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

Appeal Numbers: IA/48457/2014
IA/48466/2014
IA/48474/2014

**THE IMMIGRATION ACTS**

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| **Heard at Cardiff Civil Justice Centre** | **Decision & Reasons Promulgated** |
| **On 29 March 2019** | **On 01 May 2019** |

**Before**

**UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**MUHAMMAD [S] (FIRST APPELLANT)**
**AYESHA [A] (SECOND APPELLANT)**
**[M A] (THIRD APPELLANT)**
**(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellants: In person assisted by Mr F Afzal as McKenzie Friend
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

## DECISION AND REASONS

### Application for Anonymity

1. Subsequent to hearing the appeals, on 9 April 2019 an application for an anonymity order was made by the first and second appellants who are the parents of the third appellant. However, although the third appellant is a

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child, the appeal and evidence relate exclusively to the position of the first appellant, as a Points-Based System applicant under Part 6A of the Immigration Rules. No personal information of the third appellant is disclosed in this decision and, in those circumstances, taking into account the public interest, the public interest does not require the protection of the appellants' identities. Consequently, I do not make an anonymity order.

## Introduction

2. The first and second appellants, who are married, are the parents of the third appellant. They were born respectively on 31 January 1984, 5 November 1983 and 1 January 2011. They are all citizens of Pakistan.

3. The first appellant entered the United Kingdom on 1 December 2009 with a student visa and with leave valid until 31 March 2011. On 16 May 2011, he was granted leave to remain as a Tier 4 (General) Student until 30 December 2011. On 13 September 2012, he was granted leave to remain as a Tier 1 (Post-Study Work) Migrant until 13 September 2014.

4. On 12 September 2014, he made a combined application for leave as a Tier 1 (Entrepreneur) Migrant under the Points-Based System (PBS) and for a Biometric Residence Permit. The second and third appellants made equivalent applications as his dependants.

5. On 14 November 2014, the Secretary of State refused the first appellant's application on the basis that he had failed to establish, on the basis of the evidence submitted, that he was entitled to the necessary 25 points under the 'Attributes' requirement in Appendix A of the Immigration Rules (HC 395 as amended). Consequently, the first appellant failed to meet the requirements of para 245DD(b) for leave as a Tier 1 (Entrepreneur) Migrant. The applications of the second and third appellants, which were wholly dependent upon the success of the first appellant's application, were also refused on that date.

## The First-tier Tribunal Decision

6. The appellants appealed to the First-tier Tribunal. Judge Lebasci dismissed the appellants' appeals on all grounds. In relation to the first appellant's substantive claim under the PBS, the first appellant could not succeed as he could not establish his entitlement to the required points under Appendix A. The reason for this was that he had failed to provide the required specified documents under para 41-SD(e)(v), namely a Current Appointment Report for his company and further, under paragraph 41-SD(c)(iii), advertising material since before 11 July 2014 and up to the date of his application in order to demonstrate that he had been continuously engaged in business activity. As regards the first document, that was simply not submitted. As regards the latter documents, the advertising material was not relevantly dated.

7. Instead, the focus of the argument before Judge Lebasci was that, given the deficit in the evidential material, the Secretary of State should have exercised his discretion under the 'evidential flexibility rule' in para 245AA to request from the first appellant the missing document and information concerning the dates which the advertising material covered.

8. As regards the missing Current Appointment Report, Judge Lebasci rejected the first appellant's contention that para 245AA(d) applied and that the information was available but had been submitted in the "wrong format". She found that the absence of the Current Appointment Report was a "missing document" rather than a document submitted in the "wrong format" and, applying para 245AA(c) the Secretary of State was not required to exercise discretion to request a "missing document".

9. As regards the advertising material, Judge Lebasci accepted that para 245AA(d)(iii) applied in principle, namely that the absence of the dates meant that the specified documents did not "contain all the specified information" but rejected the argument that the missing information was, as required for the application of discretion under para 245AA(d)(iii), verifiable from other documents submitted with the application, the website of the organisation which issued the documents or the website of the appropriate regulatory body.

10. Judge Lebasci also dismissed the appellants' appeal in reliance upon Art 8 of the ECHR.

**The Further Appeal**

11. The appellants sought permission to appeal to the Upper Tribunal. In the grounds of appeal to the First-tier Tribunal, the appellants relied upon 'evidential flexibility', fairness and also that the decision in respect of Art 8 was in error. Permission to appeal was refused by the First-tier Tribunal.

