



IAC-FH-CK-V1

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

Appeal Numbers: IA/41419/2014
IA/41097/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 1st September 2015**

**Decision & Reasons Promulgated
On 3rd September 2015**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

**MR AHMAD USMAN
MR UMER JAVED CHATTHA
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M Blundell, Counsel instructed by M & K Solicitors

For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

Background

1. This is the appeal against a decision of Judge of the First-tier Tribunal C Burns, who, on 24th February 2015, dismissed both appellants' appeals against decisions by the Secretary of State to refuse their Tier 1 (Entrepreneur) applications.

2. The first appellant was born on 5th July 1986 and is a national of Pakistan. The second appellant was born on 30th July 1978 and is also a national of Pakistan. On 02 August 2014 they made joint applications to extend their leave to remain in the United Kingdom pursuant to the Tier 1 (Entrepreneur) category of the points-based scheme. The refusal decisions, both of which are dated 29th September 2014, were based on the fact that the requirements of paragraph 41-SD of Appendix A to the Immigration Rules had not been met.
3. Paragraph 41-SD(c)(i) of Appendix A set out requirements that had to be present in a letter from the relevant financial institution holding funds that were to be used in the proposed business. Paragraph 41-SD(c)(i)(10) required the letter from the financial institution holding funds in the name of a third party to confirm that the third party had informed the institution of the amount of money it intended to make available, and to note that the institution was not aware of the third party having promised to make that money available to any other person. Paragraph 41-SD(c)(ii)(6) required that a letter from a legal representative had to clearly show that a declaration from the third party provider of funds was signed and valid.
4. It is not disputed that these requirements of the Immigration Rules were not met when the applications were submitted to the respondent. The appellants, however, maintain that, pursuant to paragraph 245AA of the Immigration Rules, the Secretary of State should have requested this missing information to be provided to them.
5. Paragraph 245AA(a) indicates that all specified documents must be provided and that the respondent will only consider documents submitted after the applications where they are submitted in accordance with subparagraph (b). Subparagraph (b) indicates that, if an applicant has submitted specified documents which, *inter alia*, do not contain all of the specified information, the respondent may contact the applicant or his representative in writing, and request the correct documents. Subparagraph (c) indicates that documents will not be requested where a specified document has not been submitted or where the respondent does not anticipate that addressing the omission or error referred to in subparagraph (b) would lead to a grant because the application will be refused for other reasons.

The decision of the First-tier Tribunal

6. The First-tier Tribunal Judge dismissed the appeals on the basis that there was no obligation on the Secretary of State to request the missing information under paragraph 245AA. The Judge emphasised the discretionary nature of the paragraph. The Judge noted that the respondent did not exercise her discretion and that the respondent was not obliged to do so. The Judge concluded that it was appropriate for the respondent to award no points under Appendix A.

Discussion

7. The only basis identified by the respondent for refusing the applications related to missing information in two specified documents. The respondent did not identify any other reason for rejecting the applications. In these circumstances the appellants both fell within the terms of paragraph 245AA(b) as individuals who could potentially have benefited from an exercise of discretion in their favour.
8. In relation to Mr Chattha's decision, his refusal letter makes no reference to paragraph 245AA at all. This is concerning because it strongly suggests that the Secretary of State has not directed her mind to the possibility of exercising her discretion. There is simply no indication that the respondent was aware that she had a discretion in relation to the missing information. In circumstances where this appellant fell within the terms of paragraph 245AA the failure of the respondent to consider whether to exercise her discretion renders the decision unlawful on the basis that she failed to take account of a relevant consideration; alternatively, that she fettered her discretion. The Judge's failure to engage with this very apparent unlawfulness constitutes a material error of law.
9. In relation to the appeal of Mr Usman, the respondent's decision does make reference to the discretion under paragraph 245AA. The refusal letter reads:

"In making the decision to refuse your application we have considered paragraph 245AA which explains the actions that we may take if specified documents are not submitted with an application."
10. I first note that all specified documents were submitted with the applications. The discretion within paragraph 245AA will not be exercised if there are missing documents, unless the omitted documents form part of a sequence. The reference to paragraph 245AA in the refusal letter is therefore materially inaccurate. Moreover, the issue before the respondent and the Judge was not about missing documents but about missing information from documents that were provided.
11. Mr Clarke argued that, having regard to the wording and structure of paragraph 245AA, the respondent was under no duty to give reasons for her refusal to exercise her discretion. He submitted that the discretion contained within paragraph 245AA was very wide and noted the absence of any authority indicating that reasons had to be given for the refusal of the respondent to exercise her discretion.
12. I do not accept these submissions. I note firstly that the respondent, through the almost universal use of the Reasons For Refusal Letters, is used to giving detailed reasons for immigration decisions. I cannot see in principle any reason why the giving of reasons in respect of immigration applications should not include the giving of reasons for the exercise or withholding of the exercise of discretion conferred by the immigration rules. I next note that there is nothing in the wording of paragraph 245AA expressly or implicitly preventing the respondent from giving reasons. The giving of reasons for the failure to exercise a discretion, in the particular

context of paragraph 245AA, would entail no onerous duty on the respondent. Moreover, as Mr Clarke noted, the respondent's discretion contained within paragraph 245AA is of a relatively wide nature. There is therefore all the more reason for the respondent to explain why she chose not to exercise her discretion. A duty to give reasons ensures that the appellants know that the discretion has been lawfully exercised, one way or another. I finally note that the manner in which the respondent exercises her discretion ought to be conducted in a rational and fair manner. In circumstances where the appellants meet the requirements for the exercise of discretion, the respondent is under a duty to explain why she chooses not to exercise that discretion in their favour.

13. It is not clear to anyone reading her decision why the Secretary of State decided not to exercise her discretion in Mr Usman's favour. I regard this as a public law failure by the Secretary of State to give adequate reasons rendering her decision unlawful. The Judge's failure to engage with this unlawfulness constitutes a material error of law.
14. I allow the appeals to the extent that they are remitted back to the Secretary of State for lawful decisions to be made in relation to both applications.

Notice of Decision

The appeals are both allowed and the appellants' applications remain outstanding until lawful decisions are made by the respondent.

No anonymity direction is made.



Signed

02 September 2015
Date

Upper Tribunal Judge Blum

TO THE RESPONDENT **FEE AWARD**

As I have allowed these appeals and because fees have been paid or are payable, I have considered making fee awards and have decided to make whole fee awards because the respondent acted unlawfully by failing to consider exercising her discretion in relation to Mr Chattha and by failing to give any reasons for the refusal to exercise her discretion in relation to Mr Usman.



Signed

02 September 2015

Date

Upper Tribunal Judge Blum