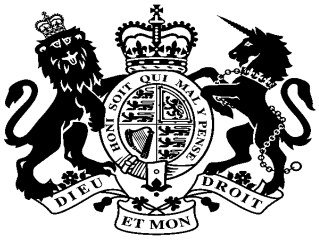

Upper Tribunal
(Immigration and Asylum Chamber)

Sultana and Others (rules: waiver/further enquiry; discretion) [2014] UKUT 00540 (IAC)

THE IMMIGRATION ACTS

Heard at Glasgow
On 02 September 2014

Determination Promulgated

……

Before

The President, The Hon. Mr Justice McCloskey
and Upper Tribunal Judge Dawson

Between

ENTRY CLEARANCE OFFICER (ISLAMABAD, PAKISTAN)

Appellant

and

RAZIA SULTANA (AND FOUR OTHERS)

Respondents

Representation:

Appellant: Mr M Matthews, Senior Home Office Presenting Officer.
Respondents: Mr A Hussain of Legal and Legal Solicitors

(1) Paragraph [D] of Appendix FM-SE is an example, within the context of the requirement to supply specified evidence, of the increasing influence of discretionary powers of waiver and further enquiry in the Immigration Rules.

(2) Where applicants wish to invoke any discretion of this kind, they should do so when making the relevant application, highlighting the specific provision of the Rules invoked and the grounds upon which the exercise of discretion is requested.

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(3) Where any request of this kind is made and refused, a brief explanation should be provided by the decision maker.

(4) A refusal to exercise a discretionary power as described in (1) above may render an immigration decision not in accordance with the law, under section 84(1)(e) of the Nationality, Immigration and Asylum Act 2002.

(5) Powers of waiver are dispensing provisions, designed to ensure that applications suffering from certain minor defects or omissions can be readily remedied.

(6) The hierarchical distinction between the Immigration Rules and Immigration Directorate Instructions ("IDIs") must be observed at all times.

(7) A failure to recognise, or give effect to, an IDI may render an immigration decision not in accordance with the law.

DETERMINATION

Introduction

1. The Appellant herein is the Entry Clearance Officer (Islamabad, Pakistan) whom we shall describe as the "*ECO*" for convenience. The Respondents are four members of the same family consisting of mother, two sons (aged 12 and 9 years respectively) and a daughter (aged 7), all nationals of Pakistan. The fifth person in the equation is the sponsor, who is described in the visa applications as the first Respondent's husband. It is not disputed that the sponsor is settled in the United Kingdom. The three children, according to the applications, were born to the mother (the first Respondent) when she was married to another person from whom she is now divorced.

The ECO'S Decisions

2. These appeals have their origins in a series of decisions of the ECO whereby the Respondents' applications for visas permitting them to enter the United Kingdom were refused. The applications were made on 28 November 2012 and the refusal decisions are dated 27 February 2013. In the applications, the sponsor is described as a self employed person engaged in "takeaway" and decorating businesses. It was represented that in the last full financial year his gross income was £29,321. It was stated that the sponsor is not financially responsible for any other person. In the childrens' applications, the sponsor is described as their "step father married to my mother".

3. The ECO's four refusal decisions are couched in identical terms. The decisions refer to paragraph EC-C.1.1 of Appendix FM of the Immigration Rules. The reasons for the refusals are expressed in the following passage:

"*You submit documents showing that your sponsor is self employed trading as* [takeaway] *and* [decorator]. *Therefore you are required to submit specified documents in relation to both businesses. In regard to* [the takeaway] *you have not provided the latest annual self assessment tax return to HMRC and Statement of Account (SA300 or SA302), original proof of registration or certified copy of documentation issued by HMRC only, your sponsors unique tax reference number, 12 months business bank statements …..*

In regard to [the decorating business] *you do not submit the latest annual self assessment tax return to HMRC and Statement of Account (SA300 or (SA302), original proof of registration as a self employed person issued by HMRC only, your sponsor's unique tax reference number, any business bank statements*".

As regards both businesses, it is stated in the decisions that while bank statements were provided with the applications, they were not compliant with the relevant requirements. The decisions conclude with the following expression of the omnibus refusal reason:

"*You have failed to provide the specified documents of your sponsor's employment. I therefore refuse your application under paragraph EC-C.1.1(d) of Appendix FM of the Immigration Rules (E-ECC.2.1).*"

The decisions also purported to apply the balance of probabilities standard.

