



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/29704/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 4 June 2014

Determination Promulgated  
On 23 June 2014

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

NORESH LAL BALMIKY

Claimant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Claimant: Mr Khan, Universal Solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The respondent appeals with permission against the determination of First-tier Tribunal Judge Powell promulgated on 30 January 2014 allowing the claimant's appeal against the decision of the respondent made on 2 July 2013 to refuse him leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant.
2. The claimant entered the United Kingdom on 7 March 2011 with entry clearance as a Tier 4 (General) Student, valid until 30 October 2012. On that date he made an

application for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant on the basis that he had £200,000 available to invest which was being provided by Mr Protap Lal Beghi, the sums being held in Rupali Bank Limited in Bangladesh. That application was supported by bank statements and a letter from Rupali Bank, a declaration from Mr Beghi and a letter from a legal representative confirming the validity of the signatures of the people included in that declaration. The respondent refused the application on the basis that:-

- (i) the letter from Rupali Bank Limited did not have a contact telephone number or any email address of the third party;
  - (ii) that the third party declaration for Mr Beghi was not acceptable as it had been altered with correction fluid and thus the original declaration might not have contained the information relating to the appellant; and
  - (iii) that the legal representative's letter did not include within it, as was required, the expiry date of the identity card of the third party, Mr Beghi.
3. The respondent considered that therefore the appellant was not entitled to the 75 points claimed under Appendix A as he had not met the requirements of the Immigration Rules but she did not carry out an assessment pursuant to paragraph 245DD(h) of the Immigration Rules as the application had been refused in any event.
4. The claimant appealed to the First-tier Tribunal, averring:-
- (i) that the appellant had wrongly failed to request additional evidence pursuant to paragraph 245AA(e) of the Immigration Rules as required by paragraph 245AA(b), that did not apply to the application [15] and that the impugned documents could be rectified had further information been sought;
  - (ii) that the respondent had in any event failed to apply the correct version of paragraph 245AA of the Immigration Rules which took effect from 6 September 2012 [18];
  - (iii) that the respondent had failed to have regard to her own evidential flexibility policy [21] and had breached the common law duty of acting fairly [25];
  - (iv) that the respondent failed in her assessment of the appellant's rights pursuant to Article 8.
5. The appeal came before First-tier Tribunal Judge Powell sitting at Newport on 29 January 2014. In his determination promulgated on 30 January 2014 Judge Powell found:-
- (i) that it was properly conceded that the evidential flexibility policy should have led the respondent to request information missing from the bank letter and that had the request been made in accordance with the policy, missing information could have been supplied;

- (ii) that although the third party declaration had been altered, there was no suggestion the documents were fraudulent and he accepted the document had been prepared in a rush hence the typographical errors which had subsequently been corrected [17 to 21] and that the document was reliable and thus valid;
  - (iii) that identification cards issued in Bangladesh do not contain an expiry date and that the respondent was imposing a requirement that could not be met and thus in order to give effect to the purpose of this part of the Immigration Rules he read the words "where expiry dates are given" into the Rule and thus was satisfied that the application was sufficient.
6. Judge Powell then allowed the appeal on the basis that the appellant was entitled to the number of points sought under Appendix A and the appeal was allowed under the Immigration Rules.
7. The respondent sought permission to appeal on the grounds that:-
- (i) that there was no record in the Home Office file of the concession referred to at paragraph 15 and in any event the evidential flexibility policy would not, in the light of **SSHD v Rodriguez [2014] EWCA Civ 2** have applied and that in any event had the evidential flexibility policy applied all the judge could have done was to allow the appeal to the extent that it was not lawful and remit the matter back to the Secretary of State for a lawful decision to be made;
  - (ii) that in any event given the appellant had relied on a bank letter from Rupali Bank, he could not have met the requirements of the Regulations given that Appendix P of the Immigration Rules includes the Rupali Bank on the list of financial institutions in Bangladesh that do not satisfactorily verify financial statements;
  - (iii) that the judge should, given the errors in the third party declaration, not have allowed the appeal on the basis of the evidence which was presented.
8. On 15 April 2014 First-tier Tribunal Judge McDade granted permission to appeal.

