Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18582/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 December 2014	**On 6 January 2015**

Before

THE HONOURABLE MRS JUSTICE CARR DBE
DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NITHYA KUMARI PUDHUMALAI RAMESH
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Ms S Iqbal, Counsel

DECISION AND REASONS

1. The respondent to this appeal, Ms Nithya Kumari Pudhumalai Ramesh, is a citizen of India born on 2 June 1988. The appellant is the Secretary of State for the Home Department, who has appealed with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Seelhof, who allowed Ms Ramesh's appeal against the decision, dated 2

May 2013, to refuse to vary her leave as a Tier 1 (Entrepreneur) Migrant and to remove her under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. It is more convenient to refer to the parties as they were before the First-tier Tribunal. We shall therefore refer to Ms Ramesh from now on as "the appellant" and the Secretary of State as "the respondent".

3. We were not asked and saw no reason to make an anonymity direction.

4. The appellant came to the UK as a Tier 4 Student and was subsequently granted further leave as a Tier 1 Post-Study Worker. She was awarded an MSc in Computing by London Metropolitan University on 21 October 2010. She made an in-time application for leave as an Entrepreneur on 26 October 2012. In her application she explained she had set up a company, called Technology South Ltd, which she operated from her home in Watford.

5. Her application was refused on 2 May 2013 by reference to paragraph 245DD(b) of the Immigration Rules ("the Rules") because she was awarded 0 points for Attributes. The decision-maker decided she had not submitted sufficient evidence with her application. In particular, her name was not stated on the advertising material she submitted and the web address indicated did not lead to the appellant's website. Further, the business contracts she submitted did not show the landline number of the third party. These were mandatory requirements under paragraph 41-SD of Appendix A of the rules.

6. The appellant's grounds of appeal argued these were minor omissions which could be easily rectified. The respondent had either failed to apply paragraph 245AA of the rules or her evidential flexibility policy.

7. Judge Seelhof agreed and held the respondent's decision was not in accordance with the law. In reaching his conclusion he considered this was a case of minor evidential issues which related to errors in the format of evidence rather than a failure to provide it.

8. The grounds seeking permission to appeal argued the judge had misdirected himself in law because the evidential flexibility policy did not extend to providing applicants with an opportunity to remedy any defects or inadequacy in the application or supporting documents (*Rodriguez v SSHD* [2014] EWCA Civ 2).

9. Permission to appeal was granted by Judge P M J Hollingworth.

10. The appellant had not filed a response opposing the appeal prior to the hearing but, having been instructed late, Ms Iqbal helpfully provided us with one setting out her submissions and appending the relevant documents.

11. We heard submissions as to whether the judge had made a material error of law in his decision. Ms Isherwood's submissions focused on two points:

    (1) As held in *Durrani (Entrepreneurs: bank letters; evidential flexibility)* [2014] UKUT 00295 (IAC), the question of whether a policy exists is one of fact. There was no evidence that a policy on evidential flexibility, independent and freestanding of paragraph 245AA, survived the introduction of that paragraph in the rules. We observe the same point was made in *Akhter and another (paragraph 245AA: wrong format)* [2014] UKUT 00297 (IAC) at paragraph 15.

    (2) Even if the judge was right to apply the evidential flexibility policy, he nonetheless erred in his application of it.

12. In reply Ms Iqbal argued the judge had been right to apply the policy, whether it was the policy in force at the date of application or the revised policy which had come into force by the date of decision. She provided copies of both versions of the policy and took us to the relevant paragraphs.

13. Ms Isherwood maintained the judge erred and she placed particular reliance on paragraph 92 of *Rodriguez* (supra).

14. It was common ground between the parties that paragraph 245AA of the Rules did not assist this appellant. The judge was wrong to say in paragraph 5 of his determination that the rule did not come into existence until after the date of application in this case, which was 26 October 2012. The rule was in force from 6 September 2012. However, the rule as then drafted made no provision (as it has done in later versions) for documents not containing all the specified information. Ms Iqbal's submissions traced the changes to the rule.

15. We reserved our decision as to whether the judge's decision was vitiated by error of law.

Error of law

16. We find there is no material error of law in the judge's decision and therefore his decision allowing the appeal (to the limited extent that the respondent's decision was not in accordance with the law) shall stand for the following reasons.