Appeal to the First-tier Tribunal

4. In their grounds of appeal to the First-tier Tribunal (the "*FtT*"), the Respondents contended:

"*It is submitted that the financial requirements are being met by the* [Respondents'] *sponsor under 5.3.6 of Appendix FM of the Immigration Rules. The sponsor is self employed with accumulated gross earnings of £29,321 (as can be noted from the annual self assessment tax return). As there are three dependent children applying alongside the main applicant, the financial requirements placed upon the sponsor is noted as requiring a minimum annual gross income of £27,200. It is submitted that the financial requirement placed upon the sponsor is being duly satisfied ….*

The ECO noted …… [that the sponsor] *…… is required to submit additional documentary evidence with regards to both business.* ***A number of documents are being forwarded clarifying matters with regards to both businesses ….."***

[Emphasis added.]

Continuing, it is stated in the grounds of appeal that, in respect of the sponsor's takeaway business, the following additional documents are enclosed:

(a) The latest self assessment tax return.

(b) "Statement of Account".

(c) Proof of registration issued by HMRC.

(d) The sponsor's unique tax reference number.

(e) The sponsor's bank statements spanning the period 17 January 2012 to 20 February 2013, with the exception of those relating to June and July 2012 when (it is asserted) the sponsor was visiting the Respondents in Pakistan.

5. As regards the decorating business, the following additional documents were enclosed with the grounds of appeal:

(i) The latest self-assessment tax return.

(ii) "Statement of Accounts".

(iii) The sponsor's personal bank statements in respect of the period 01 November 2011 to date.

The grounds of appeal also stated:

> "*There is no business bank account for* [the decorator] *simply due to the nature of this business being fully cash operated.*"

The grounds conclude with the following sentence:

> "*In overview, it can be seen contrary to the findings of the ECO the sponsor has gross earnings in the region of £29,321 being above the required amount of £27,200 as noted under Appendix FM.*"

6. The FtT allowed the Respondents' appeals. On the face of the determination, the evidence considered by the Judge included the Respondents' bundle of evidence, a chronology of events, a RBS bank statement produced at the hearing, a witness statement of the sponsor and the sponsor's oral evidence. In allowing the appeals, the Judge reasoned as follows, in [12]:

> "*The only matter that was put to the sponsor in cross examination was that his payments into his personal account did not match his claimed earnings. The sponsor explained that this was because he was paid cash. This is not an uncommon situation in the sponsor's areas of chosen endeavour. It simply means that the other documents provided have to be considered with greater security. The sponsor has produced a considerable amount of documentation to show that he is trading including, inter alia, management accounts and a letter from the HMRC updating outstanding amounts dated 13 March 2013.*"

In the next sentence, without further ado, the Judge stated that the appeal under the Immigration Rules was allowed.

7. Permission to appeal was sought on the following grounds:

(a) The FtT had failed to give effect to the specified evidence requirements enshrined in Appendix FM-SE.

(b) The relevant period was the twelve months preceding November 2012 and the FtT had failed to address the evidential requirements pertaining to this period.

(c) As a result, there was no clear evidence of the sponsor's actual gross annual income at the time when the visa applications were made.

Permission to appeal was granted in the following terms:

> "*The determination does not engage with Appendix FM of the Immigration Rules, by reference to which the decision was made, nor with Appendix FM-SE addressing the specified categories of evidence. These cannot be ignored simply because the sponsor works in a business which traditionally deals by cash. This is an arguable error of law.*"

Appeal to this Tribunal

8. The appeal was listed on 02 September 2014. Regrettably, it did not progress far, essentially by reason of the unmanageable state of the documentary evidence. Appropriate directions were given and the hearing was adjourned.

9. In compliance with our directions, and with admirable expedition, the Respondents' solicitors have now provided the following additional materials:

(a) a written submission,

(b) two "*additional pieces of evidence*", consisting of a letter from the sponsor's business accountants dated 16 September 2014 and "*copy of daily book receipts given by the sponsor to his customers (relating to his business* [as] *a decorator*"; and

(c) a more coherent bundle of evidence.

Also attached were certain excerpts from Appendix FM-SE and the Immigration Directorate Instructions.

10. In further compliance with our directions, we received a written rejoinder from Mr Matthews on behalf of the ECO. In brief compass, it was submitted that, having regard to all the evidence, the requirements of Appendix FM – SE were plainly not satisfied (first ground of appeal). It was argued that the requirements relating to specified documents are mandatory and they have not been observed. This submission further drew attention to the period under scrutiny viz the financial year April 2011 to April 2012 (second ground of appeal). In summary, it was submitted that the decision of the FtT is unsustainable because the visa applications were non-compliant with the Rules as they did not provide the obligatory documentary evidence and, further, did not satisfy the requirement as to period.

11. In our directions, we also made provision for both parties, when lodging their further submissions, to indicate whether they were desirous of a further hearing being convened. Each party intimated that a further hearing was not being sought. While we had reserved to ourselves the final decision on this discrete issue, we were satisfied, having regard to the illumination provided by the parties' responses to our directions, that the appeals could be fairly and properly determined without a further hearing.

12. As appears from the foregoing, the Respondents have provided documentary evidence at three distinct stages: when submitting their visa applications, on appeal to the FtT and, finally, on appeal to this Tribunal. They were entitled to do so to the extent that this was permitted by section 85A of the Nationality, Immigration and Asylum Act 2002, these being out of country appeals. Accordingly, insofar as permissible, we have considered the additional evidence.

Appendix FM – SE Of The Immigration Rules

13. At this juncture, it is appropriate to rehearse the main provisions of Appendix FM-SE of the Immigration Rules. Under the rubric "Family Members – Specified Evidence", the opening paragraph states:

> "*This Appendix sets out the specified evidence applicants need to provide to meet the requirements of rules contained in Appendix FM and, where those requirements are also contained in other rules and unless otherwise stated, the specified evidence applicants need to provide to meet the requirements of those rules.*"
>
> The text continues in (D):
>
> "*In deciding an application in relation to which this Appendix states that specified documents must be provided, the Entry Clearance Officer …. will consider documents that have been submitted with the application and will only consider documents submitted after the application where sub-paragraph (b) or (e) applies.*"

What follows is immaterial in the context of these appeals, since, as the résumé above demonstrates, the ECO neither considered nor was asked to consider any documents over and above those provided with the Respondents' applications.

14. The Appendix continues, in paragraph (A1):

> "*To meet the financial requirement … the applicant must meet:*
>
> *(a) The level of financial requirement applicable to the application under Appendix FM; and*
>
> *(b) The requirements specified in Appendix FM and this Appendix as to:*
>
> *(i) the permitted sources of income and savings;*

(ii) *the time periods and permitted combinations of sources applicable to each permitted source relied upon; and*

(iii) *the evidence required for each permitted source relied upon.*"

Notwithstanding the infelicitous syntax and structure of the above passage, its thrust is tolerably clear: every applicant **must** satisfy the applicable requirements of Appendix FM and this further Appendix, including those pertaining to the stipulated documentary evidence. The provisions which follow prescribe a series of "*financial requirements*". In the context of these appeals, the key provisions are contained in paragraph [7]:

"*In respect of self-employment in the UK as a partner, as a sole trader or in a franchise all of the following must be provided:*

(a) evidence of the amount of tax payable, paid and unpaid for the last financial year.

(b) the latest:

(i) annual self-assessment tax return to HMRC (a copy or print – out);

(ii) statement of Account (SA300 or SA302); and

(iii) the same for the previous financial year if the latest return does not show the necessary level of gross income, but the average of the last two financial years does.

(c) proof of registration with HMRC as self-employed if available.

(d) each partner's Unique Tax Reference Number (UTR) and/or the UTR of the partnership or business.

(e) where the person holds or held a separate business bank account, bank statements for the same 12 month period as the tax return.

(f) personal bank statements for the same 12 month period as the tax return showing that the income from self-employment has been paid into an account in the name of the person or in the name of the person and their partner jointly.

(g) evidence of ongoing self-employment through ….. [one of the specified documentary sources]."

The passages reproduced above are drawn from the version of Appendix FM-SE which applied to the Respondents' applications.

Consideration and Conclusions

15. We turn to consider the written submission of Mr Hussain on behalf of the Respondents, from which we distil the following main contentions:

(i) The appeals centre on the business and personal bank account evidential requirements in paragraph 7(e) and (f) of the Appendix.

(ii) The personal (RBS) bank statements of the sponsor span, continuously, the period 01 January 2011 to 01 January 2014.

(iii) The sponsor's "takeaway" business bank statements (BOS) relate to the period 17 January 2012 to 20 December 2013.

(iv) There is also a statement from the sponsor's savings account (RBS) in respect of the period 22 December 2011 to 12 November 2012 evidencing a credit balance of £6,650.02 on the latter date.