**Did the Decision of the First-tier Tribunal Involve the Making of an Error of Law?**

9. As both representatives agreed, it is difficult to discern which version of the Immigration Rules is applicable to this case given the substantial number of changes in the rules which have occurred between the application being lodged and it being determined. There were during this period, from 3 February 2012 to July 2013 changes with respect both to paragraph 245AA, of the Immigration Rules and paragraph 41-SD of Appendix A. In addition, as Mr Tufan very fairly conceded, the reference to Appendix P in the grounds of appeal is not relevant given that the inclusion of the Rupali Bank within Appendix P was introduced by the Statement of Changes in the Immigration Rules HC 760 with effect from 13 December 2012 but with the provision that with respect to applications made before 13 December 2012 would be decided in accordance with the Rules in force as at 12 December 2012.

10. The consideration of the Immigration Rules must start with paragraph 41-SD which sets out the requirements for the relevant documents. The provisions of paragraph 41-SD were initially introduced by Command paper 8423 on 10 July 2012 without transitional provisions. These requirements were substantially amended by HC 628 with effect from 1 October 2013 which deleted the existing paragraph 41-SD substituting it with a new version. That version of the Rules cannot have been applicable here as their introduction postdates the date of decision.
11. Absent any cogent submissions to the contrary, I am satisfied that the version of paragraph 41-SD which was in force at the date of application and the date of decision was that set out in Command paper 8423 and I am not satisfied that they were the subject of any amendments relevant to this case. I am therefore satisfied so far as it is relevant the Immigration Rules provided as follows:-
  - (a) The specified documents to show evidence of the money available to invest are one or more of the following specified documents:
    - (i) A letter from each financial institution holding the funds, to confirm the amount of money available to the applicant (or the entrepreneurial team if applying under the provisions in paragraph 52 of this Appendix). Each letter must:
      - (1) be an original document and not a copy,
      - (2) be on the institution's official headed paper,
      - (3) have been issued by an authorised official of that institution,
      - (4) have been produced within the three months immediately before the date of your application,
      - (5) confirm that the institution is regulated by the appropriate body,
      - (6) state the applicant's name, and his team partner's name if the applicant is applying under the provisions in paragraph 52 of this Appendix,
      - (7) state the date of the document,
      - (8) confirm the amount of money available from the applicant's own funds (if applicable) that are held in that institution,
      - (9) confirm the amount of money provided to the applicant from any third party (if applicable) that is held in that institution,
      - (10) confirm the name of each third party and their contact details, including their full address including postal code, landline phone number and any email address, and
      - (11) confirm that if the money is not in an institution regulated by the FSA,
12. It is not disputed that the letter from the Rupali Bank omitted the third party (Mr Beghi's) email address and telephone number and thus it did not comply with the Immigration Rules. Thus, even had any evidential flexibility policy been applicable, it was not open to Judge Powell to allow the appeal on the basis it was in accordance with the Immigration Rules.
13. On that basis alone, the determination did involve the making of an error of law and requires to be set aside.
14. Whilst I note Mr Tufan's submissions with regards to the second and third grounds, I consider that Judge Powell has given adequate reason for concluding that despite the typographical errors in the third party declaration it was nonetheless a reliable

document. I note in this respect that the respondent's case is not that the letter did not contain the relevant information simply that it could not be discerned from it whether it was "original" or not. That is I consider to misunderstand the nature of an original document; it is possible for a document still to be original, that is not a copy, if it has been amended and initialled by the parties who executed it. The fact that they amended it does not mean that the document is not an original; it simply means that the original document is that which includes the amendments.

15. Judge Powell's findings as to the letter from the legal representative are not challenged by the grounds of appeal and he has explained adequately why he was satisfied that the requirements of the Immigration Rules were met with respect to this, typographical errors notwithstanding.
16. For these reasons, I am satisfied that the decision of Judge Powell did involve the making of an error of law in that he allowed the appeal under the Immigration Rules, a decision which was not open to him. That error extends only to the letter from the Rupali Bank, and the omission from it of details of the third party's contact details. It is thus necessary to remake that part of his decision which concerns the omissions contained within the letter from Rupali Bank.

