Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/10921/2013
IA/10923/2013
IA/10791/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 December 2013	**On 8 April 2014**

Before

MR C.M.G. OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BALA KRISHNA PARVATANENI
NAGA VEYKATA MOTAPARTHI
BHARAT KUMAR REDDY ANDAPALLY

Respondents

Representation:
For the appellant: Mr P. Deller, Home Office Presenting Officer
For the respondents: Mr A. Mehta, Malik & Malik Solicitors

DETERMINATION AND REASONS

1. The Appellant in these proceedings is the Secretary of State. For clarity, in the body of this determination we refer to the respondents as the Claimants.

2. Thus, the Claimants are citizens of India born on 2 August 1984, 15 February 1990 and 15 May 1986. The first and third Claimants ("the main Claimants") are joint applicants as Tier 1 (Entrepreneur) Migrants. The second Claimant is the wife of the first Claimant and thus a dependant in the application for further leave to remain.

3. The main Claimants applied for further leave to remain as Tier 1 (Entrepreneur) Migrants. In decisions dated 20 March 2013, the applications were refused on the basis that the main Claimants were not entitled to the necessary points for Attributes under Appendix A in terms of advertising, evidence in the form of a Companies House Current Appointment report and correspondingly in relation to funds. Their appeals against the refusal of their applications were allowed by First-tier Tribunal Judge Fox in a determination promulgated on 24 September 2013.

4. At [13] Judge Fox stated that he could find no reference in the Immigration Rules to advertising. At [15]-[16] he referred to what could be described as inadequacies in the evidence provided by the Claimants. At [14] he concluded that the appropriate course was for the matter to be remitted to the Secretary of State for consideration in the light of the evidential flexibility policy, citing Rodriguez (Flexibility Policy) [2013] UKUT 00042 (IAC). At [18] he expressed the view that the Secretary of State's decisions appeared to be "ambiguous in relation to the substance of the Immigration Rules" and ultimately he allowed the appeals so as to allow the Secretary of State to reconsider her decisions. The appeals in so far as they concerned the decisions to remove the Claimants under section 47 of the Immigration, Asylum and Nationality Act 2006 were also allowed on the basis that the removal decisions being made contemporaneously with the refusals to vary leave to remain were not in accordance with the law.

5. Mr Mehta accepted that there was an error of law in Judge Fox's decision in so far as he found that there were no requirements as to advertising when it is clear from Appendix A that there are. Nevertheless, he submitted that there was advertising evidence before Judge Fox which he should have taken into account. He further contended that when the joint application was made by the main Claimants there was confusion as to whose name to provide. The name is mentioned on the 192.com name creation. It was however, accepted that the leaflets and cards that were before the judge were not put before the Secretary of State as they came into existence after the appeal. He relied on 'evidential flexibility'.

6. Mr Deller accepted that if the issue of advertising had been decided in favour of the appellants, the other requirements of Appendix A in terms of finances under Attributes would have allowed the Claimants to secure the requisite points.

7. At issue was whether the Claimants had met the Rules in relation to advertising, although as explained below, that is not the only relevant requirement in these appeals. The requirements of paragraph 245DD relating to entry clearance as a Tier 1 (Entrepreneur), as they applied at the dates of these decisions, and in so far as relevant, provide as follows:

> **245DD Requirements for leave to remain**
>
> To qualify for leave to remain as a Tier 1 (Entrepreneur) Migrant under this rule, an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused
>
> Requirements:
>
> (a) The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant.
>
> (b) The applicant must have a minimum of 75 points under paragraphs 35 to 53 of Appendix A.
>
> (c) The applicant must have a minimum of 10 points under paragraphs 1 to 15 of Appendix B.
>
> (d) The applicant must have a minimum of 10 points under paragraphs 1 to 2 of Appendix C.

8. Under Appendix A, paragraph 36 under the subheading “Attributes”, provides that available points for entry clearance or leave to remain are to be found in Table 4. These amount to 75 points. Appendix A at 41SD(c) provides that if the applicant is applying under the provisions in (d) in Table 4, which these Claimants were, he must also provide:

> “…
> (iii) one or more of the following specified documents:
>
> (1) Advertising or marketing material, including printouts of online advertising, that has been published locally or nationally, showing the applicant's name (and the name of the business if applicable) together with the business activity.
>
> (2) Article(s) or online links to article(s) in a newspaper or other publication showing the applicant's name (and the name of the business if applicable) together with the business activity,
>
> (3) Information from a trade fair(s), at which the applicant has had a stand or given a presentation to market his business, showing the applicant's

name (and the name of the business if applicable) together with the business activity, or

(4) personal registration with a UK trade body linked to the applicant's occupation; and

9. In relation to the second Claimant, the decision in her case is entirely dependant on the success or otherwise of the appeals of the main Claimants. Paragraph 319C governed her application but it is not necessary for us to set out its terms.