(v) As regards the takeaway business, the business bank statements requirement of paragraph 7(e) of the Appendix has been satisfied.

(vi) As regards the decorating business, as this is "*…. based on a cash basis it is not feasible or practically possible for the requirement of paragraph 7(f) to be met … The IJ in his decision took a practical and realistic approach … to come to the correct conclusion of allowing the appeal …*"

It is apparent that the author intended to refer to **paragraph 7(e)**, rather than paragraph 7(f), in this passage.

(vii) "*Evidential Flexibility*" should have been applied to the applications: see paragraph [D](d) of the Appendix and the Immigration Directorate Instructions of July 2014, paragraph 3.4.

16. In view of this latter submission we reproduce at this juncture paragraph [D] of Appendix FM –SE:

"[D](a) *In deciding an application in relation to which this Appendix states that specified documents must be provided, the ….. decision maker will consider documents that have been submitted with the application and will only consider documents submitted after the application where subparagraph (b) or (e) applies.*

(b) If the applicant -

(i) has submitted:

(aa) a sequence of documents and some of the documents in the sequence have been omitted (eg if one bank statement from a series is missing);

(bb) a document in the wrong format (for example, if a letter is not on letter head paper as specified); or

(cc) a document that is a copy and not an original document; or

(dd) a document which does not contain all of the specified information; or

(ii) has not submitted a specified document,

the decision maker may contact the applicant or his representative, in writing or otherwise, and request the document(s) or the corrected version(s). The material requested must be received at the address specified in the request within a reasonable time scale specified in the request.

(c) The decision maker will not request documents where he or she does not anticipate that addressing the error or omission referred to in (b) will lead to a grant because the applicant will be refused for other reasons.

(d) If the applicant has submitted:

(i) a document in the wrong format; or

(ii) a document that is a copy and not an original document,

the application may be granted exceptionally, provided the decision maker is satisfied that the document is genuine and that the applicant meets the requirements to which the document relates. The decision maker reserves the right to request the certified original document in the correct format in all cases where (b) applies and to refuse applications if this material is not provided as set out in (b)."

For completeness, paragraph [D](e) further provides:

"*Where the decision maker is satisfied that there is a valid reason why a specified document cannot be supplied eg because it is not issued in a particular country or has been permanently lost, he or she may exercise discretion not to apply the requirement for the document or to request alternative or additional information or document(s) be submitted by the applicant.*"

As the outline above indicates, the Respondents do not rely on this discrete provision of the Appendix. We have reproduced above paragraph [D] of Appendix FM-SE in its entirety because it must be considered as a composite unit.

17. Mr Hussain's written submission on behalf of the Respondents has crystallised the issues in this appeal in a helpful way, thereby fulfilling the aim of the adjourned hearing on 02 September 2014 and directions given. It is susceptible to the following analysis:

(a) It does not address at all the requirement to provide the latest annual self-assessment tax return to HMRC.

(b) Ditto the requirement to provide a "*Statement of Account (SA300 or SA302)*".

(c) Ditto the requirement to provide "*Proof of registration with HMRC as self-employed if available*".

(d) Ditto the requirement to provide the sponsor's "*Unique Tax Reference Number*".

(e) It acknowledges, implicitly, that the bank statements in respect of the takeaway business submitted with the visa applications were non-compliant with paragraph [7](e) of Appendix FM-SE.

(f) It acknowledges that, as regards the decorating business, the applications do not comply with paragraph [7](f) of the Appendix.

18. As a result, there is no challenge by the Respondents to the refusal reasons bearing on (a) - (f) in [17] above. Furthermore, there is no challenge to the mandatory nature of these requirements. The Respondents pray in aid the "Evidential Flexibility" provisions in Appendix FM-SE. However, as demonstrated above, these provisions confer a discretion on the ECO confined to cases where the applicants have submitted **a document in the wrong format** or **a copy document rather than an original**. They are far removed from the present case, where the infirmities in the Respondents' applications arise out of an outright failure to provide myriad mandatory documents. Thus there is no basis for concluding that the ECO's failure to exercise the discretion available to him was not in accordance with the law. It is appropriate to add that the discretion in question is conferred exclusively on the ECO and is not exercisable by either the FtT or this Tribunal on appeal.

19. To summarise, the Respondents' visa applications suffered from a series of systemic, incurable deficiencies in meeting the requirements of the Rules. The additional evidence relied on before the FtT and this Tribunal, to the extent that this can be permissibly considered, has not rectified these wholesale shortcomings. It follows that the decision of the FtT is unsustainable in law.

