



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

Appeal Numbers: IA/16883/2013
IA/16888/2013
IA/16873/2013
IA/16894/2013

THE IMMIGRATION ACTS

Heard at Field House
On 12 March 2014
Prepared 13 March 2014

Determination Promulgated
On 27 March 2014
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Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**BHAVESHKUMAR PRAVINBHAI SATHAWARA
KHODIDAS NIPESHKUMAR KHADIYA
KALPANABEN NIPESHKUMAR KADIYA
MIHIR NIPESHKUMAR KADIYA**

Respondents

Representation:

For the Appellant: Ms J Isherwood
For the Respondents: Mr A Khan, of Counsel and instructed by Messrs Longfellow
Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals, with permission, against a decision of Judge of the First-tier Tribunal Napthine who in a determination promulgated on 22 January allowed the appeals of Mr Bhaveshkumar Pravinbhai Sathawara, Mrs Khodidas Nipeshkumar Khadiya, Mr Kalpanaben Nipeshkumar Kadiya and Master Mihir Nipeshkumar Kadiya who had appealed against a decision of the Secretary of State made on 22 April 2013 to refuse Mr Bhaveshkumar Pravinbhai Sathawara and Mrs Khodidas Nipeshkumar Khadiya leave to remain as Tier 1 (Entrepreneur) Migrants. The other two appellants are their dependants. Although the Secretary of State is the appellant in the appeals before me I will for ease of reference refer to her as the respondent as she was the respondent before the First-tier Tribunal. Similarly I will refer to Mr Bhaveshkumar Pravinbhai Sathawara, Mrs Khodidas Nipeshkumar Khadiya, Mr Kalpanaben Nipeshkumar Kadiya and Master Mihir Nipeshkumar Kadiya as the appellants as they were the appellants before the First-tier Tribunal.
2. The first two appellants ("the appellants") applications were refused under the points-based system on the basis that they were awarded no points for attributes under Appendix A of the Immigration Rules as they had not provided the appropriate documents required under 41-SD table 4 in that they had not supplied a letter from each of the financial institution holding funds to confirm the amounts of funds available to the appellants as the letter from their parents' banks did not state their names and confirm that the money could be transferred to Britain. Moreover, the third party declaration from their mother stating that she had made the money available to the appellants to invest in the business in the United Kingdom did not contain the appellants' signatures as well as the signature of the third party and therefore it was not considered that they had shown that they had access to at least £200,000 to invest in Britain as specified under Appendix A of the Rules. A third party declaration with all the necessary information was produced.
3. The judge stated that the situation before him was very different from a situation where it is not at all clear that the funds were available to the appellants and the third party declarations were also deficient. In paragraph 17 he stated:-

"It should not have taken much thought to realise that the funds were available to the appellants and the checks of signatures in documents or other information in those circumstances added little if the Bank of India letters were genuine [except for the fact that requirements of the PBS make such information mandatory]. There is nothing from the respondent to suggest that the Bank of India letters are anything but genuine."
4. The judge then referred to the determination of the Tribunal in **Rodriguez (Flexibility policy) [2013] UKUT 00042 (IAC)** which referred to the policy letter of 19 May 2011 which stated that during an unspecified trial stage applicants should be contacted where mandatory evidence was missing from their applications and that

they should be given the opportunity to provide this. UKBA was under a public law duty to give effect to the policy in all cases to which it applied.

5. The judge found that the respondent had failed to follow her own policy and therefore that her decision was wrong in law and that in a case of this sort where the third party had actually transferred the funds into accounts in the appellants' names a fair decision making process would have prompted a request for missing information.

6. The judge ended his determination by stating:-

"The appeals are allowed to the limited extent that the respondent's decisions are not in accordance with the law and remain outstanding before the respondent awaiting lawful decisions."

7. The grounds of appeal argued that the judge had misdirected himself in law, stating that the determination **Rodriguez** had been considered by the Court of Appeal and in a judgment promulgated on 20 January 2014 the Court of Appeal had made it clear that

"requests for information should not be speculative and – as subsequently reiterated – there must be sufficient reasons to believe that any evidence requested existed."

Moreover it had been ruled that the evidential flexibility policy was 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."

It was stated therefore that in the light of the judgment of the Court of Appeal the Secretary of State was under no obligation to request further documents from the appellant. There was no suggestion in the determination that a satisfactory bank letter or third party declaration was in existence as at the date of decision and there was not sufficient reason to believe that the required evidence existed and therefore any request made for further documentation would have been entirely speculative. The evidential policy was qualified by the instructions requested information should not be speculative.

8. The application for permission was considered by Judge of the First-tier Tribunal Page and granted on the basis that the judge had made no reference to the judgment of the Court of Appeal in **Rodriguez**.
9. At the hearing of the appeal before me Ms Isherwood stated that it was evident that although the appeal had been heard and the determination drafted before the date of the judgment of the Court of Appeal the determination had been promulgated two days after the judgment had been issued. The reality was that the determination of the Upper Tribunal in **Rodriguez** had been overturned and as the appellants had not

provided all the documents required the appeals should not have been allowed even to the limited extent where the applications had been remitted to the Secretary of State. In any event she pointed out that the Rules had changed on 6 September 2012 and therefore the flexibility policy as set out in the determination in **Rodriguez** was by that stage out of date. She was unable to let me know whether or not the flexibility policy had been taken down from the respondent's website when the Rules had been changed.

10. She argued that as the appellants were not entitled to rely on the documents which had been produced after the date of decision the appeal should have been dismissed.
11. In reply Mr Khan stated that this was not a case of missing documents but merely of missing information which had been provided before the judge. The judge was entitled to take it into account and find that the issue before her had been resolved and therefore that it was appropriate that that should be considered by the Secretary of State. He referred to the judgment of the Court of Appeal at paragraph 49 which noted that the 2009 version of the instructions relating to evidential flexibility had stated that "this procedure describes the steps to take when an application has missing evidence or there is a minor error". Moreover in that judgment it was stated that the overall intent was to afford

"some alleviation to the harshness of the requirements of the Immigration Rules by sanctioning, in certain circumstances, requests for further information from applicants."

12. The reality was the judge had considered that there were two minor problems and that these should not have led to the refusal or, having led to the refusal the decision of the judge to remit the application to the Secretary of State was clearly open to him.

Discussion

13. I have some sympathy with the judge in this case because he was entitled to consider and interpret the determination of the Tribunal in **Rodriguez** when he heard the appeal and drafted the determination. However the judgment of the Court of Appeal is declaratory and makes it clear that the conclusions of the Upper Tribunal in **Rodriguez** were incorrect.
14. Moreover, the reality is that at the time of the decision the requisite evidence in the appropriate form was not before the respondent. That is the relevant date and in a points-based system appeal further evidence postdating the decision which was not before the respondent should not be taken into account.
15. I therefore find that there was a material error of law in the determination of the Tribunal.
16. I therefore set aside the decision of the Tribunal and substitute, for the above reasons, my own decision that this appeal is dismissed.

17. It does appear that relevant evidence may well be available to be produced in a fresh application and I trust that the Secretary of State will now deal with that application, provided it is made timeously, as soon as possible taking into account all relevant documentation and indeed taking into account the business plan which was placed before me at the hearing.

Signed

Date

Upper Tribunal Judge McGeachy