Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/08583/2013
IA/08589/2013
IA/08602/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11th November 2013	
Prepared on 18th November 2013	On 9th December 2013

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MRS FARIHA SIDDIQUI (FIRST APPELLANT)
(NO ANONYMITY ORDER MADE)
K (SECOND APPELLANT)
MISS SANAM KHATOON (THIRD APPELLANT)
(NO ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the first and second Appellants: Mr P Richardson of Counsel
For the third Appellant: Mr Balroop of Counsel
For the Respondent: Mr C Avery, Home Office Presenting Officer

DETERMINATION AND REASONS

The Applications

1. The Appellants are all citizens of Pakistan. The first Appellant who I shall refer to as Mrs Siddiqui was born on 11th February 1977. The second Appellant who I shall refer to as K was born in 2001 and is Mrs Siddiqui's daughter. The third Appellant who I shall refer to as Ms Khatoon was born on 1st January 1982. The Appellants

appealed against decisions of the Respondent dated 3rd May 2013. In the case of Mrs Siddiqui and Ms Khatoon this was to refuse them leave to remain as Tier 1 Entrepreneur Migrants under the points-based system. In the case of K this was as the dependant of Mrs Siddiqui. The appeals against those decisions were dismissed by Judge of the First-tier Tribunal Walters sitting at Taylor House on 16th August 2013. Permission to appeal was granted to the Appellants on 25th September 2013 and the matters therefore come before me in the first instance to decide whether there is an error of law in the First-tier Tribunal's decision such that it falls to be set aside and the appeals reheard.

2. Mrs Siddiqui entered the United Kingdom on 30th July 2011 with leave to enter as a Tier 4 General Student Migrant valid until 30th October 2012. Ms Khatoon entered the United Kingdom on 17th June 2011 also with leave to enter as a Tier 4 General Student Migrant valid until 14th October 2013. Ms Khatoon's leave was curtailed on 16th August 2012 such that it expired on 15th October 2012. On 14th September 2012 Mrs Siddiqui and Ms Khatoon made a combined application for leave to remain as Tier 1 Entrepreneur Migrants and for a biometric residence permit. Paragraph 245DD of the Immigration Rules and table 4 of Appendix A set out the requirements to be met in this category. Both Appellants were required to score 75 points under Appendix A for attributes and provide the specified documents. The burden of proof of establishing that the requirements were met rested upon the Appellants in this case that the Appellants could show they have access to not less than £200,000 No argument has been made in this case that the Appellants would be able to meet the alternative criteria set out in Table 4 (where a lesser sum of £50,000 has to be shown).

3. The Appellants' claimed 75 points stating that they were able to provide the original of a letter from Barclays Bank Plc in Pakistan (dated 7th September 2012) relating to a Mr Manghan Mal and Mrs Ganga Bai ("the third-party investors") who were husband and wife and who held a joint account equivalent to £206,678 sterling in Pakistan. The Appellants produced a declaration from the third party investors and a letter from their legal representative Mr Irfan Afzali. The letter from Barclays Bank was addressed to the Respondent and confirmed that Mr Mal was a valued customer of the bank maintaining a savings account with them with the specified balance.

The Proceedings at First Instance

4. The Respondent refused stated that the letter from Barclays Bank Pakistan did not confirm the amount of money available to the Appellants because it did not specify their name as requested in the Tier 1 Entrepreneur policy guidance. As a result the Respondent did not award 25 points for access to funds and it followed that the Respondent did not award 25 points for funds held in a regulated financial institution or disposable in the United Kingdom.

5. The Appellants appealed against the decisions arguing that they had provided all the required documents but the Respondent had not followed her own policy of evidential flexibility which allowed case workers to contact applicants for missing

documents or to correct errors once applications had been lodged. As a result the Respondent had handled the applications unfairly. The grounds also raised an argument under Article 8 (right to respect for private and family life) but this was not pursued at first instance nor in the grounds of onward appeal to the Upper Tribunal and nor was it raised before me.