Discretionary Powers of Waiver and Further Enquiry: General

20. We add the following by way of general guidance. When visa applications of this kind are being compiled, applicants and their advisers must obviously be alert to the totality of the applicable requirements enshrined in Appendix FM-SE. Alertness to the various obligatory requirements is obviously essential. We would also encourage applicants and their advisers who consider that any of the discretionary powers conferred on the ECO by paragraph [D] should be exercised in their favour to proactively make this case when submitting their applications. It would be highly desirable to draw to the attention of the ECO the specific provision/s of paragraph [D] invoked in support of a request to exercise discretion and to set out fully the grounds of such request. We confine ourselves to one pertinent illustration, arising out of the factual matrix of these appeals. If this sponsor genuinely cannot provide the necessary records concerning his decorating business, as it is a purely cash enterprise, he should, in any fresh application, specifically invoke paragraph [D](e) of

the Appendix and make his case accordingly, advancing all relevant facts, justifications and explanations. Issues of this kind belong firmly to the domain of the primary decision maker and should not be belatedly ventilated at the stage of either first instance or second instance appeal. Adherence to this exhortation and adoption of this practice will enhance the quality of ECO decision making, with the logical consequences of a reduction in appeals, greater overall expedition, reduced delay and a saving in professional costs. Furthermore, in the event of an invitation to exercise discretion being refused, one would expect a brief explanation to be given. For the avoidance of doubt, we take this opportunity to emphasise that an adequate, intelligible explanation for any discrete refusal of this kind should always be provided by the ECO. In this way, the prospects of the tribunal understanding the ECO's reasoning and, thereby, conducting an efficacious and informed review of the legality of the impugned decision will be greatly enhanced.

21. Discretionary powers of waiver and further enquiry are conferred on decision makers by other provisions of the Immigration Rules. Experience demonstrates that these are becoming increasingly prominent and topical. The Immigration Rules, in their current incarnation, now contain, in paragraph 245AA, something of an omnibus provision relating to powers of discretionary further enquiry and discretionary waiver of specified requirements. Paragraph 245AA provides, under the rubric "Documents Not Submitted With Applications":

> "*(a) Where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the Entry Clearance Officer, Immigration Officer or the Secretary of State will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with subparagraph (b).*
>
> *(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;*
>
> *the Entry Clearance Officer, Immigration Officer or the Secretary of State may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received at the address specified in the request within 7 working days of the date of the request.*
>
> *(c) Documents will not be requested where a specified document has not been submitted (for example an English language certificate is missing), or where the Entry Clearance Officer, Immigration Officer or the Secretary of State*

does not anticipate that addressing the omission or error referred to in subparagraph (b) will lead to a grant because the application will be refused for other reasons.

(d) If the applicant has submitted a specified document:

(i) in the wrong format; or

(ii) which is a copy and not an original document; or

(iii) which does not contain all of the specified information, but the missing information is verifiable from:

(1) other documents submitted with the application,

(2) the website of the organisation which issued the document, or

(3) the website of the appropriate regulatory body;

the application may be granted exceptionally, providing the Entry Clearance Officer, Immigration Officer or the Secretary of State is satisfied that the specified documents are genuine and the applicant meets all the other requirements. The Entry Clearance Officer, Immigration Officer or the Secretary of State reserves the right to request the specified original documents in the correct format in all cases where (b) applies, and to refuse applications if these documents are not provided as set out in (b).

As appears from the opening words, paragraph 245AA applies to applications made under Part 6A of the Immigration Rules. This discrete regime within the Rules regulates the "Points-based" system and is concerned with various categories of migrants – including general, highly skilled, entrepreneur, investor and post-study work. Part 6A and the Appendices which it incorporates prescribe a host of separate and cumulative requirements to be satisfied by applicants belonging to each of these categories. Paragraph 245AA is a general provision which applies to all such applications. Its importance is that, in appropriate cases, it operates as a mechanism for relaxing the strictness of a particular requirement or requirements.

