Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/30984/2013
IA/30987/2013
IA/30989/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28th April 2014	**On 02nd June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

MRS BEVERLY JUNE GOODWILL
MR SYED WAQAR HASSAN ZAIDI
MISS ZAKIA ZAIDI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Nasim instructed by Crown & Mehria Solicitors
For the Respondent: Mr Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The first appellant is a citizen of the United States born on 7th November 1987, the second appellant is a citizen of Pakistan born on 23rd June 1980 and the third appellant is a citizen of the United States and the child of the first and second appellant and born on 26th December 2011. On 8th June

2013 they made an application to remain in the UK as a Tier 1 Migrant and dependants of a Tier 1 Migrant under the points-based system and this application was refused on 3rd July 2013. The decision incorporated a refusal of leave to remain together with a decision to remove the appellants by way of directions under Section 47 of the Immigration and Asylum Act 2006.

2. The reasons for refusal letter confirmed that on 7th January 2009 the first appellant was granted leave to enter the UK as a student and her leave was extended until 8th June 2013. She then made an application as a Tier 1 Entrepreneur but this was refused under paragraph 245DD of the Immigration Rules as she did not meet the requirement of paragraph 245DD(b) under Appendix A.

3. The respondent applied paragraph 41-SD of Appendix A of the Immigration Rules and stated that she had not provided sufficient evidence with her application as specified under Appendix A.

4. She claimed points on the basis that she had registered as a director of a new company in the UK but she had not provided acceptable evidence as specified under Appendix A to establish that she had registered in an appropriate manner. She stated in her application that she was registered as a director of a new business and as proof she stated that she had submitted a Current Appointment Report from Companies House. However the document she submitted was in fact a Companies House Company Overview printout and this document did not show the date which she was appointed director and nor did the printout of the company information she had submitted.

5. Thus the evidence submitted in the form HMRC self-assessment registration had not been taken into consideration. If this evidence had been taken into consideration it would not have been acceptable as it was a printout of her *submitting* her registration for self-assessment and was *not* proof she was in fact registered.

6. On the basis of the documents she provided the Secretary of State was not satisfied she met the requirements under paragraph 41-SD of Appendix A.

7. First-tier Tribunal Judge Parkes dismissed their appeals under the Immigration Rules and under Article 8 on 20th January 2014.

8. The judge recorded that at the hearing before the First-tier Tribunal that the first appellant submitted an online version of her Companies House report but this did not show her date of appointment and the date of incorporation may be different from her date of appointment [6]. The report of 9th July was not before the decision maker. The full mail copy was requested *after* she had received the refusal letter. The full report was at page 25 of her bundle.

9. The first appellant agreed under cross-examination that the date of incorporation was 16th May 2013 and that at D1 a one page online copy did not show the date of her appointment as a director and it did not follow that the date of incorporation was the date of her appointment. She also submitted the document at E1 which did not show the date of her appointment.

10. The judge took note at paragraph 9 of his determination that paragraph 245AA was amended on 1st October 2010 and it was on that date that subparagraph (b)(iv) was added such that there was a discretion for the respondent to apply the evidential flexibility policy where the document did not contain all the required information such as now.

11. The judge found at paragraph 10 that the first appellant did not provide the documentation that met the requirements of the specified documentation and information and that the Secretary of State did not fail to apply the policy of evidential flexibility. The appellants were not assisted by the applicable terms of paragraph 245AA.

12. There was an application for permission to appeal. It was submitted that the judge misunderstood the requirements for paragraph 245AA and the application of the evidential flexibility policy. It followed that the Secretary of State's representatives should have contacted the Appellant and requested the specified information through an alternative but suitable document. The judge did not take this into account.

13. The judge should have considered paragraph 245AA(d)(iii) as it was a document which was missing and which could have been verified from the other documents, and further the Secretary of State could have obtained the necessary information directly from the website at Companies House and the appellant's application could have been granted exceptionally.

14. Application for permission to appeal was granted by Designated Judge Shaerf on 14th February 2014 on the basis that the grounds disclose the judge made an arguable error of law in his construction of paragraph 245AA of the Immigration Rules especially subparagraph (d)(iii) and permission to appeal was granted. At the initial hearing on 17th March 2014 the matter was adjourned as the appellants had changed their solicitors.

15. At the resumed hearing before me Mr Nasim submitted that the appellants could comply with paragraph 245DD(b) with reference to Appendix A paragraphs 35 to 53. He submitted that paragraph 46-SD did not apply to the new business and this Section of the Immigration Rules applied to those who had already commenced a business and invested funds. He submitted that Table 5 dealt with an extension of applications. Paragraph 46 related to those who had leave as a Tier 1 Migrant and were extending that leave. He submitted as the reasons for refusal letter suggested that all that was needed to be shown was that the appellant

complied with paragraph 41(SD). The appellant had applied under Table 4.

16. In the event the fallback position was that the documents provided showed the first appellant as a director although no date of her appointment had been given and at sections D1 and E1 of the respondent's bundle it was evident that the appellant had provided evidence and this had been printed off the day before the application to Companies House.

17. As indicated at paragraph 10 of his skeleton argument where, further to paragraph 245AA(b)(ii) a document is in the wrong format or (iii) a document is a copy and not an original document, the UK Border Agency may contact the applicant or his representative in writing and request the correct documents. The requested documents must be received by the UK Border Agency at the address specified in the request within seven working days of the date of the request.