6. At the hearing at first instance Counsel for the Appellants (who at that time was instructed on behalf of all three) relied on paragraph 41-SD of Appendix A which specified that one or more of the following documents had to be produced: a letter from each financial institution holding the funds to confirm the amount of money available to the applicant or the entrepreneurial team if applying under the provisions of paragraph 52 of this Appendix. Each letter must state the applicant's name and his team partner's name and confirm the amount of money provided to the applicant from any third party (if applicable) that is held in that institution. I pause to note here that this was the wording which applied at the date of decision and the date of hearing before the Judge at first instance. Subsequently paragraph 41-SD was amended on 1st October 2013 but those amendments are not relevant for the purposes of this hearing. The Appellants could not satisfy the requirement of paragraph 41-SD because it was not the policy of Barclays Bank to provide information to those other than their customers, it was thus impossible to provide a letter which complied with the above requirements.

7. The Judge did not accept that last submission commenting that all a letter from a bank had to say was that the Appellants had authority to access up to the equivalent of £200,000 from that account. He dismissed the appeal finding that this was not a case to which the Respondent's evidential flexibility policy as set out in the case of **Rodriguez [2013] UKUT 00042** would apply. He suggested one way round might be to execute a power of attorney (although it does not appear that that point was raised in argument before him). At paragraph 15 the Judge stated:

> "If funds are held by a third party then it is a matter for the Appellants to prove that they can get access to those funds. The other alternative of course would be for Mr Mal and Ms Bai to transfer the money to an account in the Appellants' names. However this is a matter which the Appellants have to prove and unless they can do so their application is bound to fail. I did not find that the Respondent is under any duty to write to the Appellants and point out to them that the evidence they have submitted simply does not show that they have access to the funds in the Barclays account in Pakistan. I found this to be especially so as the option always exists for the funds to be transferred to a bank in the UK where the Appellants have an account."

8. The Appellants appealed against that decision arguing that the requirement in paragraph 41-SD that the Barclays Bank letter should have stated the Appellants' names was impossible to comply with and thus irrational and unlawful. The Judge's suggestion that the Appellants might execute a power of attorney was procedurally unfair and had not been canvassed in submissions. More importantly it was not reasonable to expect the third-party investors to pass the conduct of their financial

affairs over to the Appellants in whose business they would seek to invest. It was perfectly permissible under the Immigration Rules for funds to be held abroad and they did not have to be transferred to the United Kingdom.

9. Citing at some length from the case of **Rodriguez** the grounds of onward appeal drew attention to a passage in the judgment in which the Upper Tribunal had said:

> "We consider that properly construed and evaluated in its entirety the policy enunciated in the letter [dated 19th May 2011 from Mr Jeremy Oppenheim a UKBA official] required the Respondent to notify the Appellant of the informational shortcomings in her application and to afford her the opportunity of rectification and addition prior to an adverse determination".

There was no evidence to suggest that the evidential flexibility policy had been withdrawn. There were informational shortcomings in the Appellants' original Tier 1 applications but no opportunity had been provided to them to remedy the same. There was no indication in the refusal letter that the Respondent had directed her mind to the evidential flexibility policy when refusing the applications. As a minimum alertness to the policy was required. This of itself rendered the Respondent's decision unlawful this being no in accordance with the law.

10. The application for permission to appeal came before Judge of the First-tier Tribunal Hemingway on 25th September 2013. In granting permission to appeal he wrote:

> "It is arguable the Judge erred in failing to properly explain why the evidential flexibility policy was not applicable and in failing to apply it. It is arguable the Judge erred in purporting to apply 'policy guidance'. It is also arguable though not raised that the removal aspect of the decisions was unlawful."

I pause to note here that although that point was not argued before me, the removal decisions in this case were made before 8th May 2013 thus were caught by the ratio of the Court of Appeal in the decision of **Ahmadi** and were therefore not in accordance with the law.

The Hearing before Me

11. At this hearing it was agreed that the correct approach to this appeal was either that the Judge had made no error of law or if he had because he was wrong about the evidential flexibility policy the Appellants' appeals should be allowed to the extent that the Respondent's decisions were found to be not in accordance with the law and thus still before the Respondent to make. There was no need for any further oral evidence.

