



IAC-FH-CK-V1

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

Appeal Numbers: IA/02541/2014  
IA/02546/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 7<sup>th</sup> January 2016**

**Decision & Reasons Promulgated  
On 26<sup>th</sup> January 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GRIMES**

**Between**

**MRS MARYAM KALEEM  
MR SHAHID HASSAN  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr Z Nasim, Counsel instructed by Lee Valley Solicitors

For the Respondent: Ms E Savage, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellants, citizens of Pakistan, appealed to the First-tier Tribunal against the decisions of the Secretary of State dated 18<sup>th</sup> December 2013 to refuse their applications for leave to remain in the UK, the first Appellant under the Tier 1 (Entrepreneur) scheme and the second Appellant as her dependant. Judge of the First-tier Tribunal Pears dismissed the appeal and the Appellant now appeals with permission to this Tribunal.

2. In the Grounds of Appeal to this Tribunal the Appellant contends that the First-tier Tribunal Judge erred in law in failing to decide that the decision of the Respondent is not in accordance with the law. It is contended that the first Appellant was invited by the Respondent to attend an interview to determine whether she was a genuine entrepreneur and, following the interview, her application was refused by the Respondent without granting her any opportunity to address the concerns raised by the Respondent following the interview. It is contended that the first time the Appellant was aware of these concerns was when she received the Reasons for Refusal letter.
3. Although the grounds go on to elaborate the contention that the Respondent failed to exercise discretion pursuant to paragraph 245DD(j) and relies on an unreported case to similar effect the appeal was put in the general terms set out in the first paragraph of the Grounds of Appeal. Permission to appeal was granted on the basis that it is arguable that the Tribunal erred in law in that the First-tier Tribunal Judge may have misdirected himself in relation to paragraph 245DD(j) of the Immigration Rules (as applicable at the time of the decision).
4. At the hearing before me Mr Nasim expanded upon that ground by highlighting the background to the case and submitted that in this case paragraph 245DD(j) and the principle of fairness required that the issues raised by the Respondent in the reasons for refusal letter should have been put to the Appellant to give her an opportunity to respond prior to the decision being made.
5. The Appellant applied for leave to remain as a Tier 1 (Entrepreneur) on 20<sup>th</sup> November 2012. Mr Nasim submitted that at that time the genuineness requirement currently in the Immigration Rules was not in existence. Those provisions came into force in January 2013. He accepted that this part of the Rules was retrospective. This submission was not disputed by Ms Savage.
6. The Appellant was invited for interview and attended interview in June 2013. A summary of the interview is contained in the Respondent's bundle. The refusal was then issued in December 2013. It was not disputed and I accept that the reasons for refusal letter did not take any issue with the mandatory documents required under the Rules but issue was taken in the reasons for refusal letter around the genuineness assessment set out in paragraph 245DD(h) of the Immigration Rules. The reasons for refusal letter highlights that the Respondent was not satisfied that the Appellant genuinely intends to invest the money she has in the business or businesses.
7. Mr Nasim went through the reasons for refusal letter and highlighted the issues upon which the Respondent made the decision. For example, at page 3 of the reasons for refusal letter the Respondent said that, as the Appellant had not submitted a business plan, the Respondent was unable to assess what the Appellant was hoping her company would achieve over

the coming period. Also it was indicated that the Appellant had not provided any evidence of the lease and the Respondent was unable to assess whether the landlord permitted the Appellant to run the business from her home. It was further noted at page 4 of the reasons for refusal letter that the Appellant had not provided a transcript of her qualification and the modules she studied could not be assessed.

8. The reasons for refusal letter also points out that the Appellant has not registered her business with HMRC which it states is a mandatory requirement and that she had not provided evidence that she is covered by public liability insurance or public indemnity insurance and as none of these had been provided the viability and credibility of her business was being questioned (page 5 of the reasons for refusal letter). The Respondent concluded:

“Based on the above consideration the Secretary of State is therefore refusing your application because you have not satisfactorily demonstrated that you are a genuine entrepreneur, as set out at paragraph 245DD(h) and when assessing, on the balance of probabilities, the points listed at paragraph 245DD(i) of the Immigration Rules.”

