Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/26687/2013
IA/26699/2013
IA/26716/2013
IA/26726/2013

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 19 May 2014	**On 30 June 2014**

Before

Deputy Upper Tribunal Judge Pickup
Between

Secretary of State for the Home Department

Appellant

and

Abdul Basher Mohammed Shamim
Hosne Ara Begum
Anika Mubashsira Bushra
Kaba Al Shamim
[No anonymity direction made]

Claimants

Representation:

For the claimants: Mr A Vaughan, instructed by AK Solicitors LLP
For the respondent: Ms H Rackstraw, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimants, Abdul Basher Mohammed Shamim, date of birth 3.1.70, his wife Hosen Ara Begum, date of birth 15.1.68, and their children, Anika Mubashsira Bushra, date of birth 9.11.01, and Kaba Al Shamim, date of birth 22.1.07, are citizens of Bangladesh.

2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Duff, who allowed the appeals against the decisions of the respondent to refuse to vary leave to remain in the UK as a Tier 1 (Entrepreneur) Migrant and dependants. The appeals were allowed on the basis that the decisions were not in accordance with the law and breached the appellants' rights under article 8 ECHR. The Judge heard the appeal on 28.10.13.

3. First-tier Tribunal Judge Frances granted permission to appeal on 26.11.13.

4. Thus the matter came before me on 31.1.14 as an appeal in the Upper Tribunal. I heard submissions and reserved my decision on error of law, which was promulgated to the parties on 18.2.14.

5. The remaking of the decision was then listed before me on 19.5.14.

6. At the outset of the hearing before me on 19.5.14, Mr Vaughan sought to reopen the error of law decision. The decision of the First-tier Tribunal having already been set aside, I declined to reopen the error of law decision.

7. The matter was heard as linked claimants. Unless otherwise stated or clear from the context, all references below to the claimant refer to the first claimant, Mr Shamim, the Tier 1 (entrepreneur) applicant.

8. The appeal was also heard together with the Secretary of State's appeal against the decision of the First-tier Tribunal in respect of Mr Shamim's entrepreneur team partner, Hari Krishnan, reference IA/26749/2013. There were two separate decisions of the First-tier Tribunal and I am asked to draft separate decisions, though the reasoning will largely be the same, as they were in the determinations of Judge Duff.

9. The relevant background can be summarised as follows. The claimant first entered the UK on 4.9.05 with leave as a student and extended thereafter at a Tier 1 Post Study migrant until 15.12.12. On 18.12.12 he made an application for further leave to remain as a Tier 1 (Entrepreneur), with Mr Hari Krishnan. The application was refused on the basis of failure of the appellant to comply with the evidential requirements under Appendix A paragraphs 41-SD and 46-SD. It is the appeal against that decision which came before Judge Duff.

10. The particular failures relied on by the respondent are as follows:

    (a) Insufficient evidence that the entrepreneurial team had already invested £30,000 into the business 'Fairway Business International Ltd;'

(b) The bank letter does not state the claimant's name or that of his entrepreurial team partner, or that the monies held can be transferred to the UK;

(c) The legal representative's letter related to a previous declaration and not the one made with the current application. Further, it did not clearly confirm the third party's identification details or their signature. The letter does not come from a legal representative who is authorised to practice in the country of the third party;

(d) Insufficient evidence that the claimant is engaged in business activity. None of the advertisements give the partners names. None of the contracts include a contact telephone number of the clients or original signatures from both parties, or have signatures but pages missing from the contracts;

(e) No evidence was submitted to demonstrate that that the business is subject to UK taxation.

11. For the reasons set out herein, I found that there were a number of errors of law in the making of Judge Duff's decision, such that the determination should be set aside and remade. I attach as an annex to this determination my error of law decision.

12. In summary, I found that:

(a) The First-tier Tribunal wrongly took into account evidence not submitted with the application;

(b) The First-tier Tribunal wrongly dispensed with the requirements of paragraph 41-SD in relation to PBS specified evidence; and,

(c) Was in error to find that there was an obligation on the Secretary of State to seek missing information as part of an evidential flexibility policy (or under paragraph 245AA);

(d) Was in error in the article 8 assessment to consider that the interference with family life was not necessary for the enforcement of immigration policy and misunderstood and misapplied the proportionality balancing exercise;

(e) Wrongly applied a near-miss approach to the requirements of the Immigration Rules.

13. I heard submissions from the representatives of both parties and received Mr Vaughan's skeleton argument and reserved my determination on the remaking of the decision in the appeal, which I now give.

14. For the reasons given at §12 to §17 of my error of law decision, I can only consider evidence in relation to the PBS application which was submitted with and at the date of application, which was 18.12.12. I can consider further evidence in relation to article 8 up to the date of my determination.

15. Since the hearing before me, there have been a number of further relevant decisions of the Upper Tribunal in relation to PBS cases.

