Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/19730/2014
IA/19731/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 20th April 2015	**On 13th May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mrs Vaishaliben Mafatbhai Patel
Mr Amitkumar Chimanbhai Patel
(Anonymity Direction Not Made)

Respondent

Representation:
For the Appellant: Mr Poddar instructed by Hamlet Solicitors LLP
For the Respondent: Ms Isherwood, Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The application for permission to appeal was made by the respondent but nonetheless I shall refer to the parties as they were described before the First Tier Tribunal.

2. The appellants are citizens of Pakistan and born on 5th April 1984 and 6th October 1982. The first appellant made an application on 1st April 2014 to remain in the

United Kingdom as a Tier 4 General (Student) under paragraph 245ZX and the second appellant made an application as the husband and dependant of the first appellant under paragraph 319C of the Immigration rules.

3. The first appellant was required in part to show she was in possession of £3,200 for a consecutive 28 day period, that period ending on a date no earlier than one month prior to the application. The appellants accepted that they had sent a bank statement to the respondent in support of the application but this was one statement and only covered the period from 17th February 2014 to 8th March 2014 and was short of the time period required.

4. First-tier Tribunal Judge Lucas allowed the appellant's appeal on 6th January 2015 because although the appellant had failed to show the requisite funds for the requisite period, the Home Office Presenting Officer agreed that the matter could be returned to the Secretary of State to exercise a discretion. The appellant had maintained at the appeal that she had the relevant funds in her account at all times but had simply not sent in the right documents.

5. An application for permission to appeal was made on the basis that the judge had erred in law because he had no discretion to remit this matter back to the Secretary of State. The judge had not indicated where this discretion derived. Permission to appeal was granted. Mr Poddar argued at the hearing that the matter had been remitted by agreement. Ms Isherwood responded that the matter did not fall within the remit of Paragraph 245AA and there was no discretion. The respondent also relied on **Durrani (Entrepreneurs:bank letters evidential flexibility)** [2014] UKUT 295 (IAC).

6. Following the error of law stage Mr Poddar requested an adjournment which I refused. The directions issued by the Tribunal were clear that the parties should prepare for the forthcoming hearing on the basis that, if the Upper Tribunal decided to set aside the determination of the First tier Tribunal any further evidence including supplementary oral evidence that the Upper Tribunal may need to consider if it decides to remake the decision can be so considered at that hearing. Mr Poddar stated that he could not proceed as he had family commitments and he wished to prepare a skeleton argument. No further evidence was prepared or served to the Upper Tribunal and bearing in mind the delay and expense to the parties I found it was not in the interests of justice to adjourn the second stage of the hearing.

Conclusions

7. The Immigration Rules specify that the appellant must demonstrate that funds are available for the 28 day period prior to the date of the application (Appendix C) and in this instance the bank statement provided only ran from 17th February 2014 to 8th March 2014. The rules state under 1A of Appendix C that the end date of the 28 day period will be taken as the date of the closing balance on the most recent of the specified documents (bank statements). Simply the appellants had failed to provide the relevant evidence for the requisite time period.

8. Mr Poddar argued that the judge was simply applying paragraph 245AA. I see no basis for this. There is no discretionary element within that paragraph which could be applied in this case and there is no substance to the argument that the Paragraph 245AA contains a discretion in this instance. Simply one bank statement was provided and it is not incumbent upon the Secretary of State to request further information or to exercise any discretion. The rules are framed under 245AA(a) such that The Secretary of State will only consider documents that have been submitted with the application, and will only consider documents submitted after the application if they are submitted in accordance with subparagraph (b) which reads

> '…
>
> (b) If the applicant has submitted specified documents in which:
>
> (i) Some of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing);
>
> (ii) A document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or
>
> (iii) A document is a copy and not an original document; or
>
> (iv) A document does not contain all of the specified information;
>
> the Entry Clearance Officer, Immigration Officer or the Secretary of State *may* contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received at the address specified in the request within 7 working days of the date of the request.'

