the Respondent's combined 'reasons for refusal' letter and Notice of Immigration Decision issues were identified in respect of three documents submitted by the Appellant in support of his application. The Respondent expressed herself not to be satisfied that the evidence complied with the requirements of paragraph 41-SD of Appendix A of the Immigration Rules. Moreover it was stated that "*the decision has been made not to request additional documentation or exceptionally consider the application under the provisions of paragraph 245AA as it anticipated that addressing the omission or error would lead to a grant of leave*".
5. Further to the above the decision-maker added "*we have not carried out full verification checks on the documents you submitted or the statements that you have made on your application form (or in your interview - delete if not applicable) as your application falls for refusal on other grounds as outlined above*", before "*reserve[ing] the right in future to request independent third-party verification of any piece of supporting documentation that you provided with this application*".
6. Before the First-tier Tribunal the Appellant's representative conceded that the Appellant had not met the requirements of the Immigration Rules (paragraph 13) and in the circumstances the appeal was dismissed under the Rules (paragraph 15). The Judge otherwise rejected submissions in respect of 'evidential flexibility' with reference to paragraph 245AA of the Rules, the Respondent's evidential flexibility policy, and the common law duty of fairness (paragraphs 16-24). The Tribunal also determined that the Respondent's decision did not breach Article 8 of the ECHR (paragraph 25-32).
7. The Appellant sought permission to appeal which was initially refused by Designated First-tier Tribunal Judge MacDonald on 10 June 2014, but subsequently granted by Upper Tier Tribunal Judge Rintoul on 24 July 2014, who also issued Directions for the future conduct of the appeal.

8. The Respondent has filed a Rule 24 response dated 5 August 2014.

Consideration: Error of Law

9. The deficiencies in the documentation submitted in support of the Appellant's application when measured against the requirements of the Rules were, in the Respondent's refusal decision, said to be these:

(i) A letter from the BRAC Bank did not confirm that the bank was duly regulated (notwithstanding that the bank appears on the list of financial institutions whose financial statements are accepted in Table 12 of Appendix P of the Rules).

(ii) A letter from Mr MD Wali Ullah Abbasi, purportedly an Advocate and Notary Public in Bangladesh, did not allow the Respondent to confirm the authority of the writer to practice law in Bangladesh, did not confirm signatures to be those of the third-party investors, and did not identify the details of the identification document of one of the third party investors.

10. The First-tier Tribunal Judge identified the deficiencies in the following terms at paragraph 14 of the determination – the numbers in parenthesis being references to sub-paragraphs of paragraph 41-SD(d)(ii):

"[Mr Abbasi's] letter does not include the number of the third parties' identity documents or the dates of issue and expiry (7). It also seems to me that the stamp or seal are not sufficient to state the registration or authority of the legal representative to practise (2). The letter contains a space for the registration number but, at least on my copy, it does not appear to have been included".

11. In the premises it is to be noted that the Respondent's decision letter of 17 June 2013 confines its reasoning in respect of evidential flexibility to the passage quoted at paragraph 4 above. The wording reflects paragraph 245AA(c). Beyond the fact that more than one deficiency was identified, no other reason is given for the assertion that it was not anticipated that addressing the omission or error would lead to a grant of leave. No other concerns in respect of the Appellant's application were articulated such that *"the application will be refused for other reasons"*.
12. The Judge set out the terms of paragraph 245AA (paragraph 16). He then acknowledged that *"in cases in which documents are not submitted in the right format, this rule gives case workers the option of giving the applicant a further five days to produce documents in the correct format"* (paragraph 17). The Judge was

in error in specifying five days in circumstances where the rule refers to “7 working days”. I am not persuaded that this is a material error in circumstances where the Judge correctly set out the wording of the Rule itself in the preceding paragraph of his decision, and also makes reference to “7 days” (albeit not ‘7 working days’) in the following paragraph of the decision. I am inclined to the view that the reference to 5 days was a slip and did not affect the Judge’s overall reasoning.

