



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

Appeal Numbers: IA/24270/2015  
IA/24271/2015  
IA/24272/2015

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 22<sup>nd</sup> June 2017**

**Decision & Reasons  
Promulgated  
On 25<sup>th</sup> July 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY**

**Between**

**MOLLAH MD HAMIM YASIN (FIRST APPELLANT)  
TAMANNA KHANDAKAR (SECOND APPELLANT)  
ABUL KALAM AZAD (THIRD APPELLANT)  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

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

Respondent

**Representation:**

For the Appellants Mr Karim, Counsel for Shahid Rahman Solicitors, London  
For the Respondent: Mr Whitwell, Home Office Presenting Officer

**DECISION AND REASONS**

- 1.** The Appellants are citizens of Bangladesh born on 15<sup>th</sup> February 1983, 24<sup>th</sup> April 1982 and 4<sup>th</sup> July 1985 respectively. The second and third Appellants are husband and wife and the third Appellant's appeal depends on the result of the second Appellant's appeal.
- 2.** The appellants appealed against the decision of the Respondent dated 16<sup>th</sup> June 2015 refusing the combined application of the first two Appellants for leave to remain in the United Kingdom as Tier 1 (Entrepreneur) Migrants. Their appeals were heard by Judge of the First-tier Tribunal Callender Smith on 16<sup>th</sup> September 2016. The appeal was dismissed under the

Immigration Rules and on human rights grounds in a decision promulgated on 13<sup>th</sup> March 2017.

- 3.** An application for permission to appeal was lodged and permission was granted by Upper Tribunal Judge Jordan on 11<sup>th</sup> May 2017. Judge Jordan had previously refused permission but has set aside this decision, which he made on 21<sup>st</sup> April 2017. As the appeal hearing was carried out in the absence of the Appellants through illness, this would normally result in an adjournment, without requiring the merits of the claim to be established. The Appellants did not appear for the hearing of the appeal, and there is now evidence that they were at the Accident & Emergency Department of their local hospital on the date of the hearing due to illness. This evidence was not before the judge when he refused the adjournment. Judge Jordan grants permission on all grounds. At number 3 of the permission he states that the absence of a party is a ground for setting aside.
- 4.** The grounds are that the judge materially erred in refusing the adjournment. The medical issues arose on the morning of the hearing and at paragraph 23 the judge states that witness statements were before him and these would be considered. The grounds state that the oral evidence was critical. The grounds go on to state that the judge's decision not to adjourn was unfair in the circumstances. An application under Rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 inviting the Upper Tribunal to set aside the decision on the grounds of the interests of justice was made. The medical evidence was not available at the date of the First-tier appeal hearing as the Appellants had only that morning attended the hospital. The grounds state that there does not have to be any fault attributable to the First-tier Judge for there to be an error of law and in this case, because some material evidence, (being a medical letter) was not considered, this resulted in unfairness. In the decision the First-tier Judge states that postdecision material cannot be considered in support of an appeal of this type so the only method for any issues arising can only be addressed by oral evidence. Even a credibility issue denotes the necessity of the Appellants' oral evidence. The grounds go on to list the key factors that require to be considered for a just decision and I have taken these into account. The relevant medical evidence is now available.
- 5.** On 20<sup>th</sup> June 2017 the Appellants' representative submitted an additional bundle of documents including an application under Rule 15(2) which sets out the second Appellant's wishes to be granted indefinite leave to remain in the United Kingdom under the ten years' long residence category as per paragraph 276B of the Immigration Rules. The third Appellant relies on his additional grounds for leave as the spouse of a person present and settled in the United Kingdom as enumerated in Appendix FM of the Immigration Rules. The actual Statements of Additional Grounds were submitted on 13<sup>th</sup> June 2017 for this hearing, scheduled to take place, today, 22<sup>nd</sup> June 2017.