9. Mr Nasim submitted that the matters referred to in the Reasons for Refusal letter as set out above were not required documents under the Immigration Rules and noted that the application form did not refer to these additional documents or require the submission of these documents. He referred to various parts of the application form which indicated that these documents were not being asked for and were not required. For example, the HMRC registration was not a mandatory requirement on the application form. He also referred to G18, G20, G22 and G23 of the application form and said that the application form did not ask for more documents than those submitted by the Appellant. Ms Savage did not dispute these submissions.
10. Mr Nasim referred to paragraph 245DD(j) of the Immigration Rules which gives the Secretary of State power to request further documents and to refuse an application if those documents are not provided. He submitted that this relates to paragraph 245DD(h) which sets out the genuineness requirements. He therefore submitted that the power at paragraph 245DD(j) relates specifically to the genuineness requirement. He submitted that the Appellant was interviewed and asked a number of questions but nowhere in this interview was she asked about the specific documents later referred to in the reasons for refusal letter. Ms Savage was unable to point to any question asking for documents later referred to in the Reasons for Refusal letter apart from question 10 where the Appellant was asked if she had brought any documents with her that she wished the interviewer to see.
11. Mr Nasim submitted that the exercise of the power at paragraph 245DD(j) depends on the facts of the case. He submitted that in this case the

Secretary of State was required to ask the Appellant for the documents because these were documents required under paragraph 245DD(h) which only came into force in January 2013. He submitted that an issue of unfairness arises as the Appellant did not have an opportunity to address concerns. He relied on the cases of **Naved (Student - fairness - notice of points) [2012] UKUT 00014 (IAC)** where the Tribunal's conclusion was summarised in the head note as follows;

“Fairness requires the Secretary of State to give an applicant an opportunity to address grounds for refusal, of which he did not know and could not have known, failing which the resulting decision may be set aside on appeal as contrary to law (without contravening the provisions of s. 85A of the Nationality, Asylum and Immigration Act 2002).”

12. Ms Savage remained of the position that no unfairness resulted to the Appellant and the decision was in accordance with the law. She submitted that paragraph 245AA is drafted in different terms from 245DD(j). Mr Nasim pointed out that 245AA relates to the evidential flexibility in relation to the points-based system and addresses concerns in relation to the substantive requirements of the Rules and it is not relevant here where paragraph 245DD(j) specifically refers to the requirements in 245DD(h) which go to the genuineness of a Tier 1 (Entrepreneur) application.
13. I have considered all of the submissions put forward by the parties and I am satisfied that in the very particular circumstances of this case the Appellant was not informed at the interview of the additional documents that would be required in order to meet the genuineness requirements of the Rules. As a result the first time the Appellant would have been aware of the additional documents the Respondent expected to see was in the reasons for refusal letter of 18<sup>th</sup> December 2013. In these circumstances in considering the general common law principles of fairness along with paragraph 245DD (j) of the Immigration Rules the Appellant ought to have been given an opportunity to provide these documents. This is particularly the case because in light of Section 85A of the Nationality, Immigration and Asylum Act 2002 the Appellant was precluded from producing any further documents at an appeal hearing.
14. Whilst I accept that this argument was not put in these terms to First-tier Tribunal Judge Pears I note that First-tier Tribunal Judge Pears was directed to paragraph 245DD(j) of the Rules and the judge did note at paragraph 21 that it was submitted that the Appellant had not been asked by the Respondent to provide documents which were now the source of objections.
15. In these circumstances I conclude that the judge erred in not giving proper consideration to the issue of fairness and paragraph 245DD(j). I accept that the judge was right in concluding that it does not require the Secretary of State to exercise her discretion when it is a right reserved to the Secretary of State [27]. However, it is a right to reserve to the Secretary of State which is applicable and exercisable in certain circumstances. I am satisfied on the basis of the evidence before me that

unfairness arose in this case because of the very particular circumstances in terms of the timing of the application and the basis of the subsequent refusal being reliant upon documents that were not asked for and that the Appellant could not have known would be required.

16. In these circumstances I am satisfied that the decision of the First-tier Tribunal should be set aside. I remake the decision by finding that the decision of the Respondent is not in accordance with the law and the decision in this application remains outstanding before the Secretary of State.

### **Notice of Decision**

The decision of the First-tier Tribunal contained a material error of law and I set it aside. I remake the decision by allowing the appeal to the extent that the application remains outstanding before the Secretary of State.

No anonymity direction is made.

Signed

Date: 22<sup>nd</sup> January 2016

Deputy Upper Tribunal Judge Grimes

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

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable because the Appellant was not given an opportunity to submit all documents required.

Signed

Date: 22<sup>nd</sup> January 2016

Deputy Upper Tribunal Judge Grimes