Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/19294/2013
IA/19276/2013

THE IMMIGRATION ACTS

Heard at Birmingham
on 19th December 2013

Determination Promulgated
on 17th February 2014

Before

UPPER TRIBUNAL JUDGE HANSON

Between

Mr HARPREET SINGH
Mr MERSIMREN SINGH
(Anonymity order not made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Awal.
For the Respondent: Mr Mills.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Hawden-Beal promulgated on the 17th October 2013 following a hearing at Birmingham on the 7th October 2013.

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2. Permission to appeal was sought and the matter considered by First-tier Tribunal Judge Blandy on 7th November 2013. The decision is contradictory as it states that permission to appeal is refused yet the wording in the body of the document clearly indicates that Judge Blandy found all grounds to be arguable. The parties accepted a pragmatic view was appropriate in all the circumstances and so the hearing proceeded on the basis the reference to the refusal was an error and that the intention of Judge Blandy was to grant permission.

Error of law finding and discussion

3. Both appellants are citizens of India who were born on the 4th February 1986 and 2nd January 1984 respectively. They applied for leave to remain as Tier 1 (Entrepreneur) Migrants which were refused by the Respondent.

4. Having heard the evidence Judge Hawden-Beal noted the assertion that the contracts referred to in the refusal were not included with the application forms because there was a change in the Tier 1 policy on 13th December 2012 and the applications had been filed before this date. In the application form they stated the contracts would follow which they provided on 4th February 2013. The first appellant maintained his name appeared on the contract whereas the second appellant accepted his name did not, but blamed a printing error. The Respondent refused to award 75 points under Appendix A because the contracts had not been submitted.

5. It was accepted the contracts were not submitted with the application, as the Respondent states in the refusal, but it was submitted before Judge Hawden-Beal that as they had been submitted before the date of decisions they should have been taken into account in line with the guidance provided in Khatel [2013] UKUT 00044. It was accepted that in the interim the Court of Appeal had delivered its judgment in Raju [2013] EWCA Civ 754 but as the decision had been made in May 2013 it was submitted that the Respondent was bound by Khatel.

6. It was not disputed by the Respondent that the contracts had been received before the decision but it was not accepted they met the requirements of Appendix A, paragraph 41SD(c)(iv) either as they did not have the appellants names on them. Judge Hawden-Beal accepted the contracts did not show the name of the second appellant but found they did contain that of the first appellant who satisfied this provision of the Rules [16].

7. Judge Hawden-Beal noted, however, that a further problem for the appellants was that paragraph 41SD(c)(iii) required them to have supplied advertising or marketing material which had been published locally or nationally, showing the required details, but this had not been provided and the Judge noted there was nothing before her showing that the wider world were aware of the work the appellants were undertaking. Even though it was alleged such had been

provided there was no reliable evidence of the same before the Judge who found the refusal to award the 75 points was lawful and dismissed the appeal.

8. The first appellants claim on human rights grounds was dismissed as being proportionate under both the Rules and ECHR.

9. The grounds allege that further documents had been sent to the Respondent, pre -decision, following a request by the case worker. It is clear additional information was requested by the Respondent and it is said the reference by the Judge to there being no such request is incorrect. It is submitted the Presenting Officer at the hearing conceded that the additional documents were submitted and, as a result, the Judge should not have needed convincing that the decision was lawful.

10. As stated above, it was accepted that the contract documents were submitted and I have seen a copy of the proof of posting. The postal address on the Tier 1 application is Home Office, Tier 1, PO Box 496, Durham, DH99 1WQ, which is the same as that appearing on the proof of posting dated 4th February 2013. According to Royal Mail track and trace service the item with reference BY314654142GB was delivered from their DURHAM Delivery Office on 05/02/13. This relates to the contracts and is not disputed.