12. The appellants renewed their application for permission directly to the Upper Tribunal. In these new grounds, it was asserted that there was "one ground" of appeal, namely that the First-tier Tribunal had materially erred in law in applying para 245AA of the Immigration Rules.

13. On 15 August 2016, the Upper Tribunal (UTJ Hanson) refused the appellants permission to appeal.

14. Thereafter, the appellants brought a judicial review (Cart) challenge. In the detailed grounds, settled by Counsel, paragraph 245AA was set out in full. However, the grounds did not rely upon paragraph 245AA but rather asserted, relying upon the Court of Appeal's decision in SH (Pakistan) v SSHD [2016] EWCA Civ 426 that:

> "There was no assessment of the Secretary of State's failure to apply the evidential flexibility policy only paragraph 245AA of the Immigration Rules".

15. At para 16 of the grounds, it is made plain that the challenge to the High Court, based upon SH, rested upon a "more generous evidential flexibility policy" beyond para 245AA.

16. On 14 October 2016, Globe J granted the appellants permission to challenge the Upper Tribunal's refusal of permission to appeal. In granting permission Globe J said this:

> "1. The sole ground of appeal relates to the application of paragraph 245AA of the Immigration Rules, by virtue of the decision in SH (Pakistan) and Secretary of State for the Home Department [2016] EWCA Civ 426, to the failure of the claimant to produce evidence that he was registered as the director of a new or existing business in circumstances where it was accepted that he had provided a copy of the certificate of incorporation for the company Noor Technologies Ltd.
>
> 2. In turn, the issue is whether, by virtue of the decision in SH, the Secretary of State should have applied the evidential flexibility policy and requested the claimant to provide the company's current appointment report and further evidence in relation to the start of the advertising material.
>
> 3. The point was not considered by the Upper Tribunal.
>
> 4. It is arguable that there is a reasonable prospect of success that the decision of the Upper Tribunal refusing permission to appeal and thereby the decision of the First Tier Tribunal against which permission to appeal was sought are wrong in law and that the claim raises an important point of principle or practice or compelling reasons by the extremity of the consequences for the claimants".

17. Of course, the judicial review grounds did not seek to challenge the Upper Tribunal's refusal of permission based upon the "sole ground" in the grounds of appeal to the UT, namely that the First-tier Tribunal had wrongly applied para 245AA. The judicial review grounds raised, for the first time, an argument based upon a wider 'evidential flexibility' policy beyond para 245AA. Despite Globe J's reference to para 245AA in para 1 of his observations, it seems plain that in para 2 he was granting permission to challenge the UT's refusal of permission to appeal on the basis of the pleaded ground in the judicial review proceedings relying upon that wider (asserted) evidential flexibility policy and SH.

18. Having granted permission to challenge the UT's refusal of permission to appeal, on 30 November 2016 Master Gidden made an order quashing the UT's refusal of permission to appeal.

19. Thereafter, the Upper Tribunal (C M G Ockelton, Vice-President) on 29 January 2019 granted permission to appeal on the following basis:

> "Permission is granted in the light of the decision of the High Court in these cases. The parties are reminded that the Upper Tribunal's task is that set out in s.12 of the 2007 Act".

20. The consequence of that grant of permission was that the appeal was listed before me on 29 March 2019 in order to determine whether the First-tier Tribunal's decision involved the making of an error of law and should be set aside and, if appropriate, the decision re-made.

## The Relevant Legal Provisions

21. The requirements in the Immigration Rules in order for the first appellant to succeed in obtaining leave as a Tier 1 (Entrepreneur) Migrant under the PBS were not a matter of dispute between the parties.

22. The requirements are set out in para 245DD and, so far as relevant to this appeal, Appendix A. By virtue of para 245DD(b), the first appellant had to satisfy the requirements in Table 4 of Appendix A, in particular provision (d). The first requirement relevant to this appeal is in Table 4 (d)(iii) that the applicant:

> "Since before 11 July 2014 and up to the date of his application, has been continuously engaged in business activity which was not, or did not amount to, activity pursuant to a contract of service with a business other than his own and, during such period, has been continuously:
>
> (1) registered with HM Revenue & Customs as self-employed, or
>
> (2) registered with Companies House as a director of a new or existing business. Directors who are on the list of disqualified directors provided by Companies House will not be awarded points, ..."