16. In Durrani (Entrepreneurs: bank letters; evidential flexibility) [2014] UKUT 00295 (IAC), the Upper Tribunal held:

> (1) The requirements listed in paragraph 41-SD(a)(i) of the Rules are to be construed reasonably and sensibly, in their full context. Approached in this way, the letters required from banks or other financial institutions are not designed to provide, and do not commit them to, any form of guarantee or assurance to any party. Rather, the function of the prescribed letters is to attest to the state of the relevant bank account on the date when they are written and to provide certain other items of information designed to confirm the authenticity of the application for entrepreneurial migrant status and its economic viability. There is no difficulty in the third party bank, with its customer's consent, expressing its understanding, based on the customer's instructions, that the use of specified funds in the customer's bank account/s is contemplated or proposed by the customer for the purpose of financing the applicant's proposed business venture. Accordingly, there is no substance in the argument that the relevant requirements contained in paragraph 41-SD(a)(i) produce an absurd result and must, therefore, be interpreted in some other manner.
>
> (2) The question of whether a policy exists is one of fact. There is no evidence that some policy on evidential flexibility, independent and freestanding of paragraph 245AA, survived the introduction of that paragraph in the immigration rules.

17. In Akhter and another (paragraph 245AA: wrong format) [2014] UKUT 00297 (IAC), the Upper Tribunal Tribunal held that a bank letter, which does not specify the postal address, landline telephone number and email address of the account holders is not thereby "in the wrong format" for the purposes of paragraph 245AA of the immigration rules (documents not submitted with applications).

18. In relation to the issues in this appeal, it is clear that no flexibility policy survived the introduction of paragraph 245AA and that that limitations of that paragraph cannot be expanded to include defective documents as being in the wrong format. The above case authorities entirely support my decision in relation to the application of evidential flexibility set out between §19 and §31 of that decision.

19. For the reasons set out in the error of law decision, without needing to repeat them here, it is clear that the claimants do not meet the requirements of the Immigration Rules for leave to remain as Tier 1 entrepreneur and dependents and their appeals in that regard must fail. Mr Vaughan made no submissions to the contrary.

20. Developing his skeleton argument, Mr Vaughan submitted that the appellants should succeed under the Immigration Rules, on the basis that one or both children qualify under private life under paragraph 276ADE (1)(iv) and thus the parents (and the other child) should be entitled to remain under article 8 to care for those children.

It is submitted that the best interests of the children are to remain in the UK and for the children to be raised by the parents.

21. I have a duty to have regard as a primary consideration the best interests of the child claimants. In Azimi-Moayed & others (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC), the Upper Tribunal Tribunal held that as a starting point it is in the best interests of the children to be with both their parents, "Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reasons to the contrary. What amounts to lengthy residence is not clear but past and present policies have identified seven years as a relevant period."

22. The Tribunal also noted that seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.

23. The claimant Anika Bushra has spent her life in the UK since age 4 and will be 13 years of age in November 2014. She has thus spent something over 8 years in the UK. Under 276ADE(iv) she has thus lived continuously in the UK for at least 7 years.

24. Mr Vaughan submitted that Bushra would experience a real detriment to her life to have to return to Bangladesh and that it was in her best interests to continue with her course of education in the UK. In that regard I take into account the evidence of her integration with life in the UK, including the letters of Bushra, Kaba, and their father, and the school reports and teacher comments, set out in the claimants' bundle. Bushra started secondary school in September 2013. All of the evidence is positive in support of the children, though perhaps no more than one might expect from being enrolled in school and taking an active part in school life. I also take into account that the family can be adequately accommodated and maintained in the UK without reliance on public funds.

25. The second child, Kaba is now 7 years of age and was born in the UK. Thus both children have been in the UK for 7 or more years and will have by now integrated well into their school communities, more so Bushra than Kaba. Bushra will have little recollection of life in Bangladesh and Kaba has known nothing but life in UK, although the majority of that will have been within the family.

26. In Azimi the Tribunal said that, "it is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong." Whilst the children will have had the advantage of education to date in the UK, children can adapt quickly to new environments and the challenges of that are mitigated by having the whole family together and the familiarity of the parents of the culture and society to which they are returning. The cultural norms and background to which the children belong is that of their parents which must be the society and culture of their home country of Bangladesh. I accept that that could potentially be outweighed by particular circumstances, as anticipated in Azimi.

27. Obviously, the family must remain together, whether in the UK or Bangladesh and there is no basis for splitting children or parents apart. It would be unreasonable to require one child to return without the other. It follows that if one of the children is entitled to remain in the UK, then the other child and both parents should remain with that child.

28. I have to bear in mind the context of the application at the heart of this appeal was to remain as a Tier 1 entrepreneur and dependents and that application has failed. The only basis for the wife and children to remain stood or fell with that of the husband and first claimant. As neither he nor his wife have independent grounds to remain, having failed to comply with the Immigration Rules, one would expect the first claimant to leave and for his dependents to follow.

29. Further, seven years residence in the UK is not the sole test for the children. The crucial issue on the facts of this appeal is whether it would be reasonable to expect the children to leave the UK with their parents.

30. In Azimi the Tribunal held that, "if both parents are being removed from the UK then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary." That starting point has to be considered alongside that part of 276ADE which provides that for leave to remain it must not be reasonable to expect the applicant under the age of 18 to leave the UK. Obviously, if the 7 years residence of a period under 18 were sufficient, there would be no need for the reasonableness test.