## **The Hearing**

6. Counsel for the Appellants submitted that if I find there to be a material error of law in the decision the claims should be remitted back to the Respondent. The Presenting Officer agreed to that but only if a material error of law is found.
7. Counsel submitted that the primary focus is that the adjournment request was refused. The judge was told that the Appellants were unable to attend as they were ill and Upper Tribunal Judge Jordan has now seen medical evidence and confirms that two of the Appellants were at Accident & Emergency at their local hospital on the date of the hearing. He submitted that Judge Jordan states that the absence of a party at a hearing is a reason for setting aside the decision. I was referred to the case of **MM [2014] UKUT 00105 (IAC)** head note 2. This states that an Appellant need not show the First-tier Tribunal is at fault for there to be a legal error. He submitted that the judge did not have the medical evidence but the Tribunal now has this and as the Appellants were unable to attend the hearing, the decision should be set aside as their attendance was important. He submitted that the Appellants' evidence has not been tested and the judge therefore was unable to give it proper weight. He submitted that an Appellant has a right to be at his hearing and has a right to be examined. He submitted that even if he is not cross-examined and no oral evidence is sought the Appellant could have given his representative instructions based on something which arises at the hearing and therefore the First-tier Tribunal Judge's decision should be set aside.
8. Counsel submitted that if I find that there is a material error of law in the decision he will make further submissions.
9. The Presenting Officer submitted that he is relying on the Rule 24 response. At paragraph 4 of the response it is stated that the Appellants had provided witness statements and the First-tier Judge found that they did not adequately explain the discrepancies in their evidence at interview nor the paucity of their market research or advertising so it is difficult to see in this appeal how their oral evidence could have made a material difference to the outcome. I was referred to the case of **Ahmed [2014] UKUT 365**. The Presenting Officer submitted that this entrepreneur application was on the points-based system and at paragraphs 10 and 11 of the First-tier Judge's decision the judge makes it clear that he has read all the information which was before the Respondent at the time of the original refusal and has read all the material in the Appellants' bundle. At paragraph 23 the judge refers to the witness statements which the Appellants had intended to adopt and has considered them properly. The Presenting Officer then referred to paragraphs 24 to 27 of the decision in which the judge states that he declined to adjourn the proceedings because he was not satisfied with the substance of what before him and

does not believe that the Appellants could have added anything to their witness statements and that what the court has to consider is the information available at the time the decision was made with any additional information that could have been submitted at that time and he was being referred to postdecision evidence. He states that he did not consider the postdecision comments or material.

- 10.** At paragraph 32 the judge states that there is a significant and serious discrepancy in the key figures quoted by the first 2 Appellants in interview, in respect of what the other said and no reason has been given for that discrepancy.
- 11.** The Presenting Officer submitted that perhaps if this had not been a PBS case oral evidence might have been material but based on the evidence before the judge it is not clear that if the Appellants had been cross-examined there would have been a different decision. He submitted that the parties were on the telephone to Counsel and gave instructions so there was communication and the fact that the case was not adjourned and the Appellants were not at the hearing was not material as their evidence would have made little or no difference to the discrepancies referred to in the judge's decision based on the evidence before him.
- 12.** At paragraph 24 the judge deals with the interests of justice and the Presenting Officer submitted that his decision to refuse the adjournment was fair. He also submitted that based on the Grounds of Appeal no material error has been addressed.
- 13.** Counsel submitted that a Rule 43 application is very rare and Judge Jordan, after seeing the medical evidence, set aside his previous refusal of permission and granted permission so that justice was seen to be done. He submitted that it is not clear whether a difference would have been made if the Appellants had attended the hearing but it might have made a difference. He submitted that at any future hearing the Respondent can cross-examine the Appellants and if they are still found not to be credible the original decision can be cemented.
- 14.** He submitted that Counsel did not represent the Appellants at the hearing but they had a legal representative and he submitted that the Appellants should have been in attendance so that the judge could assess their evidence and they had a right to be present.
- 15.** I was referred to paragraph 24 of the decision in which the judge deals with declining to adjourn the proceedings. Two of the reasons were that there was difficulty relisting matters in the foreseeable future and also the cost to the judicial process in adjourning cases out at the last moment is prohibitive and should not be done unless absolutely necessary. He submitted that the Appellants were entitled to the benefit of the doubt.

16. Counsel submitted that in this case the judge was not culpable but there is a material error of law in the decision as the appeal should have been adjourned.
17. He then referred to his Section 120 application and submitted that the Secretary of State requires to assess the Appellants' long residence in the United Kingdom. He submitted that with regard to the first Appellant he should be entitled to a de novo hearing at a future date.
18. The Presenting Officer referred me to the standard directions relating to this case. At number 6 a timetable is set out. He submitted that the Appellants' representative's letter of 20<sup>th</sup> June was not lodged on time. I was referred to the Immigration Rules –“Part 1 Leave to Enter or Stay in the United Kingdom” which has been produced by the Respondent at 34(1)(a) and (b) about how to make a valid application for leave to remain in the United Kingdom. This states that where the applicant is required to pay a fee the fee must be paid in full in accordance with the process set out in the application form. He submitted that that has not been done. Also the application must be made on an application form which is specific for the immigration category under which the applicant is applying on the date on which the application is made. I was referred to Section 4, “Apply to settle in the United Kingdom on long residence” and the Presenting Officer submitted that no application has been made under Rule 34.
19. The Presenting Officer also referred to paragraph 276B of the Rules and the fact that public interest requires to be taken into account. The Respondent has to form a view on this and that has not been done. Criminal record checks have to be done and he submitted that the Appellants can apply based on long residence now. He submitted that based on the public interest it should not be added on to the present appeal, which cannot succeed based on the PBS Rules and that is the basis on which this application has been made. He submitted that if I do find that there is an error of law then it will require to go back to the First-tier Tribunal based on the Rules relating to an entrepreneur application and on that basis it will have to be reheard.
20. Counsel submitted that with regard to Rule 15 of the Procedure Rules an application can be made under Section 120. He submitted that there is no time limit and the Appellants could not have submitted this application until now as their ten year period of residence started on 19<sup>th</sup> June 2017. He submitted that the statutory provision must trump the Procedure Rules.
21. I was referred to Section 96 of the 2002 Act. Because of the terms of the Rules the Tribunal has to be the primary decision maker.
22. I was referred to the case of **Patel** and Counsel submitted that this claim should be remitted to the Respondent relating to the application based on ten years' long residence and at that point the Respondent can ask for fees, etc., but he submitted that the claim can be decided by me today.