17. We deal with the first of Ms Isherwood's points as follows. It is clear that the existence of a policy having a life outside paragraph 245AA of the Rules is a question of fact (see *Durrani*, *Akhter*) (supra). The burden of establishing its existence rests on the appellant in an appeal. However, Ms Iqbal took us to the policy, or policies, in question. As at the date of

application, there was a policy in the shape of the PBS Process Instruction on Evidential Flexibility, dated 17 June 2011. This was the document which was discussed by the Court of Appeal in *Rodriguez* (supra) on the understanding that it had been subsumed within paragraph 245AA of the Rules as from 6 September 2012 (see paragraph 47). However, Ms Iqbal also showed us a second document, entitled Points-based system – evidential flexibility, dated 12 March 2013. This policy was in force as at the date of decision in this case, which was 2 May 2013. In the introductory section this documents stated as follows:

> "This guidance pulls together cross cutting guidance which previously existed in separate products, and amalgamates relevant information from other operational instructions."

18. We understand this to mean that there had been guidance in existence previously and the document was an attempt to "codify" such guidance into a single document. We are left in little doubt that an evidential flexibility policy survived the introduction of paragraph 245AA of the Rules

19. The heading over the last paragraph on the same page quoted above of the March 2013 document suggests that that particular document applied to applications made on or after 13 December 2012, in which case the relevant document for the purposes of this appeal would have been the earlier one. However, it makes no difference which document applied because they both contained similar provisions insofar as they are relevant to this appeal.

20. As said, Ms Iqbal took us through the relevant passages. Annex A to the June 2011 document listed the type of documents which it may be appropriate to request. They included the following:

> "o T1 Entrepreneur
>
> • missing information from the required letters / documents
>
> …"

21. Ms Iqbal was not able to show us the equivalent list from the March 2013 document for good reasons which she explained. It is accessible only from the archive section of the respondent's website and the links no longer work to bring up separate documents. She told us there is reference to missing information in the guidance and we accept her word on this.

22. The two documents referred to by the respondent in justifying her decision that the rules were not met fell squarely into this category. The advertisement provided did not contain the appellant's name and the contract did not contain the client's telephone number.

23. The judge erred in regarding these errors as being "errors in the format" for the reasons explained in *Akhter* (supra). However, that error

is not material given the breadth of the policy which, unlike the rules then in force, did embrace missing information.

24. For the avoidance of doubt, the fact that these might be classed as minor omissions would not be the reason for the decision being unlawful. The rules mean what they say. However, the unlawfulness arises as a result of the failure of the respondent to recognise that she had a discretion to request amended documents or information from the appellant before issuing a refusal.

25. We gave careful consideration to Ms Isherwood's second argument regarding the correct application of the policy. We set out the applicable passage from *Rodriguez*:

> "92. In this regard it is quite true that the introduction to the process instruction flagged up two significant changes, one of which was that "there is no limit on the amount of information that can be requested from the applicant". But it is to be noted that that is immediately qualified by the instruction that requests for information should not be speculative and – as subsequently reiterated – there must be sufficient reasons to believe that any evidence requested existed. The same point is made in step 3 of the procedure table – taking the example of bank statements (specified documents), the example given is that of bank statements missing from a series: see also what is said in this regard under the heading "Maintenance" at page 10 of the instruction. Taken overall, the Evidential Flexibility process instruction is demonstrably 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 from refusal after substantive consideration."

26. Ms Isherwood argued this case fell outside the terms of the policy because the case owner was not required to speculate about the existence of correct documents. However, after giving the matter careful consideration, we disagree with her for the following reasons.

27. We do not believe the case owner would be required to engage in any speculation whatsoever in relation to the decision whether to seek clarification from the appellant. Firstly, in relation to the contract, the judge was right to point out that it was simple common sense to infer that the third party who entered into a contract with the appellant and gave their address would also have a landline number which could be easily ascertained. The intention behind the rule is that the appellant be able to show she is genuinely trading by producing documents which enable the respondent to check the matter with other parties (see *Shebl (Entrepreneur: proof of contracts)* [2014] UKUT 00216 (IAC), paragraph 5). We find it was not necessary for the respondent to speculate in order to see the need to request the telephone number.

28. Secondly, regarding the advertisement, it might have been speculative to request other advertising material showing the appellant's name because there was no reason to suspect that such a document

already existed. However, the appellant had provided the address of her website on which her name was clearly stated. Although the case owner appeared to have problems opening the page, the judge did not. He was entitled to accept the appellant's evidence that this was advertising material available at the time she made her application.

29. We accordingly dismiss the appeal.

NOTICE OF DECISION

The Judge of the First-tier Tribunal did not make a material error of law and his decision allowing the appeal is confirmed.

No anonymity direction has been made.

Signed Date 13 December 2014

Judge Froom, sitting as a Deputy Judge of the Upper Tribunal