31. Thus the question in this appeal, taking an overall view of the evidence of the integration of the children through schooling in the UK, is whether it would be reasonable to expect children of a failed Tier 1 entrepreneur to accompany their parents back to Bangladesh, taking account of not only the length of residence but those factors set out above and urged upon me by Mr Vaughan. Despite the degree of integration as evidenced and the family's personal desire to remain indefinitely in the UK, I find that it would be reasonable on the facts of this case to expect the children to accompany their parents back to Bangladesh. Their presence in the UK was only temporary and the family would have known throughout that it depended entirely on whether the father qualified for leave to remain as a Tier 1 entrepreneur or in any other route for which he may qualify. There was no legitimate expectation to remain outside the Immigration Rules. In many ways this would be akin to the situation of a parent on a government or commercial overseas posting for a number of years before returning to their home country. The cultural background would have persisted in the family home, including native language.

32. I find in all the circumstances it not reasonable to suggest that the entire family should be entitled to remain because whilst the family was in the UK one (if not both) of the children has coincidentally developed a private life by being educated in the British school system and done well at school, developed friendships, and in the process lost all recollection of life in their home country. Broken down to the individual child, I reach the conclusion, for the reasons set out herein, that it would

be reasonable to expect each of the children to leave the UK and by doing so accompany their parents who have no individual right to remain.

33. Mr Vaughan accepted that the parents do not qualify under the relationship requirements of Appendix FM for leave to remain either as partners or as parents of a child in the UK. It is of no assistance to the claimants to suggest that they would have met the other requirements, as there is no near miss principle in immigration law. I reject the submission that their closeness to meeting the requirements is relevant to proportionality, as that is simply putting a near miss argument in a different way. I dealt with the near-miss point in my decision on error of law, at §44 to §49 and do not need to repeat it here. The claimants' article 8 claim cannot be strengthened by the degree to which they fail to meet the Immigration Rules, or as it was put in Miah, "the requirements of immigration control is not weakened by the degree of non-compliance with the Immigration Rules."

34. Mr Vaughan's remaining argument is that the Tribunal should go on to consider article 8 ECHR outside the Immigration Rules because the claimants have shown an arguable case to do so. I referred in the error of law decision to Gulshan in the Upper Tribunal and MF(Nigeria) in the Court of Appeal. In essence, after applying the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for article 8 purposes to go on to consider whether there are compelling circumstances not sufficient recognised under them.

35. More recently, in Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC), the Upper Tribunal held:

(i) Failure on the part of the Secretary of State to identify in her decision any legitimate aim under Article 8(2) of the ECHR does not prevent a court or tribunal from seeking to do so on the basis of the materials before it.

(ii) "Maintenance of effective immigration control" whilst not as such a legitimate aim under Article 8(2) of the ECHR can normally be assumed to be either an aspect of "prevention of disorder or crime" or an aspect of "economic well-being of the country" or both.

(iii) "[P]revention of disorder or crime" is normally a legitimate aim both in expulsion cases where there has been criminal conduct on the part of the claimant and in expulsion cases where there have only been breaches of immigration law.

(iv) MF (Nigeria) [2013] EWCA Civ 1192 held that the new immigration rules regarding deportation of a foreign criminal are a complete code. This was because of the express requirement in them at paragraph 398 to have regard to exceptional circumstances and other factors.

(v) It follows from this that any other rule which has a similar provision will also constitute a complete code;

(vi) Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT

> 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

36. Having applied the Immigration Rules and found that the claimants do not meet the requirements of the Rules, I have considered whether they can be regarded as a complete code. In respect of the child claimants the requirement under 276ADE to consider reasonableness is in essence a proportionality assessment. I have to bear in mind that the Immigration Rules including Appendix FM is the Secretary of State's response to private and family life rights and the best interests of children and are intended to be a complete code. However, because the parents do not meet the requirements of either 276ADE or the relationship requirements of Appendix FM, there has been no separate assessment of the proportionality of their removal. Thus following Shahzad, I must consider, at least in relation to the parents, whether there are arguably good grounds for granting leave to remain outside the Rules, so that it is necessary for Article 8 purposes to go on to consider whether, exceptionally, there are compelling circumstances not sufficiently recognised under the Rules, on the basis that the decision of the Secretary of State produces a result which is unjustifiably harsh (Nagre).

37. However, taking full account of all the matters urged on me and/or disclosed in the appellant's bundle or other documents before me, I am not satisfied that there are good grounds for granting leave to remain outside the Rules. I do not find compelling circumstances insufficiently recognised in the Rules which render the decision of the Secretary of State unjustifiably harsh.

38. In reaching that view, I take into account all the matters set out herein and urged upon me by Mr Vaughan, especially in relation to the schooling and degree of integration of the children and the family's length of residence in the UK. I bear in mind that there is no consideration of proportionality but in effect the requirement under the caselaw to demonstrate compelling circumstances rendering the decision unjustifiably harsh is a proportionality test and can take into account the best interest of the children, which I do. However, I have found that the children do not meet the requirements of 276ADE in respect of their private life and any compelling circumstances would have to relate to their private life, as their family life will continue with their parents, as the family will be removed together. In the circumstances, the failure of the children to meet 276ADE does not assist the claim of the parents to remain under article 8 family life.

