Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/14942/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 26 March 2015	**On 31 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

FARHANA BATEN
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:

For the Appellant: Mr T Wilding of the Specialist Appeals Team
For the Respondent: Mr A Miah of Counsel instructed by MA Consultants

DECISION AND REASONS

The Respondent

1. The Respondent to whom I shall refer as "the Applicant" is a citizen of Bangladesh born on 17 October 1978. On 30 November 2009 she arrived with leave to enter as a student. She was subsequently granted leave to remain as a Tier 1 (Post-Study Worker) Migrant until 18 January 2014. On

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27 December 2013 she applied for further leave as a Tier 1 (Entrepreneur) Migrant.

The Decision and Appeal

2. On 14 March 2014 the Respondent refused the Applicant further leave under paragraph 245DD of the Immigration Rules because she did not met the requirements to submit evidence specified at para.41-SD(e), being marketing, advertising or similar material and under para.41-SD(c)(i) because she had not supplied all the documentary evidence required by the paragraph to show she had access to funds being made available by a third party.

3. On 27 March 2014 the Applicant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds refer to details of her company and its website and evidence of active trading submitted with the application and that documentary evidence showing the ability of the Applicant to have access to third party funds had been submitted to the SSHD.

The First-tier Tribunal Decision

4. By a decision promulgated on 4 December 2014 Judge of the First-tier Tribunal Rothwell found the Applicant and the third party supplying funds, both of whom gave evidence, to be credible witnesses and allowed the appeal.

5. The SSHD sought permission to appeal on the basis that the Judge had erred in finding that the documentary evidence required in relation to the Applicant's funding arrangements as set out in para.41-SD(c)(ii) but should have considered para.41-SD(c)(i). In addition, the Applicant had not satisfied the requirements of para.41-SD(c)(ii)(4) and the Judge had consequently erred in law.

6. On 22 January 2015 Judge of the First-tier Tribunal P J M Hollingworth granted permission to appeal.

The Upper Tribunal Hearing

7. At the start of the hearing Mr Wilding handed up the judgment of the Court of Appeal in *Arshad Iqbal and Others v SSHD [2015] EWCA Civ 169* delivered on 3 March 2015 explaining the operation of para.245DD and Appendix A. In this judgment Sullivan LJ said that compliance with the requirements of para.41-SD(a) (now renumbered as para.41-SD(c)(i) and para.41-SD(b) (now renumbered as para.41-SD(c)(ii) was mandatory in all cases. He also referred to paragraph 26 of the judgment in which Sullivan LJ noted that before the Court of Appeal there was no satisfactory evidence that financial institutions would be unable or unwilling to provide the relevant information. Further, at paragraph 34 Vos LJ said he knew of no reason under English law why a bank should not be prepared to write a letter confirming it had been instructed by its customer to provide funds

from that customer's account for the benefit of a business undertaken by a third party.

8. The Judge had looked exclusively at para.41-SD(c)(ii) which although it dealt with UK-based accounts expressly and did not include third party accounts.

9. The letter from the third party's bank at page 6 of the Applicant's bundle did not state her name, which was a requirement, and the letter had not been submitted with the application and was therefore inadmissible by reason of Section 85A of the 2002 Act.

10. The Judge had erred at para 20 of her decision because the documentation did not meet the requirements of para.41-SD(c)(i)(6) and so regardless of any findings on credibility, the Applicant's appeal had to fail under the Immigration Rules.

11. Mr Miah accepted the Judge should have considered para.41-SD(c)(ii) and in the light of the recent judgment in *Iqbal* and there was little which could be said to challenge the SSHD's view of the situation.

12. I noted that the original grounds of appeal had made reference to the European Convention and brief submissions had been made to the Judge on Article 8. The Judge had not made any findings on the Article 8 claim. Mr Miah submitted the Article 8 claim remained outstanding. Mr Wilding submitted that the claim under Article 8 had been in the alternative. No evidence in support of the claim could be found in the documents contained in the Applicant's bundle filed for the First-tier Tribunal hearing. The Applicant was on notice by reason of the second paragraph of the Upper Tribunal's directions of 11 February 2015 that any further evidence should be available to the Upper Tribunal at the hearing. Mr Miah said that without the Applicant present he would be in difficulties. The Judge at the time of the First-tier Tribunal hearing had been aware that the Applicant was pregnant and having allowed the appeal under the Immigration Rules would not have been minded to deal with the alternative claim under Article 8. The position now was that the child had now been born.

Findings and Consideration

13. I am satisfied for the reasons already described in the submissions made for the SSHD and not materially challenged for the Applicant that the Judge made a material error of law in her application of the provisions of paragraph 245DD and Appendix A para.41-SD(c) to the facts of the case. The decision so far as it was made under para.245DD of the Immigration Rules is therefore set aside and I re-make the decision and for the same reasons as it has been set aside I dismiss the appeal of the Applicant against the SSHD's decision under Part 6 of the Immigration Rules. I note that the considerable assistance given on the matters before the Judge by

the Court of Appeal in *Iqbal* was not available until some months after her decision was promulgated.

14. There was a claim under Article 8 before the Judge. There may have been little evidence to support it but given that the Applicant was pregnant, it would have been appropriate for the Judge to have addressed it, even if only briefly. Although there was no evidence of the birth of the Applicant's child, given what the Judge said in paragraph 6 of her decision, it would appear the position may now be considerably changed. In all the circumstances I find the decision is in error because it failed to address the Applicant's ground of appeal based on Article 8.

15. The birth of the Applicant's child will have caused a very substantial change in circumstances which may well necessitate the hearing of considerable evidence and extensive fact finding. The Applicant's failure to comply with the directions of the Upper Tribunal necessitates that the consideration of the appeal under Article 8 remains outstanding and in need of a full hearing. Having regard to Section 12 of the Tribunals, Courts and Enforcement Act 2007 and para.7 of Part 3 of the Upper Tribunal's Practice Directions and the circumstances of the appeal I consider this is one of those cases which should be remitted for hearing afresh before the First-tier Tribunal. Neither party had any objection to that proposal.

NOTICE OF DECISION

The First-tier Tribunal's decision contained errors of law such that it should be set aside. The decision of the First-tier Tribunal under Part 6 of the Immigration Rules is re-made and the Part 6 appeal is dismissed. The Applicant's appeal on human rights grounds (Article 8) only is remitted to the First-tier Tribunal for hearing afresh before a judge other than Rothwell.

No anonymity order is made.

Signed/Official Crest Date 31. iii.
2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal