Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: IA/43701/2013**

and IA/46681/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21 October 2014	**On 31 October 2014**

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) Mr RASHID WASIF
(2) MUHAMMAD WAQAS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T Wilding, Home Office Presenting Officer
For the Respondent: Mr T Roe, QC and Mr M Iqbal, Counsel
(instructed by Farani Javid Taylor Solicitors LLP)

DETERMINATION AND REASONS

Introduction

1. The Appellant (the Secretary of State) appealed with permission granted by First-tier Tribunal Judge Page on 2 September 2014 against the determination of First-tier Tribunal Judge A R Williams who had allowed the Respondents' linked appeals as Tier 1 (Entrepreneur) Migrants to the extent of finding that the decisions appealed against were not in accordance with the law and remained outstanding before the Secretary of State for lawful decisions. The determination was promulgated on 12 August 2014.

2. The Respondents are nationals of Pakistan, respectively born on 1 February 1990 and 13 October 1984. They are business partners. They had sought variations of their existing leave to remain so as to become Tier 1 (Entrepreneur) Migrants. Their applications had been refused because they had each relied on a letter from the MCB Bank Limited, but (as they accepted and was not in dispute) it had not been produced within the three month period immediately prior to the date of their applications. This meant that the Secretary of State awarded them no points in terms of funds held in regulated financial institutions and no points as to funds disposable in the United Kingdom. The Respondents contended that the bank letter had been provided long before the Secretary of State reached her adverse decisions. There was also an issue about the English language requirement. The test scores had been withdrawn by the test provider, so the certificates were not accepted by the Secretary of State.

3. Permission to appeal to the Upper Tribunal as sought by the Secretary of State was granted because it was considered arguable that the judge's application of Raju, Khatel and Others v SSHD [2013] EWCA Civ 754 when finding that post application evidence could and should have been considered by the Secretary of State was mistaken. It was further considered arguable that the judge's reasoning was inadequate.

4. Directions were made by the Upper Tribunal in standard form. It was directed that the appeal would be reheard

immediately in the event that a material error of law was found.

Submissions – error of law

5. Mr Wilding for the Appellant relied on the grounds and the grant of permission to appeal. The determination had failed to have sufficient regard to the text of the Immigration Rules as they stood in October 2013, i.e., Appendix A, "Attributes", Table 4, Part A. Paragraph 41 set out the requirements, which was followed by paragraph 41-SD, indicating at paragraph 41-SD(c)(i)(4) that the bank letter had to have been produced within the three months immediately before the date of application. That was the rule, with which the Respondents admitted they had not complied. Sending the decisions back to the Secretary of State as the judge had ordered would achieve nothing except a re-refusal because the rule had not been met. Raju (above) covered precisely the present situation. This was a substantive requirement of the Immigration Rules, not merely a general evidential requirement: see Durrani (Entrepeneurs bank letters; evidential flexibility) [2014] UKUT 295 (IAC) and Ahmed and Another (PBS: admissible evidence) [2014] UKUT 365 (IAC).

6. If that were wrong, it was plain in any event from the relevant bank letter that one third of the funds relied on had been deposited after the applications had been submitted. Miah and ors v SSHD [2012] EWCA Civ 261 showed that the Points Based System requirements were fixed. Paragraph 34G of the Immigration Rules prescribed when an application was treated as made, and the Respondents had not complied. They had sought to make a bad application good after the event. Nor was this a situation where paragraph 245AA of the Immigration Rules (the "evidential flexibility policy") was applicable, because the applications would fail on grounds in addition to the documentary issue. The letter itself had not been provided in accordance with the Immigration Rules.

7. Mr Roe QC for the Respondents relied principally upon his supplementary skeleton argument. This was not a "near miss" situation nor was section 85A of the Nationality, Immigration and Asylum Act 2002 relevant. AQ (Pakistan)

[2011] EWCA Civ 833 indicated that the date of decision was the material date. The Respondents had acquired the right to the relevant points by the date of the decisions.

8. Raju (above) was concerned with meeting the substantive requirements of the Immigration Rules. The rule under consideration in Raju placed the possession of the qualification at the date of the application at the centre of the substantive requirements for leave, which in the present appeals was occupied by the need to have access to sufficient funds, which was the criterion for leave._

9. The Respondents had explained their position, in that Mr Waqas's leave to remain was about to expire, hence his Tier 1 application could not be postponed or he would have become an overstayer. The issue was what the consequences should be where the Respondents failed to meet the formal requirements, but had met the substantive requirements.

10. The recent decision in Avon Freeholds Ltd v Regent Court RTM Co Ltd [2013] UKUT 231 (LC) examined what the consequences of formal non compliance with a statutory requirement might be when there had been substantial compliance. Ravichandran [2000] WLR 354 was also relevant to non compliance with a procedural requirement. In the present appeal it could be seen that the substantive requirement of the Immigration Rules had been met. A requirement as to proof had been elevated to into a substantive requirement with an impermissibly inflexible approach to its application. Nor could it be said that the withdrawal of the English language test certificate scores by the test provider should penalise the Respondents.

11. Mr Iqbal for the Respondents submitted that there was no mischief identifiable from the late submission of the bank letter in any event.