12. It was argued by Counsel for Mrs Siddiqui that the Judge had not given adequate reasons to explain why the evidential flexibility policy or indeed the requirements of paragraph 245AA of the Immigration Rules did not apply in this case. Paragraph 245AA which the Appellants argued was more restrictive than the policy referred to in **Rodriguez** provides that the Respondent will only consider documents submitted

after the application if there is for example a sequence of documents and some of the documents in the sequence have been omitted or a document is in the wrong format. The Respondent will not request documents where a specified document has not been submitted for example an English language certificate is missing or where the UK Border Agency does not anticipate that addressing the omission or error referred to would lead to a grant because the application would be refused for other reasons. If the applicant has submitted a specified document in the wrong format the application may be granted exceptionally providing the Respondent is satisfied that the specified documents are genuine and the applicant meets all the other requirements.

13. Counsel submitted that if the Appellants had been alerted to the difficulty with the letter from Barclays Bank they could have taken steps to remedy the problem, for example, within trust law or, as the Judge suggested, have a power of attorney executed. What was missing in this case was one piece of information, the names of the entrepreneurs. There was no prohibition on an applicant producing new documents to the Respondent when asked and in any event under paragraph 245AA there was a general discretion to still allow the application. There was other information before the decision maker to indicate that the Appellants could submit information which had the effect of filling in the gaps in the Barclays Bank document.

14. For Ms Khatoon Counsel argued that under paragraph 41-SD of Appendix A the criteria for third-party funds had been satisfied but this aspect of the Rules had not been addressed by the Judge. Subparagraph (b) stated there had to be a declaration from the third-party that they had made the money available for the applicants to invest in a business in the United Kingdom. This was in the form of the letters signed in the presence of the Pakistan lawyer Mr Afzali enclosed with the original Tier 1 Entrepreneur application forms dated 6th September 2012. The third party investors stated that they were friends of the Appellants and they each had £101,555 and would make it equally available to the Appellants. Their signatures had been verified by Mr Afzali.

15. For the Respondent it was argued that the Appellants' submissions misunderstood the position under the evidential flexibility policy. The letter from Mr Oppenheim referred to the Respondent's system which allowed case workers to contact applicants to request further documentation or clarification where appropriate. It was talking about whether or not an application would be rejected not about a substantive consideration of the merits of the application. Under the policy the Respondent would not seek clarification or further evidence where it did not exist. That was the situation in the instant case. No effort had been made by the Appellants to show that they could satisfy the Immigration Rules. This was not a case where for example a document was missing from a sequence and this was not a situation where the requirements of paragraph 245AA applied at all. The issue was whether the Appellants could access the funds and it could not be inferred that they had access to it. The deficit in the Appellants' evidence could not be made good by other evidence placed before the Respondent. The bank letter did not show the

Appellants had an ability to access the funds and there was no error in the Respondent's decision.

16. In closing for Ms Khatoon reference was made to subparagraph (b)(i)(9) of the former wording to Appendix 41-SD which referred to a confirmation that the money would remain available to the applicants until such time as it was transferred to them or their business. This implied that it was not necessary for the Appellants to already have had the money transferred to them.

Findings

17. To satisfy the requirements in this case the Appellants had to show that £200,000 was available to them to invest in a business. The letter from Barclays Bank which I have quoted above does not do this. It confirms that the third party investors have over £200,000 in their own account. The Appellants' first argument is that this was an information shortcoming and that the Respondent should have complied with the evidential flexibility policy and asked for more information before coming to a decision on whether to reject the application. Confirmation that the Appellants had access to the funds had simply been omitted from the application.

18. However a query from the Respondent would have required the Appellants to obtain further evidence not then in existence to deal with the point. It is argued that there is nothing to prevent the Respondent from asking for this but equally there is no indication in either the evidential flexibility policy or paragraph 245AA that the Respondent is under any requirement to ask for documentation which does not then exist. If a case worker is not satisfied that the evidence which is missing does not exist the evidential flexibility policy at step 3 states that evidence cannot be requested and the application should be refused. Similarly paragraph 245AA(c) states that the Respondent will not request documents where a specified document has not been submitted.

