



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/15815/2013
IA/15819/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 25 November 2013**

**Determination
Promulgated
On 13 December 2013**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

**TANIA MOSTAFA
MAHLIL MOSTAFA KHAN**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

Representation:

For the Appellant: Mr W Mahbub, instructed by Universal Solicitors
For the Respondents: Miss K Pal, HOPO

DETERMINATION AND REASONS

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Rose allowing the appeals of the appellants against her decision to refuse the First appellant leave to remain as a Tier 1 (Entrepreneur) Migrant. The second appellant is the son of the first

appellant and is her dependant. I will continue to refer to them as appellants despite that the appeal is by the Secretary of State.

2. According to the notice of decision, the documents submitted by the appellant did not meet the requirements of appendix A to the Rules. She had provided a contract which did not include contact details for the other party involved. She had provided the certificate of incorporation for her company, but not a current printout report including her full name, the date on which she was appointed and the date on which the report was produced. Further, she maintained that she had funds in Jamuna Bank; that institution appeared on a list in appendix B to the Rules, of banks from Bangladesh that did not satisfactorily verify financial documents. Her application was refused under paragraph 245DD of the Immigration Rules as she did not meet the requirement at paragraph 245DD(b). Under this paragraph the first appellant must have a minimum of 75 points under paragraphs 35 to 53 of Appendix A. She was awarded no points.
3. The judge found that the appellant's application did not fall to be refused on the basis that the letter provided by Jamuna Bank Limited could not be used to meet the requirements of Appendix A, the reason being that at the time the first appellant made her application, the Immigration Rules did not preclude reliance on funds held in Jamuna Bank Limited. This finding was not challenged by the Secretary of State.
4. At the hearing before the judge the appellant was asked about the contract that she had submitted which did not show the client's landline or email number. She said that the client had not provided that information and she had not asked for it. She had applied for a landline number for her business but it had not been received when she made her application. As to details of the incorporation of her company, she said that her solicitor had told her that it was not mandatory to provide those details.
5. At the hearing below it was contended by the appellant's legal representative that the shortcomings in the contract document were such that it was in the wrong format and thus the Secretary of State's caseworker should have requested further information in accordance with the provisions of subparagraph 245AA(b). Further, there was a discretion in subparagraph 245AA(d) to disregard the fact that the document was in the wrong format. The further contract that had been included in the documents for the appeal amounted to a correction of the earlier document. Accordingly, Section 85A of the 2002 Act did not preclude reference to it.
6. It was also contended that paragraph 41-SD did not include a requirement for the documentation sought by the Secretary of State. A further document had been provided which, as regards Section 85A of the 2002 Act, merely confirmed what had previously been asserted.

7. The judge said that the appellant made her application on the basis that she was currently registered as a director of a new or existing business. Table 4 of Appendix A requires that such an applicant must have been so registered within the three months immediately prior to the date of application. According to her application, the appellant provided a printout of the Current Appointment Report from Companies House; but no such printout appeared to have been submitted. The first appellant did provide the certificate of incorporation of the company, which did not make any reference to directors. The judge rejected the appellant's legal representative's argument that the appellant was entitled to rely on a printout that was provided for the purposes of the appeal. The judge found that Section 85A of the 2002 Act, as it applies to the appellant's application, provides that the Tribunal may only consider evidence which was submitted in support of, and at the time of making the application. The exceptions to that Rule do not assist the appellant. In his judgment, the appellant did not provide documentation to establish that she met the requirement of Table 4.
8. The judge also found that there was a shortcoming in respect of the information contained in the contract that was submitted as it did not give the client's landline phone number or any email address as required by subparagraph 41-SD(c)(iv) of appendix A. Again the appellant sought to rely on further documents which were provided for the appeal, but the judge found that Section 85A of the 2002 Act precluded reliance on these documents.
9. The judge then relied on **Rodriguez** in which the Upper Tribunal concluded that the Secretary of State was obliged to apply her policy in respect of evidential flexibility when considering applications. That policy was heralded in a letter from UKBA dated 19 May 2011 and specified provisions which were set out in a document headed "PBS Process Instruction", which was appended to the determination. He noted that the latter document has now been superseded by a guidance document, which is valid from 20 May 2013. The judge said he was not referred to any earlier version of that guidance document. However, in respect of the current guidance, the changes are described as including "obtaining additional information: --- third paragraph, examples where additional evidence can be requested have now been limited to specific types of cases".
10. The judge said that in **Rodriguez** the Upper Tribunal refer to the introduction of paragraph 245AA of the Rules, and expressed no view on whether the policies identified in the determination had survived that amendment to the Rules. The judge said that the policy document in use at the relevant time is to be regarded as the statement of the Secretary of State's policy. He said that the policy as set out in the PBD Process Instruction required the caseworker to consider whether there was missing evidence. If so, unless the application will fall for refusal even if the missing information were provided, the next stage was to consider

whether there was sufficient reason to believe that the missing evidence existed. In cases of uncertainty, benefit should be given to the applicant. If the caseworker, or a senior colleague, had reasonable grounds to believe that the missing evidence existed, the applicant should be asked to provide it. The judge said on the evidence available to him, he had no reason to find that there was any relevant change in that policy before the date of decision (in this case 23 April 2013). The judge noted that the current guidance document indicates that the limitation to specific types of cases was introduced on 20 May.

