



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/51194/2013  
IA/51199/2013  
IA/51202/2013  
IA/51201/2013

**THE IMMIGRATION ACTS**

Heard at Centre City Tower, Birmingham  
On 6<sup>th</sup> October 2015

Decision & Reasons Promulgated  
On 16<sup>th</sup> October 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMMED ASAD ULLAH KHAN (FIRST CLAIMANT)  
SYEDA NIKHATH ARA (SECOND CLAIMANT)  
MOHAMMAD SAIFULLAH KHAN (THIRD CLAIMANT)  
AMENA RAHMATH KHANAM (FOURTH CLAIMANT)  
(ANONYMITY ORDER NOT MADE)

Respondents

**Representation:**

For the Appellant: Mr N Smart, Senior Home Office Presenting Officer  
For the Respondents: Mr I Ali of Counsel instructed by DV Solicitors

**DECISION AND REASONS**

**Introduction and Background**

1. The Secretary of State has appealed against a decision of Judge of the First-tier Tribunal Raikes (the judge) promulgated on 23<sup>rd</sup> 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 and second claimants are married and are the parents of the third and fourth claimants born 12<sup>th</sup> October 2000 and 29<sup>th</sup> March 2003 respectively. The first claimant entered the United Kingdom on 21<sup>st</sup> July 2007 with leave as a student. He was subsequently joined by his family members. His leave as a student was extended until 22<sup>nd</sup> August 2011, and thereafter he was granted leave as a Tier 1 (Post-Study) worker valid until 19<sup>th</sup> September 2013. The second, third and fourth claimants were granted limited leave to remain as dependants of the first claimant.
4. On 18<sup>th</sup> September 2013 the first claimant applied for leave to remain as a Tier 1 (Entrepreneur) Migrant under the Points-Based System, and again the other claimants applied for leave to remain as his dependants.
5. The first claimant's application was refused on 8<sup>th</sup> October 2013 with reference to paragraph 245DD(b) which requires the first claimant to be awarded 75 points under paragraphs 35 to 53 of Appendix A. The Secretary of State awarded no points because the first claimant needed to show that he had access to not less than £50,000, and provide the specified documents to prove this.
6. The specified documents are set out in paragraph 41-SD(a)(ii) of Appendix A, and the first claimant had not submitted the specified evidence to prove that the £50,000 was in an account in his own name. The applications of the dependants were refused because the first claimant's application had been refused.
7. The appeals were heard together by the judge on 8<sup>th</sup> July 2014, and the judge accepted that prior to the application the first claimant had £50,000 in his personal account, but before making his application for leave to remain, acting on advice from his accountant, he transferred the funds into a business account. Notwithstanding this the judge proceeded to allow the appeal under the Immigration Rules, commenting that having regard to the Secretary of State's policy of flexibility, the discretion afforded by the rules should have been exercised differently.
8. The Secretary of State applied for permission to appeal to the Upper Tribunal, noting that the judge accepted that the first claimant did not have the required funds in a personal account in his name, and contending that the judge was wrong to thereafter make reference to evidential flexibility and allow the appeal under the Immigration Rules.
9. It was contended that this was an unlawful approach and the judge had misapplied paragraph 245AA of the Immigration Rules, which relates to documents not submitted with applications, and it was submitted that the judge was wrong to find that the Secretary of State erred by not contacting the first claimant for further information or clarification when it was clear at the time of the application, that the first claimant had made a mistake in transferring funds from his personal account to

a business account. The Secretary of State argued that this was not a case where paragraph 245AA should have been applied by the judge.

