Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA 17038 2013
IA 17041 2013
IA 17046 2013
IA 17053 2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 December 2013	**On 30 December 2013**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NABEEL SABIR
NADIA NABEEL
MOAZAN NABEEL
ASIF MUNAWAR

Respondents

Representation:
For the Appellants: Mr S Walker, Home Office Presenting Officer
For the Respondent: Mr M Iqbal, Counsel

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal by four people against a decision of the Secretary of State to refuse them leave to remain in the Tier 1 Entrepreneur category of the Immigration Rules. The respondents are all citizens of Pakistan. The four respondents are made up of two potential entrepreneurs and their immediately dependent relatives.

2. These are cases which clearly concerned the First-tier Tribunal Judge, and they concern me. It is clear from the evidence that both of the attempted entrepreneurs have gone to considerable trouble to extend their stay in the United Kingdom as business people. They arrived in the United Kingdom lawfully as students and they have been successful in their studies.

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3. There are many requirements in the Rules relating to entering or remaining as entrepreneurs. They are confusing and, as Mr Iqbal said, very easy to get wrong. These appellants satisfied the Rules in most respects including what might be thought the most stringent requirement; they had access to very substantial sums of capital to finance their proposed business.

4. However there was something they got very badly wrong. They did not comply with the requirements of the Rules relating to the production of an advertisement of the services of the proposed business. There were other things that concerned the Secretary of State when she considered the application but the First-tier Tribunal judge resolved those in favour of the respondents to this appeal and no one has suggested that she was wrong to do that.

5. The real problem, which was identified correctly by the First-tier Tribunal judge, is that the present respondents did not provide an advertisement in the Yellow Pages showing their names. This was not in itself suspicious. They said, possibly with considerable justification, that they did not see the Yellow Pages as being an important source of their business, but it was a requirement of the Rules that an advertisement was produced and no advertisement was produced. It was not produced with the application as required because it could not be, because no such advertisement existed when the application was made.

6. Passing reference is made in the grounds to the so-called "fairness principle" but this is nothing to do with the "fairness" cases. They sometimes apply where, for example, the Secretary of State refuses an application when there is good reason to think the person making the application had complied with the requirements of the Rules but a document had gone astray for some reason. These cases are not remotely like that. The fact is the applications in these cases did not meet the requirements of the Rules. If the respondents had organised themselves differently then perhaps they could have done but they did not.

7. The First-tier Tribunal judge was so concerned about the consequences to the present respondents of the appeals being dismissed that she allowed the appeal on human rights grounds. She refers to Article 8 of the European Convention on Human Rights. Whilst I have more than a degree of sympathy for the approach, and notwithstanding Mr Iqbal's best efforts, I am quite satisfied that she was wrong in law.

8. Mr Iqbal made reference to the so-called "de minimis" principle, but, with great respect, that is nothing to do with this case. Mr Iqbal properly drew my attention to the judgment of Stanley Burton L.J. in **Miah v Secretary of State for the Home Department [2012] EWCA Civ 261** where the learned Lord Justice made the point that if it was a de minimis case it would be allowed under the Rules. It is not, and should not have been and was not. The doctrine of de minimis is a red herring so far as this appeal is concerned.

9. There is no doubt that the requirements of the Rules were not met and, in my judgment, it was wholly inappropriate to allow these appeals under human rights grounds. It really is a misapplication of the law because it is using human rights provision to enable a "near miss" to succeed. The European Convention on Human Rights is intended to underpin all law and one of its functions is to stand in the way of arbitrary decision making or unjustified interference on the parts of

governments in the lives of citizens. It is really very hard to imagine circumstances where an application that fails under the Rules should be allowed on human rights grounds purely because the failure to comply with the Rules was very slight. I will not make myself a hostage to fortune by saying that such a situation could never occur but, if it can, this is not such a case. This is clearly a case of applying wrongly the so-called near miss arguments and wrongly allowing the appeal. The judge should not have done that. She erred in law and I set aside the decision.

10. I now have to decide what to do. The sole reason advanced on human rights grounds was the interference in not allowing them to remain was disproportionate to any proper purpose.

11. These are not a cases, for example, of appellants with a United Kingdom citizen wife or husband or children who are British nationals or who have long residence in the United Kingdom being upset by the decision. These are cases of people who have stayed in the United Kingdom lawfully, who want to stay longer and cannot because they do not satisfy the requirements of the Rules. Certainly there is nothing in the Immigration Rules which would lead to their appeal being allowed on human rights grounds and I cannot see any way in which they could be allowed properly under general human rights law principles.

12. No doubt declining to give them what they require will lead to an interference with the private and family lives of each of the respondents but it will be lawful because that is what the Rules require. I find that it is proportionate, because the Rules are there to be followed, they have not been followed and the consequence of them not being followed usually is the person who does not satisfy the requirements of the Rules has to go. There are no extraneous circumstances that would point to a different result.

13. I do not know why the Secretary of State has implemented such an inflexible policy but the policy, embodied in the rules, is perfectly plain and I cannot see any basis for deciding that it is unlawful or contrary to the human rights of the people concerned to make the decision. The rules in cases such as entrepreneurs will almost inevitably have an arbitrary element. That is how rules work. Maybe the appellants will want to seek remedy outside the Rules; maybe they will campaign to change in the Rules. Such things are not matters for me.

14. I cannot uphold the decision of the First-tier Tribunal. It is plainly wrong, and for the same reasons that I find it plainly wrong I have to go ahead to substitute a decision dismissing the appeals of the original applicants.

15. I have to apply the Rule. I have given my reasons. If the decision is wrong in law they will no doubt be given proper advice about what to do with it, but I cannot change it because I feel sorry for them.

16. I set aside the decision of the First-tier Tribunal and I substitute a decision dismissing the respondents' appeals to the First-tier Tribunal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 23 December 2013