Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13214/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
On 11 March 2014	**On 25 March 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CAILAN ZHANG

Respondent

For the Appellant: Mr A Caskie, Advocate, instructed by UKCN Immigration Consultancy

For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

No anonymity order requested or made

DETERMINATION AND REASONS

1) This determination refers to parties as they were in the First-tier Tribunal.

2) The appellant is a citizen of China, born on 9 December 1985. She applied on 9 January 2013 to remain in the UK as a Tier 1 (Entrepreneur) Migrant under the Points Based System.

3) Page 1 of the respondent's decision dated 8 April 2013 says that the application has been "refused under the Immigration Rules".

4) At page 2 a box headed "Access to funds as required" says that the appellant claimed 25 points but none have been awarded:

> You have stated that you have access to funds of £200,000 … made available … by your team member.
>
> Although a declaration has been supplied by the team member … it does not show your signature as required.
>
> In addition there is no declaration from a legal representative to establish that the letter of permission supplied is valid. Furthermore, there is no evidence to show that you can have access to the team member's funds in the form of a bank letter.
>
> We have therefore been unable to award points, in line with the published guidance and the Immigration Rules.

5) In the next box no points are awarded for "funds held in regulated financial institutions", for similar reasons:

> As we have established that you have not demonstrated … access to funds as required we are unable to accurately assess this attribute as you have not demonstrated that the full amount of the funds … is held with regulated financial institutions. We have therefore been unable to award points, in line with the published guidance and Appendix A of the Immigration Rules.

6) In the next box no points are awarded for "funds disposable in the UK":

> … As we have established that you have not demonstrated … access to funds as required, we are unable to accurately assess this attribute …
>
> We therefore have been unable to award points, in line with the published guidance and Appendix A of the Immigration Rules.

7) First-tier Tribunal Judge Snape allowed the appellant's appeal, without an oral hearing, by determination promulgated on 27 August 2013.

8) At paragraph 2, the judge said that neither party had filed evidence or submissions which had not been seen by the other party. Further in her determination, she recorded further evidence produced by the appellant with her grounds of appeal, and later. At paragraph 7 the judge said, "As this is an in-country appeal, I am able to consider the evidence as it is on the date of the hearing." On the basis of the further evidence, she allowed the appeal.

9) The SSHD appeals to the Upper Tribunal on the following grounds:

> Section 85A of the … 2002 Act sets down that evidence can only be considered if … submitted with the application … the judge ... has failed to give adequate reasons for admitting evidence that she was prevented from considering by operation of section 85A …

> In *Raju and Others* [2013] EWCA Civ 754 the court held that the appellant has to send all the information to the respondent by the date of application and not by the date of decision … the appellant has only submitted the information after the date of application and … cannot meet the Rules.
>
> *Raju* … applies to all points based cases.

10) The appellant concedes that Judge Snape erred in law, as stated in the SSHD's grounds. However, an extended answer is made in a skeleton argument prepared by Mr A W Devlin, advocate, (who appeared at an earlier hearing which had to be adjourned, and was not available at the date of the hearing before me) and in further submissions by Mr Caskie.

11) The appellant says that the case should have succeeded in the First-tier Tribunal in any event, notwithstanding *Raju* and also notwithstanding *Rodriguez* [2014] EWCA Civ 2. The skeleton argument runs thus. *Rodriguez* did not decide that an appellant cannot rely on the evidential flexibility policy. It does hold that the respondent's failure to consider such policy cannot be inferred from the mere fact that she failed to contact an applicant for further documents. *Rodriguez* was concerned with the situation before paragraph 245AA was inserted into the Rules on 12 December 2012. The appellant could not have benefited from paragraph 245AA, but that paragraph did not expressly supersede the evidential flexibility policy in its June 2011 version, which remained on the respondent's website until revised guidance on evidential flexibility was issued on 20 May 2013. The present case is distinct from *Rodriguez* in that this decision letter did not look at the respondent's policy but was "addressed solely to the Immigration Rules" (paragraph 52 of the skeleton argument). Under the June 2011 evidential flexibility policy the respondent was not only entitled but obliged to contact the appellant for the missing information "as it ought reasonably to have been clear that such information was available" (paragraphs 57-59). The appellant's position was that a letter from the bank confirming transfer of funds in her favour could not be procured because the bank would not issue one, but "it would work unfairness if this aspect of the Rules were insisted upon and indeed the current version of paragraph 245AA makes provision for such cases." The respondent erred by failing to apply the June 2011 version of evidential flexibility policy, and the judge would therefore have been bound to allow the appeal, irrespective of the error made.

12) Mr Matthews drew attention to a mistake by the judge at paragraph 2 of the determination. The respondent had not been supplied with the further evidence which the appellant produced. He next pointed out that the letter in this case says more than once that the decision has been reached "in line with published guidance" as well as with the Rules. No inference could be to the contrary. The shortcomings of the information initially provided by the appellant in this case were considerable, as set out in the first box of the decision. There was nothing in evidential flexibility policy or in paragraph 245AA which required the respondent to seek further information from the appellant. This was a case of plainly inadequate documentation, not errors of formatting. There was no letter from the bank and nothing to suggest that such evidence existed. The decision reached by the First-tier Tribunal should be reversed.