22. This history of Paragraph 245AA of the Immigration Rules is noteworthy. It was introduced by HC565, with effect from 06 September 2012 and without transitional provisions. It was preceded by a provision (also paragraph 245AA) entitled "Documentary Evidence", introduced on 30 June 2008 (HC607), renumbered as paragraph 245A on 06 April 2011 (by HC863). Following its introduction on 06 September 2012, paragraph 245AA was amended by extension, on 13 December 2012 (by HC760), with the addition of sub-paragraph (D) which relates to the provision by an applicant of a specified document either in the wrong format or which is a copy rather than an original. Transitionally, any affected application made before 13 December 2012 and undetermined on that date was to be determined in accordance with the pre-existing rules. Next, on 01 October 2013, sub-paragraphs (b)-(d) of paragraph 245AA were substituted by the version set out in [21]. Prior to the original introduction of paragraph 245AA, on 06 September 2012, the issue of so-called

"evidential flexibility" was governed by policy. There was a UK Border Agency policy "PBS Process Instruction – Evidential Flexibility". This policy was considered by the Upper Tribunal in Rodriguez [2013] UKUT 0042 (IAC). This decision of the Upper Tribunal was overturned by the Court of Appeal: see Secretary of State for the Home Department – v – Rodriguez [2014] EWCA Civ 2. The final chapter remains to be written, as the United Kingdom Supreme Court has granted permission to appeal.

23. The amendments of paragraph 245AA of the Immigration Rules introduced on 01 October 2013, noted above, coincided with amendments of Appendix FM–SE (by HC628), effective on the same date. Appendix FM-SE had been introduced on 20 July 2012 (by CM8423). Its subject matter is "Family Members – Specified Evidence". The impact of these amendments was to align the discretionary powers of waiver and further enquiry contained in different compartments of the Immigration Rules. Given the virtues of clarity and consistency, this was a welcome development. The effect of these amendments was to create discretion, or "flexibility", in cases where specified information, though not provided, can be verified by other means and, further, to provide some clarification of the meaning of *"a document in the wrong format"*. This clarification, notably, is provided in illustrative and inexhaustive, not comprehensive, terms. Judges at both tiers should be alert to this. The amended provisions were considered by Foskett J recently in Gu v Secretary of State for the Home Department [2014] EWHC 1634 (Admin) [2014] EWHC (Admin), which concerned the provision relating to a document or documents missing from a sequence or series.

24. Whatever the decision making context under the Immigration Rules, where discretionary powers of waiver and/or further enquiry are conferred, the possibility of a finding by a tribunal that a decision by the primary decision maker was not in accordance with the law arises. This would be so, for example, where it can be demonstrated that the decision maker was not alert to the relevant power and that such error was material. Furthermore, by well established principle, where a decision maker declines to exercise a discretion of this kind, belonging as it does to the domain of public law, the ensuing decision is potentially open to challenge on a variety of grounds. These include, inexhaustively though typically, a failure to take into account all material considerations; disregarding a material consideration; emasculating the discretion by the imposition of an inappropriate fetter; improper motive; material error of fact; irrationality; and misunderstanding the nature and/or scope of the discretion in play. These are all grounds upon which the ultimate refusal decision could, in principle, be successfully challenged on appeal or, where no appeal lies, by an application for judicial review.

25. Where a decision is challenged on the basis of an unlawful failure to exercise a discretionary power of further enquiry or waiver or an unlawful exercise of such power, Judges will be guided by considering the purpose underlying powers of this kind. We consider that such powers are to be viewed as dispensing provisions, designed to ensure that applications suffering from minor defects or omissions which can be readily remedied or forgiven do not suffer the draconian fate of refusal. In such cases, the blunt instrument of immediate, outright and irrevocable rejection is softened to accommodate applicants whose applications suffer from insubstantial

imperfections which can be easily and swiftly rectified or excused. Furthermore, in our estimation, discretionary powers of further enquiry and waiver promote the valuers of fairness and common sense, while simultaneously minimising unnecessary dominance of and emphasis on bureaucratic formality. They also fortify the overall integrity of the United Kingdom immigration system, as expressed in the UKBA letter dated 19 May 2011 wherein the origins of these powers can be discovered: see Appendix A to the decision of the Upper Tribunal in Rodriguez (*supra*). We further consider that, in the particular context of paragraph 245AA of the Immigration Rules, these powers are properly to be viewed as measures capable of promoting the economic wellbeing of the country and should be construed accordingly. Thus the mechanism initially known as "evidential flexibility" and promulgated in a policy, now superseded and expressed in more elaborate and regimented terms in the Immigration Rules, serves to advance an identifiable public interest of some importance.