11. In his judgment there was sufficient reason to believe that the missing evidence existed. Since the respondent provided the certificate of incorporation of her company, Companies House would necessarily have a record of the company's directors. As no issue was raised as to the existence of the client identified in the contract provided by the appellant, the client's contact details were likely to be available on request. Accordingly, since he had found that the appellant's application did not fall for refusal because of her reliance on a letter from Jamuna Bank Limited, the evidential flexibility policy required that she be requested to provide the missing information.
12. Accordingly the judge found that the refusal of the appellant's application was not in accordance with the law and to that extent the appeal should succeed. He therefore allowed the appeal to the extent that the decisions to refuse the applications were not in accordance with the law.
13. The judge also allowed the appeals on human rights grounds to the same extent.
14. The grounds lodged by the respondent argued that the judge erred in applying the evidential flexibility policy to the contract document because this was not a case in which there was missing evidence; this was a case in which the evidence provided was defective. Pursuant to Appendix A, paragraph 41-SD(c)(iv) of the Rules, the contract had to show the landline phone number and any email address. The contract had been submitted but it did not do so. The appellant could not comply with the Rules by simply producing that evidence separately. FtTJ Nicholson who granted permission said that given the terms of the Evidential Flexibility Policy as recorded by the judge correctly at paragraph 27, that ground was arguable.
15. FtTJ Nicholson also said that if the decision stood to be dismissed under the immigration rules because of a defect in the evidence relating to the contract then it is arguable that the appeal should not have been allowed on the grounds that the decision was not in accordance with the law so far as the evidence relating to registration as a director was concerned, since that would have made no difference. It follows that if the judge did err in relation to the contract, the judge also arguably erred in relation to article 8 when he found that the decision was unlawful under article 8.

16. The respondent relied on subparagraph 41-SD(c)(iv) which states as follows:-

“(iv) One or more contracts showing trading. If a contract is not an original the applicant must sign each page of the contract. The contract must show:

- (i) the applicant’s name and the name of the business,*
- (ii) the service provided by the applicant’s business; and*
- (iii) **the name of the other party or parties involved in the contract and their contact details, including their full address, postal code, landline phone number and any email address.**”*

17. Miss Pal submitted that the judge had accepted that at the time of submitting her application, the respondent had failed to satisfy subparagraph (iii) of 41-SD(c)(iv). The judge had also found that Section 85A of the 2002 Act does not assist the applicant and that the amended documentation provided at the hearing could not support the application after it had been made. Furthermore, the appellant had admitted in oral evidence that at the time she submitted the application the information requested did not exist because she had applied for it and had yet to receive it. In the light of this evidence, the application form submitted by the appellant was defective from the outset.

18. Miss Pal submitted that the judge relied on **Rodriguez** which concluded that the Secretary of State was obliged to apply her policy in respect of evidential flexibility when considering applications. She said that following **Rodriguez** the Secretary of State incorporated the findings in **Rodriguez** into paragraph 245AA of the Immigration Rules. This paragraph states as follows:

“(a) Where part 6A or the Appendices referred to in Art.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 subparagraph applies if the applicant has submitted:

- (i) a sequence of documents and some of the documents in the sequence had 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.”

19. Mr Mahbub tried desperately to bring the appellant within subparagraph (i) and (ii) of 245AA even when he acknowledged that the missing information was not part of a sequence of documents or that it was a document in the wrong format. He relied on Appendix A of the PBS Instruction Process (Annex A) which was appended to the determination in **Rodriguez**. That instruction was dated July 2011.
20. I accept that the judge corrected recorded the terms of the Evidential Flexibility Policy at paragraph 27. However, in this case it was not a question of the caseworker or a senior colleague having reasonable grounds to believe that the missing evidence existed and asking the appellant to provide it. The fact is the missing evidence did not exist at the time she made her application. The appellant herself said so in oral evidence. Accordingly, I find that the judge erred in law in not dismissing the appellant’s appeal.
21. I find that the appellant had submitted a defective application. The missing information was not information that could be requested under paragraph 245AA.
22. I find that the judge erred in law in allowing the appeals to the extent that the decisions to refuse the applications were not in accordance with the law and also erred in law in allowing the appeals on human rights grounds to the same extent.
23. The judge’s decision was tainted by error of law and should not stand.
24. I re-make the decision and dismiss the appeals.

Signed

Date

Upper Tribunal Judge Eshun