Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/23557/2014
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THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 19 May 2015	**On 2 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MRS SHITAL TRIVEDI (FIRST APPELLANT)
MR KALPESH TRIVEDI (SECOND APPELLANT)
MASTER YASGH TRIVEDI (THIRD APPELLANT)
(ANONYMITY DIRECTION NOT MADE**)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms Chaggar, Counsel instructed by Hiren Patel Solicitors
For the Respondent: Mr Smart, Senior Presenting Officer

DECISION AND REASONS

1. The appellants appeal to the Upper Tribunal from the decision of the First-tier Tribunal dismissing their appeal against the decision of the respondent to refuse to vary their leave to remain, and against the Secretary of State's concomitant decision to remove them from the UK by way of directions under Section 47 of the

Immigration, Asylum and Nationality Act 2006. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellants require to be accorded anonymity for these proceedings in the Upper Tribunal.

2. The appellants are all nationals of India. The first appellant is the wife of the second appellant, and the third appellant is their child who was born in India on 5 February 2002. The first appellant is the main appellant in this appeal, and so I shall hereafter refer to her simply as the appellant save where the context otherwise requires.

3. In December 2012 the appellant applied for leave to remain as a Tier 1 Entrepreneur Migrant, with her husband and son as dependants on her application. She was going to be part of an entrepreneurial team of which the other member was Nileshkumar Patel. He was also an Indian national. At G4, she indicated that she was relying on four documents as evidence of the amount of money that was available for investment. These four documents related to funds held overseas. The funds were provided by a third party. Each of the four parcels of funds was held by the third party in the State Bank of India.

4. On 17 March 2013 the respondent refused the appellant's application as she had failed to submit the specified evidence as listed under paragraph 41-SD to show that she had access to at least £200,000. In particular:

   (a) Letters from State Bank of India did not name the appellant's entrepreneurial team member and did not provide a telephone number for the third party funder. In addition no authorised official was identified.

   (b) The third party declaration document was not dated and did not identify that the funds were equally accessible and freely disposable in the UK.

   (c) The letter from the legal representative was not acceptable as it did not validate the signatures of the third party funder or refer to his/her ID document.

5. The appellant appealed against the refusal decision, and her appeal came before Judge Thorne sitting in the First-tier Tribunal at Nottingham on 22 November 2013. In his subsequent determination, he noted the grounds of refusal. But he observed at paragraph [12] that the refusal letter made no reference to the exercise of discretion or the obligation to consider paragraph 245AA of the Rules. It also made no reference to the obligation to consider the best interests of the child under Section 55 of the Borders, Citizenship and Immigration Act 2009. The judge went on to find at paragraph [26] that although the appellant had failed to submit the correct documents in the correct format as specified in the highly prescriptive and technical Rules, the respondent had also failed to follow the same Rules by failing to consider the question of exercising discretion by reference to paragraph 245AA of the Rules, the evidential flexibility policy or general common law principles of fairness. In addition, the respondent failed to have any regard to obligations to consider the best interests of the child under Section 55. In the circumstances, he concluded that the

refusal decision was not in accordance with the law, and a lawful decision remained outstanding.

6. On 19 May 2014 the Secretary of State gave her reasons for re-refusing the appellant's application upon reconsideration. She referred to 41-SD(a), which states that the specified documents to show evidence of the money available to invest are one or more of the following specified documents:

   (i) A letter from each financial institution holding the funds, to confirm the amount of money available. Each letter must:

      (1) Be an original document and not a copy …

      (4) Have been produced within the three months immediately before the date of the application

7. The documents she provided met the required criteria for all the eleven sub-paragraphs of sub-paragraph (i) apart from sub-paragraph (1) and sub-paragraph (4).

8. There had not been compliance with sub-paragraph (1) as copies had been sent, not originals. The solicitors had said at the time of writing on 23 April 2014 that the originals were on their way from India to the UK by fastest courier option, and would be provided in a couple of days. It was now 9 May 2014, and the originals had not been received.

9. There was non-compliance with sub-paragraph (4) as the application date was 10 December 2012 but the bank letters were dated 21, 22 and 23 April 2014 and clearly had not been produced within the three months immediately before the date of the application. So the appellant was therefore not considered to have access to the funds that she claimed.

10. Insofar as it is material, the bank letters referred to in the refusal decision related to funding by different third party sponsors. Whereas previously the appellant had purported to be funded by a family friend and investor by the name of Mr Saiyad the new funding was provided by three people all with the surname Patel (two males and one female) and all of whom banked with the State Bank of Bikaner and Jaipur.