23. In order to establish that requirement, and as the first appellant was claiming points as a director of a new business, he was required to provide certain "specified documents" set out in para 41-SD, in particular, para 41-SD(e)(v)(2)(a):

> "If claiming points for being a director of a UK company at the time of the application, a printout of a Current Appointment Report from Companies House, dated no earlier than three months before the date of application, listing the applicant as a director of a company that is actively trading and not dormant, or struck-off, or dissolved or in liquidation, and showing the date of his appointment as a director of that company; ..."

24. That was the document that Judge Lebasci concluded had not been submitted by the first appellant.

25. In addition, Table 4 (d)(iv) imposed another requirement, namely:

> "Since before 11 July 2014 and up to the date of his application, has continuously been working in an occupation which appears on the list of occupations skilled to the National Qualifications Framework level 4 or above, as stated in the Codes of Practice in

> Appendix J, and provide the specified evidence in paragraph 41-SD. 'Working' in this context means that the core services his business provides to its customers or clients involves the business delivering a service in an occupation at this level. It excludes any work involved in administration, marketing or website functions for the business ..."

26. In relation to that requirement, para 41-SD (e)(iii) sets out "specified documents" which must be produced to demonstrate the first appellant's "working" in the form of advertising material as follows:

> "(iii) one or more of the following specified documents covering (either together or individually) a continuous period commencing before 11 July 2014 up to no earlier than three months before the application:
>
> (1) advertising or marketing material, including printouts of online advertising, that had been published locally or nationally, showing the applicant's name (and the name of the business if applicable) together with the business activity or, where his business is trading online, confirmation of his ownership of the domain name of the business's website.
>
> (2) Article(s) or online links to article(s) in a newspaper or other publication showing the applicant's name (and the name of the business if applicable) together with the business activity,
>
> (3) information from a trade fair, at which the applicant has had a stand or given a presentation to market his business, showing the applicant's name (and the name of the business if applicable) together with the business activity, or
>
> (4) personal registration with a UK trade body linked to the applicant's occupation; ..."

27. In relation to this requirement, Judge Lebasci at [20] noted that the evidence relied upon, namely a printout of the first appellant's company's website, an advert on Gumtree and a Facebook page did not contain dates showing "working" from before 11 July 2014 up to no earlier than three months before his application.

28. As regards the website, it showed a date of 8 September 2014 but this was the date that the document was printed. The other documents contained no dates.

29. Those, then, are the substantive provisions.

30. The focus before Judge Lebasci was the application of para 245AA and the "evidential flexibility" for which it provided. Para 245AA, relevant to this appeal, provides as follows:

> "(a) Where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the Entry Clearance Officer, Immigration Officer or the Secretary of State will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with subparagraph (b).
>
> (b) If the applicant has submitted specified documents in which:
>
> (i) Some of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing);
>
> (ii) A document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or
>
> (iii) A document is a copy and not an original document; or
>
> (iv) A document does not contain all of the specified information;
>
> the Entry Clearance Officer, Immigration Officer or the Secretary of State may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received at the address specified in the request within 7 working days of the date of the request.
>
> (c) Documents will not be requested where a specified document has not been submitted (for example an English language certificate is missing), or where the Entry Clearance Officer, Immigration Officer or the Secretary of State does not anticipate that addressing the omission or error referred to in subparagraph (b) will lead to a grant because the application will be refused for other reasons.
>
> (d) If the applicant has submitted a specified document:
>
> (i) in the wrong format; or
>
> (ii) which is a copy and not an original document; or
>
> (iii) which does not contain all of the specified information, but the missing information is verifiable from:
>
> (1) other documents submitted with the application,
>
> (2) the website of the organisation which issued the document, or
>
> (3) the website of the appropriate regulatory body;

> the application may be granted exceptionally, providing the Entry Clearance Officer, Immigration Officer or the Secretary of State is satisfied that the specified documents are genuine and the applicant meets all the other requirements. The Entry Clearance Officer, Immigration Officer or the Secretary of State reserves the right to request the specified original documents in the correct format in all cases where (b) applies, and to refuse applications if these documents are not provided as set out in (b) ."

31. The structure of para 245AA is as follows. Subparagraph (a) sets out the starting point that applications under the PBS will only be considered on the basis of specified documents submitted with the application or which, if submitted after the application, are done so in accordance with para 245AA(b).

32. Subparagraph (b) creates a discretion invested in the Secretary of State to request further documents in certain specified circumstances:

    (i) where a document or documents is missing from a sequence;

    (ii) where a document is in the wrong format; and

    (iii) where a document is submitted as a copy and not an original document.

33. Subparagraph (c) states that the Secretary of State will not request a document or documents where either a specified document has not been submitted or where a successful request for a document under subparagraph (b) would not lead to a grant because the application would be refused for other reasons.

34. Subparagraph (d) permits the Secretary of State to grant leave "exceptionally" where a specified document is in the wrong format, or it is a copy and not original document, or where it does not contain all the specified information but the missing information is verifiable from other documents submitted with the application, the website of the organisation which issued the document, or the website of the appropriate regulatory body.

35. Prior to the introduction of para 245AA on 6 September 2012, the Secretary of State, has, since 2009, put in place a 'process instruction' that permitted evidential flexibility. That 'process instruction' which became "Guidance" in March 2013 has maintained a number of iterations and has continued in existence even after paragraph 245AA entered the Immigration Rules in September 2012. A pre-para 245AA version of the Secretary of State's evidential flexibility policy was considered by the Supreme Court in Mandalia v SSHD [2015] UKSC 59.

36. The evolution of the iterations of the Guidance between Version 1 on 12 March 2013 and Version 8 on 24 November 2016 were exhaustively

considered by the Court of Appeal in R (Mudiyanselage and Others) v SSHD [2018] EWCA Civ 65.

37. In Mudiyanselage, the Court of Appeal considered its earlier decision in SA (Pakistan) which was relied upon in the judicial review proceedings which led to the quashing of the UT's refusal of permission to appeal. In SA the Court of Appeal accepted that the evidential flexibility guidance in effect in that case provided for a "free-standing" policy wider than para 245AA. The Guidance considered by the Court of Appeal in SA was Version 1 in effect from 12 March 2013.

38. However, in Mudiyanselage, the Court of Appeal concluded that that wider free-standing policy of evidential flexibility ceased with the introduction of Version 4 from 1 October 2013. At [54], Underhill LJ, with whom Sir Brian Leveson P and Sir Colin Rimer agreed, said this:

> "Accordingly in my view the correct construction of Versions 4-7 of the Guidance is that there is no longer a general policy to allow correction of minor errors: evidential flexibility will only apply in the particular cases provided for by paragraph 245AA".

39. It was common ground between the parties in these appeals that the relevant Guidance, "Points-Based System: Evidential Flexibility" in force was Version 7 valid from 12 August 2014.

40. As the Court of Appeal decided in Mudiyanselage that version of the Guidance does not contain a wider policy of evidential flexibility. The only evidential flexibility which an individual can rely on, including the appellants in this appeal, is to be found in para 245AA.

## The Scope of this Appeal

41. This analysis creates a difficulty in these appeals. In seeking judicial review of the UT's refusal of permission to appeal, the appellants only relied upon a *wider* evidential flexibility policy beyond para 245AA. That is absolutely plain from the grounds for judicial review set out above and drafted by Counsel on behalf of the appellants. Equally, in granting permission to appeal, Globe J clearly granted permission on the basis that, following SA, it was arguable that the UT had been wrong to refuse permission to appeal against the FtT's decision. However, the grounds of appeal to the Upper Tribunal rely exclusively upon para 245AA. No reference is made in those grounds to the wider policy identified, as then in existence, in SA.

42. If the appellants are restricted to relying upon the ground(s) on which their judicial review challenge to the Upper Tribunal's refusal of permission to appeal was successful, then their appeals to the Upper Tribunal are bound to fail. As we now know, as a result of the detailed analysis by the Court of Appeal in Mudiyanselage subsequent to Globe J's decision in the judicial review proceedings, there is no *wider* evidential flexibility policy beyond para 245AA. The Cart grounds of challenge relied upon what is now an

unarguable ground of appeal. The First-tier Tribunal could not conceivably have erred in law by failing to consider a *wider* flexibility policy beyond para 245AA (even ignoring the fact that it was never argued before the First-tier Tribunal) because no such wider policy exists in Version 7 of the Guidance which is the relevant one for the purposes of this appeal.

43. Only if the appellants can rely upon para 245AA, which was the basis of the original grounds seeking permission to appeal directly to the UT, is there any tenable argument to be made on their behalf.

44. A Cart judicial review challenge to the Upper Tribunal's refusal to grant permission to appeal against a First-tier Tribunal's decision is, as the Upper Tribunal recognised in Shah ('Cart' judicial review: nature and consequence) [2018] UKUT 51 (IAC) (Lane P and UTJ Blum):

> "emphatically not an opportunity for a party to raise new grounds of appeal against the decision of the First-tier Tribunal" (at [62]).

45. In granting permission subsequently, Ockelton V-P, adopting the usual formulation, granted permission in light of the High Court's decision, namely to quash the earlier refusal of permission to appeal.

46. Where then does that leave the Upper Tribunal in respect of the grounds of appeal that an appellant may rely upon?

47. One view would be that, if the grant of permission by the UT following the successful Cart challenge is general in nature and not limited, all of the grounds upon which the individual relied in his grounds of appeal to the Upper Tribunal are ones that he may now rely upon. It may be that in practice the focus would be upon the merits of the ground(s) which led to the successful Cart challenge. And, of course, if the drafter of those successful grounds complied with the strong indication of the Upper Tribunal in Shah, there would be no disconnection between the grounds upon which the High Court quashed the refusal of permission by the Upper Tribunal and the grounds of appeal made to the Upper Tribunal – leaving, of course, the possibility of a more limited grant of permission by the Upper Tribunal following the Cart decision in the individual's favour.

48. Here, however, the Cart challenge was on a ground not raised before the UT. Given that the High Court found that ground arguable, and in the result persuasive, leading to the quashing of the decision, I have no doubt that the appellants are entitled to rely on that ground before the UT once permission has been granted subsequently. It may be, and I express no concluded view on this as it was not touched on in the submissions, that he High Court's decision acts as an implied amendment or variation (by addition) of the original grounds to the UT. Of course, as I have already made clear, that new ground does not assist the appellants in this appeal since, subsequent to the Cart proceedings, it is plain that that ground has no merit in it.

49. Mr Howells, on behalf of the Secretary of State submitted that was the only ground of appeal which I could consider. I do not accept that submission. The grant of permission by the Upper Tribunal subsequent to the Cart challenge is general in nature. The grounds of appeal originally rejected by the Upper Tribunal are, once more, potential grounds upon which the appellants are entitled to rely. Permission has been granted "generally" on the grounds. The position might well be otherwise if the grant of permission by the Upper Tribunal was more limited in scope, for example restricted to the basis upon which the Cart challenge had been successful.

50. Consequently, in these appeals I am satisfied that the appellants may rely upon the original grounds to the Upper Tribunal seeking to challenge the First-tier Tribunal's decision. Although those grounds were not precise in their focus, they undoubtedly relied upon para 245AA.

51. In the appeal before me, the first appellant developed his case in respect of para 245AA. Having indicated that I intended to reserve the question of whether that ground could be relied upon at the hearing, Mr Howells also addressed me *de bene esse* on para 245AA.

52. I now turn to consider para 245AA.

**Paragraph 245AA**

53. In his oral and written submissions, the first appellant sought to argue that para 245AA(b)(ii) and (d)(i) applied since, although the Current Appointment Report had not been provided, all the information was available in the other documents and so the document had been provided in the "wrong format".

54. That contention is not sustainable. A failure to provide a "specified document" (namely, the Current Appointment Report) is simply that: there is a "missing" document. It is not a "specified document" which has been provided but in the "wrong format".

55. Paragraph 245AA(c) deals with a "missing" document, i.e. where one has not been submitted. That is a situation in which there is no discretion to request it. By contrast, if a "specified document" is submitted and it is in the "wrong format" (for example if a letter is not on a letterhead paper as specified), that document in the correct format may be requested. The plain and simple fact in this appeal is that the first appellant did not provide the specified document in a printout from Companies House of a "*Current Appointment Report*". The fact that information that would be contained within that document was, if this is the case, elsewhere in the documentation did not overcome the need to provide that specified document. It is simply non-sensical to consider that a non-submitted document has been provided in the "wrong format" simply because information that would be contained with it is contained in other documents submitted with the application.

56. For these reasons, the judge was correct to find that para 245AA did not assist the appellants, and provide for a discretion to request the "missing" document in the form of a Current Appointment Report concerning the first appellant's directorship of his company.

57. Turning now to the advertising material, the judge found that this material did not, when read cumulatively, demonstrate that the first appellant had been "working" for a period prior to 11 July 2014 until no earlier than three months before the date of application. The documents relied upon did not have any relevant dates covering that period. The only date was that on the website but that related to when the document was printed rather than when the website was set up.

58. In his submissions, the first appellant drew my attention to a number of documents which he submitted 'plugged the gap'. He set these documents out at paragraph 12.30 of his written submissions which he handed up at the hearing. He relied upon a document concerning the setting up of his website, in particular the registration of the UK domain at page 250 of the bundle. That is dated 29 May 2014. He also relied on the documentation at pages 192–211 which, he submitted, demonstrate business activity before and after 11 July 2014.

59. Whilst this material does, in some cases, predate 11 July 2014, it is noteworthy that the appellants' counsel (who represented them before the First-tier Tribunal) placed reliance upon the documents relating to the website and advertising which the judge found deficient in para 22 of her determination. That deficiency is self-evident. The Facebook document does not appear to even be a "specified document" under Appendix A.

60. I accept that the absence of dates on the relied upon advertising material fell, in principle, within para 245AA(b)(iv) and (d)(iii) as "specified documents" which do not "contain all the specified information" (see Mudiyanselage at [92] per Underhill LJ). The difficulty for the appellants in this appeal is that the information contained within other documents in the bundle did not supply the "missing" information on the advertising material, namely the dates on which it was being utilised in order to demonstrate the first appellant's period of "working". Likewise, it is not suggested that these documents could simply have been 'corrected' to show when they were in use. The documents were simply undated and there was no reason to believe that a fuller version of the documents existed (containing dates) or that information contained within the bundle 'plugged the gap' by providing the dates of their utilisation. In reality, as presented to the First-tier Tribunal, the first appellant's documentation lacked essential information to be a satisfactory specified document under para 41-SD(e)(iii) of Appendix A and, as the respondent's decision notes at page 2, "[no] other evidence from paragraph 41-SD(e)(iii) has been submitted". I reiterate that no other documents appear to have been relied upon before Judge Lebasci.

61. The first appellant relied upon the very recent decision of the Court of Appeal in R(Islam) v SSHD [2019] EWCA Civ 500 at [40]-[43] (judgment was handed down 3 days prior to the hearing). I did not hear extensive argument on the decision. The case, however, differed from the present one in that the Court took the view that the "missing information" in the documents submitted could, potentially, have been obtained from the claimant (see especially [40] and [41] – the claimant's name). Here, as I have made clear above, there is no reason to believe the missing information could have been provided.

62. In any event, even if the Secretary of State had requested, and received, documents and information so that the advertising material satisfied the requirements of the Rules, the first appellant would still not have succeeded in being granted leave because of the absence of the Current Appointment Report. Its absence, and as I have already made plain para 245AA cannot assist the first appellant in regard to that document, was fatal to the first appellant establishing the required number of points under Appendix A. In those circumstances, under para 245AA(c) even if the first appellant's omission or error in that regard was corrected it would not "lead to a grant because the application will be refused for other reasons". The other reason is that the first appellant failed to provide the required specified document, namely a Current Appointment Report from Companies House. That omission could not be rectified under para 245AA.

63. For these reasons, therefore, I am satisfied that Judge Lebasci did not err in law in dismissing the appellants' appeals, in particular in concluding that the Secretary of State had wrongly failed to apply his evidential flexibility policy in para 245AA.

64. Neither the grounds of appeal in the original application for permission to appeal to the Upper Tribunal nor those in the judicial review Cart challenge sought to challenge Judge Lebasci's decision to dismiss the appellants' appeals under Art 8 of the ECHR. That decision, therefore, stands unchallenged. The judge's reasoning at paras 25–31 fully supports her conclusion in respect of Art 8. Her finding that the appellants' removal would be a proportionate interference with their private and family life under Art 8(2) was one properly open to her as a reasonable and rational conclusion on the evidence.

## Decision

65. The decision of the First-tier Tribunal to dismiss the appellants' appeals on all grounds did not involve the making of an error of law. The decision stands.

66. Accordingly, the appellants' appeals to the Upper Tribunal are dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

30 April 2019

**TO THE RESPONDENT**
**FEE AWARD**

As the appeals have been dismissed, no fee award is payable.

Signed

A Grubb
Judge of the Upper Tribunal

30 April 2019