



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

Appeal Number: IA/15332/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 22<sup>nd</sup> September 2014**

**Determination  
Promulgated  
On 29<sup>th</sup> September 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**MR UBAID ALI KHAN  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr S Bellara (Counsel)  
For the Respondent: Mr S Kandola (HOPO)

**DETERMINATION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge Omotosho, promulgated on 4<sup>th</sup> June 2014, following a hearing at Taylor House on 28<sup>th</sup> May 2014. In the determination, the judge allowed the

appeal of Ubaid Ali Khan. The Respondent Secretary of State, applied for, and was granted permission to appeal to the Upper Tribunal, and thus the matter comes before me.

### **The Appellant**

2. The Appellant is a male, a citizen of Pakistan, who was born on 7<sup>th</sup> November 1985. He appeals against the decision of the Respondent Secretary of State dated 23<sup>rd</sup> April 2013 refusing his application for a variation of leave to remain in the UK as a Tier 1 (Entrepreneur) Migrant under the points-based system.

### **The Appellant's Claim**

3. The Appellant entered the UK as a student on 8<sup>th</sup> March 2005. He was granted a series of successive further grounds of leave to remain as a student. On 10<sup>th</sup> March 2010, and on 16<sup>th</sup> June 2010 and on 22<sup>nd</sup> September 2010, his applications for further leave to remain as a Tier 4 (General) Student were refused. However, on 13<sup>th</sup> November 2011, his application for a student leave was granted until 10<sup>th</sup> April 2011. This was then valid to 14<sup>th</sup> February 2013. When on 12<sup>th</sup> December 2012, his application for leave to remain as a Tier 1 (Entrepreneur) Migrant was made this was then refused on 23<sup>rd</sup> April 2013.
4. The basis of the refusal was that the Appellant had failed to provide a letter from a legal representative with respect to third-party support, as required by Appendix A. He had also failed to provide evidence of his directorship of the company, which he had set up, in the form required, and there was no evidence that he had sent the shareholder certificate as claimed.

### **The Judge's Findings**

5. At the hearing before Judge Omotosho, the representation from the Respondent Secretary of State was to the effect that the appeal could not succeed quite simply because the requirements of paragraph 245AA had not been met.
6. For his part, Mr Bellara, of Counsel, submitted that the applications in this context have to be considered with commonsense and fairness and that if the caseworker in question had made a request for the requisite documents to be produced, they would have been forthcoming. Reliance was placed by Mr Bellara upon the application of "evidential flexibility", as affirmed by the Upper Tribunal in **Rodriguez (Flexibility policy) [2013] UKUT 00042**.
7. The judge applied the Upper Tribunal's determination in **Rodriguez (Flexibility policy) [2013] 00042** and held that had full effect been given to the requirements of the evidential flexibility policy document, and had a request been made for further evidence, in the interests of fairness, then the Appellant would have been able to furnish the necessary

documentation. The judge held that the discretion should have been exercised differently in accordance with the Respondent's own flexibility policy (see paragraph 22). The appeal was allowed.

### **Grounds of Application**

8. The grounds of application assert that the judge erred in law by failing to give due regard to the Court of Appeal's judgment in **Rodriguez [2014] EWCA Civ 2**, which had overruled the determination of the Upper Tribunal in the same case, and held that the evidential flexibility policy is not "designed to give an applicant the opportunity first to remedy any defect or inadequacy in the application or supporting documentation so as to save the application refusal after substantive consideration" (see paragraph 92).
9. Permission to appeal was granted on 6<sup>th</sup> August 2014 by the Tribunal.

### **Submissions**

10. At the hearing before me, Mr Kandola, appearing as Counsel on behalf of the Respondent Secretary of State, placed reliance upon **Rodriguez** and submitted that the judge had done precisely that which the Court of Appeal in **Rodriguez** had indicated was not open to the judge. The judge had fallen into error only because he had been guided by the Upper Tribunal determination in **Rodriguez (Flexibility policy) [2013] 00042**. The fact was that there was no flexibility open to the judge. The only flexibility was in relation to those matters specifically so enumerated in the policy itself. That policy did not state that a document that was "foreseeable" as being in existence could be requested. Therefore, I should set aside the decision and dismiss the appeal.
11. For his part, Mr Bellara submitted that since the share certificates were there (and this had been confirmed by Mr Kandola this morning as well) then the Secretary of State should properly have made a request for evidence of the directorship. Secondly, whilst it was accepted that the legal representative's letter had not been sent, if one looked at the latest redraft of the evidential flexibility policy (promulgated in February 2014), which Mr Bellara handed up, it was clear that there was a degree of flexibility open to the decision maker.
12. In reply, Mr Kandola submitted that the new form of Rule 245AA, promulgated in February 2014, is at odds with the Rule that was applicable at the time (see **Phelan** at page 676). It was right that the applicable law at the time of the decision had to be applied. In any event, the documentation with respect to the shareholder certificate, could only be properly requested, if it formed part of a sequence of documents, where one was missing. There was no requirement to request documents that could be deemed "foreseeable".

### **Error of Law**

13. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision (see Section 12(2) of TCEA 2007). My reasons are as follows. First, the judge erred in being guided by the Tribunal determination in **Rodriguez [2013] 00042**. The applicable authority was the Court of Appeal judgment in **Rodriguez [2014] EWCA Civ 2**. This makes it quite clear that “requests for information should not be speculative” and that “there must be sufficient reasons to believe that any evidence requested existed”. Moreover, as far as evidential flexibility policy is concerned, it is not “designed to give an applicant the opportunity to first remedy any defect or inadequacy in the application ...”
14. In the instant case, the Appellant had simply failed to provide a required legal representative’s letter, and the policy did not cover this failure, as is now clear following the Court of Appeal’s judgment.
15. Second, the Appellant also did not demonstrate he was the director of a UK company because he failed to provide a specified document such as to meet the requirements of Appendix A. That omission also could not be rectified by having recourse to the evidential flexibility policy. Accordingly, the judge fell into error.

### **Remaking the Decision**

16. In remaking the decision, I have had regard to the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am dismissing this appeal for the reasons that I have set out above.

### **Decision**

17. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. This appeal is dismissed.
18. No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

29<sup>th</sup> September 2014