



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/12401/2013
IA/12402/2013
IA/12403/2013
IA/12404/2013

THE IMMIGRATION ACTS

Heard at Newport
On 12 November 2013

Determination Promulgated
On 3 December 2013

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

Appellant

MOHAMMAD SARTIPI
FARZANCH HAJALIAKBARI VARNOS FADERANI
AREZOU SARTIPI
AMIR HOSSEIN SARTIPI

Respondent

Representation:

For the Appellant: Ms Hulse, Duncan and Moghal Solicitors & Advocates
For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION

1. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

2. The appellants are citizens of Iran. The first and second appellants are married and the third and fourth appellants are their daughter and son respectively. The appellants were born on 26 May 1963, 23 June 1963, 16 February 1993 and 19 February 1996 respectively.
3. The first appellant entered the United Kingdom on 24 May 2008 with entry clearance until 16 April 2009 as a business person. On 14 December 2009 the first appellant was granted leave to remain in the United Kingdom until 14 December 2012 as a Tier 1 (Entrepreneur) under the Points Based System in the Immigration Rules. On 10 December 2012, the first appellant applied for further leave as a Tier 1 (Entrepreneur) Migrant under para 245DD of the Immigration Rules. On 3 April 2013, the Secretary of State refused the appellant's application and made a decision to remove him by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006. At the same time, the Secretary of State refused the applications of the first appellant's family as his dependents under paragraph 319H of the Immigration Rules. The latter applications necessarily failed as they were dependent upon the success of the application of the first appellant.
4. The first appellant (together with his family) appealed to the First-tier Tribunal. In a determination promulgated on 29 July 2013, Judge Archer allowed the first appellant's appeal and those of his family as his dependents.
5. First, Judge Archer found that the appellant met the maintenance requirements of the Rule under Appendix C as, taking into account the first appellant's overdraft facility of £5,000 during the relevant 90 day period, he had the required funds of £2,700. Secondly, Judge Archer found that the Secretary of State had acted unfairly in breach of her "evidential flexibility policy" in failing to request from the first appellant signed P11s for his employees as required by the Immigration Rules. Consequently, the Judge allowed the first appellant's appeal (and that of his family) to the extent that refusal to vary his leave to remain was not in accordance with the law. Finally, the Judge also allowed the appellant's appeal against the removal decision under s.47 applying the Upper Tribunal's decisions in Admally and Jaferi [2012] UKUT 00414 (IAC) and Ahmadi v SSHD [2012] UKUT 00147 (IAC).
6. The Secretary of State sought permission to appeal on the basis that the Judge had been wrong to take into account the overdraft facilities available to the first appellant in determining whether he had the required funds under Appendix C. The grounds rely upon the decision of the Court of Appeal in R (On the Application of Adeyemi-Doro) v SSHD [2011] EWCA Civ 849 where at [9] Sullivan LJ stated that:

"9. In my judgement where the Rules says that an applicant "must have the funds specified..." or the policy requires migrants to demonstrate that "they hold the required level of funds", those words "have" and "hold" do not mean that an applicant would qualify if he/she has an overdraft available to them either up to or in excess of the specified level of funds. In the context of Appendix C to the Rules and in the context of the policy, an applicant has or holds funds of £800 if their credit balance is £800 or more. That accords with a common sense interpretation of the Rules and policy and indeed it is reflected in the guidance that was and still is applicable as to the manner in

which the Tier 1 policy in respect of Maintenance Funds will be applied by the respondent.”