39. In considering whether the family's circumstances are insufficient recognised in the Immigration Rules, I have to bear in mind that there is a route for leave to remain for the children under 276ADE, as discussed above, and that the Rules specifically do not provide for a right to remain for parents of children where both parents are together caring for children who are neither British nor settled in the UK. That is itself in part a proportionality assessment of what can be regarded as giving potential rise to a right to remain. If parents do not meet those requirements of Appendix FM

then the Secretary of State's position is that they have no right to remain. That does not prevent, however, consideration of their private and family life rights under article 8 ECHR outside the Rules, but only if their circumstances are both compelling and so insufficiently recognised under the Rules that the decision to remove can be regarded as unjustifiably harsh. For the reasons set out herein, I find that the claimants' circumstances do not meet either the requirements of the Immigration Rules or of the recent caselaw providing protection where the circumstances are insufficiently recognised in the Rules.

40. I am required to take into account the fact that the family does not meet the requirements of the Immigration Rules for leave to remain, even though there is a route for leave to remain for those in similar circumstances, provided that they can meet all the requirements of the Rules. I bear in mind the nature and purpose of the application made by the first claimant and the rest of the family as his dependants, which was as a Tier 1 Entrepreneur. The family had no legitimate expectation to remain in the UK beyond qualifying to do so under those provisions of the Immigration Rules. They have no right to remain simply because they prefer to settle in the UK or simply because of the elapse of time. I also have to take account of the fact that the Rules and the 2002 Act are designed to require applicants to provide specified evidence with the application and that evidence or other documents submitted after the application cannot be taken into account except and insofar as paragraph 245AA applies. The Rules for leave to remain in this category are intentionally quite strict and thus the effect of non-compliance is stark.

41. In Gulshan the Upper Tribunal considered that it was not unduly harsh for a husband who originated from Pakistan but was now a British national, to return to Bangladesh with his wife who was seeking leave to remain as his spouse. The panel acknowledged that the couple would suffer some hardship, as he had been in the UK since 2002, he had worked here and was receiving a pension, and housing benefit and other state benefits, some of which could not be transferred to Pakistan. Whilst this family's circumstances are different, the Upper Tribunal's decision on what was not unjustifiably harsh is illustrative of that test.

42. Mr Vaughan asked me to consider that the claimants were running a business, employing two staff members and contribution to the economy. However, the evidence showed that the business was making a loss and there was very little reliable evidence before the First-tier Tribunal to show that the business was or would be successful. I also note that a qualified chartered accountant did not audit the accounts. I also have to bear in mind that the entrepreneurial team partner has failed to demonstrate that he can meet the requirements of the Immigration Rules and has failed to make out any valid claim on the basis of article 8; it is difficult to see how the business could continue without that partner's contribution. The evidence demonstrated that the business was fragile. It if failed the claimants would then become dependent on the public purse.

43. In the circumstances, taken at best, the running of the business is a neutral factor in the assessment of compelling circumstances. At the First-tier Tribunal the claimants

asserted that they could not return to Bangladesh because they had put everything into the business. However, that is neither compelling circumstances nor a valid reason not to remove.

44. In essence, the only circumstances in this case which could ever be considered compelling are those outlined above in relation to the children; summarised as their length of residence and integration in schooling and friendships revolving around their private lives. I am satisfied that the claimed likely disruption to their lives is not as great as claimed, bearing in mind that they will have the support of their parents and the whole family as a unit returning together. They will have no linguistic difficulties and the culture will be familiar to them. Children are young enough to quickly adjust and make new friendships. There is no evidence that they will not be able to continue schooling. Their family circumstances are of a middle-class Bangladeshi family with good education and the advantage of English as a second language. Their education to date in the UK will be a positive benefit to their future advantage. Taken as a whole, I am satisfied that the best interests of the children will be to remain with their parents as a complete family unit. I do not accept the argument that their best interests are to remain in the UK. Obviously, they would prefer to remain in the UK indefinitely and to continue to be educated in the UK. Whilst that lifestyle is inevitably going to be superior to that available to the family in Bangladesh, that is not the same thing as saying their best interests are to remain in the UK. Otherwise the best interests of every child would be to have the best of everything. It is an assessment that has to be made in the context of the case as a whole and in this case in the light of the fact that the parents have no right to remain, then it is in the children's best interests to return with their parents. That is why it is not unreasonable to expect them to do so.

45. In all the circumstances, taking the evidence as a whole, in the round, I find that there are no sufficiently compelling circumstances insufficiently recognised in the Immigration Rules so as to justify, exceptionally, granting leave to remain outside the Immigration Rules under article 8 ECHR on the basis that the decision of the Secretary of State is unjustifiably harsh. For those reasons the appeals must fail.

Decision:

The appeal of each appellant is dismissed.

Signed: Date: 27 June 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeals have been dismissed.

Signed: Date: 27 June 2014

Deputy Upper Tribunal Judge Pickup

ANNEX: ERROR OF LAW DECISION

Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/26687/2013
IA/26699/2013, IA/26716/2013 & IA/26726/2013

THE IMMIGRATION ACTS

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Abdul Basher Mohammed Shamim
Hosne Ara Begum
Anika Mubashsira Bushra
Kaba Al Shamim
[No anonymity direction made]

Claimants

Representation:

For the claimants: Mr R Reynolds, instructed by AK Solicitors LLP
For the respondent: Mr Mangion, Senior Home Office Presenting Officer

DECISION AND REASONS

46. The claimants, Abdul Basher Mohammed Shamim, date of birth 3.1.70, his wife Hosen Ara Begum, date of birth 15.1.68, and their children, Anika Mubashsira

Bushra, date of birth 9.11.01, and Kaba Al Shamim, date of birth 22.1.07, are citizens of Bangladesh.

47. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Duff, who allowed the appeals against the decisions of the respondent to refuse to vary leave to remain in the UK as a Tier 1 (Entrepreneur) Migrant and dependants. The appeals were allowed on the basis that the decisions were not in accordance with the law and breached the appellants' rights under article 8 ECHR. The Judge heard the appeal on 28.10.13.

48. First-tier Tribunal Judge Frances granted permission to appeal on 26.11.13.

49. Thus the matter came before me on 31.1.14 as an appeal in the Upper Tribunal.

50. The matter was heard as linked claimants. Unless otherwise stated or clear from the context, all references below to the claimant refer to the first claimant, Mr Shamim, the Tier 1 (entrepreneur) applicant.

51. The appeal was also heard together with the Secretary of State's appeal against the decision of the First-tier Tribunal in respect of Mr Shamim's entrepreneur team partner, Hari Krishnan, reference IA/26749/2013. There were two separate decisions of the First-tier Tribunal and I am asked to draft separate decisions, though the reasoning will largely be the same, as they were in the determinations of Judge Duff.

Error of Law

52. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Duff should be set aside.

53. Following the submissions of the representatives on the issue of error of law, I reserved my decision, which I now give.

54. The relevant background can be summarised as follows. The claimant first entered the UK on 4.9.05 with leave as a student and extended thereafter at a Tier 1 Post Study migrant until 15.12.12. On 18.12.12 he made an application for further leave to remain as a Tier 1 (Entrepreneur), with Mr Hari Krishnan. The application was refused on the basis of failure of the appellant to comply with the evidential requirements under Appendix A paragraphs 41-SD and 46-SD. It is the appeal against that decision which came before Judge Duff.

55. The particular failures relied on by the respondent are as follows:

    (a) Insufficient evidence that the entrepreneurial team had already invested £30,000 into the business 'Fairway Business International Ltd;'

    (b) The bank letter does not state the claimant's name or that of his entrepreurial team partner, or that the monies held can be transferred to the UK;

(c) The legal representative's letter related to a previous declaration and not the one made with the current application. Further, it did not clearly confirm the third party's identificateion details or their signature. The letter does not come from a legal representative who is authorised to practice in the country of the third party;

(d) Insufficient evidence that the claimant is engaged in business activity. None of the advertisements give the partners names. None of the contracts include a contact telephone number of the clients or original signatures from both parties, or have signatures but pages missing from the contracts;

(e) No evidence was submitted to demonstrate that that the business is subject to UK taxation.

56. For the reasons set out herein, I find that there were a number of errors of law in the making of Judge Duff's decision, such that the determination should be set aside and remade.

57. Judge Duff noted the evidential failures at §7 of the determination. At §2 the judge recognised that by reason of section 85A of the Nationality, Immigration and Asylum Act 2002 only evidence submitted with the application could be considered in a PBS case. The application was made on 18.12.12 and the refusal decisions followed on 14.6.13. At §11 Judge Duff noted the claimant's reliance on further documentation submitted after the date of application and concluded at §12 and §14 that the Secretary of State had failed to take account of all the evidence submitted, "as it ought to have been." For the reasons set out below, I find that to be an error of law.

58. As drafted, section 85A provides that when considering a PBS appeal the Tribunal may consider evidence adduced by the appellant only if it was submitted in support of, and at the time of making, the application to which the immigration decision related. Immigration Rule 34G provides that an application is made on the date it is sent or submitted, depending on how it is submitted.

59. Previous authority suggesting that an application remains open until the date of decision has been overturned. In Raju, Khatel and Others v SSHD [2013] EWCA Civ 754 the Court of Appeal made it clear that AQ (Bangladesh) v SSHD [2011] EWCA Civ 833 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". Rule 37 of the Immigration Rules governs the date of the application. Paragraph 34G precludes the concept of a 'continuing application' which started when it was first submitted and concluded at the date of the decision either of the Secretary of State or, on appeal, of a Tribunal.

60. Despite the apparent effect of section 85A, in Nasim and others (Raju: reasons not to follow?) [2013] UKUT 00610(IAC), the Upper Tribunal stated, inter alia,

> " 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."

61. At §76 of Nasim, it is clear that this view was *obiter* and not part of the rationale for the decision. However, it appears from §73 that the respondent's position before the Upper Tribunal was that an application is to be treated as continuing for evidential purposes after it is initially submitted to the SSHD, enabling an applicant to provide further evidence in addition to that initially submitted. There may have been a particular reason for such a concession in that appeal and it may be a matter entirely restricted to that case. However, whilst the respondent could consider evidence submitted after the date of application, the Tribunal cannot as it is clearly prohibited from doing so by 85A(4); I can find no authority to the contrary.

62. Paragraph 245AA was not considered in Nasim, as that case dealt with a different set of criteria for the now-closed post study work route at a time before paragraph 245AA was introduced into the Rules in September 2012.

63. In the circumstances, I find that there was an error of law in Judge Duff taking into account evidence that was before the Secretary of State before she made her decision, and not taken into account by her, as such evidence had not been submitted with the application.