13. At paragraph 17 the Judge identified that paragraph 245AA gave the Respondent a discretion to request the correct documents. The Judge did not determine that the discretion did not arise - in other words he implicitly accepted that at least one of the circumstances specified at 245AA(b)(i)-(iii) applied - and indeed in making reference to documents “*not submitted in the right format*” reflected the wording of 245AA(b)(ii). It was then stated “*the exercise of discretion may be reviewed by the Tribunal (section 86(3)(b) of the 2002 to Act)*”, but the Judge concluded that there was “*no basis to do so*”, which he explained at paragraph 18.
14. Paragraph 18 is concerned only with the letter of Mr Abbasi. I make the following observations.

(i) Although the Judge makes reference to the Respondent’s position that paragraph 245AA(c) applied because the application would be refused “*for different reasons*”, the Judge does not expressly identify what those different reasons might be. As already noted, beyond the deficiencies in the documents no other basis of refusal was advanced by the Respondent.

(ii) In so far as the bank letter potentially constituted a basis of refusal different from the deficiencies in the legal representative’s letter, the Judge did not expressly address the bank letter in the context of ‘evidential flexibility’, whether by reference to the Rules or policy.

(iii) The only deficiency identified in the bank letter had been the omission of confirmation that the bank was duly regulated. This is a matter which potentially might have been overlooked by the Respondent pursuant to 245AA(d) given the inclusion of the bank in Table 12 of Appendix P. Alternatively it might otherwise have itself been dealt with as the subject of a request to provide such a letter in the correct format pursuant to 245AA(b). Yet further in the alternative it might have been dealt with under version 2.0 of the Respondent’s ‘Guidance - PBS evidential flexibility’ policy valid from 20 May 2013, which expressly identifies “*missing information from the required letters or documents*” in a Tier 1 Entrepreneur type case to be a

circumstance where *“it maybe appropriate for the caseworker to [make a relevant] request”*.

(iv) The Judge determined that it was *“highly improbable”* that a substitute legal representative’s letter *“would be available within 7 days”* (paragraph 18). The Judge does not explain the basis of such a conclusion. Whilst the timetable may indeed be tight – although not as tight as 7 days because 7 working days if spread over two weekends may amount to 11 days in total, and otherwise in any event extend to 9 actual days – the Judge identifies no evidential basis for evaluating delivery time through commercial courier services, and was otherwise not in a position to evaluate how quickly the already drafted letter could be re-prepared with the few necessary corrections to make it compliant with the Rules. It is in any event to be noted that the ‘timetable’ does not appear to have informed the Respondent’s exercise of discretion or to have otherwise been advanced by the Respondent as a reason for declining to exercise the discretion under 245AA to request correct documents in the Appellant’s favour.

15. In my judgement in considering for himself the exercise of discretion under paragraph 245AA the Judge erred in failed to identify that the Respondent had not explained her own decision in respect of the exercise of discretion. It was merely asserted that a request for information was not anticipated to lead to a different result; but given that no other basis of refusing the application was identified such reasoning was unsustainable. It followed that that the Respondent had herself erred in considering the exercise of discretion and as such the Respondent’s decision was not in accordance with the law.
16. Further, in my judgement, the Judge erred in failing to explain by reference to any evidential basis his finding as to the improbability of the Appellant obtaining corrected documents within 7 working days. The Judge’s own consideration of the exercise of discretion pursuant to section 86(3)(b) was therefore erroneously premised.
17. In the circumstances I find that there was a material error of law and the decision of the First-tier Tribunal in respect of the Immigration Rules must be set aside in appeal IA/27724/2013. In such circumstances the decision in appeal IA/27725/2013 must also be set aside.

Re-making the Decisions in the Appeals

18. For the reasons already given above, I find that the Respondent’s decision to decline to exercise the discretion in paragraph 245AA was not in accordance with the law. (See in particular paragraph 15 above.)

19. In such circumstances both appeals are allowed. The applications of both Appellants remain outstanding and require to be considered by the Respondent in accordance with the law.

Notice of Decisions

20. The decisions of the First-tier Tribunal contained a material error of law, and are set aside.
21. I remake the decisions in the appeals. The Respondent's decisions were not in accordance with the law, and accordingly the appeals are allowed to the extent that matters are remitted to the Respondent to determine the applications of both Appellants in accordance with the law.
22. No anonymity orders are sought or made.

Deputy Judge of the Upper Tribunal I. A. Lewis 11 May 2015