Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/11534/2013
IA/11542/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 26 November 2013	**On 21 February 2014**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SYED ARSHAD ABBAS SHAH
MRS SYEDA SABA FATIMA NAQVI
(NO ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellants: Mr Deller
For the Respondent: Ms Lovejoy

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State; however I shall refer to the parties as they were before the First-tier Tribunal.

2. The first Appellant, Mr Shah, (hereafter simply 'the Appellant') is a citizen of Pakistan born in 1980. The second Appellant, born in 1989, is his wife. She is dependent on his appeal.

3. Mr Shah appealed against a decision of the Secretary of State made on 25 March 2013 to refuse to vary his leave to remain. Also, to give directions for removal under section 47 of the Immigration, Asylum and Nationality Act 2006.

4. The history is that the Appellant entered the UK in April 2007 with leave as a student valid until December 2007. He received an extension of leave as a student until April 2010. He was then granted further leave to remain as a Tier 1 (Post-Study Work) Migrant until 19 November 2012. His wife arrived in March 2011 and was granted leave to enter as a Tier 1 (Post study) Partner until November 2012.

5. On 14 November 2012 he made a combined application for leave to remain as a Tier 1 (Entrepreneur) Migrant under the Points Based System, and for a Biometric Residence Permit.

6. The application of Mr Shah was refused and that of his wife in line.

7. Under the heading 'Attributes', 'Appendix A' the Appellant had sought 25 points but was not awarded any. He had stated that he was entitled to 25 points because he had access to no less than £50,000 as required by paragraph 245DD(b) and Appendix A of the Immigration Rules. He had provided in support of his application two letters from Bank Al Habib Ltd concerning account holders Muhammad Rafiat Ali and Muhammad Navaid Ali and indicating the amount held in that account as at 31 October 2012. There was also a third party letter from Rifat Aly Qazilbesh dated 8 November 2012.

8. In refusing the application the Secretary of State's position was that the Rules required a letter from the bank confirming the amount of money from the account available to the applicant from any third party. The letters from the bank also did not make plain that the Appellant had been given access by Navaid Ali to funds held by him in his account.

9. Another ground for refusal was that the Appellant needed to show that he was engaged in business activity, other than the work necessary to administer his business, in an occupation which appears on the list of occupational skills and to National Qualifications Framework Level 4. He had stated a job title of Chief Executive Officer. Although this appears on the Standard Occupational List, this job title only applies where the applicant is part of a large major organisation. The Secretary of State did not consider the wholesale buying and selling of garments to be a business activity at the required level and thus did not meet the requirements specified under Appendix A.

10. A final basis of refusal was in relation to funds held in a regulated financial institution and funds disposable in the UK. In respect of these matters the Appellant had sought 25 points but not been awarded any. There was a lack of evidence that

the Appellant had access to sufficient funds and the same reasoning was applied in relation to the issue of funds disposable in this country.

11. The Appellants appealed. Following a hearing at Taylor House before Judge of the First-tier Tribunal Cockrill on 24 September 2013 Mr Shah's appeal was allowed as was his wife's in line.

12. His findings are at paragraphs [27] to [35] of his determination. At [29] he found that Bank Al Habib '*is not really in a position to confirm the amount of money provided to the Appellant by any third party. The situation must surely be that it is really up to the account holders what they do with their funds and the bank is not in a position to do any more really as I see it than say what the level of funds are held to the credit of a particular account. In this instance it is in a joint account in the names of the paternal uncle and cousin of the first Appellant*'.

13. The judge went on (at [30]): *'What the first Appellant has done, and in my overall assessment and judgment this must be critical, is to provide two Affidavits from the account holders showing not only that they are indeed the account holders, but also that they are confirming that the first Appellant has access to these funds in that joint account. That is information that was properly related as I see to the Respondent.'*

14. Further, he stated at [31], having noted that the burden of proof to show compliance with the Rules was on the Appellant: '*… taking an entirely sensible and practical view, this Appellant has done what he can to show that he does have access to funds which are in total in excess of £50,000.'*

15. And at [33], '*The overall picture … which is really of fundamental importance, is that the first Appellant has shown that he has got access to this large sum of money of over £50,000 which is in the account held by his two relatives. They have done all they reasonably can to demonstrate that he can have access to those funds and funds can be readily remitted to the United Kingdom from the Bank Al Habib Limited*.' Further, '*nothing more can reasonably be expected of the first Appellant*.' [33]

16. The judge then went on to find that he was entitled to the points claimed in respect of his job title of Chief Executive Officer.

17. The Secretary of State sought permission to appeal which was granted by a judge on 24 October 2013.

18. At the error of law hearing before me Mr Deller, first, acknowledged that the section 47 decision was not in accordance with the law.

