



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/25975/2013**

THE IMMIGRATION ACTS

**Heard at Field House
On July 14, 2014**

**Determination
Promulgated
On July 18, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

**MR HASEN MIA
MR MASHIUR RAHMAN
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

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

Respondent

Representation:

For the Appellant: Mr Hossain (Legal Representative)
For the Respondent: Mr Kandola (Home Office Presenting
Officer)

DETERMINATION AND REASONS

1. The appellants, born October 11, 1987 and October 30, 1988 respectively, are citizens of Bangladesh. On

December 12, 2012 the appellants applied to extend their leave to remain for as Tier 1 “entrepreneurs”.

2. The respondent refused their applications on June 14, 2013.
3. On June 26, 2013 the appellants appealed under Section 82(1) of the Nationality, Immigration and Asylum Act 2002.
4. The matter was listed before Judge of the First-tier Tribunal Devittie (hereinafter referred to as “the FtTJ”) on March 26, 2014 and in a determination promulgated on April 23, 2014 he dismissed their appeals.
5. The appellants appealed the decisions on April 28, 2014. Permission to appeal was granted by Judge of the First-tier Tribunal Grimmett on May 22, 2014 who found it was arguable that the FtTJ had erred in finding funds were not freely available and for considering the appeals under the wrong Immigration Rules.
6. The matter was listed before me on the above date and the appellants were in attendance.

PRELIMINARY ISSUES

7. Mr Hossain agreed the following:-
 - a. There was no appeal on human rights grounds.
 - b. Although the FtTJ had applied the wrong Rules in paragraphs [5(i) and (iii)] of his determination this in itself would not amount to an error in law because the correct Rules said the same as the Rule applied by the FtTJ. The FtTJ had applied the Rules as they were at date of hearing as against the Rules in force at the date of the application.
 - c. Section 85A of the 2002 Act applied to this appeal.

SUBMISSIONS

8. Mr Hossain relied on the grounds of appeal and submitted as follows:-
 - a. The FtTJ found at paragraph [4] of his determination that the respondent should have exercised evidential flexibility. Even if no error of law was found on certain matters it is submitted the FtTJ should have found the decision was not in

accordance with the law and remitted it back to the respondent to consider all the documents that had been submitted.

- b. Although Mr Rahman had not received his English language tests results by the date of application, he had taken them and the results were submitted on December 24, 2014. Although issues were now being raised about the test this was not a matter raised before the FtTJ and was something that could be raised subsequently by the respondent by the issuing of a section 10 notice.
 - c. The FtTJ erred by not finding an authorised signatory had signed the bank letter. The document at page C of the respondent's bundle referred to the signatory of the bank as an "authorised Signatory". The FtTJ erred in paragraph [5(i)] of his determination.
 - d. The bank was Standard Chartered and this is a worldwide bank with its principal office in London. Although the letter at page C of the respondent's bundle did not mention who regulated the bank there was subsequent letter, page 17 of Mr Mia's bundle, that confirmed the bank was regulated and in any event the respondent could have used her own facilities to check. In any event, if the FtTJ was not satisfied with the format of the letter then under paragraph 245AA a correct letter could have been sought.
 - e. The FtTJ erred in paragraph [5(iii)] of his determination by finding the funds were not transferable. The letter at page J of the respondent's bundle confirmed the funds were transferable.
 - f. There was satisfactory evidence of third party declaration compliance. The witness statements confirmed the correct documents were sent and copies were in the bundles. It was not unusual for the respondent to lose or misfile documents.
9. Mr Kandola relied on the Rule 24 response dated June 10, 2014 and submitted:
- a. The appellant, Mr Rahman, had not passed his English language test as at the date of application.

The test also originated from TOEIC and the mere fact he had provided evidence to show he had passed would not be accepted in light of the recent issues raised in respect of the provider.