7. On 13 August 2013, the First-tier Tribunal (Judge Landes) granted the Secretary of State permission to appeal.
8. In a Rule 24 response, the appellant accepts that Judge Archer may have made an error of law in taking into account the appellant’s overdraft facility. Nevertheless, the appellant in that response argues that that error was not material. First, Judge Archer had left open consideration of Article 8 and, on the facts, it is argued that he would have determined that issue in favour of the appellant. Further, it is stated that Judge Archer was right to allow the appeal on the basis that the Secretary of State’s decision was unfair and was in breach of her evidential flexibility policy.
9. At the hearing, Ms Hulse accepted that the appellant could not succeed under the Rules in reliance upon his overdraft. She drew my attention to the Secretary of State’s flexibility policy and, although she initially submitted that the Judge had been correct to allow the appeal on that basis, having drawn to her attention para 245AA of the Immigration Rules Ms Hulse acknowledged that the appellant could not succeed under para 245AA. She submitted that, nevertheless, Judge Archer had failed to consider Article 8 and a decision remained to be made in respect of that.

Discussion

10. There is no doubt that the Judge erred in law in finding that the appellant could succeed under the Immigration Rules. The decision of the Court of Appeal in Adeyemi-Doro is clear. In order to establish that he had the required maintenance funds of at least £2,700 for a period of 90 days prior to the date of application under Appendix C, the first appellant could not rely upon his overdraft facility. He had to show that those funds were actually in his bank account at the relevant time. In paragraph 27 of his determination, Judge Archer, therefore, erred in law in finding that taking into account the overdraft facility the maintenance requirement in Appendix C was met. The appellant could not establish this requirement and, for that reason alone under the Immigration Rules failed.
11. Secondly, in paras 28 and 29 the Judge found, applying Rodriguez (Flexibility Policy) [2013] UKUT 0042 (IAC), that the Secretary of State had failed to give the first appellant an opportunity to provide documents in proper form (namely signed P11s) in order to rectify the shortcomings of his application when he had submitted unsigned P11s.
12. At the hearing, there was some discussion about the relevant policy in force at the date of the Secretary of State’s decision made on 3 April 2013 in response to the first appellant’s application which was made on 10 December 2012. Both Ms Hulse and Mr Richards provided me with a Home Office document entitled “Points-based System - Evidential Flexibility”. Those documents - one dated 20 May 2013 and the other dated 7 November 2013 - make reference to para 245AA of the Immigration Rules.

13. Paragraph 245AA has been amended on a number of occasions. As inserted from 6 September 2012 (by HC 565) para 245AA is in the following terms:

“245AA. Documents not submitted with applications

- (a) Where Part 6A of any appendices referred to in Part 6A state that specified documents must be provided, the UK Border Agency will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where subparagraph (b) applies.
- (b) The sub-paragraph 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.
- (c) The UK Border Agency will not request documents where a specified document has not been submitted (for example an English language certificate is missing), or where the UK Border Agency does not anticipate that addressing the omission or error referred to in sub-paragraph (b) will lead to a grant because the application will be refused for other reasons.”

14. Para 245AA was further amended by HC 760 on 13 November 2012 and most recently by HC 628 on 1 October 2013. Those amendments, inter alia, allow for more flexibility in accepting non-compliant documents rather than requesting compliant ones. In particular, the amendments allow “exceptionally” for an application to be granted where, for example, genuine documents are submitted which are not in the correct format or are copies.
15. The version of para 245AA applicable to this appeal is that which came into force on 6 September 2012. As the guidance makes clear, the amendment made by HC 760 on 13 November 2012 only applies to applications made on or after 13 December 2012. The appellant’s application was made on 10 December 2012 and so is governed by para 245AA as amended on 6 September 2012 which I have set out above. For completeness, the amendments made by HC 628 apply to applications (according to the guidance) decided on or after 1 October 2013.
16. In my judgement, para 245AA now sets out in the Immigration Rules the Secretary of State’s so-called “evidential flexibility” policy. That is clear from the guidance which in relation to applications governed by para 245AA incorporates as its contents the substance of para 245AA. In other words, since the introduction of para 245AA as amended from 6 September 2012 (previous versions were not concerned with ‘flexibility’), there has been no “evidential flexibility” policy in existence outside the Rules.