19. Turning to the judge's decision on the merits, he submitted, in summary, that the Rules set out clearly what requirements needed to be satisfied. Either the Appellant met the literal interpretation of the requirements of the Rules or not. The judge had erred in applying a different test, namely, that he 'did not quite meet' the requirements. It was simply that the rules are the rules. There was no unfairness on the part of the Respondent.

20. Second, the two affidavits from the relatives postdated the decision and were thus not admissible. The judge, who found them '*critical*' to his decision to allow the appeal erred in taking them into account.

21. In reply, Ms. Lovejoy referred to her skeleton argument. In summary, the judge had correctly noted that the burden of proof lay with the Appellant to show compliance with the Rules. However, he had found the Bank Al Habib, recognised as a valid institution by the Respondent, was unable to provide the appropriate letter and that the Appellant had done all he could. In the circumstances the Rule required a purposive and practical interpretation which allowed for other evidence to be relied on. To prevent such an interpretation would be contrary to not only the purpose of the Rules but also to the principle of common law fairness. She noted the headnote in **Ferrer (limited appeal grounds; Alvi) [2012] UKUT 00304 (IAC)** which stated : *'Applying Philipson (ILR- not PBS: evidence)[2012] UKUT 00039 (IAC), where the provisions in question are ambiguous or obscure, then it is legitimate to interpret the provisions by assuming that Parliament is unlikely to have sanctioned rules which (a) treat a limited class of persons unfairly…'*

22. Further, the application form simply requests a letter from each financial institution holding the applicant's funds confirming the amount of money held in that institution; confirming that it is regulated by the home regulator and that the money is disposable in the UK. Also, in relation to the third party support a letter of permission from each third party providing funds together with a letter from a legal advisor confirming the validity of the permissions. All were duly supplied. For the additional requirements to be absent from the application form was unfair.

23. Second, if the Respondent was not satisfied with the evidence received further evidence should have been requested from the Appellant prior to the Respondent making her decision.

24. Third, there was no error of law in the judge's approach to the affidavits. One was submitted with the original application confirming the availability of third party funds. The other two simply confirmed the validity and genuineness of earlier documents and as such were admissible.

25. In considering this matter I note first the applicable law. The Immigration Rules in force at the date of decision state:

> *"Tier 1 (Entrepreneur) Migrants*
>
> *245D. Purpose of this route and meaning of business*
> *This route is for migrants who wish to establish, join or take over one or more businesses in the UK.*
>
> *245DD. Requirements for leave to remain*

(b) The applicant must have a minimum of 75 points under paragraphs 35 to 53 of Appendix A." (emphasis added)

Appendix A as then in force provides (as relevant):

"Attributes for Tier 1 (Entrepreneur) Migrants
35. An application applying for entry clearance, leave to remain or indefinite leave to remain as Tier 1 (Entrepreneur) Migrant must score 75 points for attributes.

36. Subject to paragraph 37, available points for applications for entry clearance or leave to remain are shown in Table 4…"

26. Table 4 includes reference to the individual showing he has access to not less than £50,000.00 and paragraph 41 and 41-SD lay out the way the individual can show he had access to funds. The central issue of this appeal is the access to third party funds. The relevant parts of 41 and 41-SD as in force at the date of decision provide:

41. An applicant will only be considered to have access to funds if:

(a) The specified documents in paragraph 41-SD are provided to show cash money to the amount required (this must not be in the form of assets);

(b) The specified documents in paragraph 41-SD are provided to show that the applicant has permission to use the money to invest in a business in the UK; and

(c) The money is either held in a UK regulated financial institution or is transferable to the UK.

41-DS. The specified documents in Table 4 and paragraph 41 are as follows:

(a) The specified documents to show evidence of the money available to invest are one or more of the following specified documents:

(i) A letter from each financial institution holding the funds, to confirm the amount of money available to the applicant (or the entrepreneurial team if applying under the provisions in paragraph 52 of this Appendix). Each letter must:

(9) confirm the amount of money provided to the applicant from any third party (if applicable) that is held in that institution.

(10) confirm the name of each third party and their contact details, including their full address including postal code, landline phone number and any email address, and

…(emphasis added)

27. The crux of the judge's conclusions are at 29 to 31 and 33 (referred to above).

28. In my judgement, however, his conclusions were wrong in law. First, I do not agree with counsel that the relevant rules are ambiguous or obscure. They are entirely clear.

29. As the court stated in SSHD v Rodriguez *[2014] EWCA Civ 2* (at [44]) *'Overall, the Immigration Rules are uncompromising in their stipulations. They among other things, require the specified documents to be lodged with the application. If the contents of the specified documents are not such as to satisfy the requirements as to maintenance funding, the points will not be awarded and the application will be refused…'*

30. I do not see merit in the criticism that the application form (G4,G6) does not state the full requirements as set out in the Rules. It is the Rules which state the law. This is not a situation where the application form has waived a requirement of the Rules.