10. The Secretary of State was granted permission to appeal by Designated Judge of the First-tier Tribunal Shaerf.

### **Error of Law**

11. The appeal came before me on 3<sup>rd</sup> July 2015 and after hearing submissions from both parties in relation to error of law, I concluded that the judge's decision must be set aside. I set out below paragraphs 21-30 of my decision dated 10<sup>th</sup> July 2015, giving my reasons for setting aside the decision of the First-tier Tribunal;
  21. The decision of the First-tier Tribunal is, in my view, not clear. This is demonstrated by the fact that Mr Ali argues that the appeal was allowed under paragraph 245DD, while Mr Smart argues that the appeal must have been allowed with reference to paragraph 245AA and evidential flexibility.
  22. I note that the judge refers to paragraph 245AA in paragraph 21 but in my view this is a typographical error as she records that "the refusal was made under the provisions of paragraph 245AA with reference to paragraph 41 and Table 4 of Appendix A." The refusal was in fact made under paragraph 245DD. The judge goes on in that paragraph to correctly remind herself that there is no discretion to be exercised, and if the first claimant does not meet the requirements for leave to remain contained in paragraph 245DD the application will be refused.
  23. In paragraph 22 the judge makes reference to the first claimant and Sponsor giving evidence, but it is clear that she must be referring only to the first claimant, and found that "he did have access to funds as required under paragraph 245DD(b) with reference to Appendix A of the rules." This conflicts with the concluding sentence of the paragraph in which the judge finds that the first claimant made a mistake, which must refer to the transfer of funds, and he was not contacted to establish clarification of his position.
  24. In paragraph 23 the judge again records that the first claimant made a genuine mistake, by transferring funds from his current account to his business account prior to the application for leave to remain.
  25. In paragraph 24 the judge finds that had the first claimant not erred and not transferred the funds from his personal to his business account, he would have been found to have access to the requisite funds.
  26. It does therefore appear to be the case that the judge found that the first claimant did not have the sum of £50,000 in his personal account when he made the application.
  27. The law as it stood when the application was made, is helpfully set out in Mr Ali's skeleton argument. It is common ground that the first claimant must demonstrate that he has access to not less than £50,000. He must then provide the specified documents to prove this, and these documents are set out in paragraph 41-SD(a)(ii). One of the requirements at (4) is that;

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;

The judge found that the first claimant did not have £50,000 in an account in his own name only, but the money was in an account held in the name of the first claimant's business and therefore the requirements of paragraph 41-SD(a)(ii)(4) were not satisfied. If the judge allowed the appeal under paragraph 245DD this was a material error in law.

28. If the judge allowed the appeal with reference to paragraph 245AA then this is also an error of law as she failed to explain how paragraph 245AA applied to this application.
29. Therefore the decision of the First-tier Tribunal must be set aside. The findings that the first claimant had the sum of £50,000 in a personal account, which he subsequently transferred to a business account, were not challenged by the Secretary of State and are therefore preserved.
30. When I indicated I was reserving my decision on error of law I canvassed the views of the representatives as to whether there would be a need for a further hearing. Mr Ali indicated that the issue of common law fairness had been raised at the hearing before the First-tier Tribunal, and if the decision was set aside, he would wish to be given the opportunity to make further submissions on that point. Mr Ali acknowledged that Article 8 was not pursued before the First-tier Tribunal, and he would not be seeking to pursue Article 8 before the Upper Tribunal.

## **Re-making the Decision**

### **Preliminary Issues**

12. I received from Mr Ali, prior to the hearing, his skeleton argument dated 2<sup>nd</sup> October 2015. Mr Smart confirmed that he had received a copy.
13. I received from Mr Smart at the commencement of the hearing EK (Ivory Coast) [2014] EWCA Civ 1517, R on the application of Baljeet Kaur [2013] EWHC 1538 (Admin), and Alam and Others [2012] EWCA Civ 960.
14. Mr Ali confirmed it was accepted that the appeal could not succeed under the Immigration Rules or Article 8 of the 1950 ECHR. The only issue to be decided related to the issue of common law fairness. If I found that the Secretary of State had not acted fairly, then I was invited to find that the decision was not in accordance with the law, and would remain outstanding before the Secretary of State.
15. Both representatives indicated that they were ready to proceed and there was no application for an adjournment. Mr Ali confirmed that no further evidence would be called.

### **The Secretary of State's Submissions**

16. Mr Smart submitted that the appeal should be dismissed and noted Mr Ali's reliance upon Thakur Bangladesh [2011] UKUT 00151 (IAC) in his skeleton argument. Mr Smart submitted that the issue considered in Thakur was an issue that was not known to the Appellant but was within the knowledge of the Secretary of State. That

was not the position in this appeal. I was asked to accept that the Secretary of State had acted fairly, by applying the law and policies in place at the date of application.

17. Mr Smart submitted that the issue in this appeal was the same issue as raised in Ground 4 which is set out in paragraph 24 of Alam and which is set out below;

The common law duty of fairness imposed an obligation on the Secretary of State to contact an applicant in the position of Mr Alam when specified documents were missing from his application, and to give him an opportunity to rectify the omission, before reaching a decision on his application.

18. Mr Smart contended that this ground was dismissed by the Court of Appeal in paragraphs 43-45 of Alam.
19. In addition, Mr Smart relied upon paragraphs 40, 56-59 of EK (Ivory Coast) and paragraphs 21, 23, 24, 31, 34 and 42 of Baljeet Kaur. I was asked to conclude that the case law referred to, proved that the Secretary of State was under no duty to contact the first claimant in this case, to give him an opportunity to rectify the defect in his application.

