Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/16077/2014

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 4 November 2014	**On 21 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON

Between

MS RASHMI RAJESH KANDALKAR
ANONYMITY DIRECTION NOT MADE

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Adophy, Solicitor from Rana & Co, Solicitors
For the Respondent: Mr C Avery, Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant, a female citizen of India, applied for leave to remain as a Tier 4 (General) Student Migrant pursuant to paragraph 245DD of HC 395, as amended (the Immigration Rules). Her application was refused under paragraph 245DD(b) because with her application she did not provide the documentary evidence specified in paragraph 41-SD(d)(ii) of Appendix A, despite requests from the Respondent on 24 February 2014 by email and on 5 March 2014 by letter to her representatives. She sent the information requested by special delivery letter on 18 March 2014 and it was received by

the Respondent on 19 March 2014. The decision on her application was issued on 20 March 2014. Her appeal against the decision to refuse to vary her leave to remain was dismissed by First-tier Tribunal Judge Harries (the Judge), who found that she had not complied with the terms of the request for information.

2. The nub of the Appellant's grounds of application is that the Judge erred in: (i) failing to properly consider the facts as set out in the documentary evidence before him and to give sufficient weight to it (in relation to the receipt of the additional evidence and as to Article 8); (ii) finding that the Respondent had not received the additional documents within the given time of 7 working days bearing in mind that there was no evidence tendered by the Respondent as to date of posting and it was served on the Appellant on 11 March 2014; (iii) failing to apply the principle of fairness as provided in **Thakur (PBS decision – common law fairness (Bangladesh) [2011] UKUT 00151**. It is further submitted "reliance is placed on Article 8 ECHR".

3. Permission was granted because it was arguable that the Tribunal erred in law in holding that the Respondent was not obliged to consider the further documents, which she herself had requested from the Appellant and which she received (as the Tribunal appeared to have accepted) on the day before the date on which she decided to refuse the application [17].

4. The Respondent submitted a Rule 24 response asserting that the Judge made a sustainable finding at [17] that "The Appellant was obliged to submit further information within 7 working days from the date of the letter which was 5 March 2014. She therefore had the flexibility to submit information until 17 March at the very latest. Her evidence is that she sent the additional evidence on 18 March 2014 and it was received on 19 March 2014. In these circumstances I do not accept that the information had to be considered by the Respondent before the refusal on 20 March 2014. I am not entitled to take account of evidence not submitted with the application and there was no obligation on the Respondent to exercise discretion."

5. Mr Adophy submitted that:

   a. Although the grounds of application were lengthy, they could be summarised as follows: The evidence was requested by the Respondent on 5 March 2014. The Appellant sent it on 18 March 2014, the Respondent received it on 19 March 2014 and issued the decision on 20 March 2014. The question was therefore whether having made the request for documentary evidence, the Respondent was entitled to ignore the evidence submitted in compliance with the request. The letter of 5 March 2014 was date stamped 'received' by the Appellant's representative on 11 March 2014. That was the date when the request came to their knowledge. The letter of 5 March 2014, at p2 of 3, paragraph 2, required the evidence to be sent within 7 working days of the request. This period of time would start to run when the Appellant

has knowledge of the request. This was not the view taken by the Judge who stated at [17] "….I do not accept that the timescale of 7 working days from the second request in a letter can correctly be interpreted as being from the date of receipt by the Appellant, particularly when the letter was first sent to her representative." In so deciding, Mr Adophy argued that the Judge erred because this interpretation does not follow from the terms of the letter. The Tribunal inserted additional words into the letter of 5 March 2014 in stating that time must run from the date of the letter.

b. If the Respondent intended to rely on the presumption that the letter would be received on the day after posting, then proof of posting would need to be provided. The date of the letter is not the date of posting and no evidence of the date of posting was provided. If it was posted on 5 March 2014, and it is not the practice of the Home Office to post letters on the same date as the date on the letter, it would have arrived on 7 March 2014. As this was a Friday, time would begin to run from Monday 10 March 2012 and would end on 18 March 2014. The date on which the further information would have been received by the Respondent would be 18 March 2014, relying on the provisions of paragraph 34G of the Immigration Rules which provides that an application made by post is deemed to be made on the date on which it is posted. Therefore, the Appellant supplied the information within 7 working days of the request. This was based on the assumption that the request was posted on 5 March 2014 and there was no need to disregard the 'date received' stamp on the letter received by her representatives. The information was therefore received in time and should have been considered by the Respondent.

c. The Respondent would not have requested the evidence if it had not been clear that leave would be granted if evidence was supplied. Therefore there was no reason why the Appellant's appeal should not be allowed. He submitted that the Judge had clearly materially erred in law.

