



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

**Appeal number: IA/46036/2014  
IA/46037/2014  
IA/46038/2014**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On March 31, 2016**

**Promulgated  
On April 13, 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ALIS**

**Between**

**MR SYED ALI QUTUB  
MRS HUMA ZAFAR  
[R S]  
(NO ANONYMITY DIRECTION)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

Representation:

Appellant

Mr Alluwalia, Counsel, instructed by Visa Inn

Respondent

Mr Bramble (Home Office Presenting Officer)

**DECISION AND REASONS**

1. The Appellants are citizens of Pakistan. The appellants are related in that the first two-named appellants are husband and wife and the third-named appellant is their child. The first-named appellant was granted leave to enter the United Kingdom as a student on February 19, 2008 with leave to remain until July 31, 2009. His leave was extended as a Tier 4 (General)

Migrant until August 30, 2012. He was served with a curtailment notice but was then granted leave to remain as a Tier 1 (Post study) Migrant until September 5, 2014. The appellants applied to remain as Tier 1 (Entrepreneur) Migrants and dependants but the respondent refused these applications on November 4, 2014.

2. The appellants appealed those decisions under section 82(1) of the Nationality, Immigration and Asylum Act 2002 on November 12, 2014.
3. The appeal came before Judge of the First-tier Tribunal Watt (hereinafter referred to as the Judge) on July 6, 2015 and in a decision promulgated on July 27, 2015 he refused the appellant's appeal finding the documents did not satisfy the requirements of the Immigration Rules and in particular paragraph 41-SD(e)(iv) of Appendix A of the Immigration Rules.
4. The appellants lodged grounds of appeal on August 7, 2015 submitting the First-tier Judge had erred.
5. Judge of the First-tier Tribunal Heynes refused permission to appeal. The appellants renewed their grounds of appeal to the Upper Tribunal and Upper Tribunal Judge Eshun gave permission firstly, on the basis there was an arguable error in law in the way the Judge had approached the documents and secondly, by failing to consider article 8.
6. In a Rule 24 letter dated December 22, 2015 the respondent opposed the appeal.
7. The matter came before me on the above date and I heard submissions from both representatives. Mr Bramble conceded that the Judge's failure to deal with an article 8 claim, that was highlighted in a detailed skeleton argument, would amount to an error but he continued to dispute the error alleged under the Rules.
8. I indicated that if there was an error in law in the Judge's approach to the Immigration Rules then I would remake the decision in the Upper Tribunal. However, if that decision was in order then I would remit the matter back to the Judge to deal with article 8 issues.
9. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 I make no order.

### **SUBMISSIONS**

10. Mr Alluwalia submitted a third skeleton argument on the basis this helpfully set out his arguments. In short, he submitted the Judge accepted the appellant satisfied paragraph 41-SD(e)(iii) of Appendix A of the Immigration Rules and the issue was whether subsection (iv) was met. He argued the documents identified in paragraphs [26] and [27] of his skeleton argument demonstrated the appellant had set up a business. The bank statements demonstrated over a twelve-month period that this was

an active business. He submitted the Judge had erred in how he approached the issue of a service contract in paragraph [34] of his decision. He had failed to have regard to all of the documents including the items he had highlighted. Following the decision of Shebl (Entrepreneur: proof of contracts) [2014] UKUT 00126 it was clear that in considering whether there was a contract the decision maker should have regard to all of the documents.

11. Mr Bramble relied on the Rule 24 response and submitted that the appellant had provided evidence of setting up a business but he had not provided evidence of who he was doing business with. Subsection (iv) required this and the Judge had been entitled to refuse his appeal.

### **DISCUSSION AND FINDINGS**

12. This was an appeal that ultimately fell to be decided on whether the first-named appellant satisfied paragraph 41-SD(e)(iii) and (iv) of Appendix A of the Immigration Rules.
13. Mr Bramble accepted the Judge had concluded the requirements of subsection (iii) had been met and the only issue remaining to be decided was whether the Judge's approach to the evidence and more particularly subsection (iv) displayed an error in law.
14. There was no dispute between the parties that the appellant had the building blocks of a business. In an analogy Mr Alluwalia described this aspect of the business as being akin to a shopkeeper renting a shop, buying in products and placing those products on the shelves. Continuing this analogy both representatives agreed that to satisfy the Rules the appellant had to then demonstrate he had customers. The difference in approach was that Mr Bramble submitted the appellant had to show who his customer was as this was a requirement of paragraph 41-SD(e)(iv).
15. I accept Mr Alluwalia's submission that in considering whether the appellant satisfied subsection (iv) of paragraph 41-SD(e) the Judge should not merely have looked at the contract but should have had regard to all of the documents submitted with the application as this was a points based application.
16. Mr Alluwalia agreed with me at the hearing that if the appellant had submitted invoices, with his application, showing details of his customers then the Rules would have been met and his application would probably have been granted without an appeal process.
17. His submission is that the bank statements are the evidence needed to satisfy paragraph 41-SD(e)(iv).
18. Paragraph 41-SD provides details of what an applicant has to submit. They are mandatory requirements and a failure to submit the required documents leads to the situation that appellants often face. The wording

of Paragraph 41-SD(e)(iv) is important as this section placed a requirement on the appellant to submit certain evidence.

19. Mr Alluwallia's submission that the bank statements meets this requirement overlooks the fact that the Rules require, for this particular type of application, the naming of persons you are servicing. The appellant was not operating a sweet shop as per the above analogy. He would not come within the Tier 1 provisions in that case.
20. The bank statements do not meet the requirements of paragraph 41-SD(e) (iv). Although those payments demonstrate cash flow they do not demonstrate compliance with that part of the Rules. If the appellant merely had to show cash flow the appellant would have satisfied the Rules but this is not what is required.
21. Having carefully considered all of the evidence I am not persuaded there was a material error in the Judge's approach to the Immigration Rules. Whilst the Judge did not demonstrate full consideration of the documents the fact remains there was no evidence to satisfy what was necessary under subsection (iv) and in those circumstances there can be no material error.
22. However, Mr Bramble had already has conceded there was an error with regard to article 8 ECHR and section 55 of the Borders, Citizenship and Immigration Act 2009 because the Judge had failed to deal with these issues despite the matter being raised in the skeleton arguments and IAFT1.
23. Part 3, Section 7.1 to 7.3 of the Practice Statement states:

“Where under section 12(1) of the Tribunals, Courts and Enforcement Act 2007 (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b)(i) or proceed (in accordance with relevant Practice Directions) to re-make the decision under section 12(2)(b)(ii).

The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that :

- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
- (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary.”

24. Both parties agreed that the matter be remitted back to the First-tier for a decision to be taken on those matters.
25. I raised with both representatives whether there was any reason why the matter should not be remitted back to the original Judge to complete the job he had started bearing in mind he had already heard the facts of the case. Both agreed the matter could be remitted back to the same Judge and I therefore in remitting the matter back I direct that, if possible, the matter be listed before Judge of the First-tier Tribunal Watt. If he is no longer sitting in this jurisdiction or is unavailable then the matter can listed before any Judge.

### **DECISION**

26. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law in that no article 8 or section 55 of the Borders, Citizenship and Immigration Act 2009 decision was taken.
27. The appeal is remitted back to the First-tier Tribunal for these issues to be addressed under Section 12 of the Tribunals, Courts and Enforcement Act 2007.
28. I uphold the decision dismissing the appeal under the Immigration Rules.

Signed:

Dated:



Deputy Upper Tribunal Judge Alis