Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/32631/2013**

THE IMMIGRATION ACTS

Heard at	**Field House**
	Determination promulgated
On 20 May 2014	**On 12 August 2014**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Secretary of State for the Home Department

Appellant

and

Noriko Chathurani Weerasinghe Arachchige
(Anonymity direction not made)

Respondent

Representation
For the Appellant: Mr. G. Saunders, Home Office Presenting Officer.
For the Respondent: The Respondent in person.

DETERMINATION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Oliver promulgated on 24 January 2014, allowing the appeal of Ms Arachchige against the Secretary of State's decision dated 16 July 2013 refusing Ms Arachchige variation of leave to remain as a Tier 1 (Entrepreneur) migrant, and to remove her from the UK

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pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.

2. Although before me the Secretary of State is the appellant and Ms Arachchige is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Ms Arachchige as the Appellant and the Secretary of State as the Respondent.

Background

3. The Appellant is a national of Sri Lanka born on 30 May 1980. Her personal details and immigration history are a matter of record on file, and it is unnecessary to rehearse them here; I make reference as is incidental for the purposes of this document.

4. On 29 June 2013 the Appellant applied for variation of leave to remain as a Tier 1 (Entrepreneur) Migrant. The Respondent refused the application for reasons set out in a combined Notice of Immigration Decision and 'reasons for refusal letter' dated 16 July 2013, in which the section 47 removal decision was also communicated.

5. The Respondent refused the Appellant's application with reference to paragraph 245DD(b) and (c) of the Immigration Rules. Additionally the Respondent stated:

> "*In line with paragraph 245DD(l) of the Immigration Rules, we have not carried out an assessment as detailed in paragraph 245DD(h) of the Immigration Rules as your application has been refused. We reserve the right carry out this assessment in any challenge of this decision or in future applications for Tier 1 (Entrepreneur).*"

6. The Appellant appealed to the IAC. Her appeal was allowed under the Immigration Rules for reasons set out in the First-tier Tribunal Judge's determination.

7. The Respondent sought permission to appeal to the Upper Tribunal which was granted on 2 April 2014 by First-tier Tribunal Judge Chambers.

8. The Appellant filed a Rule 24 response dated 21 April 2014.

Consideration

9. The Respondent refused the Appellant's application essentially for three reasons:

> (i) A letter provided from the Sri Lanka Savings Bank did not meet the evidential criteria under Appendix A of the Rules because it did not confirm that the bank was regulated by the appropriate regulatory body.
>
> (ii) The Appellant had not specified a SOC code or job title on her application form, and had thereby not shown that she was engaged in business activity in an occupation which appears on the list of occupations skill to National Qualifications Framework level 4 or above.
>
> (iii) The Appellant's MBA degree certificate from the University of Wales that had been submitted as evidence of competency in the English language was not an original document, but was a copy.

10. Further, as noted above, in such circumstances the Respondent did not engage in an assessment as envisaged under paragraph 245DD(h). Paragraph 245DD(h) involves a qualitative assessment of an applicant's business including possible consideration (pursuant to 245DD(i)) of the viability of the business plan.

11. Although the First-tier Tribunal Judge found in the Appellant's favour in respect of the matters summarised at paragraph 9 above in reliance upon the 'evidential flexibility' policy (determination at paragraph 8), he seems on the face of the determination not to have been alert to the significance of paragraph 245DD(h). In any event he made no findings relevant to 245DD(h), and as such there was no reasoned basis to allow the appeal outright under the Rules.

12. In such circumstances, even if the Judge's approach and findings in respect of other matters were to be accepted, he went too far in allowing the appeal without an assessment pursuant to 245DD(h). This was a material error of law.

13. Whilst this was not a ground pleaded by the Respondent, in my judgement it is a 'Robinson obvious' point because it is an express requirement of the Rules and it was expressly referred to in the combined Notice of Immigration Decision and RFRL. Whilst I am conscious that the Appellant appeared before me unrepresented and may not have been 'equipped' to meet this point with legal submissions, in my judgement there was no purpose in affording the Appellant an opportunity to seek further legal advice in this regard in circumstances where the issue was essentially unanswerable: the Judge had plainly failed to deal with a vital component of the

requirements of the Rules and no amount of legal submissions could make that factual circumstance any different.

14. As regards the matters that were considered by the Judge, I make the following observations.

(i) Mr Saunders indicated that the Respondent no longer took issue with the English language requirement. Mr Saunders acknowledged that at section 4 of the Tier 1 (Entrepreneur) Application Form used by the Appellant there was a 'tick-box' option for claiming points for English Language by "*Evidence previously submitted/considered to automatically meet*". When an applicant ticks this box they are directed to the next section of the application form in respect of maintenance, and are thereby routed past the sections of the application form that request details and documentation in respect of any relevant English language qualification. It was accepted that the Appellant had previously demonstrated competence in the English language by presentation of a degree certificate in support of her earlier successful application for variation of leave as a Tier 1 (Post Study Work) migrant. It was therefore immaterial whether she had submitted her degree certificate in original or copy format, or at all, in the context of this particular application.