- b. There was no evidence that the document at Page C contained the signature of a person authorised to sign on behalf of the bank.
 - c. The Standard Chartered letter dated December 10, 2012 did not confirm an appropriate body regulated the bank. The fact the principal office of the bank was in the United Kingdom did not satisfy the Rules. The second letter from the bank dated December 1, 2013 could not be admitted as section 85A of the 2002 Act prevented its admission. The missing information was not something the respondent was obliged to seek from the appellant because when the application was refused there were a large number of reasons for the refusal and evidential flexibility only applied where the obtaining of that missing piece of information would lead to the application succeeding. The Tribunal in Durrani (Entrepreneurs: bank letters; evidential flexibility) [2014] UKUT 00295 (IAC) made clear there is no separate evidential flexibility outside of paragraph 245AA HC 395.
 - d. It is accepted the letter at page J of the respondent's bundle confirms the funds were transferable to the United Kingdom but as the appeal would fail on other grounds this would not amount to a material error.
 - e. The respondent's file clearly shows the additional third party documents contained in the appellants' bundles at pages 16-17 (Rahman) and 15 to 16 (Mia) were not sent to with the application. The letter dated December 11, 2012 refers to confirmation letters dated December 5, 2012 but the documents in question were dated December 6, 2012. The absence of these documents means the third party declaration did not meet the Rules.
10. I reserved my decision and confirmed that if there was an error then I would be able to remake it without any further submissions.

ERROR OF LAW ASSESSMENT

11. The FtTJ rejected the appellants' appeals on the basis they did not satisfy the Immigration Rules. Mr Hossain has primarily challenged the findings contained at paragraph [5] of his determination.
12. During his submissions Mr Hossain submitted that the FtTJ had accepted that evidential flexibility applied to this appeal and my attention was drawn to paragraph [4] of the determination. However, I am satisfied that the FtTJ's finding was not an open ended acceptance of evidential flexibility but related to the requirement to provide *original* documents. This approach has no bearing on issues relating to the English language certificate, whether the bank was regulated or whether the third party declaration was in the correct format.
13. This is a points based application and the FtTJ was concerned with whether the applications satisfied the Rules. Mr Hossain previously confirmed there was no claim under article 8 ECHR.
14. I have considered paragraph 41-SD and I have considered the application against the Rules that were in place at the date of application and not the Rules that subsequently came into force.
15. I therefore turn to the matters that were raised before me:-
 - a. In relation to the question of whether the bank was regulated the Rules make clear that any foreign bank must confirm it is a regulated bank. The letter submitted by the appellants did not do this. I am asked to accept that the bank in question was regulated because firstly, a second letter confirmed this, secondly, the original letter refers to the principal office being in London and thirdly, I was invited to find that paragraph 245AA(d) HC 395 placed an obligation on the respondent to look at the internet in certain circumstances. Dealing with these three submissions I find as follows:-
 - i. The second letter cannot be taken into account in assessing whether the Rules were met because Section 85A of the 2002 Act bars this.

- ii. The letter submitted did not meet the Rules. It may well be the bank is regulated by an appropriate body but the onus is on the appellant to provide the correct information. The appellants failed to provide this with their applications and this is not a matter that would engage evidential flexibility as set out in paragraph 245AA HC 395.
- iii. Paragraph 245AA (d) did not come into force until October 1, 2013 and the appellants cannot take advantage of the change in the Rule.
- iv. The Tribunal in Durrani allowed some room for manoeuvre. The relevant passages can be found at paragraphs [12] to [17] of Durrani:-

12. All of the requirements listed in paragraph 41-SD(a)(i) of the Rules are to be construed reasonably and sensibly, in their full context....

15. The cornerstone of the second ground of appeal, properly analysed, consists of an assertion. The assertion is to the effect that an “evidential flexibility” policy of sorts survived the introduction of paragraph 245AA. The latter provision of the Rules came into operation on 06 September 2012. It is common ground that paragraph 245AA governed all of the applications for entrepreneurial migrant status generating this cluster of appeals. The FtT’s primary reason for rejecting this ground of appeal was the absence of any evidence that some policy, independent and freestanding of paragraph 245AA, also applied to these applications: see [32]. We endorse this reasoning and conclusion. In doing so, we highlight the distinction between argument and evidence. The question of whether a policy exists, in whatever context it arises, is a question of fact. This ground of appeal fails because it has no supporting evidence, direct or inferential.