19. In this case the specified document that should have been submitted was evidence from the bank that the Appellants had access to £200,000. That had not been submitted. It did not exist and there was no burden on the Respondent to request such documents. In my view the Judge was right in holding that the evidential flexibility policy did not apply in this case and (notwithstanding the brevity of his observations) his overall conclusion was sound. The Appellants rely on a passage from **Rodriguez** at paragraph 12 that the flexibility policy heralded unequivocally the introduction of a new practice whereby all applicants would be notified of the absence of mandatory evidence from their applications and would be given the opportunity to rectify the relevant shortcoming prior to rejection.

20. It should be borne in mind however that the letter from Mr Oppenheim states that applicants would be contacted "where appropriate". What is or is not appropriate depends on the wording of the policy itself and/or the wording of the relevant Immigration Rules. As I have indicated above the wording of both the policy and the Rules does not require the Respondent to ask for documents that do not exist. It may well be that if the Respondent does ask for such documents there is no bar on the

Appellant producing them but that is different to saying that there is a requirement on the Respondent to ask whether such documents can be obtained and the decision is not in accordance with the law unless the Respondent has done that.

21. The second point made by the Appellants (made by Mr Balroop on behalf of the third Appellant but I assume adopted by Mr Richardson on behalf of the first Appellant) was that the declarations from the third party investors was sufficient to meet the Rules because they met the requirements of paragraph 41-SD(b). This assumes that subparagraph (b) is in the alternative to subparagraph (a). For the reasons I have already given I do not find that the Appellants are able to satisfy subparagraph (a). I do not accept the implication that subparagraph (b) of paragraph 41-SD is in someway in the alternative. The documents from the investors may well satisfy the requirements of subparagraph (b) but that does not relieve the Appellants of the responsibility of showing that they are entitled to access monies held in the bank. Nor does it show that there was an omission which could be rectified by a request under the policy because the investors were prepared to make the £200,000 in their accounts available to the Appellants.

22. Whilst I agree it was not for the Judge to speculate on how the Appellants could satisfy the requirement to show they had access to the funds in the bank, equally it was not an unreasonable requirement of the Respondent contained in the Rules that some evidence of ability to access funds in a bank account be shown. It is self-evident that the Respondent needs to know that the particular applicant can access the particular funds. Otherwise there is nothing to stop a wealthy individual who has over £200,000 declaring the same in support of multiple applications under the Tier 1 Entrepreneur system. That would be an abuse of the scheme as the applications relying on such monies would not be genuine applications.

23. It was not for the Judge to specify what the Appellants could do to rectify the position but the plain fact of the matter was that they have still not done anything to show that they can rectify the position. They simply rely on what they submitted to the Respondent that there are two wealthy individuals who between them have £200,000. It is not a requirement that those individuals transfer the £200,000 to the Appellants now but it is a requirement that some evidence of an ability to access the money is shown and this the Appellants failed to do. Although the Rules indicate that the Respondent can nevertheless grant an application even if otherwise it might fail, that is subject to severe restrictions (see paragraph 12 above) which render it inapplicable in the instant case. This was not a case of a document in the wrong format.

24. I do not accept the interpretation of the case of **Rodriguez** which amounts to a submission that in effect the Respondent can never refuse a points-based system application if no request has been made to an applicant. These Appellants could not satisfy the Rules and still cannot. Whilst it is arguable that the Judge could have explained himself in more detail, I do not accept that his reasoning reveals any material error of law such that his determination should be set aside. He did not deal with the point in relation to paragraph 41-SD(b) but it does not appear to have been

raised before him and in any event, as I have decided, is not relevant to the outcome in this case.

Decision

The decision of the Judge did not involve the making of a material error of law and I dismiss the Appellants' appeals against his determination which will stand.

Appeals dismissed.

I make no anonymity orders (save in relation to the second Appellant) as there is no public policy reason so to order.

Signed this 2nd day of December 2013

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Deputy Upper Tribunal Judge Woodcraft