26. We note, for completeness, what we believe to be the latest development in this sphere, namely the promulgation of an "Immigration Directorate Instruction" on behalf of the Secretary of State in July 2014. This "IDI" bears the title "Family Members under Appendix FM and Appendix Armed Forces of the Immigration Rules". Chapter 3 of this publication is entitled "Operating Principles". It considers, under separate headings, the topics of meeting the financial requirement, the level of the financial requirement and evidence requirements. This is followed by a discrete section under the rubric "Evidential Flexibility". For convenience, we have included this as an appendix to this determination. While this instrument, of course, did not apply to the decision which was the subject of the present appeal, it will be of progressively increasing importance.

27. A reminder that instruments such as IDIs do not have the status of Immigration Rules is timely. They have a statutory foundation, per paragraph 1(3) of Schedule 2 to the Immigration Act 1971, which provides:

> *"In the exercise of their functions under this Act Immigration Officers shall act in accordance with such instructions (not inconsistent with the Immigration Rules) as may be given them by the Secretary of State …… ".*

IDI's operate as guides, or policies, which may influence the decision in any given case. Their orientation is inwards, being directed to case workers and decision makers. They also have an external orientation, as they publicly available and serve to inform both the actions and decisions of individuals and the advice given to them. IDI's are incapable of emasculating or modifying a provision of the Immigration Rules. Hierarchically, they are inferior. This is clear from section 3(2) of the statute and the express language of Schedule 2. Additionally, there is the constitutional consideration that, in common with any Government policy or guidance, they lack Parliamentary oversight and approval. They are not to be confused with either the Immigration Rules or any form of legislation.

28. Given the recurring phenomenon of IDIs co-existing with the Immigration Rules and their prominence in immigration appeals, a reminder of one particular aspect of the

correct doctrinal approach is instructive. Lord Hoffmann stated in Odelola v Secretary of State for the Home Department [2009] 1 WLR 1230, in which a question of construction of the Immigration Rules arose, at [4]:

> *"Like any other question of construction, this ……. depends upon the language of the Rule, construed against the relevant background. That involves a consideration of the Immigration Rules as a whole and the function which they serve in the administration of immigration policy".*

In the same case, Lord Brown suggested, in [33], that the intention to be ascertained by the Court or Tribunal is that of the Secretary of State, the maker of the Rules. Reverting to this theme in Mahad (Ethiopia) Entry Clearance Officer [2010], 1 WLR 48, Lord Brown developed this theme further, at [10]:

> *"But that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations.* ***Still less is the Secretary of State's intention to be discovered from the Immigration Directorate's instructions [IDI'S] issued intermittently to guide immigration officers in their application of the Rules****".*

[Emphasis added]

As Lord Brown emphasised, IDIs are issued under paragraph 1(3) of Schedule 2 to the Immigration Act 1971. They are directed by the Secretary of State to Immigration Officers. In the statutory language, Immigration Officers *"shall act in accordance with such instructions"*. There is nothing in this language to convey any intention that IDI's can override the Immigration Rules. In short, IDIs cannot inform the meaning of the Immigration Rules. This conclusion is both unsurprising and unavoidable, given the hierarchical analysis to which we have adverted above.

29. We also draw attention to three principles emerging from the jurisprudence of the Court of Appeal. In Adedoyin v Secretary of State for the Home Department [2011] 1 WLR 564 it was decided that in cases where there is genuine ambiguity about the meaning of a provision of the Immigration Rules, it is legitimate to derive assistance from the executive's formally published guidance, including IDIs: per Rix LJ at [70]. Construed carefully and narrowly, this principle can co-exist harmoniously with Adedoyin. More recently, the Court of Appeal, in Pokhriyal v Secretary of State for the Home Department [2013] EWCA Civ 1568, having endorsed the Adedoyin principle, developed two further principles. First, reliance by the Secretary of State upon extraneous materials (such as IDIs) in order to persuade a court or tribunal to construe a provision of the Immigration Rules more harshly or to resolve an ambiguity in the executive's favour is impermissible. As Jackson LJ stated, at [43]:

> *"The Secretary of State holds all the cards. The Secretary of State drafts the Immigration Rules; the Secretary of State issues IDI's and guidance statements; the Secretary of State authorises the public statements made by his/her officials".*

This collection of truisms prompted his Lordship to formulate a further, related principle:

"The Secretary of State cannot toughen up the rules otherwise than by making formal amendments and laying them before Parliament".

This analysis follows from the reasoning of the Supreme Court in R (Alvi) v Secretary of State for the Home Department [2012] 1 WLR 2208.

