Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **IA 06647-13**

THE IMMIGRATION ACTS

At **Field House**	Decision signed: **17.01.2014**
on **17.01.2014**	sent out: **22.01.2014**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Ruphine Anna GUYA

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Mashood Iqbal* (counsel instructed by Frederick Rine, High Barnet)
For the respondent: Mr Nigel Bramble

DETERMINATION AND REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Anna Shamash), sitting at Taylor House on 11 October 2013, to allow on article 8 grounds only a student appeal by a citizen of Kenya, born 23 June 1986.

2. The appellant had applied on 25 November 2012 for tier 4 leave to remain for the fourth year of her master's degree in pharmacy, which was refused on 14 February 2013. The reasons given were that her own funds were inadequate, without proper evidence of funding from the company which was sponsoring her, First Choice Recruitment and Training Limited. Under paragraph 13 of appendix C to the Rules, her financial sponsor needed to be an international company, and the Home Office did not

accept that First Choice was. This is no longer an issue, however, because the judge did accept (at paragraph 34) that it probably was an international company, and this finding was not challenged by Mr Bramble.

3. The judge says at paragraph 32 that she was invited by Mr Iqbal to allow the appeal first on the basis that the decision under the Rules was not in accordance with the law, on the basis of the former evidential flexibility policy; but to take a 'pragmatic approach' and also to consider it under article 8, which she went on to do, without expressly dealing with the appellant's 'not in accordance with the law' case. However, the judge pointed out at 34 that the appellant had submitted no bank statements from First Choice, as the Rules required; so the decision had probably been correct on that basis.

4. Mr Iqbal sought before me, not only to support the judge's decision on the article 8 basis she gave for it, to which I shall come in due course, but to maintain that she should also have found in the appellant's favour on her 'not in accordance with the law' case. He did so without there having been any attempt on her behalf to comply with r. 24 (3) of the Upper Tribunal Procedure Rules, which requires a response from a respondent to an appeal to the Upper Tribunal (in this case her) containing

> (f) the grounds on which the respondent relies, including [(in the case of an appeal against the decision of another tribunal)] any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely in the appeal;

5. Nor was Mr Iqbal able to produce a copy of the former evidential flexibility policy, or of the Tribunal's decision in *Rodriguez* (Flexibility Policy) [2013] UKUT 42 (IAC), on which he also relied. His explanation that he had not expected this point to arise carried little conviction, since he himself was seeking to maintain the result reached by the judge on the basis of it. He was unable to refer me to any particular provision of the former evidential flexibility policy on which the appellant would have been entitled to rely, and had to concede that the decision under appeal in *Rodriguez* had been made on 21 April 2012, well before the present paragraph 245AA appeared in the Rules.

6. As the Tribunal pointed out in *Rodriguez* at paragraph 25, the effect of paragraph 245AA did not arise and had not been argued in the case before them. It was however in force from 6 September 2012, before both the application and the decision under appeal in this case, and in my judgment was clearly intended to replace the former evidential flexibility policy. Paragraph 245AA requires the specified documents to be produced with the application: while it allows leave to be given on an exceptional basis if, for example, one of a series is missing, or they are in the wrong format, it does not allow for the specified documents, in this case First Choice's bank statements, not to be produced at all.

7. It follows in my view that, even if the appellant had filed the response required by r. 24 (3) (f), she could not have maintained the judge's decision on the basis that she was entitled to succeed, even in having her case reconsidered under the former evidential flexibility policy. So I shall

turn to her case under article 8. Here permission to appeal was given on the basis that the judge had effectively allowed the appeal on the basis of *Miah & others* [2012] EWCA Civ 261, upheld in *Patel & ors* [2013] UKSC 72.

8. Mr Iqbal referred me to Lord Carnwath's judgment in *Patel & ors* at paragraphs 55 – 56, where he acknowledged the continuing potential relevance of "the practical or compassionate considerations which underlie [a] policy" to the cases of those who fall just outside it, and that "… the context of the rules may be relevant to the consideration of proportionality …".

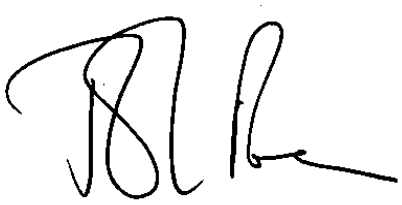
9. Mr Iqbal did not go on to refer to the passage which follows, from paragraph 56 – 57:

> … a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit.
>
> 57. It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the rules are not reviewable on appeal: section 86(6). One may sympathise with Sedley LJ's call in *Pankina* for "commonsense" in the application of the rules to graduates who have been studying in the UK for some years (see para 47 above). However, such considerations do not by themselves provide grounds of appeal under article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8.

10. This appellant was a very promising student, who only needs to complete her work experience, which she will have done by September 2014, to have the full professional qualification which was the object of her studies here, and which will be entitled to recognition in her country of origin or elsewhere in the world. The appellant did not raise any 'private and family life' case outside the context of her studies, and in the light of *Patel & ors* the judge was not entitled to allow her appeal on that basis, and her decision is reversed.

11. However, Mr Bramble pointed out that the removal directions given at the same time as the refusal of leave to remain were unlawful as things stood then (see *Ahmadi* [2012] UKUT (IAC) 147) and should also be quashed, which I do. That I hope will give the Home Office an opportunity for further reflection as to whether there is any pressing need to re-issue, or if re-issued, enforce them before the end of September, when the appellant will have the full qualification for which she came to this country, and which she thoroughly deserves to have on the basis of her record as a student.

Home Office appeal allowed
First-tier decision quashed: appellant's appeal dismissed
Removal directions quashed



(a judge of the Upper Tribunal)