(ii) In support of her appeal the Appellant provided a letter from the Sri Lanka savings bank dated 19 August 2013 in which it was confirmed that the bank was regulated by the Central Bank of Sri Lanka (Appellant's bundle page 8). The Judge referred to this letter at paragraph 5 of the determination. The Judge considered that the omission of this information from the letter submitted with the Appellant's application confirming the balance in her account was something that was "*easily capable of remedy*" and such remedy could have been secured by a request in accordance with the evidential flexibility policy (determination at paragraph 8).

(iii) As regards the Appellant's occupation code the Judge accepted that the Appellant had omitted certain sections of the application form because she had mis-read the directions, and indicated himself satisfied in respect of the information now provided by the Appellant (determination at paragraph 5). Although the Judge does not descend to particulars, it is clear from the supporting documents in the Appellants bundle before the First-tier Tribunal that she stated she was a 'Director' and the SOC code '3534' was applicable. Again, the Judge considered that this was an omission readily remediable by application of the evidential flexibility policy (paragraph 8).

(iv) However, such conclusions meant that the Respondent's decision was not in accordance with the law and required to be remitted to the Respondent. The Judge did not have jurisdiction to evaluate the case under the Rules in reliance upon the material presented to the Tribunal because the Tribunal is excluded pursuant to section 85A of the 2002 Act from taking into account any evidence not submitted with the application. The consequence is that even on the Judge's findings the case should have been remitted to the Respondent, for a decision to be made on the Appellant's application in accordance with the law.

(v) At Annex A of the evidential flexibility policy (which is appended to **Rodriguez [2013] UKUT 00042 (IAC)**) in identifying documents that it might be appropriate to request under Tier 1 (Entrepreneur) applications included is "*missing information from the required letters/documents*". The omission of a statement as to regulation from the bank letter in my judgement is plainly just such 'missing information' from the 'required documents'.

(vi) I acknowledge that the omission of any reference to the job title and SOC code is less clear cut. However, in this context I note that the Appellant states that although such information was omitted from the visa application form, details of the Appellant's work – specifically that she was a director of her company and was working as a financial consultant – was set out in her business plan which she says was submitted with her application. The business plan was not included in the Respondent's bundle; however, in circumstances where the Respondent declined to evaluate the business plan, this is not indicative that the plan was not submitted with the application. Mr Saunders confirmed that there was on the Respondent's file an envelope which contained the Appellant's business plan, although it was not immediately apparent exactly when it had been submitted. It seems to me more likely than not that it was indeed submitted with the application as claimed by the Appellant. Whilst the failure to complete fully the application form was both unfortunate and unhelpful, it seems to me where the Respondent was constructively in receipt of all of the relevant information a fair and sensible application of the evidential flexibility policy should have been to provide the Appellant with an opportunity to make good the omissions from the application form.

(vii) In this latter respect, I do not accept Mr Saunders' submission that the evidential flexibility policy did not apply to

this residual matter because there was another basis for refusal. The other two matters relied upon by the Respondent did not inevitably form the basis of refusal: indeed the Respondent now acknowledges that she was in error in respect of the English language requirement; the omission by the bank in respect of regulation was a matter that fell squarely within the policy, and so could not be said prior to an invitation to provide further information pursuant to the policy to be a matter that would lead to a refusal in any event.

15. However, notwithstanding my observations at paragraphs 14(vi) and (vii) above, in light of the observations at paragraphs 11, 12, and 14(iv), I find that the First-tier Tribunal Judge materially erred in law, and in all of the circumstances the decision of the First-tier Tribunal must be set aside.

Remaking the decisions

16. I remake the decision in the appeal pursuant to the analysis set out above.

17. Pursuant to the reasons given at paragraphs 14(vi) and (vii), on the very particular facts of this case - and acknowledging the impact of **Rodriguez [2014] EWCA Civ 2** - I have reached the conclusion that the Respondent failed to have regard to, or give effect to, the evidential flexibility policy, and as such the Respondent's decision was not in accordance with the law.

18. Because the Tribunal is excluded pursuant to section 85A of the 2002 Act from taking into account any evidence not submitted with the application, I cannot remake the decision substantively under the Rules. The consequence is that the case should be remitted to the Respondent, for a decision to be made on the Appellant's application in accordance with the law.

19. In the circumstances the section 47 removal decision was premature and also not in accordance with the law.

20. Further to the above I make the following observation. In reconsidering the application the Respondent will no doubt want to have regard to the fact that the evidence now available - which would have been available to the Respondent's decision-maker had there been a request for clarification and/or further documents pursuant to the evidential flexibility policy, and will now be available to the decision-maker if the evidential policy is operated in the Appellant's favour – on its face appears to show that the Appellant's bank is duly regulated and the Appellant was working in an

appropriate occupation. In such circumstances, and bearing in mind the concession now made in respect of the English language requirement, it is likely that the only remaining issue under the Rules will be that of 245DD(h) which has yet to be assessed by the Respondent.

Decision

The decision of the First-tier Tribunal contained material errors of law and is set aside. I remake the decision in the appeal.

21. The appeal is allowed to the extent that it is remitted to the Respondent to consider the Appellant's application in accordance with the law.

Deputy Judge of the Upper Tribunal I. A. Lewis 11 August 2014