Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/22344/2015**
IA/22329/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 June 2017	**On 26 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

SUKINDER KAUR
JASWINDER SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Patel, Hiren Patel Solicitors
For the Respondent: Mr Singh, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Appellants are nationals of India who were born on 3 November 1982 and 25 December 1969. On 20 August 2014 the First Appellant made a combined application for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant under the Points Based System (PBS) and for a

Biometric Residence Permit. The second Appellant was her dependent in that application and consequently I refer to the first Appellant as 'the Appellant' in this appeal. The application was refused on 14 October 2014. The Appellant lodged an appeal against the decision on 28 October 2014 and the appeal was withdrawn by the Presenting Officer on 14 January 2015 and remitted back to the Respondent for reconsideration.

2. On 28 May 2015 the Respondent refused the application under paragraph 245DD of the Immigration Rules as the Appellant did not meet the requirements of paragraph 245DD (b) under Appendix A. The reasons for refusal were that although the Appellant had provided a job title that was listed in Appendix J, the evidence that she had submitted to demonstrate that she was active in that occupation was not acceptable. Paragraphs 41-SD(e)(iii) and 41-SD (e) (iv) listed the evidence that must be submitted to demonstrate that the business was actively trading. The evidence that the Appellant had submitted in relation to advertising material, and personal registration with a trade body linked to her occupation was not acceptable as it did not cover a continuous period commencing before 11 July 2014, up to no earlier than three months before the date of the occupation. Additionally the Appellant had submitted no evidence to confirm the ownership of the domain of the business for her website. The evidence she had submitted in relation to a trading contract/an original letter from a UK-regulated financial institution with which she had a business bank account, on the institution's headed paper, confirming the dates that the business had been trading was not acceptable as it did not cover a continuous period commencing before 11 July 2014, up to no earlier than three months before the date of her application and the bank letter did not state the dates that her business had been trading. As a result the Secretary of State concluded that she had not submitted the evidence specified at paragraph 41-SD(e) of Appendix A of the Immigration Rules and not demonstrated that she met the requirements of the Rules to be awarded points under provision (d) in the first row of Table 4 of Appendix A. The Appellant was not awarded points for 'funds held in regulated financial institutions' or 'funds disposable in the United Kingdom' under Appendix A for the same reasons.

3. The Appellants appealed against this decision under section 82 (1) of the Nationality, Immigration and Asylum Act 2002 (NIAA). Their appeal was determined on the papers by First-tier Tribunal Judge M Eldridge who dismissed it in a determination promulgated on 22 July 2016. He considered the evidence submitted by the Appellant under paragraph 41-SD (e) (iii) and concluded that the adverts did not bear any dates other than 19 August 2014 and the trade certificate was dated 9 August 2014 and therefore did not meet the requirements of specified evidenced of continuous trading before 11 July 2014. He further found that the letter submitted by the Appellant from Santander Bank did not demonstrate trading before 11 January 2014; the contracts were dated 30 July or later and the letter from Santander Bank only confirmed credit in the bank on 15 August 2014. The First-tier Tribunal Judge then stated that he has considered all of the documents in the Appellant's bundle but that they did not demonstrate

when the business commenced trading. He also concluded that this was not a case where paragraph 245AA of the Immigration Rules could apply.

4. In a decision sent to the parties on 31 March 2017 I found that the First-tier Tribunal had made a material error of law. My core findings are at paragraphs 10 to 12 of the decision:

> "10. I am satisfied that the First-tier Tribunal made a material error of law for the following reasons. The First-tier Tribunal did not have the benefit of hearing submissions as this was a paper case. However, the Appellant's case was comprehensively set out in grounds of appeal at page 28 of her bundle. The Appellant set out at page 33 that she had submitted a letter from Santander Bank dated 24 October 2014 confirming that her business was trading since 1 July 2014. That letter was at page 119 of her bundle. In **Nasim** the Upper Tribunal held that:
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> > "As held in **Khatel and others (s85A; effect of continuing application)** [2013] UKUT 00044 (IAC), section 85A of the Nationality, Immigration and Asylum Act 2002 precludes a tribunal, in a points-based appeal, from considering evidence as to compliance with points-based Rules, where that evidence was not before the Secretary of State when she took her decision; but the section does not prevent a tribunal from considering evidence that was before the Secretary of State when she took the decision, whether or not that evidence reached her only after the date of application for the purposes of paragraph 34F of the Immigration Rules."
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> 11. The reasoning for that conclusion is at paragraphs 72 to 75 of the decision and rests on a concession by the Respondent in **Raju** and in **Nasim** that that Respondent had never suggested that she was not entitled to consider post-submission but pre-decision evidence. The Respondent has also made it clear that, in any event, the Tribunal was entitled to consider the evidence that the decision maker considered. The Respondent in this case has not sought to argue that the letter of 24 October 2014 was not submitted in relation to the appeal in January 2015 and was therefore not before the Respondent when the decision was made or that the Respondent has now reneged from the concession in relation to s85A. In the circumstances, the First-tier Tribunal should have considered whether that letter met the requirements of paragraph 41-SD(e)(iv). Further, the Appellant had submitted with her application dated 20 August 2014 business bank statements from Santander Bank for the period from 1 July 2014 to 15 August 2014 at ages 57 to 61 of her bundle which showed trading of this period and consequently, notwithstanding the fact that the Santander Bank letter dated August 2014 confirming that the Appellant's business was trading did not state that trading commenced before 11 July 2014, this information was verifiable from the other documents submitted with the application. In the circumstances, paragraph 245AA(d)(iii) and/or the evidential flexibility policy applied and the Respondent should have considered exercising her discretion.
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> 12. In the circumstances I conclude that there was a material error of law in the decision of the First-tier Tribunal and in view of the limited fact-finding required I conclude that the decision should be re-made in the Upper Tribunal. "

The Re-making of the decision in the appeal

5. The Appellants' application for leave to remain as a Tier 1 Entrepreneur was made on 20 August 2014 and consequently the Appellants have a full right of appeal under the 'old' section 84 of the Nationality, Immigration and Asylum Act 2002 as the Immigration Act 2014 (Commencement No.4 Transitional and Saving Provisions and Amendment) Order 2014 No 371 introduced the new provisions to any person who made an application after 2 March 2015 for leave to remain as a Tier 1, 2 or 5 Migrant or partner or child.

6. Both representatives agreed that in the light of my findings, as the decision was not in accordance with the law, it remained outstanding before the Secretary of State for a lawful decision to be made.

7. In the light of my findings, the Respondent's decision was not in accordance with the law as paragraph 245AA(d)(iii) and/or the evidential flexibility policy applied and the Respondent should have considered exercising her discretion for the reasons given in my decision in relation to the error of law as set out above.

Conclusions:

8. The appeal is allowed to the extent that it is not in accordance with the law. The Respondent's decision was unlawful and remains outstanding for a lawful decision to be made.

No anonymity direction is made.

Signed Dated 8 July 2017

Deputy Upper Tribunal Judge L J Murray