64. Further, at §15 of the determination Judge Duff purports to dispense with the requirements of 41-SD in relation to the advertisements submitted as evidence of engagement in business activity, finding that, "the material taken together satisfied the requirement." The judge's opinion that it would make no commercial sense for published advertisements to have the claimant's name, or that of his team partner, as opposed to the name of the business is irrelevant. The specific requirement in 41-SD (c)(iii) is that the advertisement must contain, "the applicant's name (and the name of the business if applicable) together with the business activity." It is not open to the First-tier Tribunal to dispense with the stated requirements; to do so is a clear error of law. I will deal below with the evidential flexibility point made in the alternative in §15.

65. At §16 the judge accepted that none of the contracts had the telephone numbers of the clients on them. At §17 the judge notes that the claimant accepts failing to provide the required evidence of tax registration. At §19 Judge Duff finds that because of these two evidential failures, described as "minor aspects of the rules," the appeal cannot be allowed on the basis that the application was not in accordance with the Immigration Rules. However, he proceeded to allow the appeal on the basis that the decisions were not in accordance with the law on the following basis set out in the determination at §17 and §19:

66. That the evidential failures, "ought to have prompted the Secretary of State to make an enquiry of the claimant pursuant to the evidential flexibility policy in existence at that time… A caseworker considering the case clearly ought to have had sufficient

reason to believe that the missing piece of evidence existed or at the least to have been uncertain as to whether it existed and to have given the benefit of the doubt to the (claimant) and requested the missing material."

67. For the reasons set out below, I find that Judge Duff made an error of law in reliance on evidential flexibility to allow the appeals.

68. In relation to the evidential flexibility policy, in Alam and others [2012] EWCA Civ 960 the Court of Appeal held that the exclusion of new evidence introduced by the Nationality, Immigration and Asylum Act 2002 s.85A applied to all appeals made after the date that s.85A was brought into force. The Court accepted the Respondent's contention that the check as to the validity of applications was a very preliminary check to see whether there were obvious omissions: e.g. no fee paid, no photograph supplied, no signature on the Student Declaration at the end of the form. The Court of Appeal accepted the distinction between an invalid application, which would not be considered unless the obvious defect was cured, and an application that was a valid application, but nevertheless fell to be rejected because, on examination, the applicant had failed to score that required number of points, e.g. because he had failed to supply a specified document. In the circumstances, irrespective of any argument as to whether submitted documents were in the wrong format, the failure to provide a specified document, including in this case the contracts, advertisements and tax registration, were omissions fatal to the application.

69. Judge Duff relied on Rodriquez (Flexibility Policy) [2013] UKUT 00042 (IAC). However, Rodriquez was further considered in the Court of Appeal, Rodriquez [2014] EWCA Civ 2, where the court almost entirely disagreed with the conclusions of the Upper Tribunal as to the applicability of an evidential flexibility policy to PBS cases. Ms Rodriguez had failed to demonstrate by her submitted bank statement that she had the necessary funds over the required 28-day period and her application for further leave to remain as a student was refused. The First-tier Tribunal decided that pursuant to section 85A it could not take account of further bank statements showing additional funds. She then appealed to the Upper Tribunal, relying on an evidential flexibility policy in a letter dated 19.5.11.

70. It should be pointed out that in Rodriguez, the incorporation of what was the evidential flexibility policy into the Immigration Rules at paragraph 245AA was not directly material to the three appeals before the Court of Appeal, as it came about after the relevant dates. The Court of Appeal was considering the contention that an evidential flexibility policy, referred to as the PBS Process Instruction, published in June 2011, was the version potentially relevant to the three appeals before the court. The document appears as Appendix B to the Upper Tribunal Rodriguez decision.

71. The Court of Appeal found that the letter of 19.5.11 was not intended to herald an unequivocal relaxation of the Immigration Rules over and above the process instruction; it was merely referential to existing policy and mooting a temporary trial. At §92, it was held that taken overall, the process instruction, "is demonstrably not designed to given an applicant 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." In Ms Rodriguez case there was no reason to believe that she had other funds available to her and she had not met the requirements of the Rules in that she failed to submit the specified documentation showing the required minimum amount over the 28 day period required. Consideration of the policy did not and would not have assisted Ms Rodriguez. The court found that the conclusion of the First-tier Tribunal in her case was correct.

72. The PBS Process Instruction policy, predating paragraph 245AA, purports to deal with missing evidence or a minor error. It states, inter alia, that there is no limit on the amount of information that can be requested from the applicant; that multiple pieces of evidence can be requested; and that where there is uncertainty as to whether evidence exists, benefit should be given to the applicant. At section 3, it provides that before seeking additional information, it must be established that the evidence exists, or sufficient reason to believe that it exists.

73. In any event, by the time of the facts in the present appeal, the PBS Process Instruction had been incorporated into the Immigration Rules on 6.9.12 in paragraph 245AA, setting out that only documents submitted with the application will be considered and that documents submitted after the application will only be considered in certain circumstances where 245AA(b) applies. This relates to a missing document in a sequence, or a document in the wrong format, or the supply of a copy instead of the original. "The UK Border Agency will not request documents where a specified document has not been submitted, or where the UK Border Agency does not anticipate that addressing the omission or error … will lead to a grant because the application will be refused for other reasons."

