Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/14416/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2 October 2013	**On 11 February 2014.**

Before

THE HON. MR JUSTICE COLLINS
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS ANGELA WANGESHI GATHERU

Respondent

Representation:

For the Appellant: Mr P Turner, Counsel
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The respondent to this appeal, Ms Gatheru, is a Kenyan national who was born in November 1975. In February 2013 she made a combined application for leave to remain in this country as a Tier 1 (Entrepreneur) Migrant under the points-based

system and for a biometric residence permit. The decision was made on 20 April 2013 and her application was refused. Essentially, the refusal was based upon a failure to produce some of the documents which were needed in order to comply with the somewhat detailed appendices to the relevant Rules and also there was a failure to comply with the provision of a document which was an original as opposed to a copy and a failure to sign all the pages of another. We will come to full details in a moment.

2. The respondent herself has a contract with a firm of solicitors, she having qualifications in California which are recognised in this country and that contract was produced. However, it ought to have been signed on every page and it was not and that was one of the failures which was relied on. It was not contended at any stage that this was other than a genuine application in the sense that the contract was a genuine contract and it simply needed to be authenticated in the way that was required by the particular Rule. She qualified on the basis of the necessary financial requirements. We do not need to go into those in any way at this stage.

3. She failed to provide an original document which ought to have been provided in relation to the qualification certificate. Again, it was not contended and never has been contended that, albeit the original was not produced, it was not a genuine qualification. There was an error there.

4. Perhaps the most substantial error relied on was a failure to produce what is described as advertising or marketing material in the form of personal registration with a trades body, in this case of course the Law society which regulates solicitors. The existence of the contract and the other material indicated on its face that she did qualify and she would be able to produce that material to establish the qualification if she had been asked to do so.

5. Now it is true that applicants for leave to remain are told quite clearly that it is up to them to produce all the material that the Rules require. This can be somewhat complicated but there is a good reason why these requirements are there because there are a very substantial number of these applications which have to be dealt with by the relevant Immigration Officer and it makes his or her task that much more difficult if all the relevant material is not produced. Accordingly, there is no ground at all to criticise the requirements which are set out in detail in the Rules. However, it must be recognised that there are going to be cases where there have been omissions which are accidental and which are perhaps somewhat insubstantial. The circumstances of this case indicate that this looks like a thoroughly genuine application and the omissions which have been identified could be cured. And so it is that at the material time there was in being what is described as an evidential flexibility policy. I am told that there was a policy which existed until March 2013 and indeed was considered in a decision of this Tribunal in **Rodriguez v Secretary of State for the Home Department**, decided in October 2012, promulgated in January of this year by Mr Justice McCloskey and Judge Spencer. We are told that that particular decision is under appeal but we do not think it is necessary in the

circumstances to go into it. We are content to rely upon the existence of the policy as at April 2013. In fact that policy apparently lasted for two months because in May it was abolished and we are told that there is now no substantial flexibility policy in being. However, we have to approach the matter on the basis of the situation as it existed in April 2013.

6. When the matter came before the First-tier Tribunal on appeal the appellant as she then was had produced all the necessary material which should be permitted. This led the First-tier Tribunal Judge to decide that she did qualify. Unfortunately that decision was contrary to Section 85A of the 2002 Act in that it was the production of material which was not produced before the decision maker and which was therefore not admissible in the circumstances on appeal. Accordingly, for that reason alone the First-tier Tribunal Judge erred in law.

7. However, as we will make clear, that omission does not mean that we are bound to allow the appeal and remit the matter. The fact is that the decision maker in this case did not purport to have regard to the evidential flexibility policy at all. It is to be noted that incorporated into that policy is an indication as to the documents which it might be appropriate to request in relation to the relevant application and in all cases missing academic certificates and evidence that is copied instead of an original are possible candidates. So far as entrepreneurs are concerned missing information from the required document is again a candidate as is evidence that is copied instead of an original. Now so far as not signing every page of the contract is concerned, that clearly on the face of it would be covered by missing information from a required document and the failure to provide the original document is clearly covered in both of the documents to which reference is there made. However, the obtaining of additional information is dealt with in the policy in this way. It said that the decision maker must only request additional information in certain circumstances which would lead to the approval of the application and before requesting any additional evidence the decision maker must have sufficient reason to believe the information exists. Then examples are given which are said to include, but not to be limited to, missing bank statements from a series; evidence that shows specific qualifications have been provided before, for example in a previous application; evidence detailed on a Confirmation of Acceptance for Studies or Certificate of Sponsorship is missing; name deposits on bank statements from an employer who had no wage slips provided and then it is said "for more information see related link - evidential flexibility documents which it may be appropriate to request for each Tier." Those are the documents to which we have already referred.

8. So far as the missing advertising material etc. is concerned it is argued by Mr Jarvis that the omission is not one which could properly be regarded as falling within the ambit of the evidential flexibility policy because it was substantial evidence that was required. However, it was clear on the face of it from the contract with the solicitors that she was likely to be, and indeed would have to be a member of or approved by the Law Society in order to practise in a firm of solicitors in this country. Accordingly, it was highly likely that this was an error which was capable of being

dealt with and the necessary documentation could be, as indeed it subsequently has, been provided. It seems to us that on the facts of this case and we make it clear that we are concerned only with the facts of this case, the missing material was such as could properly and should properly have fallen within the flexibility policy and so it would have been necessary for the decision maker before rejecting the application to have requested the missing documentation. Two of them, that is the not signing every page and not providing the original, without doubt fell within the policy. There is as we have said in argument in relation to the other missing material but for reasons we have indicated we take the view that it did fall on the face of it within the policy and at the very least there should have been consideration given to whether a request for further information was appropriate. Since it was not considered and since any sensible decision would have led to a request for the further information we are satisfied that the original decision by the Secretary of State was wrong.

9. It is now accepted based upon the findings of the First-tier Judge which have not been challenged that the respondent to this appeal qualifies. In those circumstances in our judgment there is no need to remit this matter. What the First-tier Tribunal Judge should have done was to base his decision as we have done on the failure to have regard to the flexibility policy. If he had done that having regard to the material that was produced he would inevitably have found that the appeal would be allowed. That being so we approach it in the way that he should have approached it and in the way which in our judgment is the correct way and reach the conclusion that the respondent's appeal against the original decision was one which should have succeeded. Accordingly, and for those reasons, we dismiss the Secretary of State's appeal in this case.

Signed pp Dated: 10 February 2014

Dictated as an extempore judgement by
Mr Justice Collins
Sitting as a Judge of the Upper Tribunal on 2 October 2013