18. Further he submitted that Article 8 had not been properly assessed and the whole family could not return to the USA.

19. Mr Wilding submitted that the Rules were difficult to follow in this context but paragraph 46-SD did apply. The application was made on 8th June 2013 and the decision was made on 3rd July 2013. Applicable to both of these dates was paragraph 46-SD(f) which was introduced by HC 760 on 13th December 2012. In particular paragraph (f) applied which states,

> "*Where Table 5 applies and the applicant's last grant of entry clearance, leave to enter or leave to remain was as a Tier 1 (Entrepreneur) Migrant, or where (d) in Table 4 applies he must provide the following specified documents as evidence of his registration as self-employed or as a director within the 6 months after the specified date in the relevant table:*
>
> *(i) If the applicant was self-employed, he must provide one of the following:*
>
> *(1) an original, dated welcome letter from HM Revenue & Customs containing the applicant's unique taxpayer reference number, dated no more than 8 months from the specified date in the relevant table,*
>
> *…*
>
> *(ii) If the applicant was a director of a new or existing company, he must provide a Current Appointment Report from Companies House, listing the applicant as the Director of the company and the date of his appointment, which must be no more than 8 months after the specified date in the relevant table."*

20. Mr Wilding accurately observed that Table 4 had been deleted on 1st October 2013 by HC 628 and inserted in paragraph 41-SD(v)(ii) and he stated therefore there was a requirement for the Current Appointment Report as at the date of the decision and continues to be a requirement now. I accept that paragraph 46-SD is not exclusively for those who wish for leave to remain as specifically paragraph 46-SD applies to Table 4.

21. This is not a case of a document being in the wrong format or a document that is a copy or not an original because it did not appear that this document was in existence as at the date of the application and therefore I do not accept that Judge Parkes was incorrect in his assessment within his determination. The document is specified precisely and the information it should contain was also specified as being *Current Appointment Report from Companies House, listing the applicant as the Director of the company and the date of his appointment*. The document produced was an overview not a report. There was no reason for the respondent to suppose a full report was in existence at the time.

22. I do not consider there is any unfairness to the appellant in the respondent's approach to the evidential flexibility policy. **SSHD v Rodriguez** [2014] EWCA Civ 2 confirmed the proposition that 'there is no unfairness in the requirement in the PBS that an applicant must submit with his application all of the evidence necessary to demonstrate compliance with the rule under which he seeks leave'. Further to **Rodriguez** and as specified in Paragraph 245 AA the respondent *may* request further evidence and further to 245AAd (iii) may grant the application exceptionally if all the other requirements are met (identified in the refusal letter was that the tax documentation was not provided) but in this case, as I state, the report document was not in existence until after the respondent's decision was made. The actual report was dated 9th July 2014.

23. I note that the refusal letter quoted only paragraph 41-SD and not paragraph 46-SD but I do not think that the decision substantively was not in accordance with the law because the refusal letter clearly set out the requirement for the Companies Report.

24. At the first hearing I allowed Mr Nasim to amend his grounds of appeal to include an application with regards to Article 8 and note that Judge Parkes made reference to Article 8 but made no reference to **Gulshan (Article 8 – new Rules – correct approach)** [2013] UKUT 640 .

25. The appellants cannot succeed under the Immigration Rules with regard their family or private lives. Neither parent had lived in the UK for a continuous period of 20 years and the child was only 3 years old and has not lived in the UK for a continuous period of 7 years. The rules reflect how under Article 8 of the Human Rights Convention the balance will be struck.

26. I carefully read the supplementary statement by the first appellant. She arrived in the UK on 7th January 2009 with a valid visa certificate and her

husband and daughter were dependants on this application. As she stated, her solicitors initially did not put forward her case and that the best interests principle had not been considered.

27. I find that the best interests of the child are to remain with the parents and there is no suggestion that either child, and indeed I note that their subsequent child has been born since the couple have been in the UK, will be separated from one of the parents. Both adult appellants came to the UK in order to study and this they have both no doubt undertaken. Judge Parkes confirmed and noted at paragraph 12 that the family would be returned as a unit.

28. Article 8 does not guarantee the right of the parties to choose where to establish their lives and they can either return to the United States or to Pakistan as they choose. I take into account the fact that both have been here lawfully, the husband since 2005 as a student and she since 2009. Both of them understood that they only had temporary leave to remain in the UK whilst they forged their relationship and had their children here.

29. I take into account that they have both worked. The first appellant would have known that her family were against her marrying her husband because he was from Pakistan and that his family were against her marrying the second appellant. They must have known this at the date of their marriage.

30. There was no information put before me to the effect that they were precluded from relocating for security reasons either in Pakistan or for visa reasons in the USA. The fact that the first appellant did not like her experience in Pakistan where she visited for a short period was unfortunate but the second appellant has lived for most of his life in Pakistan and can no doubt relocate there particularly after the advantages gained from his education in the UK.

31. As the first appellant stated she obtained a masters in business management from the University of Wales and has registered with the Health and Care Professions Council as a qualified social worker and worked with a community mental health team. I find that she has transferrable skills which she can use either in Pakistan or the United States. The fact that she has not relied on public funds does not lend itself to enhancing her Article 8 rights.

32. As stated in **Shahzad (Art 8: legitimate aim)** [2014] UKUT 00085 (IAC)

Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it

necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

33. I am not persuaded that there are any arguably good grounds as to why this matter should be considered outside the Immigration Rules (including Paragraph 276ADE or Appendix FM) and as Judge Parkes pointed out the family would be returned together. The judge may have only given very brief reasons with reference to the human rights grounds which may have been an error but in view of my findings not one that would make a material difference.

34. I find that his decision shall stand.

Signed Date 30th May 2014

Deputy Upper Tribunal Judge Rimington