9. Paragraph 245AA does not confirm that where the appellant has failed to provide the necessary documentation the respondent would write and give them 7 days to provide the required document. An analysis of the documentation shows any defect did not fall within 245 AA (b) and the rules are not framed in the light of a discretion in this instance. The discretion for these purposes is a matter for the Secretary of State and there is no obligation founded in fairness which obliges the Secretary of State further to investigate with the Sponsor or to inform the student, **Sukhjeet Kaur v SSHD [2015] EWCA Civ 13**.

10. The appellants had failed to provide the required documentation. There was no document was 'missing' from a sequence as there was no sequence; there was only one document. Further, the document was not in the wrong format and thus 245AA was not engaged (**R (on the application of Gu) v Secretary of State for the Home Department** [2014] EWHC 1634). One sole bank statement does not indicate that the required money would have been present in the account or that one bank statement should have obliged the Defendant's caseworker to pursue any further information.

11. The appellant may have had the funds available (which was unknown to the Secretary of State) but she simply 'did not notice' that the statement submitted was defective. The authorities of **Patel (revocation of sponsor licence –fairness) India** [2011] UKUT 00211 IA and **Naved (Student Fairness notice of points)** [2012] UKUT 14 (IAC) can be distinguished on the basis that in those cases there was no culpability on the part of the appellant. I am not persuaded that the case of **Thakur (PBS**

decision – common law fairness) Bangladesh [2011] UKUT 00151 (IAC) assists. The Immigration Rules in this respect are clear as to the evidence to be provided and the appellant had adequate opportunity to provide the relevant documentation at the relevant time.

12. In this case it was the responsibility of the appellant to ensure that she produced the documentation to show she had the funds in her account which she did not. It is unfortunate that the appellant did not submit the documentation to show she had the funds but the judgments, **Patel and Others v SSHD** [2013] UKSC 72 and **EK (Ivory Coast) v SSHD [2014] EWCA Civ 1517** both confirm that the responsibility in these instances does not fall on the respondent. These cases confirm the need to submit all documentation with the application and at paragraph [29] **EK** gives the reasoning as follows:

> "As Sullivan LJ observed in Alam, it is an inherent feature of the PBS that it "puts a premium on predictability and certainty at the expense of discretion" (para. [35]). Later, at para. [45], he said:
>
> > "… I endorse the view expressed by the Upper Tribunal in Shahzad [Shahzad (s 85A: commencement) [2012] UKUT 81 (IAC) (paragraph 49) that there is no unfairness in the requirement in the PBS that an applicant must submit with his application all of the evidence necessary to demonstrate compliance with the rule under which he seeks leave. The Immigration Rules, the Policy Guidance and the prescribed application form all make it clear that the prescribed documents must be submitted with the application, and if they are not the application will be rejected. The price of securing consistency and predictability is a lack of flexibility that may well result in "hard" decisions in individual cases, but that is not a justification for imposing an obligation on the Secretary of State to conduct a preliminary check of all applications to see whether they are accompanied by all of the specified documents, to contact applicants where this is not the case, and to give them an opportunity to supply the missing documents. Imposing such an obligation would not only have significant resource implications, it would also extend the time taken by the decision making process, contrary to the policy underlying the introduction of the PBS." "

13. Mr Poddar stated that evidential flexibility was not being argued, but even if it were, **Durrani** is proposition confirming that the evidential flexibility policy did not survive the introduction of Paragraph 245AA.

14. In sum the appellant did not fulfil the requirements of the Immigration Rules and this was not a case were the appeal should have been remitted to the Secretary of State. There can be an agreed concession in fact but not in law. The appellants did not fall into any of the categories cited with Paragraph 245AA.

15. I considered the evidence including the witness statement of the first appellant who entered the UK in 2009. Her husband then joined her. Her witness statement disclosed minimal detail in respect of the Article 8 issue and as she and her husband had their appeal dismissed together no doubt they will be returning to Pakistan together. **Patel** confirms that Article 8 is not a general dispensing power. This is an

appellant who came to the UK recently to study knowing that she would have to return. I am not persuaded that any private or family life has been prejudiced in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8, **Nasim and others (Article 8)** [2014] UKUT 00025 (IAC).

16. For the reasons given above the Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007.

17. I dismiss the appeal both under the Immigration Rules and on human rights grounds.

Order

The appeals are dismissed under the Immigration Rules and on human rights grounds.

Signed Date 20th April 2015

Deputy Upper Tribunal Judge Rimington