



**Upper Tier Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/16423/2014
IA/16428/2014
IA/16426/2014
IA/16433/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 10 September 2014**

**Determination Promulgated
On 13 October 2014**

Before

**Deputy Upper Tribunal Judge Pickup
Between**

**Samjhana Khoteja
Shobha Aryal
Raju Shilpakar
Krishna Banadur Dhungana**

[No anonymity direction made]

Appellants

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellants: Ms D Revill, instructed by Peer & Co (Watford)
For the respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants, all citizens of Nepal, are team Tier 1 applicants, the first and second appellants, and their dependant husbands, the third and fourth appellants.

2. These are their linked appeals against the determination of First-tier Tribunal Judge Pacey, who dismissed their appeals against the decisions of the respondent, various dated between 19-24 March 2014, to refuse their applications for further leave to remain in the UK as team Tier 1 applicants with dependants husbands, and to remove them from the UK pursuant to section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 1.8.14.
3. First-tier Tribunal Judge Levin granted permission to appeal on a date unknown.
4. Thus the matter came before me on 10.10.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Pacey should be set aside.
6. The Secretary of State, and on appeal Judge Pacey, were not satisfied that the appellants genuinely intended and were able to establish, take over or become a director of one or more businesses in the UK within the next six months, or that they genuinely intends to invest the money referred to in table 4 of Appendix A in the business, or that the money was genuinely available to the appellants. The appeals were thus dismissed by the First-tier Tribunal.
7. In essence, the grounds of appeal take issue with the judge's findings and argue that she failed to correctly apply the requirements of paragraph 245DD(h).
8. Ground 1 asserts that the judge erred in finding that the funds held by the appellants were not available to their company. Ground 2 asserts that the judge found that the appellants had submitted a false contract document, but ignored the burden of proof. Ground 3 points out that the appellants do not have to demonstrate that their business is likely to be successful, only that they genuinely intend to pursue it. It is submitted that the judge applied an overly critical approach to the way in which the business is to be run and confused viability with genuine intent
9. In granting permission to appeal, Judge Levin found that, "The judge's failure to identify at para 38 of her determination why she found that the Appellants had failed to discharge the burden of proof with reference to the specified requirements of the Immigration Rules and to make clear findings thereupon arguably amounts to an error of law. In such circumstances both the grounds and the determination disclose arguable errors of law."
10. The Secretary of State's Rule 24 response noted that the First-tier Tribunal Judge raised various concerns as to whether the appellants were genuine entrepreneurs, the requirement of paragraph 245DD(h) of the Immigration Rules. "The concerns appear valid. The fact that they were inconsistent regarding the enquiries made, regarding the number of client required to obtain projected profits, the concerns over advertising and also their general lack of experience, which was inconsistent with the

claims to have years of experience.” As to ground 3, the response is, “that appears to be a disagreement with the findings of the Judge, who appears for all the reasons given above to have been entitled to conclude that they were not “genuine entrepreneurs.”

11. There is merit in ground 1. The judge did not address the respondent’s concern that the funds were not genuinely available to the appellants for the purpose of the business, except in the narrow sense set out at §33 of the determination. There, the judge found that as the funds were held in an account in the names of both of the first and second appellants, they were not held by the company they had set up, which was an independent legal entity. Whilst the judge was correct about the legal status of a business, the judge appears to have ignored the meaning of ‘available’ in paragraph 245DD(h), which includes that funds are held in the own possession of the applicant, or in the financial accounts of an incorporated business of which he is the direction, or available from a third party. There is no requirement that the funds must be held in the name or account of the business set up. The judge has made an error of law in the making of the decision. However, in the light of my findings regarding grounds 2 and 3, this error of law is not material.
12. I do not accept the premise of ground 2, which is that the judge made a finding that the appellants had submitted a false document. At §34 the judge considered the contract submitted with Rainna Clothing Ltd and stated that she did not find it to be a genuine contract. Something has gone awry with the wording of §34, as it appears incomplete in the reasons given for finding the contract not genuine. Nevertheless, I do not accept that the judge made a finding that the document was false or that this discrete finding adversely affected the credibility of the appellants or adversely affected the other factual findings. It is for the appellants to demonstrate that a document submitted can be relied on. The judge was not making a finding of forgery.
13. In any event, as this document came into existence after the date of application, it is excluded by the operation of section 85A(4) of the Nationality, Immigration and Asylum Act 2002, as it was not submitted in support of, and at the time of making the application to which the immigration decision relates. However, this only relates to points based decisions. It is arguable that as the refusal decision was divided between points based system and non-points based system reasons for refusal and that the production of the contract document, which was considered by the Secretary of State, is not caught by section 85A(4). However, in Ahmed and Another (PBS: admissible evidence) [2014] UKUT 00365 (IAC), the Upper Tribunal panel found that where a provision of the Rules provides that points will not be awarded if the decision-maker is not satisfied as to another (non-points-scoring) aspect of the Rule, the non-points-scoring aspect and the requirement for points are inextricably linked and as a result the prohibition on new evidence in section 85A(4) applies to the non-points-scoring aspect of the rule: the prohibition is in relation to new evidence that goes to the scoring of points. In the circumstances, the Secretary of State and the First-tier Tribunal judge should have excluded this contract from consideration.

14. I see no inter-relation between this finding and the rest of the decision. In the circumstances, I find no material error of law with regard to ground 2.
15. I agree with the submission of Ms Isherwood that ground 3 is no more than a disagreement with the findings of the judge. I do not accept Ms Revill's argument that the judge has confused viability with genuine intent. It is clear from §7 of the determination that Judge Pacey recognised that the Rules require the intention to run a business to be genuine and that "There is no specific evidence that it be realistic." I find nothing improper about the judge's following statement that, "in order for an intention to be genuine the team members must establish that they consider that the business has, to borrow a phrase from another context, a "realistic prospect of success" and that it is not purely rooted in the realms of fantasy. However, I am not satisfied that the judge chose an appropriate example, in relation to a singing business, as if a person can sing, it requires no other qualifications to do so as a business.
16. Considering the determination as a whole, I am satisfied that the judge has, at some length, given anxious consideration as to whether the appellants' intentions are genuine. That must necessarily involve an assessment of the circumstances of the proposed business, the business plan, the plans for marketing and advertising, and the appellants' qualifications and experience. I am satisfied that whilst the judge makes some criticisms of the viability of the proposed business, in the end the judge's conclusion that their intentions are not genuine, the judge has given cogent reasons for reaching such a conclusion, and that the conclusion was one open to the judge to make on the facts before her. I do not find the decision in this regard perverse or irrational, or otherwise flawed. In essence, the grounds in this regard are no more than a disagreement with and an attempt to reargue the judge's findings of fact. I thus find no error of law in respect of ground 3.
17. In all the circumstances, whilst there is an error of law, as stated above in relation to ground 1, the appellants have failed to demonstrate that the decision would or could have been any different. Even if one excludes ground 1 entirely, the appeals would fail on the credibility assessment. Thus the decision does not disclose any material error of law.
18. It is obvious that the appeals of the third and fourth appellants stand or fall with those of the first and second appellants and that on the facts of this case the appeal of the first and second appellants also stand or fall together.

Conclusion & Decision:

19. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal of each appellant remains dismissed.



Signed:

Date: 10 October 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeals have been dismissed.



Signed:

Date: 10 October 2014

Deputy Upper Tribunal Judge Pickup