10. It is clear that there are requirements as to advertising and Mr Mehta was correct to concede that there was an error of law in this respect. Given that it is established that there is an error of law in the decision of the First-tier judge, we set aside his decision and proceed to re-make it. The question is whether, as was submitted on their behalf, the Claimants met the requirements of the Rules in terms of advertising.

11. In support of their application the Claimants produced to the Secretary of State leaflets advertising their business, Bakt Services Ltd, seemingly offering support services for businesses. They also produced an on-line print out from 192.com, again in relation to Bakt Services Ltd, this time relating to an off-licence. Neither of these pieces of advertising material had the Claimants' names on them, as the Rules require.

12. The skeleton argument before the First-tier Tribunal does not dispute what is said in the notice of decision about the failure to comply with the rules in terms of the Claimants' names not being on the advertisements, but stating that they had advertised their business in more than one place and that the Respondent should have requested further evidence or done an on-line check.

13. In submissions Mr Mehta said that there had been other advertising material before the First-tier Tribunal but accepted that this material was not sent in support of the applications for further leave. In the bundle that was before the First-tier Tribunal is a copy of a business card in the name of Bakt Services Ltd, a further 192.com printout and the same type of leaflet that was sent in support of the application, this time with the names of the Claimants on all the material. There was also what purported to be a copy of a customer survey but none of this material was submitted in support of the application.

14. Mr Mehta explained that because the Claimants were making a joint application they were confused as to whose name should be provided. We are rather sceptical about that explanation. If the Claimants knew that a name had to be provided on the advertising material it is unlikely that they would have chosen to put no name rather than the name of one or other of the main Claimants. In any event, the explanation takes the Claimants' case no further. Nor does the other explanation for the

failure to comply with the Rules, namely that because they were starting a new business they were unfamiliar with the Rules, particularly bearing in mind that on the application form the Claimants stated that their application was being dealt with by legal representatives, Malik and Malik, a well-known specialist immigration firm of solicitors. They are also named on the notice of appeal to the First-tier Tribunal.

15. The Claimants rely on evidential flexibility, specifically with reference to Rodriguez (Flexibility Policy) [2013] UKUT 00042 (IAC). However, that decision was overruled by the Court of Appeal in Rodriguez [2014] EWCA Civ 2. Mr Mehta was not able to refer us to the terms of any evidential flexibility policy which existed at the time of these decisions, or to explain the basis on which such a policy ought to have been applied to the specific circumstances of the Claimants' case. We have considered evidential flexibility as set out in the Immigration Rules at paragraph 245AA but its terms as they applied at the relevant time do not assist the Claimants.

16. Even if the evidential flexibility policy could be said to have been applicable in terms of the missing information (the Claimants' names) on the advertising material, the application could not have succeeded in any event because they did not provide a Current Appointment report, a matter raised in the notice of decision and not disputed by the Claimants as being a necessary requirement of the Rules which they needed to have satisfied (under Appendix A, paragraph 46-SD(f)(ii)).

17. The skeleton argument before the First-tier Tribunal refers to the Current Appointment report which it states was submitted with the application, referring to the report created on 18 January 2013 and which is in the appellants' unpaginated bundle. There is another Current Appointment report dated 4 April 2013, and a further one dated 13 June 2013 on the Tribunal file, sent on 18 June 2013 to the Tribunal. Although the First-tier judge referred to the 18 January and 4 April reports, the Secretary of State's bundle does not contain any copy of a Current Appointment report submitted with the application and there is no evidence that it was submitted. Although the application forms in respect of the main Claimants have indicated that a printout of the Current Appointment report from Companies House was submitted with the application, we think it more likely that this is a reference to the application to register a company, a copy of which is in the respondent's bundle. It would be surprising if a Current Appointment report had been submitted with the application given that the Secretary of State gave its absence as one of the reasons for refusal.

18. Although the Claimants' skeleton argument states that anyone, including the Home Office and the judge, can obtain the Current Appointment report, that does not absolve the Claimants from providing the required documents in order to discharge the burden of proof which is on them. The comment about anyone being able to obtain a Current

Appointment report rather belies the suggestion that it was sent with the application.

19. The resolution of this appeal does not however, depend on whether or not a Current Appointment report was submitted with the application given the failure of the Claimants to meet the requirements of the Rules in terms of advertising and that the Claimants have been unable to point us to the terms of the evidential flexibility policy which is said to have applied at the relevant time.

20. We are not satisfied that the Claimants have established that they meet the requirements of the Immigration Rules for leave to remain as Tier 1 (Entrepreneur) Migrants. Consequently, the appeals under the Immigration Rules are dismissed.

21. Although the grounds of appeal before the First-tier Tribunal raise human rights in general terms, neither those grounds nor the Claimants' skeleton argument contain any detailed argument in relation to Article 8 of the ECHR.

22. We re-make the decision by dismissing the appeal of each Claimant.

Decision

23. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal is set aside and re-made, dismissing the appeal of each respondent.

Upper Tribunal Judge Kopieczek

7/04/14