11. In her grounds of appeal to the First-tier Tribunal, the appellant disputed the claim that she had not provided originals of the specified documents. She was going to provide a postal receipt and a printout from the Royal Mail website confirming delivery of the documents. Also, her legal representatives called the respondent on 29 April at 14.57 and had spoken to someone called Miss Maisy and she had confirmed the documents received.

12. As for the allegation of non-compliance with sub-paragraph (4), there had been inordinate delay in the processing of her application. So her earlier third party had refused to continue his support. She changed her third party, and had requested the respondent to consider her application based on the documents provided by her new

third party funders. Nowhere in the Rules was it stated that while the application was under consideration the third party funder could not be substituted. Her position could be distinguished from the scenario where someone did not have access to £200,000 at the date of application, and access was gained after the application was submitted. In this case, she did have access to £200,000 on the date of application, but she had simply substituted the third party. It was not reasonable for a third party to continue to hold such a large sum of money for such a long and uncertain period of time, and it was due to the inordinate delay that she was forced to change her third party.

The Hearing before, the Decision of, the First-tier Tribunal

13. The appeals of all three appellants came before Judge Colyer sitting at Nottingham Justice Centre on 30 October 2014. Both parties were legally represented. The appellant adopted as her evidence-in-chief a witness statement which reflected the broad thrust of the grounds of appeal. In his closing submissions on behalf of the appellant, Mr Patel said there were cases where the Home Office had accepted a change of third party finance. He insisted the appellant had access to third party funds at the date of application. He contended that the Rule that the third party should be named in the application should not be applied strictly.

14. In his subsequent decision, the judge addressed the question of specified documents in paragraphs [24] to [31]. He noted that in the appellant's bundle there was a letter from Hiren Patel Solicitors dated 25 April 2014 to the Home Office indicating that they were enclosing original documents, including three letters from the State Bank of Bikaner and Jaipur, India. He also noted the letter asking the Home Office to note their clients were supported by different third parties, and requested the Home Office to kindly ignore documents provided by the earlier third party in regards to access to £200,000 in favour of the documents provided with this letter.

15. The judge found at paragraph [30] that the appellants had not addressed the issue appropriately raised by the respondent, which was the failure of the appellant to provide the original document issued by Mr Saiyad to support evidence of third party finance. The judge held that the original was not produced. So the respondent was correct to refuse the application on this ground.

16. The judge went on to address the question of compliance with sub-paragraph (4) under the heading of third party finance. At paragraph [33], he found the application was made on 10 December 2012, and the respondent was correct in stating that the bank letters were dated 21, 22 and 23 April 2014 and thus had clearly not been produced within the three months immediately before the date of the application. He found the respondent was correct in law to decide that the appellant did not qualify for the award of required points under Appendix A.

17. The judge went on to give extensive consideration to the question of common law fairness, the best interest of the third appellant, and the alternative claim under

Article 8 ECHR. He dismissed the appeals of all three appellants on all grounds raised.

The Application for Permission to Appeal to the Upper Tribunal

18. Mr Zane Malik of Counsel, who did not appear below, settled the grounds of appeal to the Upper Tribunal. He contended that the First-tier Tribunal had misconstrued paragraphs 41 and 41-SD in dismissing the appellant's appeal under the Rules. He submitted that the appellant's application for leave to remain made on 10 December 2012 was validly varied when she submitted evidence as to the second third party sponsor on 24 April 2014. The judge had erred in law in failing to take the date of 24 April 2014 as the date of application for the purposes of paragraphs 41 and 41-SD. His approach was inconsistent with the reported decision of the Upper Tribunal in **Qureshi (Tier 4 – effective variation – Appendix C) Pakistan [2011] UKUT 00412 (IAC)**.

19. He submitted that **Qureshi** had been endorsed by the Upper Tribunal in **Nasim and Others (Raju: reasons to follow?) [2013] UKUT 610 (IAC)**, and that the correctness of the general principles set out in **Qureshi** and **Nasim** were not disturbed by the Court of Appeal when it recently considered those decisions in **Rasheed v Secretary of State for the Home Department [2014] EWCA Civ 1493**.

The Rule 24 Response

20. On 12 February 2015 Tony Melvin of the Specialist Appeals Team settled the Rule 24 response on behalf the Secretary of State opposing the appeal. The Immigration Rules were quite clear the sponsor had to show that the funds were available prior to the application. It was unacceptable for the third party sponsor to change post-application, and the appellant to expect the Rules to be met. The first decision (of Judge Thorne) remitted the case back for the Secretary of State to consider a part of the application again, not to consider a completely different sponsor as if that sponsor was providing evidence from the date of application. The judge has directed himself properly in accordance with the Rules and the law.