### **The Claimants' Submissions**

20. Mr Ali relied upon his skeleton argument. It was accepted that at the time of application the required funds were not in the first claimant's personal account, but it was clear that he had made a genuine mistake in transferring the funds into his business account, and bank statements for both accounts were submitted. The money in the business account had not been used. When the first claimant realised his mistake, after his application was refused, the money was transferred back into his personal account.
21. It was argued that in material or practical terms there was no difference as to whether the funds were held in the first claimant's personal or business account, because he had access to the funds in both accounts, and he was the sole director and shareholder of his business. It was submitted that the Secretary of State should have exercised her residual discretion and accepted that the first claimant had demonstrated possession of the relevant funds, albeit held in a business account, or alternatively should have contacted the first claimant to clarify the position, and/or allow him the opportunity to rectify the mistake by transferring the funds back into his personal account before his application was decided. I was therefore asked to find that the Secretary of State had not acted fairly, and on that basis the decision was not in accordance with law.
22. At the conclusion of oral submissions I reserved my decision.

### **My Conclusions and Reasons**

23. It is accepted on behalf of the claimants, and I find as a fact, that the appeals cannot succeed under the Immigration Rules. The appeals of the second, third and fourth

claimants depend upon that of the first claimant, and his appeal cannot succeed under the Immigration Rules because the Secretary of State was correct not to award him 75 points under paragraph 245DD(b) of the Immigration Rules. This is because he did not have £50,000 in an account in his own name.

24. It was confirmed by Mr Ali that no reliance was placed upon paragraph 245AA of the Immigration Rules, which relates to documentation not submitted with an application, and no reliance was placed upon paragraphs A-F of Appendix FM-SE, which contains similar provisions to paragraph 245AA. It was also confirmed that no reliance was placed upon paragraph 276ADE of the Immigration Rules in relation to private life, nor on Article 8 outside the rules.
25. The issue to be decided is that of common law fairness. The issue is whether the Secretary of State should either have accepted the first claimant did have access to £50,000 albeit not in an account in his name, or should have contacted him to let him amend his application by arranging for £50,000 to be placed in an account in his name, rather than in a business account.
26. I find paragraph 9 of Alam to be relevant and set it out below;
  9. Part 6A of the Immigration Rules contains the PBS, which was introduced in November 2008. The PBS is based upon an approach that decisions on entitlement to enter and remain in the UK should be taken by reference to objectively verifiable criteria. Points are allocated to the relevant criteria, e.g. "Attributes", and "Maintenance (Funds)", and whether the application is granted or refused is determined by the overall points score. The PBS is very detailed and highly prescriptive. An important feature of the PBS is that it specifies the evidence that must be produced with the application in order to demonstrate that the criteria are met.
27. I find that the issue in this appeal is similar to Ground 4 which is set out in paragraph 24 of Alam and the Court of Appeal dealt with that ground in paragraph 45 which I set out below;

In these three appeals there was no change of position after the applications were submitted, the Appellants were simply at fault in not supplying the specified documents with their applications. I endorse the view expressed by the Upper Tribunal in Shahzad (paragraph 49) that there is no unfairness in the requirement in the PBS that an applicant must submit with his application all of the evidence necessary to demonstrate compliance with the rule under which he seeks leave. The Immigration Rules, the Policy Guidance and the prescribed application form all make it clear that the prescribed documents must be submitted with the application, and if they are not the application will be rejected. The price of securing consistency and predictability is a lack of flexibility that may well result in "hard" decisions in individual cases, but that is not a justification for imposing an obligation on the Secretary of State to conduct a preliminary check of all applications to see whether they are accompanied by all of the specified documents, to contact applicants where this is not the case, and to give them an opportunity to supply the missing documents. Imposing such an obligation would not only have significant resource implications, it

would also extend the time taken by the decision making process, contrary to the policy underlying the introduction of the PBS.

28. In my view the decision in Alam does not assist the first claimant's case. it is clear that the application could not satisfy the requirements of the Immigration Rules, the responsibility for ensuring that the application met the rules was the first claimant's responsibility, not that of the Secretary of State.
29. I do not find that the Secretary of State was under a duty to check that the application was in order, and thereafter to point out defects in the application to the first claimant, and give him an opportunity to amend the application. Because of that, I do not find that the Secretary of State acted unfairly or breached the common law duty of fairness.
30. The appeals of the claimants must be dismissed.

### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside. I substitute a fresh decision.

The appeals of the claimants are dismissed.

### **Anonymity**

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

Signed

Date 9<sup>th</sup> October 2015

Deputy Upper Tribunal Judge M A Hall

### **TO THE RESPONDENT FEE AWARD**

The Claimants' appeals are dismissed. There is no fee award.

Signed

Date 9<sup>th</sup> October 2015

Deputy Upper Tribunal Judge M A Hall