6. Mr Avery submitted, and I agreed, that the provisions of paragraph 34G of the Immigration Rules related to the date of receipt of applications. The relevant Immigration Rule for the purposes of requests for additional evidence was 245AA which provides that "The requested documents must be received at the address specified in the request within 7 working days of the date of the request." The request was made on 5 March 2014 and the Appellant did not provide the evidence within 7 working days of the request; paragraph 245AA did not state that the requested documents must be provided within 7 working days of the date of receipt of the request. Had the Secretary of State wished to make that provision, it would have been specified in paragraph 245AA. It was therefore open to the Judge to find that the Appellant did not supply the evidence within the timescale set by the Rules.

7. I asked Mr Avery whether, if the Appellant put the evidence in before the date of decision but not within the timescale envisaged by paragraph 245AA, the Respondent was obliged to consider evidence that she had before the decision was made. He stated that the Respondent had in fact requested information on 24 February 2014 and it had not been supplied. The documentary evidence did not reach the decision maker before the decision was made.

8. In response, Mr Adophy submitted that he stood by his previous submissions. He submitted that a further point of fairness arose because the Respondent had initiated the request and then had failed to consider evidence that was provided in compliance with that request. Mr Avery submitted that no unfairness arose; the Respondent had merely behaved in the way that she said she would. The documentary evidence was not provided within 7 working days of the request.

9. Although Mr Adophy submitted that if I found that there was a material error, I should go on to remake the decision to allow the appeal because the Respondent would not have requested the information if supply of it would not have resulted in leave being granted, I pointed out that the Respondent had in fact stated in the RL that the application had not been finally assessed because the requested documentary evidence had not been provided. Mr Adophy accepted that the only course of action would be to allow the appeal to the limited extent that it was not in accordance with the law.

Analysis and reasons

10. Mr Adophy did not in fact refer to Article 8 in his submissions. Article 8 was not raised before the First-tier Tribunal and it was not an error of law for the Judge not to deal with grounds which were not raised before him.

11. As to the submissions based on paragraph 245AA, this provision requires evidence to be received by the Respondent within 7 days of the date of request, not from the date on which the request was received by the Appellant. The Judge was therefore correct in stating that the information should have been received by the Respondent on 17 March 2014 [17]. I do not agree with Mr Adophy that words should be added to the Immigration Rules to require the evidence to be sent to the Respondent within 7 days of the receipt of the request.

12. However, where evidence is provided to the Respondent before the decision is issued, the Respondent has a continuing duty to assess the information that has been provided in support of the application up to the date of decision (**Nasim others (Raju: reasons not to follow?) [2013] UKUT 610**, head note (4)).

13. In the Appellant's case, the evidence was supplied prior to the date of decision and was not considered. In the circumstances the Judge was wrong

to hold that the Respondent was not obliged to consider the documents which had been provided prior to the date of decision.

14. I therefore allow this appeal to the limited extent that the decision is not in accordance with the law and it remains with the Respondent to make a decision on the Appellant's application on the basis of all the information provided prior to the date of decision.

Decision

15. The determination of Judge Harries contains a material error of law. His decision is set aside. I remake the decision to allow the appeal to the limited extent that it is not in accordance with the law. The Appellant's application remains with the Respondent to make a lawful decision.

Anonymity

16. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I see no reason why an order should be made pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date **20 November 2014**

Manjinder Robertson
Sitting as Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

I have considered whether to make a fee award. I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011). As the Appellant's appeal has been allowed, I make a fee award of £140.00.

Signed Dated **20 November 2014**

M Robertson
Deputy Upper Tribunal Judge