17. Para 245AA applies to “specified documents” that must be provided by virtue of Part 6A and any appendices of the Rules. First, it states that the UKBA will only consider “specified documents” which have been submitted with the application unless the documents are submitted after the application because para 245AA(b) applies. Secondly, para 245AA(b) applies where an applicant has submitted: (i) a sequence of documents and some of that sequence are omitted; (ii) a document in the wrong format; or (iii) a copy rather than an original document. Thirdly, if that document or documents are omitted or a non-compliant document is submitted then the UKBA will contact the applicant or representative and request that the correct document or documents be sent within 7 working days. Fourthly, the UKBA will not request a document where the “specified document” has simply not been submitted (unless it is missing from a sequence of documents) or where the UKBA does not anticipate that, even if the specified document is submitted, that will lead to a “grant” because the application will be refused for other reasons.
18. Applying the terms of para 245AA, the Secretary of State was not under an obligation to request further bank statements from the first appellant. The first appellant did not omit a document from a sequence of documents; he did not submit bank statements in the wrong format and he did not submit copies when originals were required. The first appellant submitted the relevant documents for the period of time under the Immigration Rules over which he had to establish that he had the required funds. This was simply a case where the documents - complete in themselves - did not establish that the maintenance requirement of the Rules was met.
19. As regards the P11s, by contrast para 245AA(b) did apply. These were documents in the “wrong format” in the sense that a signature was omitted from them. Nevertheless, the Secretary of State was not under an obligation to request corrected documents from the first appellant. That is because, by virtue of para 245AA(c), even with that documentation the application would be refused “for other reasons”, namely the first appellant’s failure to meet the maintenance requirement.
20. Consequently, Judge Archer erred in concluding that the Secretary of State had acted contrary to her “evidential flexibility” policy in failing to give the first appellant an opportunity to rectify the omission of signatures from the P11s. The Judge relies upon the Upper Tribunal’s decision in Rodriguez. That case was concerned with the Secretary of State’s flexibility policy prior to para 245AA coming into existence (see [24]). Para 245AA did not assist the first appellant in this appeal.
21. For these reasons, Judge Archer erred in law in allowing the appellant’s appeal as not being in accordance with the law.

Decision and Disposal

22. Having indicated that was my view at the hearing, Ms Hulse took instructions in relation to the issue of Article 8. It was common ground between the parties that as Judge Archer had failed to reach a decision on whether the appellants’ removal would breach Article 8, a decision was now required. After some discussion with

the appellants, Ms Hulse invited me to retain the appeal in the Upper Tribunal but adjourn the hearing in order that further preparation could be undertaken to present the appellants' Article 8 appeal. Although Mr Richards initially invited me to remit the appeal to Judge Archer in order to reach findings under Article 8, in the light of Ms Hulse's invitation he did not seek to resist the retention of the appeal in the Upper Tribunal.

23. The decision of the First-tier Tribunal to allow the first appellant's appeal involved the making of an error of law. I set aside the decision to allow the appeal under the Immigration Rules and on the basis that the respondent's decision in relation to the first appellant was not in accordance with the law. The decisions of the remaining appellants (as the first appellant's dependants) also cannot stand.
24. I remake the decisions. The first appellant's appeal is dismissed under the Immigration Rules. The respondent's decision was in accordance with the law. The appeals of the other dependants under the Immigration Rules are also dismissed.
25. The Judge's decisions to allow the appeals against the decisions to remove the appellants under s.47 of the Asylum and Immigration Act 2009 stand.
26. The appeals will be relisted before me for a resumed hearing (the agreed date is 2 January 2014) in order to remake the decisions in respect of Article 8 of the ECHR.
27. To the extent that either party wishes to rely on further evidence at that hearing (not before the First-tier Tribunal), the parties are reminded of the need to comply with rule 15A of the Tribunal Procedure (Upper Tribunal) Rules 2008. Any such evidence should be filed with the Upper Tribunal and served upon the other party no less than 7 days before the resumed hearing.

Signed

A Grubb
Judge of the Upper Tribunal

Date: