Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA 22939 2013
IA 22962 2013
IA 22965 2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 January 2014	**On 28 January 2014**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABDUL HADI SHAHUL HAMEED
TANYA ABDUL
RAJE PRIYA ABDUL HADI

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Ms S Hosein, Legal Representative Diamond Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing an appeal by the present respondents, who I will call the claimants, against a decision of the respondent to refuse them leave to remain as a Tier 1 (Entrepreneur) Migrant or dependant as the case may be. The appellants are members of the same family, the first two appellants are married to each other and the third appellant is their daughter.

2. Their application for permission to extend their stay was refused because the Secretary of State found that they had not satisfied the requirements of the Rules relating to third party sponsorship. The Rules relating to leave to remain as an entrepreneur are proving extremely complex and people

are making mistakes. A mistake was made in this case because a document proving third party funds and a document proving that the other document was correctly signed was conflated on to the same document and this, according to the Secretary of State, did not meet the requirements of the Rules.

3. The First-tier Tribunal disagreed but I am wholly unpersuaded by the reasons given in the determination or in submissions before me. The Rule appears at paragraph Rule 41 – SD(b) and its material parts require:

> (i) an original declaration from every third party that they have made the money available for the applicant to invest in a business in the United Kingdom, and
>
> (ii) a letter from a legal representative confirming the validity of signatures on each third party declaration subject to certain qualifications.

4. I am quite satisfied that the rule requires the production of two distinct documents, one from the third party showing that the money is available and one from a legal representative confirming that the signature of the other document is valid.

5. There is a suggestion in the skeleton argument that because the policy documents do not develop this point or do not make it clear that a second letter is required then somehow it is acceptable to do give all the information in one letter. Such a construction does not work. The plain meaning of the Rule is that two documents are required. It is not uncommon in recent amendments to the Immigration Rules to find requirements that are strict and are more concerned with content than form. Although this can sometimes appear to be infuriatingly petty the policy is clearly designed to facilitate fast decision making by people who are required to check rather than to think. The rules are published and applicants should do as they require.

6. It follows therefore that on the face of things the claimants did not meet the requirements of the Rules and the application was refused rightly and the appeal should not have been allowed at least not for the reason given.

7. In this respect I entirely agree with the Secretary of State and I find that the First-tier Tribunal erred materially.

8. However matters do not end there. The strict and potentially oppressive operation of the Rules is softened by paragraph 245AA of HC 395 which is sometimes called the evidential flexibility rule. This makes it plain that in certain circumstances there is an obligation on the Border Agency, (as they are described in the version of the Rule before me), to consider documents produced with the application and to seek further documents in certain circumstances. One of these is where a document is in the wrong format. Mr Hosein says that the documents provided here were in the wrong format. The Secretary of State had got the information that she needed. She had got confirmation about the sponsorship and she got confirmation about the signature but she had it on one document instead of on separate documents.

9. Mr Hosein argued that in accordance with policy and Rule 245AA the Secretary of State should have said to the claimants something to the effect that they had given the necessary information so it looked as though the application ought to be allowed but the information was not in the right form and needed to be put in that form before the application could be decided.

10. Miss Everett argued that this is a wrong analysis. It is not seeking a document in the right format but it is seeking a fresh document which plainly did not exist when the application was made. I see the semantic attraction of that argument but I find that when the information is provided in writing to the Secretary of State but not in the two documents required by the rules it is information provided in the wrong format rather than not existing at all. I am persuaded that this is a case where 245AA(b)(ii) applied and the Secretary of State should have made further enquiries.

11. The First-tier Tribunal anticipated this sort of argument and purported to allow the appeal alternatively under the evidential flexibility policy, but, with respect the Tribunal erred in allowing the appeal on the alternative basis. If the appeal was to be allowed because the flexible evidence rule had not been considered it should have been allowed because the decision was not in accordance with the law and be sent back to the Secretary of State for a decision to be made. It is quite plain that the rules incorporate a discretionary element. The correctly formatted document will have to be inspected to see if, as is expected to be the case, it satisfies the requirements of the rules. Such a decision is firstly a matter for the Secretary of State unless, unusually, only one outcome if possible. I am not saying that the application ought to be allowed but that it should be decided again with regard to paragraph 245AA(b)(ii). If that decision is against the respondents then it too can be appealed to the Tribunal.

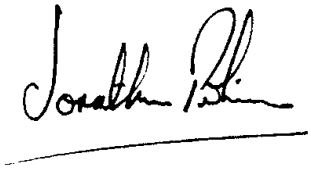
12. It follows therefore that I set aside the decision of the First-tier Tribunal Judge. I allow the Secretary of State's appeal to the extent that I rule that two documents are required by the Rules and to the extent I find that the Secretary of State ought in the circumstances to have applied 245AA(b)(ii) and give an opportunity to the claimants to provide the information in the correct format and then make a decision on it.

13. I therefore substitutive a decision to that effect.

Decision

The decision of the First-tier Tribunal is set aside.

The Secretary of State's appeal is allowed to the extent that the existing decisions are not in accordance with the law and the applications remain to be decided by the Secretary of State.

Signed
Jonathan Perkins
Judge of the Upper Tribunal  Dated 22 January 2014