Upper Tribunal
(Immigration and Asylum Chamber) **Appeal**
Numbers: IA/25481/2013;

IA/25475/2013;
IA/25454/2013;
IA/25427/2013;
IA/25449/2013;
IA/25441/2013

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 4 November 2014	**On 18 December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MR MOHAMEDSAJID MOHAMEDSAFI MANIA (first appellant)
MRS SUMAIYA MOHAMEDSAJID MANIA (second appellant)
MR SAHEJADBHAI MOHAMEDSAFI MANIA (third appellant)
MRS FAIZA SHAH (fourth appellant)
MASTER SAIHAN SAHEJAD MANIA (fifth appellant)
MISS SEHREEN SAHEJAD MANIA (sixth appellant)

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr R Pennington-Benton, instructed by Farani Javid Taylor Solicitors
For the Respondent: Mr J Parkinson, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are nationals of India. The first and third appellants are brothers, the second and fourth appellants are their wives and the fifth and sixth appellants are the children of the third and fourth appellants. The appeal of the child of the first and second appellants was determined to not be valid upon receipt of the appeal notice and did not proceed. The appellants appealed to the First-tier Tribunal against the decisions of the Secretary of State to refuse the first and third appellants' applications for leave to remain as Tier 1 (Entrepreneur) Migrants under the Points Based System and to remove them from the UK and to refuse the remaining appellants applications for leave to remain as dependants. First-tier Tribunal Judge Traynor dismissed the appeals and the appellants now appeal with permission to this Tribunal.

2. At the outset of the hearing before me Mr Pennington-Benton applied for an adjournment so that the appeal could be considered by a panel because the arguments he was putting forward in relation to the evidence as to the third party's funds, challenge the decision in Durrani (Entrepreneurs: bank letters; evidential flexibility) [2014] UKUT 00295 (IAC). In the alternative he submitted that these proceedings should be stayed until the Court of Appeal considered the appeals in the cases of Secretary of State for the Home Department – v – AI (Pakistan) and Others [2014] EWCA Civ 17 and UT (India) and Another – v – Secretary of State for the Home Department C5/2014/0212. Mr Parkinson submitted that there is clear case law in relation to this issue from the Upper Tribunal and that the circumstances of this case were not such that it should be adjourned to be heard by a panel. I refused to grant the adjournment as I considered that I should firstly consider the sixth ground of appeal which contends that the First-tier Tribunal erred in determining that the respondent was entitled to ignore the evidence submitted after the application but before the decision. I further note that, whilst not refusing permission on the other grounds of appeal, First-tier Tribunal Judge Pirotta granted permission to appeal to the Upper Tribunal on the ground that it is arguable that the First-tier Tribunal Judge erred in deciding to exclude cogent evidence submitted before the date of decision.

3. I therefore deal firstly with ground 6. It is the appellants case that they submitted the applications on 12 December 2012 and that they did not have all of the required documents. They say that they sent further documents to the respondent as follows – letters and bank statements from Syndicate Bank and Indian Bank, third party letter and a legal letter on 4 February 2013; a further third party signature letter and a copy of an affidavit on 20 May 2013; further bank letters from Syndicate Bank and Indian Bank on 24 May 2013 and a final set of documents including further letters from Syndicate Bank and Indian Bank on 31 May 2013. The respondent made her decisions on 5 June 2013. According to the Reasons for Refusal letter the appellants were awarded 0 of the required 75 points under Appendix A (Attributes) because the bank

letters do not state the names of the applicants or the third party details as required. It appears from the Reasons for Refusal letter that the respondent did not consider the evidence submitted after the application was made.

4. At paragraph 44 of his determination the First-tier Tribunal Judge said that section 865A of the Nationality, Immigration and Asylum Act 2002 precluded him from taking into account the evidence submitted after the application and that there was nothing unlawful in the respondent's decision not to take that evidence into account.

5. It is contended in the grounds of appeal that it is only where an applicant is required to possess a quality at the date of the application that post-application evidence cannot be considered. It is contended however that the respondent may consider evidence that the application possessed that quality at the date of the application at any time up to the date of decision. The grounds of appeal rely on AQ (Pakistan) v Secretary of State for the Home Department [2011] EWCA Civ 833. Mr Parkinson accepted that there is nothing to indicate that all of the documents must be submitted with the application. However he submitted that there is nothing on his file to show that any further evidence reached the file by the date of the decision.

6. Mr Parkinson submitted that, even if the First-tier Tribunal Judge had erred in not returning the case to the Secretary of State to make a decision based on all of the evidence said to have been submitted, such an error was not material because the Santander letter was fatal to the application. The letter from Santander, the UK bank of the third party funder, states that the information requested could not be provided. The appellants contend that the information requested was that required by the Immigration Rules to be provided by a third party funder to confirm that the sponsor intended to make the money available to the appellants.

7. However Mr Pennington-Benton submitted that it was not certain what the respondent would have done had she considered all of the evidence submitted. She could have relied on paragraph 245AA of the Immigration Rules and sought further information in relation to the letter from Santander.

Error of law

8. The Tribunal in Nasim and others (Raju: reasons not to follow?) [2013] UKUT 00610(IAC) summarised the decision in Khatel in the head note as follows;

> "(4) As held in Khatel and others (s85A; effect of continuing application) [2013] UKUT 00044 (IAC), section 85A of the Nationality, Immigration and Asylum Act 2002 precludes a tribunal, in a points-based appeal, from considering evidence as to

> compliance with points-based Rules, where that evidence was not before the Secretary of State when she took her decision; but the section does not prevent a tribunal from considering evidence that was before the Secretary of State when she took the decision, whether or not that evidence reached her only after the date of application for the purposes of paragraph 34F of the Immigration Rules."

9. The appellants' bundle contains copies of the letters said to have been submitted by the appellants' solicitors to the respondent in February and May 2013. Each letter has a copy of a sticker with a recorded delivery number thereon and I am satisfied on the balance of probabilities that these letters with enclosures were sent to the respondent as claimed. It is not in dispute that the respondent did not consider the evidence submitted with these applications in reaching the decisions made on 5 June 2013. Section 85A does not preclude the Tribunal from taking these documents into account as at least some, if not all, of them relate to the situation at the date of the applications and were submitted before the decisions were made. The Judge therefore erred at paragraph 44 in deciding that he could not take account of evidence submitted after the date of the application in December 2012. I accept Mr Pennington-Benton's submission that it is not a certainty that, had the respondent had these documents, she would not have sought the further specified evidence in relation to the Santander letter in exercise of her discretion under paragraph 245AA (b) of the Immigration Rules.

10. I am satisfied on this basis that the First-tier Tribunal Judge made a material error of law and that his decision should be set aside. In remaking the decision I decide that the respondent's decisions are not in accordance with the law as the respondent did not consider all of the documents before her and failed to consider the exercise of her discretion under paragraph 245AA.

11. I am satisfied that the proper approach in the circumstances of this case is to return the application to the respondent to make a decision based on the evidence before her at the date of the decision in accordance with the Immigration Rules.

Conclusion:

The making of the decision of the First-tier Tribunal did involve the making of an error on point of law.

I set the decision aside and remake it by allowing it only to the extent that the application remains outstanding before the Secretary of State.

Signed Date: 17 December 2014

A Grimes
Deputy Judge of the Upper Tribunal