Upper Tribunal
(Immigration and Asylum Chamber) Appeal nos: **IA 09830, 35, 45-13**

THE IMMIGRATION ACTS

At **Field House** Decision signed: **09.01.2014**
on **09.01.2014** sent out: **13.01.2014**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

ARSHAD ALI & 2 others

appellants

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: Mr S Randhawa (solicitor, Sky)
For the respondent: Miss Alice Holmes

DETERMINATION AND REASONS

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Eileen Herlihy), sitting at Taylor House on 28 October 2013, to dismiss appeals by a citizen of Pakistan, born 10 February 1979, his dependent wife Abida, born 2 January 1987, and their son A, also born in Pakistan on 11 January 2007. The appellant has been in this country since 2007, with continuous student leave till 9 March 2013: before that expired, he applied for tier 1 entrepreneur leave, which was refused on 18 March 2013. Abida and A have been here since July 2011. The permission judge expressly declined to grant permission to appeal on the points raised under the Immigration Rules, but did so on the sole basis that the hearing judge had not considered A's best interests in reaching her article 8 assessment.

2. The appellant's proposed business partner Abdul Rafiq Butt was refused permission to appeal altogether, though that decision appeared in the same document as the grant to these appellants. Perhaps as a result of that, his case was listed for hearing with theirs; but I declined to hear him. Despite the terms of the grant of permission to these appellants, sent out on 25 November, with notice of hearing following on 3 December, Mr Randhawa, without the elementary courtesy of giving notice of his intention, either to the Tribunal or to the Home Office, sought before me to re-open the grounds of appeal under the Immigration Rules. Since permission had not been expressly refused on those grounds, I invited Mr Randhawa to persuade me, if he could, that they were arguable.

3. The basis on which the appellant was refused entrepreneur leave was not set out as clearly as it might have been, either in the refusal letter or in the first-tier decision. Essentially it concerned the availability to him (and Mr Butt) as funding for their business of money held in an account in this country by a Mr Paramjit Singh. That needed to satisfy the following provisions of appendix A to the Rules:

> 41. An applicant will only be considered to have access to funds if:
> (a) The specified documents in paragraph 41-SD are provided to show cash money to the amount required (this must not be in the form of assets);
> (b) The specified documents in paragraph 41-SD are provided to show that the applicant has permission to use the money to invest in a business in the UK;
> (c) The money is either held in a UK regulated financial institution or is transferable to the UK; and
> (d) The money will remain available to the applicant until such time as it is spent in the establishment or running of the applicant's business or businesses. … 'Available to him' means that the funds are:
> (1) in his own possession,
> (2) in the financial accounts of a UK incorporated business of which he is the director, or
> (3) available from the third party or parties named in the application under the terms of the declaration(s) referred to in paragraph 41-SD(b) of Appendix A.

4. Requirements (a) and (c) were satisfied; so the appellant needed first to provide the documents required by (b). Although the money was held in this country, he could not do so by satisfying the requirements of paragraph 41-SD (c) (ii), because, contrary to (c) (ii) (4), it was not held in his name, or Mr Butt's, but in that of Mr Singh. So he needed to comply with the requirements of paragraph 41-SD (i): the relevant ones are these:

> (i) A letter from each financial institution holding the funds, to confirm the amount of money available. Each letter must: …
>
> (6) state the applicant's name, and his team partner's name where relevant,

5. Mr Randhawa told me that Mr Singh's bank, in common with the general practice of other financial institutions in this country, had declared themselves unable to produce such a letter, confirming the availablity of funds in their own client's account to a third party. This may well be the case, though Mr Randhawa was unable to produce any letter from the bank to confirm it. He suggested that this state of affairs defeated the underlying purpose of the Rules, and that this raised a question of public importance.

6. While it is possible that such a question might have to be decided in some future case, it is conceded, and in any case beyond doubt, that this appellant could not satisfy the relevant provisions of the Rules. If that was because banking law meant that they were incapable of being satisfied, then this was an argument which needed to be properly made before the hearing judge, who was faced with nothing more than the apparent refusal of an individual bank to provide the documentary evidence required by the Rules.

7. The judge was not even arguably wrong in law to hold that this meant that the appellant was unable to satisfy those requirements; as to whether the deficiency was one which could be cured by reference to the discretion given by paragraph 245AA (a) of the Rules, which arises

> (b) If the applicant has submitted specified documents in which:
>
> (i) Some of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing);
> (ii) A document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or
> (iii) A document is a copy and not an original document; or
> (iv) A document does not contain all of the specified information

this appellant had been given an opportunity by the Home Office to produce a bank letter which did comply with the requirements, but the further letter of 18 February 2013 still did not do so. I told Mr Randhawa I was not prepared to hear him further on the Rules.

8. So far as the article 8 point on which permission was given is concerned, Miss Holmes was prepared to concede that the judge had been wrong not to make A's best interests a primary consideration, as required by *ZH (Tanzania)* [2011] UKSC 4. She was inclined to argue that this failure had not been material to the decision; however. since the point had not been considered by (or, it seems, put to) the judge at all, it seemed to me best to consider it on its merits for myself, and re-make the article 8 decision on that basis. Mr Randhawa did not dissent from this course of action.

9. Mr Randhawa told me that A was now in his third year at school in this country: he submitted that the appellant, who had obtained an MBA degree from the University of Wales in the course of his stay here as a student, and had a business ready to go ahead, would be in a much better position to look after him, and his mother, in this country, than if they all had to return to Pakistan.

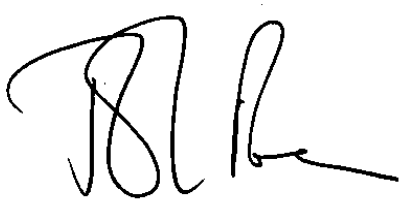
10. That was the full extent of my information about A's best interests, even though these had formed the ground on which permission to appeal was given. Clearly at his age (still two days short of his seventh birthday), he will stay with his mother and father whatever happens. While the general trend of immigration suggests that their financial prospects as a family might be brighter in this country than in Pakistan, there is nothing to suggest that this appellant, clearly an able man with an MBA from a respectable institution in this country, would not be able to make his way and look after his family properly back home.

11. That being the case, there is nothing but the two years and a term A has spent at school in this country to suggest that his best interests might be significantly in favour of the whole

family staying here. However, there is nothing from his school, or elsewhere, to show any special needs on his part; and children of that age are generally well capable of adapting to changes in their surroundings, especially if they continue to have, as he will, the love and support of both parents. No doubt going back to Pakistan after 2½ years here would be a big change for him; but English is an official and business language there, as here, and the knowledge of it he will have got could only help him there.

12. I see no reason why A's best interests significantly militate against his return to Pakistan with his mother and father. There is nothing else in the appellants' article 8 case to suggest that this was disproportionate to the legitimate purpose of immigration control: none of them has ever had leave to remain in a capacity leading to settlement, or could have had any legitimate expectation of that, without being able to comply with the requirements of the Rules.

Appeals dismissed



(a judge of the Upper Tribunal)