74. The examples set out at step 3 of the process instruction are virtually identical to paragraph 245AA as it stood in September 2012. In the circumstances, I find no significant difference in the application of the policy between this document and paragraph 245AA of the Immigration Rules. In any event, neither the application of the process instruction nor paragraph 245AA could rescue the several evidential failures in the present case. In the circumstances, it is not necessary to determine whether paragraph 245AA displaces the process instructions.

75. It is obvious that an error in a contract document cannot be cured in the same way as a missing document in a series or failure to provide an original document rather than a copy, as that would mean the creation of an entirely new contract document. Similarly, an advertisement that does not contain the correct information cannot be cured without a completely new advertisement. There was thus no basis for considering there might be evidence in existence in relation to these two issues that met the requirements of the Rules. Further, the failure to provide the correct document to evidence that the business is subject to UK taxation does not falls within the types of documents set out in 245AA(b) or the process instruction. This was not an error in the documentation supplied but a complete failure to provide the required documentation to meet this part of the requirements. In the circumstances,

there was no requirement for the Secretary of State to make further enquiries of the claimant in relation any of these evidential failures.

76. In summary, the claimant's case is not assisted by considerations of evidential flexibility. If follows that Judge Duff erred in law in concluding that the appeal should be allowed on that basis.

77. Judge Duff went on to consider the claimant's circumstances under article 8. However, as Mr Reynolds accepts, if the Secretary of State's decision were not in accordance with the law, Judge Duff should not have gone on to consider article 8 but should have allowed the appeals to the limited extent that it remained for the Secretary of State to make decisions that were in accordance with the law. Thus, even on the claimant's there was an error of law in the decision of Judge Duff such that the determination cannot stand.

78. I turn now to article 8 considerations. The First-tier Tribunal allowed the appeals on the basis of article 8 family and private life.

79. Article 8 provides that:

> "*Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *"There shall be no interference by a public authority with the exercise of this right* ***except*** *such as is* ***in accordance with the law*** *and is* ***necessary*** *in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

80. At paragraph 17 of Razgar v Secretary of State for the Home Department [2004] UKHL 27, Lord Bingham of Cornhill stated:

> *"In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the Tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on Article 8, these questions are likely to be:*
>
> > *(1) Will the proposed removal be an interference by a public body with the exercise of the applicant's right to respect for his private or (as the case may be) family life?*
> > *(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?*
> > *(3) If so, is such interference in accordance with the law?*
> >
> > *(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?*
> >
> > *(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"*

81. Following Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) it is clear that on the current state of the authorities:

> "After applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);"

82. Broadly speaking MF (Nigeria) [2013] EWCA Civ 1192 and Nagre make clear that the Immigration Rules as now in force are to be read as incorporating Article 8 of the ECHR but, of course, the existing jurisprudence continues to bind the decision maker and the courts in its interpretation of those Immigration Rules. Put another way, a decision purporting to be made in compliance with the Rules will only be sustainable if it is reconcilable with those legal principles as well as the structure of the Rules itself. Otherwise the decision maker will have failed to apply the respondent's policy that refusal of the application must not result in unjustifiably harsh consequences such as to be disproportionate under Article 8. Only if there were arguably good grounds for granting leave to remain outside the rules would it be necessary for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules.

83. Judge Duff considered at §20 the circumstances of the claimants, pointing out that the family is settled in the UK with substantial roots including the business. The two children are well-settled in school and making good progress. The judge concluded that the claimant was running a genuine business and there was nothing at all about the claimants that was detrimental to the UK. The judge concluded that to uproot them all and force them to return to Bangladesh because of a minimal failure to comply with aspects of the Immigration Rules was wholly disproportionate.

84. It is to be noted that the claimant has been in the UK since 2005, first as a student and then a post study work migrant.

85. Taking full account of those matters recited by Judge Duff and other matters evident in the case papers before me, I find no compelling circumstances, for granting leave to remain outside the Immigration Rules on the facts of this appeal. Neither do I find evidence sufficient to render the decision either disproportionate or unjustifiably harsh; whichever test is applied. There were clearly stated rules for leave to remain, with which the claimant has not complied. The claimants must be taken to understand that they have no inherent right to remain in the UK unless and until they can comply with the Immigration Rules for doing so.

86. In his article 8 considerations, Judge Duff referred to the Razgar steps in considering article 8, but found that the interference was not necessary for the enforcement of immigration policy. With respect, that was a misunderstanding and misconstruction of the Razgar steps. In essence, the judge conflated the necessity of protecting the economic well-being of the country with the proportionality balancing exercise and in doing so made a material error of law.

87. The judge then went on to consider at §20 that he had, "not the slightest doubt that the decision was entirely disproportionate in relation to the trivial failures in respect of the immigration rules," and purported to additionally allow the appeal on that basis. The judge entirely failed to take into account in the balancing exercise the very significant factors weighing in favour of the Secretary of State's decision, including that the claimant had failed to meet the requirements of the Immigration Rules for leave to remain in the UK. The judge erred in concluding which provisions of the Rules had not been complied with. The judge, also wrongly, took into account his conclusion that the claimant should have been given the opportunity to correct what he described as a minimal failure to comply with two trivial aspects of the Immigration Rules.