### **Remaking the decision**

17. Mr Khan submitted that the letter from Rupali Bank fell within the terms of paragraph 245AA which were applicable at the time and in the alternative that they met the terms of the evidential flexibility policy then in place.
18. Mr Tufan submitted that the requirements of paragraph 245AA at the time were not met and that, in any event, following **SSHD v Rodriguez**, the evidential flexibility policy was no assistance to the claimant.
19. As currently constituted paragraph 245AA of the Immigration Rules it does appear to cover the situation where, as here, information was omitted from a document. The Rules currently provide as follows:-
  - (b) If the applicant has submitted specified documents in which:
    - (i) Some of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing);
    - (ii) A document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or
    - (iii) A document is a copy and not an original document; or
    - (iv) A document does not contain all of the specified information;
20. The previous provisions provided as follows:-
  - (b) The subparagraph applies if the applicant has submitted:

- (i) A sequence of documents and some of the documents in the sequence have been omitted (for example, if one bank statement from a series is missing);
- (ii) A document in the wrong format; or
- (iii) A document that is a copy and not an original document, the UK Border Agency will contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received by the UK Border Agency at the address specified in the request within 7 working days of the date of the request.

21. The significant difference so far as it relates to this case is in the introduction of paragraph 245AA(b)(iv). That provision was not in force at the date of decision or application and thus I am not satisfied that the appellant is assisted by it. I do not consider that the omission of information from a document could fall within paragraph 245 AA (b) as constituted at the date of decision.
22. As the Court of Appeal noted in **Rodriguez**, [47] the evidential flexibility policy guidance which had underpinned the decision of the Upper Tribunal had been incorporated into the Immigration Rules from 6 September 2012 by amendment of paragraph 245AA. It also appears that subsequent guidance has been given and there was a version of the evidential flexibility guidance (version 5.0) before the Court of Appeal. As it appears that policies have continued to be issued, albeit not in the same terms as the policy which was in place prior to the introduction of paragraph 245 AA
23. The questions then arise with respect to this appeal
  - (1) Was there in place at the relevant time any evidential flexibility instruction;
  - (2) If so, what were its contents; and,
  - (3) whether the policy could or should have been considered.
24. The refusal letter refers to the Rules but makes no reference to paragraph 245AA or to guidance. As I am satisfied that paragraph 245AA would not have benefitted the appellant, any failure by the respondent to consider it is not material.
25. Mr Khan sought to rely on a policy entitled "PBS process instruction evidential flexibility" produced by Mr Khan is undated. It gives no version number and I cannot therefore tell whether it was in place at the relevant date although I do accept that as it refers to applications under consideration as of 28 March 2011. That is not a sufficient basis for determining when the policy was put into force, or when or if it was superseded.

26. Accordingly, I cannot be satisfied that this undated policy was in place at the relevant time and the claimant had therefore failed to satisfy me that the decision in this case was contrary either to the Immigration Rules or to any relevant policy. Accordingly, I find that the decision was in accordance with the law and in accordance with the Immigration Rules and I dismiss the appeal on those grounds.
27. Judge Powell did not address whether the respondent's decision was unfair in the "Thakur" sense, nor did he consider whether the appellant's removal would be in breach of his article 8 rights. There was no cross appeal in this case, nor did Mr Khan address me on either issue. I find that I am not satisfied on the material before me that the applicant's decision in this case which was in accordance with the rules and policy involved any unfairness on the part of the respondent. Further, I am not satisfied that the claimant meets the requirements of paragraph 276 ADE or Appendix FM of the Immigration Rules. In addition, while I am satisfied that the claimant has established a private life in this country, he has lived here for a short time. I am not satisfied that he has established any good grounds why his removal would, despite being in accordance with the immigration rules, nonetheless be disproportionate, nor did Mr Khan make such a submission to me.
28. I dismiss the appeal on all grounds.

Signed

Date; 19 June 2014

Upper Tribunal Judge Rintoul