The Grant of Permission

21. On 23 January 2015 Judge Michael Keane granted permission to appeal on the ground raised by Mr Malik. He observed the application for permission was not concerned with the judge's dismissal of the human rights appeal, and accordingly permission to appeal was only granted in respect of the judge's dismissal of the appeal in respect of the Immigration Rules.

The Hearing in the Upper Tribunal

22. Before me, Mr Smart relied on the **Secretary of State for the Home Department v Raju and Others [2013] EWCA Civ 754** as showing that Judge Colyer had directed himself appropriately. As this authority had not been mentioned in the Rule 24 response, Ms Chaggar said she had been taken by surprise. So I adjourned for 30

minutes at her request so that she could consider this authority. On the resumption of the hearing, Ms Chaggar adhered to the line taken by Mr Malik in the application for permission to appeal. She disagreed with Mr Smart that **Qureshi** had been wrongly decided.

Discussion

23. As became apparent in the course of argument, Judge Colyer confused the first application with the purported variation of the application when addressing the question of whether the appellant had provided original bank letters. According to the determination of Judge Thorne, it was not alleged by the respondent that the appellant had failed to provide original bank letters in respect of the purported third party funding from Mr Saiyad. The problem with the bank letters relating to Mr Saiyad was not that they were not originals, but they did not contain various important pieces of information, including a certification by the bank that the funds in Mr Saiyad's account were available to the entrepreneurial team members.

24. The alleged non-compliance with sub-paragraph (i) related to the second set of third party funding documents. Judge Colyer did not clearly resolve this issue. However, the implication of his line of reasoning is that he accepted on the balance of probabilities that *original* bank letters relating to the second set of third party funders had been provided to the Home Office under cover of the letter of 25 April 2013, but that this was irrelevant, as there had been non-compliance with sub-paragraph (4).

25. **Raju** supports the position taken by Mr Smart. **Raju** overturned the Upper Tribunal decision which allowed the appeals of Mr Raju and Mr Khatel, among others, against the decision to refuse to vary their leave to remain on the ground they had not been notified of the required qualification (United Kingdom recognised Bachelor or Postgraduate Degree) by the time they submitted their applications. The Upper Tribunal found in their favour, by treating their applications as starting when the applications were first lodged and remaining open until they were decided. The Court of Appeal found that this approach was based on a misconstruction of paragraph 34G of the Rules, which provides that the date on which an application or claim (or a variation in accordance with paragraph 34E) is made on is on the date of posting, if the application form is sent by post; and on the date on which the online application is submitted, where the application is made via the online application process. The Court held that an application is made *when paragraph 34G says it is made*:

> The Secretary of State at the date of her decision assesses the evidence which determines whether the applicant for leave to remain as a Tier 1 (Post-Study Work) Migrant has accumulated 75 points. Whether that evidence was assessed by the Secretary of State, or even later, by a Tribunal, these applicants could not score 75 points because they had made their applications before they had obtained their qualifications. On a true construction of the relevant Rule, the fourth section of table 10 in Appendix A, they could not score the fifteen points they needed. No subsequently obtained evidence could cure that defect. **AQ** does not assist these respondents. From authority for the proposition on which the Upper Tribunal relied, that the applications

were 'made' throughout the period starting with the date of their submission and finishing with the date of the decisions.

26. By parity of reasoning, the wording of sub-paragraph (4) makes it plain that the bank letter showing third party funding must have been produced within three months before the date that an application is made in accordance with paragraph 34G. It is not suggested on behalf of the appellant that she submitted a new application, or varied her application in accordance with paragraph 34G, after 10 December 2012. What is in contemplation in sub-paragraph (4) is an application which has been made in one of the four alternative ways specified in paragraph 34G, and it is only the application of 10 December 2012 which counts as an application for the purposes of the sub-paragraph.

27. I consider that **Qureshi** turns on its own special facts. The appellant made an in time application for the purposes of further studies in the UK. She then sought subsequently to vary the application in anticipation of that course expiring or coming to an end on 21 January 2011. At the time she made the application on 12 August 2010, it was for an extension of leave to remain in order to study at Empire College London. On 15 December 2010 she wrote to the Home Office explaining that her course at Empire College London was going to end on 21 January 2011, and informing the Home Office that she been accepted onto a new course of MSc Management at Birmingham City University due to start in January 2011. Her student CAS information for the new course and institution was enclosed with her letter. She asked the Home Office to "include this" with her Tier 4 application. On 12 January 2011 she wrote again to the Home Office with further details about her new course.