88. Once one strips out the errors of law from the proportionality assessment, there remains little in favour of permitting the claimant leave to remain outside the Immigration Rules. In the circumstances, without needing to elaborate further, it is clear that the article 8 proportionality assessment, if such was required at all, was fatally flawed.

89. Further, on the present case, whilst the evidence that did not accompany the application and was excluded from consideration in respect of the Rules, could potentially be brought into play in relation to article 8, it does little to strengthen such an article 8 claim, as the claimant is not entitled to succeed on the basis of article 8 simply by the degree to which he failed to meet the Immigration Rules.

90. In granting permission to appeal, Judge Frances also noted that the grounds submitted that, following Miah [2012] EWCA Civ 261, the First-tier Tribunal wrongly applied the Near-miss principle in the assessment of proportionality.

91. "It is arguable that the judge erred in law in finding that the Evidential Flexibility Policy applied and it was unfair not to give the First (claimant) an opportunity to correct the omission, given that the first (claimant) had failed to supply specified documents. Further, contrary to Miah, the judge appears to have applied the near-miss principle in his assessment of proportionality. The grounds are arguable."

92. In Miah, Burnton LJ stated at §26, "In my judgement, there is no Near-Miss principle applicable in the Immigration Rules. The Secretary of State, and on appeal the Tribunal, must assess the strength of an article 8 claim, but the requirements of immigration control is not weakened by the degree of non-compliance with the Immigration Rules." It follows that it is not open to the Tribunal to allow the appeal on the basis of a near miss, as held in MM and SA (Pankina: near-miss).

93. Further, in Patel [2013] UKSC 72 Lord Carnwath said:

> "55. Thus the balance drawn by the rules may be relevant to the consideration of proportionality……
>
> 56. Although the context of the rules may be relevant to the consideration of proportionality….this cannot be equated with a formalised "near-miss" or "sliding

> scale" principle…..Mrs Huang's case for favourable treatment outside the rules did not turn on how close she had come to compliance with rule 317, but on the application of the family values which underlie that rule and are at the heart of article 8. conversely, a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit.
>
> 57. It is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the Secretary of States' discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right…."

94. The facts of Patel & others are worth summarising. Mr Alam's application for leave to remain as a Tier 4 student under the PBS system was refused as he had failed to provide the relevant documentation with his application. By the time of the First-tier Tribunal appeal he had produced qualifying bank statements but the Tribunal held that they were excluded from consideration by section 85A, but went on to regard the evidence as relevant to article 8 and found the decision disproportionate on the basis that the appellant now met the requirements of the Rules. The Upper Tribunal reversed the decision of the First-tier Tribunal, finding that the judge had erred in treating the new evidence as effective compliance with the Rules for the purpose of article 8. The Supreme Court considered that the new evidence could be excluded insofar as it related to human rights grounds and article 8 considerations, and could take the evidence outside the scope of exception 2 in section 85A. However, on the facts of the case, the Supreme Court found no error in the approach of the Upper Tribunal, as there was little merit in the article 8 claim, even if some weight was given to the unusual circumstances in which he lost his ability to rely on the new evidence, because of when section 85A came into force. The evidence did not significantly improve the human rights case and there is no near miss or sliding scale principle to be applied.

95. For the reasons set out herein, I find that Judge Duff made clear errors in respect of his consideration of the appeals in application of the Immigration Rules, even though he ultimately concluded that the appeals could not succeed under the Rules, the degree to which they failed to meet the Rules was in fact greater than the judge concluded, which would also have a significant bearing on the proportionality of the decision under article 8.

96. As far as the near-miss argument is concerned, I am satisfied that Judge Duff was not consciously seeking to apply a near-miss principle to the appeal, but the effect of §19, referring to the failure to satisfy, "two minor aspects of the rules," and §20, referring to, "trivial failures in respect of the immigration rules," as justification for the decision to allow the appeal was to apply the purported near-miss principle to the case either independently or as part of the article 8 proportionality assessment. That was also an error of law.

97. At the conclusion of the hearing before me, I reserved my decision on error of law. Mr Reynolds submitted that if I found only an error of law in relation to Judge Duff going on to consider article 8 when he found the decision was not in accordance with the law, I could remake the decision without any further hearing. However, if I

found errors of law as contended for by the Secretary of State, he submitted that it should be remitted to the First-tier Tribunal.

98. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. However, the facts of this case are clear; it is the conclusions from and the application of the law to those facts which is in issue. In the circumstances, I see no purpose in remitting the appeal to the First-tier Tribunal and propose to remake it in the Upper Tribunal.

99. Before doing so, given that I adjourned before reaching a decision on error of law, I consider it appropriate to allow the parties the opportunity to make further representations in writing, should they choose to do so.

Conclusions:

100. For the reasons set out herein I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I reserve the remaking of the decision to the Upper Tribunal.

I issue directions.

Signed: Date: 14 February 2014

Deputy Upper Tribunal Judge Pickup

Consequential Directions

101. The representatives of the Secretary of State and the claimants may submit further representations in writing within 14 days of the receipt of this error of law decision.

102. The appeal should be relisted before myself at the earliest available date thereafter convenient to the parties.

103. Failing written response, I will proceed to remake the decision consistent with the conclusions made herein.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeals have been set aside to be remade.

Signed: Date: 14 February 2014

Deputy Upper Tribunal Judge Pickup