Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/18266/2013
IA/18272/2013

THE IMMIGRATION ACTS

Heard at Field House
On 26 June 2014
Dictated 27 June 2014

Determination Promulgated
On 2 July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE GIBB

Between

REZWANA SULTANA (FIRST APPELLANT)
MD BAYEZID AKHTAR (SECOND APPELLANT)
(NO ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr L Rahman, Counsel, instructed by Ashfield ILP
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DETERMINATION AND REASONS

1. Since the appeal was allowed at the First-tier the appellant before the Upper Tribunal is the Secretary of State. For the sake of clarity and convenience, however, I am referring in this determination to the parties as they were before the First-tier.

2. The appellants are a married couple, and both are citizens of Bangladesh. The first appellant was in the UK, with leave as a student, from 2006. She was subsequently granted leave to remain for post-study work. This period of leave ran from 31 January 2011 to 31 January 2013. On 15 August 2012 the second appellant was granted leave to enter the UK as the dependant partner of the first appellant. The first appellant then applied, in time, for leave to remain as a Tier 1 (Entrepreneur) Migrant, with the second appellant listed as her dependant.

3. The applications were refused on 8 May 2013. The appeals were allowed under the Immigration Rules by First-tier Tribunal Judge Lobo, in a determination promulgated on 25 March 2014.

4. The Secretary of State was granted permission to appeal by First-tier Tribunal Judge Cruthers, on 6 May 2014. Having heard submissions from both sides I decided that the judge had erred in law in his treatment of evidence referred to at paragraph 12(a) of the determination. The evidence consisted of a newspaper advertisement for the business. This had not been submitted with the application. An earlier advertisement, which had been submitted with the application, had not included the first appellant's name and other details required by the Rules. The later advertisement did include these details.

5. It was agreed at the hearing, by Mr Rahman for the appellants, that the second newspaper advertisement was not submitted to the respondent before the date of decision.

6. Various other matters were canvassed at the hearing by Mr Rahman, including the fact that Counsel representing the respondent at the hearing made a concession that the second advertisement satisfied the requirements because it was published before the decision was made. Mr Rahman also referred to the fact that evidential flexibility was not raised because of the position adopted by the respondent at the hearing. On the central issue, however, he was not in a position to make any relevant submissions.

7. The error of law in paragraph 12(a) is that the judge treated the second advertisement as admissible evidence for meeting a requirement of the Immigration Rules that generated points. This was material to the outcome, allowing the appeal under the Immigration Rules, because if this evidence had been treated as inadmissible the appeal could not have been allowed on that basis. In points-based appeals, for matters connected to the award of points, evidence will not be admissible unless it was submitted with the application. This flows from section 85A of the 2002 Act.

8. Since it was agreed, and was clear from the evidence presented before the judge, that the second advertisement had not been submitted with the application, and indeed had not been submitted at all, the judge was obliged by section 85A to regard the

evidence as inadmissible in relation to the points-scoring aspect of the appeal. His treatment of the evidence as admissible amounted to a material error of law.

9. As a consequence I set aside his decision allowing the appeal under the Immigration Rules.

10. There was discussion at the hearing of how the decision in the appeal should be remade. I indicated my view, that having read the papers this was an example of a meritorious application, which was only refused because of a peripheral technical issue. There will be cases under the points-based system, because of the structure of it and the way that the case law has developed, where unmeritorious applications succeed, because they have met all of the detailed requirements; and there will also be cases where meritorious applications fail, because they omitted to submit some minor piece of evidence with the application.

11. I am grateful to Mr Jarvis, who assisted with an impressively detailed knowledge of the complex area of evidential flexibility. He agreed on behalf of the Secretary of State that the decisions taken were not in accordance with the law, because the decision maker had failed to consider a relevant policy. In view of this agreement it is not necessary for me to set out the argument in full, but I am satisfied that the reasoning behind the agreement was sound. The outline is as follows. These decisions were taken on 8 May 2013. At that time there was an earlier and narrower version of paragraph 245AA of the Immigration Rules in force than at present, but also, significantly, there was in force a modernised guidance document, in the version that applied between 12 March 2013 and 20 May 2013. Although the guidance was in line with the then version of paragraph 245AA, which was significantly narrower than the version of that Rule that was brought in by HC628 in September 2013, the guidance also had a document appended to it. This document was the same as the second appendix to the **Rodriguez** decision in the Upper Tribunal, subsequently overturned by the Court of Appeal. Within this document there was a list of categories, which included Tier 1 Entrepreneurs. Under that heading caseworkers were advised to make enquiries if information was missing from a document. As a result Mr Jarvis concluded that there was a policy in existence at the time that would have obliged the caseworker, on noting that the advertisement was missing certain information, to contact the applicants and give them an opportunity to remedy the defect.

12. As agreed between the parties I therefore remake the decisions in the appeals by allowing them to the limited extent that they were not in accordance with the law for failure to consider a relevant published policy in force at the date of decision. Despite the fact that the appeals do not fall to be allowed under the Immigration Rules, therefore, the applications remain outstanding awaiting lawful decisions. As a result the further evidence can be considered by the Secretary of State, who is not prevented from considering such evidence, since section 85A of the 2002 Act only applies to the appeal process.

13. There was some brief discussion of the other ground of refusal, the contract issue. This aspect of the judge's decision was not criticised in the grounds. The focus of the argument that he erred in law was only in relation to the advertisement. In any event matters may now have moved on, in that there may be further contract evidence. The judge's reasoning in relation to the contract issue appeared to be sound, however, and as a result the only remaining ground of refusal related to the newspaper advertisement.

14. It was not suggested that there was any need for anonymity in these appeals, and I make no such direction. No submissions were made as to fee awards. The appellants have accepted that they omitted a significant piece of information with the application. That would point towards no fee award being made. On the other hand it has been accepted that the respondent failed to consider and apply a relevant policy which, if applied, may well have led to a grant. In the circumstances I have decided to make a partial fee award, to reflect this situation, of half of the fees paid.

Decision

15. The judge made a material error of law and his decision allowing the appeals under the Immigration Rules is set aside.

16. The decision is remade as follows.

17. The appeal of the Secretary of State to the Upper Tribunal is dismissed. The appeals are allowed to the limited extent that the decisions were not in accordance with the law and the applications remain outstanding, awaiting lawful decisions.

Signed Date

Deputy Upper Tribunal Judge Gibb

TO THE RESPONDENT
FEE AWARDS

Note: this is **not** part of the determination.

In the light of my decision to re-make the decision in the appeal by allowing it, 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).

The First-tier Judge made whole fee awards, having allowed the appeals under the Immigration Rules. In the light of my decision to remake the decisions in the appeals by allowing them to a limited extent I have decided to vary those awards, for the reasons given above. I make a partial fee award for each appeal, in the sum of £70 (50%) for each appellant, making a total fee award of £140.

Signed Date

Deputy Upper Tribunal Judge Gibb