



IAC-HW-AM-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/39807/2014
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THE IMMIGRATION ACTS

**Heard at Newport
On 27th July 2015**

**Decision & Reasons Promulgated
On 25th August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

**ABDUL GAFOOR KANNANTHODY KUNJHUMHAMMED (FIRST
APPELLANT)**

**REBIN JOHN VARKEY (SECOND APPELLANT)
CHRISTEENA MARY XAVIER (THIRD APPELLANT)
(Anonymity Direction Not Made)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Sinjarajah, instructed by Paul John & Co Solicitors

For the Respondent: Mr P Richards, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellants are nationals of India born respectively on 21st August 1981, 27th March 1987 and 5th May 1988. The first and second appellants are partners in respect of their Tier 1 (Post Study) Migrant applications.
2. The first appellant entered the United Kingdom on 27th October 2010 as a Tier 4 (General) Student with leave until September 2012 and was subsequently granted further leave as a Tier 1 (Post-Study) Migrant until 31st July 2014.
3. On 30th July 2014 he applied for further leave to remain in the UK as a Tier 1 (Entrepreneur) under the points-based system.
4. The second appellant entered the United Kingdom on 24th October 2010 also as a Tier 4 (General) Student with leave in due course extended to 1st August 2014 and he too applied for leave as an entrepreneur on 30th July 2014. The third appellant is the partner and dependent of the second appellant.
5. In a letter dated 26th September 2014 the Secretary of State refused the applications with reference to paragraph 245DD(b) of the Immigration Rules and paragraph 41-SD of Appendix A on the basis that the first two appellants had failed to comply with the requirement in relation to documentary evidence (Paragraph 41-SD(c)(i) of Appendix A and with reference to the third appellant under paragraph 319C(b) as her partner's application had failed. The Secretary of State also decided to remove the appellants under Section 47 of the Immigration Asylum and Nationality Act 2006.
6. The linked appeal came before Judge of the First-tier Tribunal Fitzgibbon QC on 27th February 2015 and refused their appeal on 3rd March 2015.
7. The appellants were relying on third party funds from a Mrs N Tina. I should set out that in the reasons for refusal letter from the Secretary of State noted that:

“... no letter from the financial institution in which Mrs N Tina's funds are held has been supplied to establish that those funds are accessible to you or your business as specified under paragraph 41-SD(c)1 of Appendix A of the Immigration Rules.”
8. The First-tier Tribunal Judge noted at paragraph 9 of his decision that the Secretary of State claimed that the appellants had not provided a letter from the bank confirming the amount available in the form specified in paragraph 41-SD. The appellants were deriving third party funds from Mrs Tina and the judge recorded [9]

“Ms Tina maintains that ‘the bank authority stated that they have no such policy to issue a letter for UK Border Agency”.
9. An application for permission to appeal was made on the basis that it was submitted that the First-tier Tribunal Judge failed to consider that the third

party's funds were not held in a financial institution overseas and therefore there should be no requirement on the third party to submit such a letter. Secondly, it was submitted that the evidential flexibility provisions contained in paragraph 245AA of the Immigration Rules and their applicability to the appellants' case was not considered. In particular when a "specified document" had been submitted which did not contain all of the specified information, the respondent had a discretion to grant the application anyway if missing information was verifiable from other sources.

10. There were further grounds but for the time being I shall concentrate on the Rule in relation to the absence of the letter.
11. Permission to appeal was granted by Designated First-tier Tribunal Judge Zucker who referred to **Durrani (Entrepreneurs: bank letters; evidential flexibility [2014] UKUT 295 (IAC)** as being relevant and indicating the first ground was arguable.
12. At the hearing before me Mr Sinjarajah attempted to persuade me that I should either stay the decision or remit it to the First-tier Tribunal in order that I allowed time for the appeal from **Rodriguez** in the Court of Appeal to be considered by the Supreme Court. He also produced **Ahmed and Another (PBS: admissible evidence) [2014] UKUT 00365 (IAC)**. This states that the prohibition on new evidence in Section 85A(4) of the Nationality, Immigration and Asylum Act 2002 applies to the non-points-scoring aspect of the Rule such that where a points-based application is made and refused the assessment by the judge is to be of a material that was before the decision maker rather than a new consideration of the material.