30. Thus IDIs, in common with comparable instruments of Secretary of State's guidance or policy, are subservient in nature, the handmaidens of the Immigration Rules. Instruments of this kind, notwithstanding their legal status, can, nonetheless, feature in a Tribunal's review of whether a decision was in accordance with the law. This follows from a correct understanding of their status. In public law terms, policies, or guides, of this kind have the status of a material consideration in cases where they are engaged. Accordingly, a decision maker's failure to have regard to this kind of instrument may operate to vitiate the decision under challenge. Similarly, where a decision maker purports to have regard to the guidance but misconstrues or misapplies it. This kind of instrument can also, in principle, engender a substantive legitimate expectation to which the law will give effect. Our final observation concerning IDIs is that provided their terms are consistent with the provisions of the Immigration Rules to which they relate, they may, potentially, fulfil a further role, namely that of illuminating the rationale and policy underpinning the relevant Rules. This is illustrated in the statement in paragraph 3.4.2 of the IDI appended hereto that:

"*Decision makers are also able to grant an application despite minor evidential problems …..*"

We merely add that statements of this kind, do not preclude arguments to the effect that the underlying policy or rationale is other than as stated.

Decision

31. Giving effect to the above analysis and conclusions:

(a) We set aside the decision of the FtT.

(b) We re-make said decision by dismissing the Respondents' appeals to the FtT.

As a result, we affirm the decisions of the ECO.

Edward McCloskey.

THE HON. MR JUSTICE McCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 19 October 2014

APPENDIX

Evidential Flexibility Provisions in the Immigration Directorate Instructions relating to family members under Appendix FM and Appendix Armed Forces of the Immigration Rules [July 2014]

3.4.1. There is discretion for decision-makers to defer an application pending submission of missing evidence or the correct version of it, within a reasonable deadline set for this. Decision-makers will not have to defer where they do not think that correcting the error or omission will lead to a grant.

3.4.2. Decision-makers are also able to grant an application despite minor evidential problems (but not where specified evidence is missing entirely).

3.4.3. There is also discretion for decision-makers where evidence cannot be supplied because it is not issued in a particular country or has been permanently lost.

3.4.4. Decision-makers have general discretion to request additional information or evidence before making a decision.

3.4.5. The evidential flexibility is set out in paragraph D of Appendix FM-SE:

D. (a) In deciding an application in relation to which this Appendix states that specified documents must be provided, the Entry Clearance Officer or Secretary of State ("the decision-maker") will consider documents that have been submitted with the application, and will only consider documents submitted after the application where sub-paragraph (b) or (e) applies.

(b) If the applicant:

(i) Has submitted:

(aa) A sequence of documents and some of the documents in the sequence have been omitted (e.g. if one bank statement from a series is missing);

(bb) A document in the wrong format (for example, if a letter is not on letterhead paper as specified); or

(cc) A document that is a copy and not an original document; or

(dd) A document which does not contain all of the specified information; or

(ii) Has not submitted a specified document, the decision-maker may contact the applicant or his representative in writing or otherwise, and request the document(s) or the correct version(s). The material requested must be received at the address specified in the request within a reasonable timescale specified in the request.

(c) The decision-maker will not request documents where he or she does not anticipate that addressing the error or omission referred to in sub-paragraph (b) will lead to a grant because the application will be refused for other reasons.

(d) If the applicant has submitted:

(i) A document in the wrong format; or

(ii) A document that is a copy and not an original document, or

(iii) A document that does not contain all of the specified information, but the missing information is verifiable from:

(1) other documents submitted with the application,

(2) the website of the organisation which issued the document, or

(3) the website of the appropriate regulatory body, the application may be granted exceptionally, providing the decision-maker is satisfied that the document(s) is genuine and that the applicant meets the requirement to which the document relates. The decision-maker reserves the right to request the specified original document(s) in the correct format in all cases where sub-paragraph (b) applies, and to refuse applications if this material is not provided as set out in sub-paragraph (b).

(e) Where the decision-maker is satisfied that there is a valid reason why a specified document(s) cannot be supplied, e.g. because it is not issued in a particular country or has been permanently lost, he or she may exercise discretion not to apply the requirement for the document(s) or to request alternative or additional information or document(s) be submitted by the applicant.

(f) Before making a decision under Appendix FM or this Appendix, the decision-maker may contact the applicant or their representative in writing or otherwise, to request further information or documents. The material requested must be received at the address specified in the request, within a reasonable timescale specified in the request.