13) Mr Caskie submitted that although there was error of law, the respondent did not now seek to dispute that the appellant ultimately succeeded in showing the merits of her case. Any shortcomings were therefore only technical and procedural, and should not be allowed to stand in the way of a good business application. He drew attention to the decision letter at page 1 saying that the decision was reached "under the Immigration Rules" – full stop. Paragraph 245AA made allowances for specified documents submitted in the wrong format. Two of the documents here disclosed such formatting issues. There was a complaint that a document did not have the appellant's signature. That meant that the document was acceptable other than the absence of the signature. The document was sourced from the appellant's team member, and did not have any need for her signature other than the imposition of the requirement in the Rules. In other words, it was a minor technical and formatting requirement only. The team member was the appellant's business partner and provider of the letter which accompanied her application. Any reasonable Secretary of State would have seen that the letter could readily be signed by the appellant as required. There was also omission of a lawyer's letter, but that was only a formal validation process. The Secretary of State could only reasonably have proceeded on the basis that such a letter could be made available. This was an arbitrary hurdle, which could be overcome simply by the appellant giving evidence of her identify for money laundering purposes to her solicitors. As to the absence of the bank letter, the appellant's team member was providing the funds, and this was another document which could easily be provided on his instructions. The judge had readily concluded that the appellant with her further evidence "ticked all the boxes". The original decision was not in accordance with the law, because although the decision referred to policy, it did not state which of the respondent's 1200 policy documents were relevant. That amounted to a failure to give reasons. There was no point in remitting to the Secretary of State for further decision, because the appellant had shown that she could meet all requirements. The Upper Tribunal should substitute a determination allowing the appeal against the respondent's decision for being not in accordance with the law, and directing that leave be granted.

14) Mr Matthews in reply submitted that the reference at page 1 to a decision in accordance with the Rules was accurate – all decisions of this nature are made under the Rules. That did not imply that the guidance was not considered. The further detailed terms of the decision showed that guidance had been considered. There did not have to be a specific reference, it being obvious that this meant the relevant published guidance. The absence of a signature was not a formatting defect, but non-compliance with a basic requirement. The omission of a letter from a legal representative was not a mere technicality. Money laundering checks were an important requirement. There was no reason for the Secretary of State to assume that the appellant could put right all the apparent deficiencies.

15) Finally, Mr Caskie said that although the Presenting Officer presented a money laundering check as an important requirement, all a solicitor had to do was take a copy of a passport and a household bill from an appellant. Those were items which the Secretary of State already had. His source for the respondent having a total of 1200 respondent's policies was ILPA (the Immigration Law Practitioners' Association). A reader could not be asked simply to trust the respondent to have looked at the correct policy.

16) I reserved my determination.

17) The arguments for the appellant are ingenious, but they take the latitude available to the appellant under paragraph 245AA and flexibility policy too far.

18) As put at paragraph 44 of *Rodriguez*, the Immigration Rules are uncompromising in their stipulations, in particular in requiring the specified documents to be lodged with the application. The Court in *Rodriguez* acknowledged that policy and paragraph 245AA sought to alleviate results which could in some cases be viewed as unduly harsh (paragraph 45) but the question was how far the respondent obliged herself to go. In *Rodriguez* the decision bore to have been made under the Rules "and the Tier 4 policy guidance". I do not agree that the respondent in this case had to cite the guidance any more specifically. The reference was enough for it to be known that guidance applied, and for that guidance to be identified.

19) As put in *Rodriguez* at paragraph 92, the guidance 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." I do not think the omissions in this case were all minor, procedural, technical and obviously capable of rectification. That asks the Tribunal to assume that the Rules impose several pointless requirements. Nor can the deficiencies be put under the heading of formatting. The appellant was not entitled to expect that on the several deficiencies in her application, the respondent was bound to make assumptions in her favour.

20) Paragraph 100 of *Rodriguez* quotes with approval what Sullivan LJ said in *Alam* [2012] EWCA Civ 960 at paragraph 45:

> The appellants were simply at fault in not supplying the specified documents with their applications. I endorse the view expressed by the Upper Tribunal in *Shahzad* … that there is no unfairness in the requirement in the PBS that an applicant must submit with his application all of the evidence necessary to demonstrate compliance with the Rule … the Immigration Rules, the policy guidance and the prescribed application form all make it clear that the prescribed documents must be submitted with the application and if they are not, the application will be rejected. The price of securing consistency and predictability is a lack of flexibility that may well result in "hard" decisions in individual cases, but that is not a justification for imposing an obligation on the Secretary of State to conduct a preliminary check of all applications to see whether they are accompanied by all the specified documents, to contact applicants where this is not the case, and to give them an opportunity to supply the missing documents. Imposing such an application would not only have significant

resource implications, it would also extend the time taken by the decision making process, contrary to the policy underlying the introduction of the PBS.

21) This is perhaps an example of such a "hard" case. Although not mentioned in submissions, I see that the appellant stated to the First-tier Tribunal in a letter of 9 August 2013 that her partner, Mr Long Lin, had his visa application granted until 14 June 2016. That may be an anomalous result, but it is not one for the Tribunal to correct. Discretion in the matter does not arise from the Rules or from policy, and remains a matter entirely for the respondent – 2002 Act section 86(6).

22) The determination of the First-tier Tribunal is **set aside**. The appellant's appeal, as originally brought to the First-tier Tribunal, is **dismissed**.

Hugh Macleman

12 March 2014
Judge of the Upper Tribunal