12. In reply, Mr Wilding reiterated that the Immigration Rules could not be circumvented. Avon Freeholds (above) referred to the construction of a statute and the decision was not comparable. AQ (above) had been considered in Raju (above). Paragraph 41-SD could not be overcome by what was in substance a "near miss" argument. The route taken by the judge had not been open to him. There was

nothing inherently unfair about a process which had been set out and where three months had been allowed for.

13. The tribunal reserved its decision.

The error of law finding

14. After due reflection, the tribunal considers that the Appellant's arguments succeed. The tribunal recognises that it has had the benefit of much fuller argument and citation of authority than that made available to Judge Williams. The case on both sides has been put somewhat differently, as may happen when the issues are purely legal.

15. Tier 1 (Entrepreneur) Migrant appeals have often given rise to difficulty, not least in the interpretation of the main authorities such as Raju (above) as to when the reception of post-application but pre-decision evidence within the Points Based System regime is permissible for the First-tier Tribunal. Here it seems to the tribunal that inadvertently the judge erred in his approach. It is easy to see why. In terms of public administration, the fact that the Secretary of State reached no decision(s) until many months after the admittedly late bank letter had been received from the applicants helped create the impression that the provisions of paragraph 41-SD were precatory not mandatory, or, as the case was put on behalf of the Respondents, merely an evidential requirement and not a binding, time fixed condition. When remitting the decisions to the Secretary of State, no doubt the judge was also influenced by the lack of any statement of proper reasons for rejecting the English language test certificates which had been valid at the time they were submitted, but which were later withdrawn. No doubt, too, the judge had in mind that the Respondents had paid substantial fees when submitting their applications. The general impression created by the Secretary of State when dealing with the applications was one of unfairness. The judge's view that the applications should be looked at again in all the circumstances reflects judicial tradition and indeed the broad principles summarised in Avon Freeholds.

16. The problem is that the terms of paragraph 41-SD(c)(i)(4) of Table A are mandatory and are highly prescriptive. There is no choice of routes to compliance. The Respondents had not complied, as they accepted. The fact that the Secretary of State had not decided the applications at the time the bank letters were submitted is irrelevant, and is merely indicative of slowness of administration. This was a narrow but crucial point.

17. Avon Freeholds (above) offers no assistance to the Respondents. The facts, a property case far removed from the sphere of public law, show that a serious injustice would have resulted from an insistence on formal or technical compliance, contrary to the purpose of the legislation in question. Ravichandran, an asylum case, has a similar rationale. No such considerations applied to the present applications for variations of leave to remain, which are governed by the Immigration Rules. The applications were voluntary acts. The applicants were on notice that they had to comply with all of the terms and conditions laid down in the Immigration Rules if their applications were to succeed. They knew that their fees would be wasted if they failed to meet the conditions. They were also on notice that the applications, together with the prescribed documents in the correct form, had to be lodged prior to the expiry of any existing leave to remain if a right of appeal to the First-tier Tribunal was to be available (as opposed to the rigours of Judicial Review).

18. Nasim and others (Raju: reasons not to follow?) [2013] UKUT 00610 (IAC) examined the meaning of the date of "obtaining the relevant qualification" for the purposes of Table 10 of Appendix A of the Immigration Rules in force immediately before 6 April 2012. A strict approach to the substantive requirements of the Immigration Rules was taken. The Upper Tribunal reiterated that the First-tier Tribunal may not consider evidence as to compliance with points-based rules where that evidence was not before the Secretary of State when she took her decision.

19. The critical difference between Nasim (above) and the facts of the present appeal is that paragraph 41-SD(c)(i)(4) laid down the specific requirements for the bank letter and the date for its production. The rule identified the conditions. The Respondents did not satisfy those requirements, as they admitted. The rule was not met.

There was thus no proper basis for the finding that the decisions were not in accordance with the law.

20. The tribunal finds that the determination contains material errors of law, such that it must be set aside and remade. The Secretary of State's appeal to the Upper Tribunal is allowed.

The fresh decision

21. In this part of the determination for convenience and clarity the tribunal will refer to the parties by their original titles in the First-tier Tribunal. There was no need for any further evidence or submissions for the original decisions to be remade.

22. For the reasons set out above, it is clear that both applications were doomed to fail because of the failure of the Appellants to comply with paragraph 41-SD(c)(i)(4), an ineluctable immigration rule. Indeed, as Mr Wilding pointed out, the substance of the requirement was demonstrating access to funds, but the full amount necessary was not available until after the application(s) had been submitted. The applications had thus been made prematurely. There was no scope for resort to paragraph 245AA, since the prescribed time limit had been missed. It was not, for example, a situation where a page from a sequence had been accidentally omitted from an otherwise correct application.

23. As the applications failed on the paragraph 41-SD(c)(i)(4) point alone, and so the appeals must fail, the tribunal need not embark on consideration on the other grounds of refusal.

24. As was made clear in their decision letters, the Appellants may chose to make and rule compliant fresh applications, although they will not enjoy a right of appeal to the First-tier Tribunal in the event that the fresh applications are refused.

DECISION

The making of the previous decision involved the making of an error on a point of law. The appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal is set aside and remade as follows:

The Appellants' appeals are dismissed

Signed **Dated**

Deputy Upper Tribunal Judge Manuell **30 October 2014**

TO THE RESPONDENT
FEE AWARD

The appeals were dismissed, and so no fee awards can be made

Signed **Dated**

Deputy Upper Tribunal Judge Manuell **30 October 2014**