16. In our judgement, this ground of appeal must fail on the further basis that whereas the Upper Tribunal in Rodriguez held that the two documents appended to its

decision constituted a policy of the Secretary of State of wide ranging scope and effect, the Court of Appeal reversed this holding: see Rodriguez (Flexibility Policy) [2013] UKUT 00042 (IAC), [9] - [13] and Appendices and Secretary of State for the Home Department - v - Rodriguez [2014] EWCA Civ 2, [82] - [101]. Insofar as necessary, we are also mindful of the additional evidence adduced on behalf of the Secretary of State in Rodriguez see [47] and [65]. While this was not admitted on the basis of the new evidence principles, we cannot pretend that it does not exist and were not invited to do so.

17. Thus, the Appellant's appeal must be dismissed. To this we would add that the Appellant's application and both ensuing appeals were, in our estimation, doomed to failure in any event on account of the egregious and irremediable failure to comply with all of the requirements enshrined in paragraph 41-SD(c) of the Immigration Rules.

- v. I therefore turn to the issue in hand namely whether there has been an error in law on this issue. Mr Hossain has submitted that the FtTJ should have found either an appropriate body regulated this particular bank or the respondent should have enquired further. I am satisfied that a letter submitted twelve months later was properly excluded. Following on from what the Tribunal said in Durrani there was no separate "evidential flexibility" policy outside of paragraph 245AA HC 395.
- b. In so far as there is a requirement for both appellants to have the English language certificate I refer to the authority of Ali (s.120 - PBS) [2012] UKUT 00368(IAC) where the Tribunal stated at paragraph [20] that,
 - "... what is said in AQ (Pakistan) [2011] EWCA Civ 833 about the relevant date being the date of decision not the date of application has to be seen as not applying to cases governed by section 85A....".

Accordingly, although the appellant had taken his test at the date of application he did not actually pass it until after his application and was therefore unable to provide a valid English language certificate. Mr Rahman could not meet the Rules and as Mr Hossain acknowledged both appellants had to satisfy the Rules for the appeal to succeed.

- c. The appellants' UK representatives submitted a letter with the third party declaration when they submitted their application. The respondent's file was examined and there was no evidence that the additional documents now contained in the appellants' bundles were ever sent. There was evidence of other documents having been submitted but there was no documentary evidence submitted to confirm the authorisation documents had been submitted prior to the application. This is another mandatory requirement of the Rules and following Durrani these documents have to be submitted with the application.
16. In Akhter and another (paragraph 245AA: wrong format) [2014] UKUT 00297 (IAC) the Tribunal made clear that where there are material defects in the Appellant's application such as the letter not stating the Appellant's name or other requirements then paragraph 245AA(b), accorded its ordinary and natural meaning, is not engaged and the appellant cannot invoke paragraph 245AA in support of a contention that he should have been given an opportunity to rectify the deficiencies in his application.
 17. There were two other issues raised in this appeal regarding authorised signatories and whether monies could be transferred. I find:
 - a. The appellant provided a letter contained at Page J of the respondent's bundle. This letter confirmed the funds were transferable to the United Kingdom and I find the FtTJ's finding at paragraph [5(ii)] was incorrect in light of the fact there was no evidence to contradict what was contained in that letter.
 - b. The letter from the bank at Page C contains an authorised signature. There is nothing in the Rules that suggests this has to be by a particular person and I find the FtTJ's finding in paragraph [5(i)] has no basis.

18. Following the recent decisions of Fayyaz (Entrepreneurs: paragraph 41-SD(a)(i) - "provided to") [2014] UKUT 00296 (IAC), Akhter and Durrani I am satisfied the FtT did not err in refusing these appeals in circumstances where the specified documents had not been provided at the date of application. I am satisfied that there was no requirement to invite the appellant to rectify any deficient documents. Although other documents (bank letter, third party signatory letter and English language certificate) were subsequently provided this does not assist these appellants.



DECISION

19. There is no material error of law. I uphold the original decisions.

20. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.



Signed:

Dated: **20 October 2014**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I make no fee award

Signed:

Dated:

Deputy Upper Tribunal Judge Alis