Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/42352/2013
IA/42360/2013
IA/42338/2013
IA/42324/2013

THE IMMIGRATION ACTS

Heard at Field House
On 27th October 2014

Decision and Reasons Promulgated
On 29th July 2015
Edited and approved transcription of ex tempore decision

Before

The President, The Hon. Mr Justice McCloskey

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

THAPALIYA, RAVI
THAPALIYA, RASHMI GHIMIRE
UPRETI, ROSHAN
MAINALI, DEEPA KUMARI

Respondents

Representation:

For the Appellant: Mr E Tufan
For the Respondents: Mr Reid of Advisa Solicitors and Ms G Thomas, of Counsel

DECISION AND REASONS

1. The framework of these appeals is as follows. The Secretary of State made decisions in respect of all four Respondents dated 30th Sept 2013. The two dominant decisions were those relating to the mother and father respectively of the family concerned. They are the first and second Respondents. The third and fourth Respondents are their dependants.

The Secretary of State decided that an award of nil points would be made in respect of the first and second Respondents' claims for 75 points pursuant to their applications for variation of their leave to remain in the United Kingdom as Tier 1 Entrepreneur Migrants.

2. On the face of the documents there is something of a mismatch between the Secretary of State's decisions and the determination of the First-tier Tribunal (the "FtT"). The Secretary of State found that as regards compliance with the various requirements of the Immigration Rules there was a series of defects. In contrast, the FtT found that there was but a single flaw. It is recorded in the determination and confirmed by the documentary evidence that the Respondents submitted separate bank account statements. One of these demonstrated that the mother had, in round terms, £26,000 in her bank account. The second demonstrated that the father had in round terms, some £30,000 in his bank account. In three separate places (in paragraphs 25, 26 and 27) in its determination the FtT identifies a single flaw, namely, a failure to demonstrate that all of the funds were available to both the first and second Respondents. The Secretary of State's assessment was that, in the language of the Rules, the first and second Respondents had failed to demonstrate that each had "*equal level of control*" over the entirety of the funds viz £50,000 minimum. Concurring with this assessment, the Judge concluded that this was non-compliant with paragraph 245DD and paragraph 41-SD of the Immigration Rules.

3. The judge also made reference to paragraph 52 (a) and (b) of the Rules. These are encompassed within Table 4 which is part of the governing regime. This is summarised in the following sentence at paragraph 27 of the determination:

> "From the evidence it was therefore clear that although the appellants both had the relevant funds they were unable to show that as an entrepreneurial team they both had equal access to the full amount being invested. This needed the first appellant to have access to the funds in the second appellant's account and vice versa in order for them to be able to show that they were able to jointly invest the £50,000."

This prompted the judge to conclude that the Secretary of State's decision was in accordance with the law (see paragraph 27).

4. The judge then made reference to a document entitled "Policy Guidance" which had been brought to the Tribunal's attention, and specifically, paragraphs 28 to 30 thereof. The judge also quoted from the decision of the Upper Tribunal in **Naved [2012] UKUT 14 (IAC)**. Having done so the judge said the following, at [30]:

> "From the Policy Guidance Note provided it is evident that there is a possibility for further documentary evidence to be obtained from the Appellants in relation to the application and in relation to whether or not the funds contained in the bank accounts were available to the two principal Appellants. It is therefore

> arguable that in failing to apply this policy that the Secretary of State has acted unfairly in failing to provide the Appellants the opportunity to present the relevant evidence and therefore score the relevant points."

The judge continued, in [31]:

> "On this issue I find that the decision in not awarding the points was not in accordance with the Policy Guidance issued by the Respondent herself in deciding these points-based applications.

The judge did not particularise the respects in which there had been a failure to comply with the Policy Guidance. This was the basis on which the appeals were allowed. Permission to appeal was granted on this issue.

5. It is clear from both the Rules and the related policy guidance in vogue at the material time (July 2013 version) that the monies designed for investment in the proposed business can be shared by both members of the entrepreneurial team. This was not in dispute between the parties. At this juncture, I turn to examine the impugned decisions of the Secretary of State, each dated 30 September 2013 and framed in identical language. I consider that these suffer from certain material flaws. First, while they purport to acknowledge the entrepreneurial team dimension of the Respondents' applications, they treat the applications as if they were reliant on third party funding. This, in my judgment, is the correct construction of the decisions. This was plainly erroneous, since these were not individual entrepreneurial applications relying on third party donor funds emanating from sources such as financial institutions or family members. I consider that the wrong prism was applied to these applications. This is abundantly clear from, *inter alia*, the following passage:

> "*Furthermore,* ***if the applicant is applying using money from a third party, he must provide all of the following specified documents … …***"
>
> [My emphasis.]

This discrete statement prefaces the second manifest flaw in the decision, which proceeded to penalise the Respondents for a supposed failure to comply with a series of requirements in the Rules which have no application to a joint entrepreneurial team proposal. Thirdly, these errors were repeated in the points allocations of zero under the separate rubrics of "*funds held in regulated financial institutions*" and "*funds disposal in the United Kingdom*".

6. The impugned decisions are, therefore, unsustainable in law. On the discrete issue of access to each other's funds viz the requirement that each of the Respondents have "*equal level of control*" over their partner's funds I am persuaded by the argument that,

on the evidence presented to the Secretary of State considered against the framework of the relevant Rules and the policy guidance, each of the Respondents was deemed to have consented to an arrangement whereby both had full control over the totality of the funding. In passing, I note that this would now appear to be clear beyond peradventure in consequence of the new paragraph 41-SD of Appendix A, coupled with the latest policy guidance dated 01 October 2013, both operative from the latter date.

Decision

7. While, properly, there should have been a Rule 24 Notice on behalf of the Respondents in this appeal, the absence of same is not fatal. For reasons which differ from those of the FtT, I reach the same result. Accordingly, this appeal is allowed to the extent that it is not in accordance with the Immigration Rules or the law and is hereby remitted to the Secretary of State for further consideration and fresh decision in accordance with this judgment.

Postscript

8. As appears from the heading of this decision, these appeals were heard on 27 October 2014. At the conclusion of the hearing I gave an oral judgment. Regrettably, the production of this transcribed decision has been heavily delayed due to administrative error. The Upper Tribunal apologises unreservedly to all parties for this aberration.

Signed: Brian McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 21 July 2015