11. The submission by Mr Awal that the Respondent was bound by the decision in Khatel, as the Judge herself seems to have found in paragraph 15 of her determination, has no arguable merit. The Respondent never accepted that the decision in Khatel was correct in law and was proved to be correct in this assertion by the Court of Appeal in Raju, Khatel and Others v SSHD [2013] EWCA Civ 754. In Raju the Court of Appeal appeared to make it clear that AQ was "not authority for the proposition… that applications were "made" throughout the period starting with the date of their submission and finishing with the date of the decisions". An applicant relying on a qualification on the Tier 1 (Post-Study Work) Migrant route had to have that at the date of application for the purposes of the relevant rule. The Court of Appeal clearly held that where a rule specifies a need for evidence to be submitted with the application that is a specified point in time. Whilst it does not preclude an applicant from adducing material on an ongoing basis up to the date of decision there is no obligation upon the decision maker to consider such material. The reliance upon an evidential flexibility argument not been shown to have any arguable merit on this point. Paragraph 34 G of the Rules specifies when an application is deemed to be made which, in the case of an application that is posted, is the date of posting – see 34G(i). Neither the contract evidence nor that relating to the advertising material put before the Respondent at this date. I reject the argument the Judge did not err in following a case that has been shown to be wrong in law and it cannot be correct that the Judge made no error if she relied upon bad law. As the documents had not been filed by the date of application, or at all, the requirements of the Rules could not be met.

12. In relation to the alleged concession, I accept the submission made by Mr Mills that there is no evidence of such a concession being made by the Presenting Officer in relation to the advertising materials. It was accepted the contracts had been sent on 4th February 2013 but not the advertising material. There is a copy of an e-mail which the Judge refers to but not to the actual material being relied upon. There is no evidence that marketing material of the required standard was submitted. No error of law has been proved as it is not accepted by this Tribunal that any concession was made in relation the marketing material. There is no evidential basis for finding such. It is noted the Judge made specific reference to the concession in relation to the contract and it is reasonable to assume that if an additional concession had been made she would have made reference to this too. The fact she did not and was looking for evidence of the relevant material demonstrates this was an area of concern to her.

13. It is not disputed that the contracts did not meet the requirements of the Rules in relation to the second appellant in any event, as found in paragraph 16 of the determination, and having considered the evidence as a whole it has not been shown the conclusions in relation to the Rules was not ones properly open to the Judge.

14. The finding in relation to Article 8 is also challenged on the basis the Judge should not have made the same. If this was an issue the Judge was asked to consider in the appeal she was bound to do so, although the original grounds of appeal appear to only refer to the decision not being in accordance with the Rules with no reference to Article 8 ECHR. There is a contradiction in the determination in that at paragraph 8 the Judge records that the Presenting Officer withdrew the section 47 removal directions for all the appellants whereas in paragraph 20 she notes that that made in relation to the first appellant was issued after 8th May and so is lawful. It may be the case that a section 47 direction issued from 8th May 2013 is lawful, even it made before the applicant has notice of the variation decision, but if it was withdrawn it no longer remained extant unless reinstated, of which there is no evidence.

15. The Judge was therefore faced with a situation in which both a lawful and an unlawful removal direction had been withdrawn but in which she had grounds of appeal alleging the decision was not in accordance with Immigration Rules. This ground as pleaded is not limited to the rules relating to the Tier 1 application and so must be read as encompassing all the Rules which, therefore, must include those relating to the appellants human rights. Section 86 (2) of the NIAA 2002 imposes a statutory duty upon a tribunal to determine any matter raised as a ground of appeal. As a result there is no error in the Judge determining the claim in paragraph 20 as she did. Any error is in not doing so in relation to the second appellant who also alleged the decision was not in accordance with the Rules. To this extent the determination is set aside although the findings in relation to the Tier 1 elements of the appeal and the inability of

the first appellant to succeed under the Rules in relation to his human rights claim are preserved.

16. I substitute a decision that on the evidence the second appellant has not show he is able to succeed under the Rules in relation to the human rights element of his claim either as he has not shown he is able to satisfy paragraph 276ADE in relation his private life. Family life is not relied upon by either appellant.

17. Although Article 8 ECHR is not pleaded the outcome is likely to be the same in light of the evidence relied upon, although this is an observation and no more at this stage.

18. At the hearing I indicated that the finding was likely to be that the Judge had made no material error but having considered the matter further the correct outcome is as stated below.

Decision

19. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

20. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008) as there is no application for anonymity and no basis for making such an order on the facts.

Signed………………………………………………….
Upper Tribunal Judge Hanson

Dated the 16th February 2014