28. The respondent subsequently refused her application. She was awarded points as claimed for her CAS from Birmingham City University assigned on 10 December 2010. But no points were awarded for maintenance. This was because the amount which she had in her bank statements for her two HSBC accounts for the period running up to the date of her application in August was not sufficient to cover the additional cost of her studying at Birmingham City University.

29. The appeal was allowed by the First-tier Judge on the ground that the Home Office had treated the appellant as making the application on 12 January 2011, because they based their decision on what she said in that letter, and not on what had been said in her original application. The appellant had the required funds in her HSBC account for the 28 day period leading up to 12 January 2011, and therefore he allowed the appeal.

30. In the Upper Tribunal, Mr Tufan on behalf of the respondent maintained it was incumbent upon the appellant to demonstrate the availability of specified funds as of 12 August, being the date of the application. He accepted that the evidence before the respondent showed that the funding requirement was met with regard to her studying at Empire College, London.

31. Accordingly, Mr Tufan effectively conceded that the judge below had reached the right result, albeit (in Mr Tufan's view) for the wrong reason. Although she was applying for leave to study on a more expensive course, she only needed to show funding for the course referred to in the original application. Despite acknowledging the illogicality in his position, Mr Tufan maintained 12 August was the effective date for assessment under Appendix C - even though the appellant would not have known of the cost of the new course at that juncture.

32. The Upper Tribunal held that there was no indication in Appendix A that the Attributes needed to be in place at the time of application. On that basis, they were satisfied that a Tier 4 General Student application could be varied at any time under Section 3C(5). If the appellant sought to vary her application for the same purpose, which was further leave to remain in the United Kingdom in order to pursue studies, the variation which she sought (and which was accepted by the Home Office) was not one which was caught by the provisions in paragraph 34E of the Rules. As to the date which the respondent is required to take into account for the purposes of determining the points to be awarded under Appendix C, where there has been a variation substituting a new college, it is the date of the most recent variation for the purposes of paragraph 1A(C): paragraph [38].

33. I do not consider that **Qureshi** is authority for the proposition that the appellant in this appeal, who was applying for leave to remain as a Tier 1 Entrepreneur Migrant – not for leave to remain as a student - had the right to substitute alternative third party funding by way of a variation of her original application. The present case is distinguishable from **Qureshi** both on the law and on the facts. Firstly, the Upper Tribunal was not asked to consider how paragraph 34G impacted on their line of reasoning. Secondly, the parties in the Upper Tribunal did not dispute that the appellant should succeed in her appeal: the only question was by what route. Thirdly, the respondent accepted a fundamental variation of her original application by accepting a CAS for a completely different course at a completely different institution and for a different start date. So commonsense dictated that the application date had to shift from the original application date for the purposes of calculating maintenance under Appendix C. Fourthly, and perhaps most importantly, it was conceded by the Secretary of State that the appellant met the maintenance requirements as of the date of application, albeit in relation to her original course of study. Conversely, the appellant here failed to produce the specified documents to show that she had third party funding at the date of her application in December 2010. So the appellant did not show that she was "substituting" one source of third party funding which was in place in December 2010 with another source of third party funding which she had secured in April 2014.

34. An additional consideration is that, on her own case, there has been non-compliance with paragraph 245DD(h)(iii). Sub-paragraph (h) of paragraph 245DD provides that the Secretary of State must be satisfied, inter alia, that:

(iii) The money referred to in table 4 of Appendix A is genuinely available to the applicant, and will remain available to him until such time as it is spent for the purposes of his business or businesses.

35. The evidence of the appellant is that the original third party funder at some unspecified point in time withdrew his funding, and thus the money referred to in Table 4 of Appendix A is not genuinely available to her, and will not remain available to her until such time as it is spent for the purpose of her business or businesses.

36. Paragraph 245D(C), states that where paragraphs 245D to 245DF and paragraph 35-53 of Appendix A, referred to money remaining to the applicant until such time as it is spent for the purposes of his business or businesses:

(i) "Available" means that the funds are:

(1) in the applicant's own possession,

(2) in the financial accounts for UK incorporated business of which she is the director, or

(3) available from the third party or parties *named in the application* (my emphasis) under the terms of the declaration(s) referred to in paragraph 41-SD(b) of Appendix A.

37. The third parties now sought to be relied upon were not named in the application form submitted on 10 December 2012. Mr Saiyad was also not named in the form itself, but sufficient detail and documentation was provided with the application to make it clear that it was his four bank accounts with the State Bank of India that were being relied upon as the source of funding; and so Mr Saiyad, and Mr Saiyad alone, is the third party "named" in the application.

38. In conclusion, for the reasons given above, I find that the decision of the First-tier Tribunal did not contain a material error of law. Accordingly, the decision stands.

Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed Date