Conclusion

13. It was accepted that no bank letter in compliance with the Immigration Rule was produced and this was a requirement of the Immigration Rules Appendix A at paragraph 41-SD(c)(i).
14. The judge set out at paragraph 12 of the judge's determination:

"In my view, the requirements of Appendix A are clear, unambiguous, and readily understood. I do not accept that Lloyd's Bank, one of the UK's major financial institutions, has no capacity to give written confirmation in the required form that a third party funder has a particular amount of money available. If this were the case, I would have expected confirmation from the bank itself, but the appellants have not provided it. I do not regard Ms Tina's bare assertion as sufficient. She did not attend the hearing to give further details of what she claims the bank has told her."

and therefore he did not accept that the requirements of the Immigration Rules had been complied with.

15. Mr Sinjarajah tried to persuade that in view of paragraph 13 there was a clear error of law in that the judge had stated that he was proscribed from taking in late evidence as indeed was, as shown by **Ahmed**, but at the same time the judge criticised the appellants for failing to seek clarification from the bank or taking the opportunity to transfer the funds to an institution capable of issuing the required document.
16. Even if that were an error, (and which I do not accept it could be material because the judge took into account that there was no letter), it cannot rectify the difficulties for the appellants with the failure to comply with the immigration requirements as specified. Further regarding the submission to stay the case pending the **Rodriguez** appeal to the Supreme Court first I am not persuaded that this would assist the appellant for the reasons I give in relation to the onus on the respondent to request documentation. Secondly, I must apply the law as it at present. I saw no reason in the circumstances to postpone the decision.
17. Paragraph 41-SD(c)(i) (of the Rules at the relevant date) stipulated:
 - (c) The specified documents to show evidence of the funding available to invest, whether from the applicant's own funds or from one or more third parties, 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 ...'
18. Despite being referred to in the permission to appeal by supporting the grounds of appeal **Durrani** in fact confirms that the requirements of paragraph 41-SD are reasonable and sensible.
19. For completeness the argument in the application for permission to appeal that the bank letter requirement did not apply because the funds were held outside the UK does not bear scrutiny. The alternative limb of the Rules can only be adopted if the funds are held in the account of the appellant himself and that was not the case here.
20. I am not persuaded that there has been any unfairness in the decision by the Secretary of State and perpetuated by the decision. As stated in **EK (Ivory Coast) v The Secretary of State for the Home Department [2014] EWCA Civ 1517** at 38:

"The authorities in which the general public law duty of fairness has been found to impose additional obligations on the Secretary of State in the context of the PBS have been materially different from the present case. It has been held that where the Secretary of State has withdrawn authorisation from a college to issue CAS letters, fairness requires that she should give foreign students enrolled at the college a reasonable opportunity to find a substitute college before removing them: **Patel (revocation of sponsor licence - fairness) India** [2011] UKUT 00211

(IAC); **Thakur (PBS Decision - Common Law Fairness) Bangladesh** [2011] UKUT 00151 (IAC); and see **Alam** at para. [44]. But that requirement was found to arise where there had been a change of position of which the Secretary of State was aware, and indeed which she had brought about, in circumstances in which the students were not themselves at fault in any way, but had been caught out by action taken by the Secretary of State in relation to which they had had no opportunity to protect themselves. In the present case, by contrast, the Secretary had no means of knowing why the Appellant's CAS letter had been withdrawn and was not responsible for its withdrawal, and the fair balance between the public interest in the due operation of the PBS regime and the individual interest of the Appellant was in favour of simple operation of the regime without further ado."

21. Although that case relates to a Tier 4 application, it shows that even where events have conspired to undermine the appellant's application, there is no burden on the Secretary of State to seek out documentation. The Rules here were clearly set out and in the hands of the appellant to comply with them when they applied.
22. In this case it is clear that Paragraph 245AA does not assist the appellant. The document does not fall within the realm of Paragraph 245AA and there is no duty on the Secretary of State to seek out documents certainly those not in existence. The document required in this instance was not in existence at the date of either the application or the decision made by the respondent and the application was bound to fail.

Notice of Decision

23. I find no error of law and the decision shall stand.

Signed

Date 24th August 2015

Deputy Upper Tribunal Judge Rimington