31. Nor do I see merit in the submission that if the Respondent was not satisfied with the evidence received, they should have requested further evidence from the Appellant prior to making their decision. As the Court of Appeal stated in Rodriguez (at [92])

'….it is quite true that the introduction to the process instructions flagged up two significant changes, one of which was that "there is no limit on the amount of information that can be requested from the appellant". But it is to be noted that that is immediately qualified by the instruction that requests for information should not be speculative…there must be sufficient reasons to believe that any evidence requested existed…Taken overall, the Evidential Flexibility process instruction is demonstrably not designed to give an appellant the opportunity first to remedy any defect or inadequacy in the application or supporting documentation so as to save the application from refusal after substantive consideration'.

32. In this case the appellant did not meet the requirement of the Immigration Rules in that the specified documentation required to be supplied by him was not supplied. Accordingly, the policy did not fall to be applied in his favour.

33. The First-tier judge placed reliance on an affidavit lodged with the application from one of the account holders confirming the availability of third party funds to the Appellant and, for the hearing, two further affidavits from both the account holders purporting to do the same. He found these *'critical'* [30] in showing that the Appellant had access to the funds in the joint account.

34. I consider that the judge erred in so finding. As indicated the Appellant was required to ensure that the specified documents were lodged with the application. They were not. A letter from the bank (31 October 2012) (C2) states only that Muhammad Rifat Aly and Muhammad Navaid Ali maintain accounts with the bank. Another, undated, letter (C1) states that the account holders use the account and can transfer amounts abroad. These did not advance the case as they do not confirm the amount of money available to the Appellants or provided to them from any third party. A third party letter (8 November 2012) from M. Rifat Ali only (which is not in

the bundle and which neither side could give me sight of, but which it was accepted was produced to the Secretary of State) was also not a specified document as set out in paragraph 41-SD. Two affidavits by M. Rifat Ali and M. Navaid Ali lodged for the hearing also did not advance the case. They were not admissible under section 85A (3) of the Nationality, Immigration and Asylum Act 2002. I do not accept the submission that the later affidavits were covered by section 85A (4) (c) as being adduced to prove that the items submitted with the application were 'genuine or valid'. There was no suggestion that the earlier documents were not genuine or valid. Rather, that they were not items permitted by the Rules.

35. For the reasons stated the First-tier judge materially erred in law. His decision allowing the appeal under the Rules is set aside and remade as follows: the appeals are dismissed under the Immigration Rules.

36. The Appellants had raised human rights in the original grounds. I was referred to brief statements by the Appellants (12 September 2013). I also heard brief evidence from Mr Shah, which was unchallenged. It was not argued that they had any claim to stay on the basis of family/private life under the Rules. The submissions were in relation to ECHR.

37. It is clear that the Appellants have family life together here. Were they to be removed there would be no interference with that family life as they would be removed together.

38. As for private life, the evidence, which I accept, was that he has been in the UK for some six years, she for a shorter time, always lawfully. His wife used to work for Marks and Spencer as a section coordinator. She is now pregnant and no longer working. They live in a rented property. They are used to living here and get support. They have contributed to society and paid their taxes. Treatment for pregnant women is better here than in Pakistan.

39. It may be that the Appellants during their time here have built up contacts and associations such as to amount to a private life. If so, and if interference reached the threshold for establishing an interference with that private life, such interference would be in accordance with the law and pursues a legitimate aim, namely, the maintenance of a fair and effective system of immigration control.

40. In *Nasim and others (Article 8 [2014] UKUT 25 (IAC)* it was held that the judgements of the Supreme Court in *Patel and others* v *SSHD [2013] UKSC 25 (IAC)* serve to re-focus attention on the nature and purpose of Article 8 of the ECHR and, in particular, to recognise that article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity.

41. In this case the Appellant came to the UK in 2006 (his wife in 2011) spending until 2010 as a student and since then as a Tier 1 (Post Study) Migrant. They wish to remain as Tier 1 Entrepreneurs. Although they have been here some years the vast

majority of their lives have been spent in their home country. They have very limited evidence of attachments and associations here. They own no property. They are in good health. The fact that they have not relied on public funds and have been lawful throughout does not enhance their human rights. They fail to meet the Rules. In *Patel* it was held that there is no 'near miss' argument as such albeit that all facts have to be taken into account and considered in context. I consider on the facts of this case that it is at the 'fuzzy penumbra' of Article 8 (*Nasim* [20]), and that the issue of proportionality is resolved in favour of the Secretary of State, by reference to her functions as the guardian of the system of immigration controls, entrusted to her by Parliament.

42. The appeals fail on human rights grounds.

DECISION

The decision of the previous Tribunal involved the making of an error of law. Its decision is set aside and remade as follows:

The appeals are dismissed under the Immigration Rules.

The appeals are dismissed on human rights grounds (Article 8)

The appeal in so far as it relates to the decision to remove the Appellants is allowed as not being in accordance with the law.

Signed Date

Upper Tribunal Judge Conway