



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

Appeal Numbers: IA/42113/2013
IA/42114/2013
IA/42115/2013

THE IMMIGRATION ACTS

**Heard at Sheldon Court, Birmingham
On 3rd December 2014**

**Determination Promulgated
On 17th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**MD DIDARUL ALAM (FIRST APPELLANT)
FAHMIDA NARIN MAHIN (SECOND APPELLANT)
FARISHA ZEHNA (THIRD APPELLANT)
(ANONYMITY ORDER NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M Bhuiyan of Haque & Hausmann Solicitors
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction and Background

1. The Appellants appeal against a determination of Judge of the First-tier Tribunal Ferguson (the judge) promulgated on 4th July 2014.

2. The Appellants are nationals of Bangladesh. The first and second Appellant born 13th October 1986 and 5th October 1986 respectively are husband and wife and are the parents of the third Appellant born 14th September 2012.
3. The first Appellant applied for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant under the points-based system (PBS) and the second and third Appellants applied for leave to remain as his dependants.
4. The applications were refused on 24th September 2013. The first Appellant's application was refused with reference to paragraph 46-SD(c)(iii) as evidence had not been produced to prove that the business is subject to UK taxation. The first Appellant therefore failed to satisfy the requirements of the Immigration Rules, and because his application was refused, the applications of his dependants were refused in line.
5. The Appellants appealed to the First-tier Tribunal and their appeals were heard together by the judge on 21st May 2014 and dismissed. The judge found that the first Appellant's application could not satisfy the requirements of the Immigration Rules for the reasons given by the Respondent in refusing the application, and rejected the contention that the Respondent should have considered evidential flexibility. The judge considered the family and private lives of the Appellants and rejected the appeals on those grounds.
6. The Appellants applied for permission to appeal to the Upper Tribunal. In summary it was contended that the judge had erred by misapplying sections 85 and 85A of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act), and had made his decision "in disregard of the principles of burden of proof". It was also contended that the judge had not given appropriate weight to documents, and had blatantly disregarded the Appellants' human rights.
7. It was further submitted that the judge had failed to have due regard to the evidential flexibility policy which existed in PBS cases.
8. It was contended that the first Appellant satisfied the requirements of the Immigration Rules, and that the judge in dismissing the appeal did not "apply the principles of burden of proof which was on the SSHD."
9. Permission to appeal was granted by Judge of the First-tier Tribunal Keane who recorded;

"Broadly, the grounds amounted to no more than a disagreement with the findings of the judge. However, in paragraph 8 of the grounds, the author arguably contended that the judge had not borne in mind the burden of proof and had not applied the requisite standard of proof. Nowhere in his determination did the judge mention the burden and standard of proof and his failure to do so arguably amounted to an error of law but for which the outcome of the appeals might have been different. The applications for permission are granted."

10. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of the The Tribunal Procedure (Upper Tribunal) Rules 2008 contending that it was common ground between the parties before the judge, that the first Appellant did not satisfy the requirements of the Immigration Rules, and failing to mention the burden and standard of proof did not amount to a material error of law.
11. The Tribunal issued directions that there should be a hearing before the Upper Tribunal to decide whether the First-tier Tribunal determination should be set aside.

The Appellants' Submissions

12. Mr Bhuiyan had not appeared before the First-tier Tribunal as his firm were not instructed in those proceedings, but relied upon the grounds contained within the application for permission to appeal. Mr Bhuiyan accepted that the appeal could not have succeeded under the Immigration Rules because the specified evidence in relation to taxation had not been submitted.
13. He, however, argued that the first Appellant had invested £50,000 in the business, and it would be disproportionate if he had to leave the United Kingdom. I was therefore asked to find that the judge had not adequately considered Article 8, and Mr Bhuiyan pointed out that the judge had not made a finding as to whether the first Appellant was credible, and had not made any reference to the length of time that the first Appellant had been in the United Kingdom, and he had entered this country in 2006.
14. It was also contended that the judge had failed to adequately explain why the evidential flexibility policy could not be considered.
15. I was asked to find that the judge had failed to set out and apply the correct standard and burden of proof.

The Respondent's Submissions

16. Mr Mills submitted that much of what Mr Bhuiyan had contended was not relevant to the grant of permission by Judge Keane, which indicated that the grounds amounted to a disagreement with the findings made by the judge, although failing to mention the burden and standard of proof was an arguable error of law.
17. Mr Mills pointed out that it was accepted before the First-tier Tribunal that the Immigration Rules could not be satisfied and that the judge had considered paragraph 245AA and concluded that this did not assist the Appellants and had not erred in so doing.
18. I was asked to accept that it was not clear how setting out the burden and standard of proof would have made any difference to the decision in this case.
19. In relation to Article 8, Mr Mills contended that the judge had properly and adequately considered all that was relevant and had not erred in law.

The Appellants' Response

20. Mr Bhuiyan agreed that permission was limited to the burden and standard of proof issue, but contended that this was relevant to the judge's overall consideration of the appeals. I was asked to accept that the judge had not considered all relevant factors in relation to Article 8, such as the length of time that the first Appellant had been in the United Kingdom, and therefore the determination was flawed and should be set aside.
21. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

22. I do not find any merit in the grounds contained within the application for permission to appeal, and I do not find that the judge erred in law for the following reasons.
23. Failing to set out a self-direction regarding the burden and standard of proof does not without more amount to an error of law. I find no evidence within the determination that the judge applied the wrong burden or standard of proof.
24. It is apparent that it was common ground between the parties, before the judge, (see paragraphs 7 and 10) that a specified document was not provided with the application. This was the reason why the first Appellant's application was refused, as the requirements of paragraph 46-SD(c)(iii) were not satisfied. The specified evidence required to prove that the business is subject to United Kingdom taxation had not been provided. The application of section 85A of the 2002 Act prevented the submission of the missing specified evidence after the application had been lodged.
25. It was therefore argued that evidential flexibility should have been considered by the Respondent. The judge considered this argument at paragraphs 11 and 12 of the determination and decided that paragraph 245AA(c) did not impose an obligation on the Respondent to contact the first Appellant because he had failed to submit a specified document with his application. That finding was clearly open to the judge to make, and discloses no error of law.
26. Dealing with Article 8, the judge noted that it was accepted that the requirements of Appendix FM and paragraph 276ADE of the Immigration Rules could not be satisfied. The judge went on to consider Article 8 outside the Immigration Rules, and took into account the relevant case law. It was not necessary for the judge to make a specific credibility finding in relation to the first Appellant, as there appears to have been no issue in relation to his credibility, and the judge dealt with the appeals on the first Appellant's own account. It is incorrect to say that the judge did not take into account the length of time that the first Appellant has been in the United Kingdom, as the judge in his first paragraph set out that the first Appellant had entered the United Kingdom in September 2006 as a student.

27. The conclusion reached by the judge that the Respondent's decisions did not amount to a disproportionate breach of the family or private lives of the Appellants is a conclusion open to him on the evidence, and the judge has given sustainable reasons for reaching that decision, and has not erred in law.

Decision

The determination of the First-tier Tribunal discloses no error of law.

I do not set aside the decision, and the appeals are dismissed.

Anonymity

No order for anonymity was made by the First-tier Tribunal. There has been no request for anonymity and the Upper Tribunal makes no anonymity order.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

9th December 2014

**TO THE RESPONDENT
FEE AWARD**

The appeals are dismissed. There are no fee awards.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

9th December 2014