Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/10864/2013
IA/10867/2013
IA/10871/2013
IA/10874/2013
IA/10878/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination issued**
on 1 April 2014	**On 7 April 2014**
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Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

IRUM SHAH NAWAZ + husband and 3 children

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr A Caskie, Advocate, instructed by Drummond Miller, Solicitors

For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

No anonymity order requested or made

DETERMINATION AND REASONS

1) The first appellant ("the appellant") appeals against a determination by First-tier Tribunal Judge Handley, promulgated on 8 November 2013, dismissing her appeal against refusal of her application under the Points Based System (PBS).

2) The case turns on the application of paragraph 245AA of the Immigration Rules as it stood at the date of decision, 16 March 2013. It does not involve any policy of the respondent about "evidential flexibility", or any case law on that subject.

3) The application for permission to appeal to the Upper Tribunal and the grant of permission were on the view that the respondent should arguably have applied Rule 245AA(d)(iii)(1), which says that if an applicant has submitted a specified document which does not contain all of the specified information, but the missing information is verifiable from other documents submitted with the application, then the application may be granted exceptionally. However, representatives agreed that as at the date of decision, that provision was not in the Rules.

4) In her application dated 9 October 2012 the appellant sought leave to remain as a Tier 1 (Entrepreneur) Migrant. Her family members applied as her dependants. As part of her application, she had to show access to £200,000.

5) Without waiting for the outcome of her application, the appellant proceeded to purchase the intended business, a garage in Cowdenbeath.

6) The respondent refused the application by letter dated 16 March 2013.

7) The live point arises from the appellant stating that she had access to funds being made available by Mr M S Nawaz, amounting to £202,000, in Lloyds TSB Bank. Rule 41-SD(a)(i) sets out detailed requirements to show access to funds made available by a third party contributor. There was no letter from Lloyds TSB Bank confirming access to these funds, so the application failed to gain the points required.

8) Mr M S Nawaz is the husband, co-applicant and co-appellant of Irum Shah Nawaz.

9) With the applications by the appellant and by her husband and children as dependants, there was a letter from Lloyds TSB dated 9 October 2012 to Mr M S Nawaz relating to a specified account number with a balance of £202,000. (This is at page D10 of the respondent's bundle in the FtT.)

10) There was produced to the First-tier Tribunal a copy letter from the bank, dated 21 October 2013, to Mr and Mrs M Nawaz as account holders, relating to the same account number, balance £8,200. (This is at page 78 of the inventory of productions for the appellants in the FtT.)

11) Mr Caskie said that the above showed that the account was (at some unknown date) transferred into the joint names of husband and wife. The bulk of the money in the account was in the meantime used for the purchase. He submitted that this is a case where the appellant bought a genuine business, and complied with the "substance" of the Rules. Her case failed "only on a procedural basis". There had been timing issues when preparing the original applications. It had not been possible for the appellant to become a party to the bank account before the applications were submitted. The funds

of £200,000 could be treated as an asset of the marriage between the first and second appellants, to which they were both entitled. The facts that the garage had been purchased and that the account was later in their joint names amounted to powerful evidence that she did in fact have access to those funds. Although there was a statutory exclusion against the First-tier Tribunal looking at post-decision evidence [2002 Act, section 85A], such evidence became admissible by applying the discretion which the Secretary of State has within paragraph 245AA of the Rules. The concept of a document "in the wrong format" was not defined in the Rules. It should be given a broad interpretation, *contra proferentem*. If the appellants had been contacted, the required document could have been supplied within the 7 working days permitted. As the discretion arose within the Rules, it was exercisable also by the First-tier Tribunal or the Upper Tribunal. Discretion should have been exercised differently. If it had, full compliance with the Rules could have been shown. The decision of the First-tier Tribunal should be reversed.

12) Mrs O'Brien argued that deficiencies in this application could not be treated as a formatting issue. There was no reason for the decision maker to think that the document produced was in any way in a wrong format. Even although it now emerged that the funds were held by the appellant's husband and co-applicant, there was nothing to prompt the decision maker to exercise the discretion given by the Rule, so as to go looking for further information.

13) I reserved my determination.

14) Like the judge in the First-tier Tribunal, I have some sympathy with the appellant. However, as he also said, she must have known that there was a risk in proceeding to purchase a business before having a decision from the respondent. Strictly, she ought to have known that the applications were flawed.

15) As I observed at the hearing, there is no reason for document D10 to have been included with the applications other than to support the availability of the funds to the appellant. If Rule 245AA(d)(iii)(1) had been in place, I would have seen some force in the proposition that the missing information was verifiable from the documents submitted with the application.

16) The argument for the appellant turns entirely on the proposition that document D10 should have been identified by the decision maker as "a document in the wrong format". On the broadest interpretation conceivable, I do not think the wording of the Rule can be stretched that far.

17) The document is not in itself deficient in any way.

18) The money not being in her hands, the appellant needed a letter complying with Rule 41-SD(a)(i), the requirements of which are mentioned in the respondent's decision (page 2 of 7) and in Judge Handley's determination (paragraph 8). As the judge found at paragraph 22, no such letter was there. This is not a formatting error, but an item of

a different nature. There was nothing in Rule 245AA as at date of decision to prompt a decision maker to consider requesting further documents. Indeed, it appears that the appellant did not have the necessary document to produce, if the request was made. In order to comply, the underlying financial arrangements had to be changed, not the format of a document.

19) In *Alam* [2012] EWCA Civ 960 the Court of Appeal said at paragraph 45:

> In these three appeals there was no change of position after the applications were submitted, the appellants were simply at fault in not supplying the specified documents with their applications. I endorse the view expressed by the Upper Tribunal in *Shahzad* that there is no unfairness in the requirement in the PBS that an applicant must submit with his application all of the evidence necessary to demonstrate compliance with the rule under which he seeks leave. The Immigration Rules, the Policy Guidance and the prescribed application form all make it clear that the prescribed documents must be submitted with the application, and if they are not the application will be rejected. The price of securing consistency and predictability is a lack of flexibility that may well result in "hard" decisions in individual cases, but that is not a justification for imposing an obligation on the Secretary of State to conduct a preliminary check of all applications to see whether they are accompanied by all of the specified documents, to contact applicants where this is not the case, and to give them an opportunity to supply the missing documents. Imposing such an obligation would not only have significant resource implications, it would also extend the time taken by the decision making process, contrary to the policy underlying the introduction of the PBS.

20) Under the 2002 Act section 86(3)(b), the FtT and the UT have jurisdiction where it is thought that a discretion exercised in making a decision against which the appeal is brought should have been exercised differently. Under section 86(6), refusal to depart from the Rules is not the exercise of a discretion for that purpose. It now emerges into full light that the holder of the funds was the appellant's husband and co-applicant, with the same apparent interest in the outcome. Whether that justifies discretion outside the Rules being exercised in favour of the appellant, notwithstanding the scheme of the PBS, is a matter for the respondent only.

21) The determination of the First-tier Tribunal has not been shown to err in any point of law, and it shall stand.

Hugh Macleman

7 April 2014
Judge of the Upper Tribunal