Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/26258/2012
IA/26262/2012
IA/26266/2012

THE IMMIGRATION ACTS

Heard at : Field House
On : 11th July 2013

Determination Promulgated
On : 22nd July 2013
……

Before

Upper Tribunal Judge McKee

Between

RAHEEL UR REHMAN
SUMAIR AHMED TARIQ
AYESHA FAYYAZ PARACHA

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Paul Turner, direct-access barrister
For the Respondent: Mr T. Wilding of the Specialist Appeals Team

DETERMINATION AND REASONS

1. Mr Rehman and Mr Tariq had both spent a number of years in the United Kingdom, first as students and then as Post-Study Work Migrants, before they applied in June 2012 to 'switch' into the Tier 1 (Entrepreneur) category as an 'entrepreneurial team'. At the same time, Mrs Paracha, who is married to Mr Rehman, sought further leave to remain as the dependant of a Relevant Points Based System Migrant. All three applications were refused on 6th November 2012, and the appeals which were subsequently lodged stand or fall together.

2. Messrs Rehman and Tariq had already started a private limited company, Mingle Foods, and their applications were supported by a letter dated 11th June 2012 on headed notepaper of Mingle Foods Ltd, written by them as directors of the company and confirming that the company's funds were fully available to them to invest in a new enterprise, Mingle Tech Ltd. A bank statement for Mingle Foods from HSBC was provided, showing a credit balance on 11th June of £51,090. The minimum sum needed in order to switch from the Post-Study Work category to the Entrepreneur category was £50,000. Documents were also enclosed about the newly incorporated Mingle Tech, including an agreement to provide IT and electrical services to a recruitment agency in Slough.

3. The applications were refused because no points were awarded for Attributes under Appendix A to the Immigration Rules. Table 4(d) sets out the requirements for this class of application, which include having access to no less than £50,000. On 20th July 2012, subsequent to the joint application by Mr Rehman and Mr Tariq, a new paragraph 41-SD was inserted into Appendix A, listing the "specified documents" which could demonstrate the availability of the necessary funds. One way of doing this was to provide a letter from a financial institution, or a personal bank statement, confirming the amount of money available to the entrepreneurial team. In the instant case, there was no letter from HSBC, while the HSBC statement fell foul of the requirement at paragraph 41-SD(a)(ii)(4) that the account had to be in the names of the applicants, and not in the name of a business or third party. The account here was the business account of Mingle Foods.

4. The possibility was then explored that Mingle Foods could be regarded as a 'third party' contributor of funds. But this fell foul of another requirement of paragraph 41-SD, namely that there should be both a declaration from the third party (41-SD(b)(i)) and a letter from a legal representative (41-SD(b)(ii)). The letter of 11th June on Mingle Foods headed notepaper counted as a declaration, but it was not accompanied by a letter from a legal representative.

5. A third reason was then given for refusing the joint application. It was noted that most of the money deposited in the HSBC account held by Mingle Foods, which had built up the credit balance to over £50,000, had been deposited by Mr Rehman and Mr Tariq. These deposits could, it was said, "*be classed as funds which have already been invested in the United Kingdom*." But in order for the funds to be accepted, the evidence specified in paragraph 46-SD, such as company accounts and tax returns, should have been provided. This is apparently an allusion to Mingle Foods and the business activity carried on by Messrs Rehman and Tariq while they were Post-Study Work Migrants. Indeed, it seems that they could have put forward Mingle Foods, rather than Mingle Tech, as the basis upon which to apply for Entrepreneur status. But they made their applications without any professional assistance, and by their own admission did not fully comprehend the complexities of this particular part of the Points-Based System. Indeed, I have had difficulty grasping it myself.

6. Not only were the applications to vary leave refused, but decisions were also taken to remove the applicants under section 47 of the Immigration, Asylum and Nationality Act 2006. When the three linked appeals came before the First-tier Tribunal on 5th March 2013, Judge Hubball correctly found at paragraph 28 of his determination that

the removal decisions (he actually uses the phrase 'removal directions', which had not yet been given) were unlawful, but did not expressly allow the appeals against those decisions. A letter from HSBC dated 29th November 2012 was adduced, providing some of the information whose absence led to the applications being refused. But the judge ruled that this evidence was inadmissible under section 85A of the 2002 Act, and the appeals against the 'variation' decisions were dismissed.

7. Permission was sought to appeal to the Upper Tribunal, on the footing that the Border Agency should have contacted the applicants before deciding their applications and asked them to provide the missing documentation, in line with the policy of 'evidential flexibility' examined in *Rodriguez (Flexibility Policy)* [2013] UKUT 42 (IAC). Permission was initially refused by Designated Judge Garratt, but was granted on renewal by Upper Tribunal Judge Perkins. When the matter came before me, Mr Turner expanded upon the grounds of appeal which had impressed Judge Perkins, and was resisted by Mr Wilding. I am grateful to both representatives for the skill and lucidity with which they presented their submissions, in a case of considerable technical difficulty. Having pondered long over those submissions, I can now give my determination in quite a brief compass.

8. The First-tier Tribunal did err in law, in my view, by not adverting to the 'evidential flexibility' policy. *Rodriguez* had been reported several weeks before these appeals were heard, and should have been taken into account. Despite a persuasive rebuttal by Mr Wilding, I find myself in agreement with the contention made by Mr Turner at paragraphs 13 to 27 of his Grounds. The parties already have them, and I need not recapitulate them here. I would add that this was not a situation where the caseworker was unaware of the policy. He must have been aware of it, for at two points in the refusal letters he considers whether he should contact the applicants and ask for certain documents, but decides not to. These were, however, applications which were crying out for the policy to be applied. The applications had not been prepared by lawyers, but on their face it was clear enough that the applicants were genuine entrepreneurs, the kind of people that the Points Based System is supposed to encourage. All that was needed was some tidying up of the paperwork.

9. Not only was the policy engaged, as explained in *Rodriguez*, but common law fairness required that the applicants be contacted and told about the documents that were missing. The applications were made on 13th June 2012, and it was not until 20th July that paragraph 41-SD, with all its documentary requirements, was inserted into the Immigration Rules. Previously, the 'specified documents' had been listed in Policy Guidance, which was not binding. When the provision of specified documents suddenly became binding, in the wake of *Alvi*, fairness required that applications which were already pending should not be refused because specified documents were missing. Fairness required that such applicants be given the opportunity of supplying the specified documents.

10. As for the policy itself, the panel in *Rodriguez* did not express a view on whether the 'evidential flexibility' policy outside the Rules, to which they had ascribed a very wide ambit, had continued beyond 6th September 2012, when paragraph 245AA was inserted into the Rules, arguably incorporating into the Rules a much restricted version of the policy described in *Rodriguez*. But in any event, the full-blown policy

had been in force for three months after the applications in the present case were made, giving plenty of time for the application of that policy. It is expected that the Upper Tribunal will shortly determine an application by the Secretary of State for leave to appeal *Rodriguez* to the Court of Appeal, but unless and until it is overturned I should follow a 'reported' case of the Upper Tribunal, especially one written by the future President of the Chamber.

DECISION

The appeals against the refusal to vary leave are allowed to the limited extent that the decisions were not in accordance with the law. The applications for further leave to remain are therefore outstanding before the Secretary of State, and are to be determined in the light of the evidence provided by the appellants of their current circumstances.

The decisions to remove the appellants under section 47 of the 2006 Act are also allowed, as those decisions were not in accordance with the law as it was at the time.

Richard McKee
Judge of the Upper Tribunal

19th July 2013