- 23.** He submitted that there is nothing to show that it would be against public interest to allow these Appellants to remain in the United Kingdom so the claim must be allowed based on their long residency and in my decision the additional fee can be requested and no-one will be prejudiced.
- 24.** He submitted that based on the said case of **Patel** and the case of **AS (Afghanistan)** the Tribunal is compelled to make a decision and I was asked to find that there was a material error of law in the First-tier decision and that the Appellants' claim should be allowed based on ten years' long residency.

## **Decision and Reasons**

- 25.** I have carefully considered the terms of the First-tier Tribunal Judge's decision relating to the first two Appellants' appeals for leave to remain in the United Kingdom as Tier 1 (Entrepreneur) Migrants. I have noted the permission by Upper Tribunal Judge Jordan dated 11<sup>th</sup> May 2017. He states that the absence of a party is a ground for setting aside a decision. Having taken note of all the evidence in this claim, and taken note of the judge's decision and the fact that the terms of the PBS application cannot be satisfied for reasons carefully set out in the First-tier Judge's decision, I believe that if the Appellants had attended the court hearing the judge's decision would have been the same, as no matter what their oral evidence was, the decision would have been the same, as the terms of the PBS application could not be satisfied. The judge refers in particular to the discrepancy in the first and second Appellants' answers to questions about projections and turnover, gross profit and net profit. The discrepancies are significant. The judge makes this clear at paragraph 32.
- 26.** The judge finds that the Respondent was entitled, against the background, to doubt the credibility of the contracts and the sales figures being relied on. The judge also refers to market research for which there was no evidence, and the fact that at interview their specific details as owners of any credible business were not acceptable. There were also problems with the advertising costs given, as both Appellants were extremely vague. The judge states that their educational experience causes no concern but they do not have any relevant business experience and he finds that the Appellants have not discharged the burden of proof to the balance of probabilities.
- 27.** The judge refers to the refusal letter mentioning all of these concerns and it is clear that in spite of this the Appellants did not address the concerns in their statements or with additional evidence.
- 28.** There was no medical evidence before the judge at the hearing and we are told that this was because they attended the hospital on the same day as the hearing. That is of course true but the evidence from North Middlesex University Hospital NHS Trust states that Mr Yasin attended the A&E Department on 16<sup>th</sup> September at 10.18 a.m. and was discharged at 11.31 a.m. He was in touch with his solicitor on the date of the hearing. I find that the letter from the hospital does not sway me and would not have swayed the judge at the First-tier hearing. There is no substance in the second appellant's brief attendance at the hospital. It also appears as if only one of the appellants attended the hospital. There were 3 appellants in this appeal. Why did the others not attend the hearing? There is nothing before me and there was nothing before the judge which could enable the PBS claims as entrepreneurs to succeed. Had the Appellants been given a chance to submit oral evidence the judge's decision would

not have been any different. There is no error and no procedural unfairness in the First-tier Judge's decision.

**29.** There are no material errors of law in the judge's decision.

**30.** We now have the additional grounds and the Section 120 notice submitted by the Appellants' solicitors. The Presenting Officer has given good reasons for not considering these and as I find there is no error of law in the First-tier Tribunal Judge's decision there is not any scope for me to consider these. It is significant that the 10 year period of residence started on 19 June 2017. The First-tier hearing was on 16 September 2016.

**Notice of Decision**

**31.** I find that there is no material error of law in the First-tier Judge's decision and that his decision must stand relating to the Tier 1 (Entrepreneur) applications which decision was promulgated on 13 March 2017.

**32.** No anonymity direction is made.

Signed

Date 24 July 2017

Deputy Upper Tribunal Judge I A M Murray