



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

Appeal Numbers: IA/18507/2013
IA/18541/2013

THE IMMIGRATION ACTS

Heard at Field House

On 7 May 2014

Determination

Promulgated

On 02nd June 2014

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MD HUMAYUN KABIR KHAN (FIRST APPELLANT)

MRS AYRIN PERVIN (SECOND APPELLANT)

(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Miss S Vidhyadharan

For the Respondents: Mr T Bin-Aziz

DETERMINATION AND REASONS

1. For ease I refer to the parties as they were in the First-tier Tribunal so that hereafter the Secretary of State for the Home Department is referred to as the respondent and Md Khan and Ayrin Pervin are referred to as the appellants.

2. The appellants are a married couple who applied for leave to remain under Tier 1 (Entrepreneur) of the points-based system ("PBS"). The application was made on 28 November 2012 and was refused by a decision dated 7 May 2013. The appellants appealed the adverse decision and the matter came before a Judge of the First-tier Tribunal. In a very short determination the judge allowed the appeal but only to the extent that the applications remain outstanding before the Secretary of State. The intention of the judge was that the respondent should afford the appellants the opportunity to adduce missing evidence, the respondent having failed to allow them to do so thus far.
3. In substance the judge found that the application under paragraph 245DD and Appendix A of the Immigration Rules was refused on the grounds of deficiencies in the documentary evidence adduced in support. Details of the entrepreneurial team members and relevant telephone numbers were missing from the contract that the appellants had relied upon. Furthermore, as evidence of the business being registered in the United Kingdom the appellants provided a blank copy of a tax return form.
4. The respondent sought permission to appeal the judge's decision and permission was granted. In granting permission the judge doing so stated that the grounds of appeal argued that the judge erred in that he accepted that there were deficiencies in the documentation produced by the appellants but failed to take into account the case of **Secretary of State for the Home Department v Rodriguez [2014] EWCA Civ 2** which is to the effect that the respondent is not required to give an applicant the opportunity to remedy any defect for inadequacy in the application or supporting documentation so as to save the application from refusal after substantive consideration.
5. The representative for the appellants relied on his skeleton argument filed for the hearing before me. If I found an error of law in the judge's determination then the appeal should be allowed under the Rules, but as argued in the original grounds of appeal the appellants should succeed under Article 8 ECHR in any event.

The Error of Law

6. The First-tier Judge signed and dated the determination on 20 January 2014. The determination was promulgated on 21 January 2014. On or about the same date the Court of Appeal decision in **Rodriguez** was published but that case would not have been before the First-tier Judge. There can be no criticism of him in that regard. However, in allowing the appeal to the extent that the respondent should afford the appellants the opportunity to adduce missing evidence the judge did not explain sufficiently why the appellants should be given that opportunity.
7. Paragraph 245AA of the Rules makes clear that the Secretary of State will only consider documents that have been submitted with an application and will only consider documents submitted after the application where

they are submitted in accordance with sub-paragraph (b). sub paragraph (b) was modified from 1 October 2013 which was after the date of this application and decision. At the time of application the practice was that if the applicant submitted a sequence of documents and some of them in a sequence were omitted (an example is given of one bank statement from a series being missing); a document is in the wrong format or a document is a copy and not an original document UK Border Agency “will” - (this was deleted from 13 December 2012 and then “may” was inserted from the same date) - contact the applicant or his representative in writing and request the correct documents. The Rules required that missing or defective documents would then need to be received within seven working days of the date of the request. In 245 AA (c) UKBA would not request documents where a specified document had not been submitted (for example an English language certificate) or where UKBA did not anticipate that addressing the omission referred to in sub-paragraph (b) would lead to a grant because the application would be refused for other reasons.

8. The relevant Section of the Rules has been further changed as from 1 October 2013 to make more specific when and how the Secretary of State may contact the applicant or his representative requesting correct documents but those changes are of no application here because the decision was made at an earlier date.
9. The judge makes reference to missing entrepreneurial team members’ details and relevant telephone numbers, and also the appellant providing a blank copy of a tax return form which the judge found was “clearly an oversight” on the part of the appellant. As the judge said “(it cannot) be said that the adduction of these documents would have made no difference, and that the applications were bound to fail”. That appears to me to be precisely the point and that important information was missing from the application itself. It is clear from reading the Rules and Guidance that it is only where there are minor defects or omissions that the Secretary of State is obliged to contact the applicant in writing to obtain missing information.
10. However, I find that it cannot be said that addressing the omission or error would necessarily have lead or even have been likely to lead to a grant of leave. The complaint about the contract was not only that it did not contain the entrepreneurial team members’ names and the other party’s landline contact number, but the services described in the contract did not appear to be client specific. That reason for refusal does not seem to have been addressed by anybody. If the contract needed to be varied there would have to be agreement between the parties to that contract to enable the variation to be made. That is not a minor matter capable of remedy as contemplated under the Rules and Guidance.
11. As to the blank copy of a tax return form, that may well have been a mistake but not necessarily one that would be known to be a mistake at the time of receipt of the application. It is not apparent to me that there would be sufficient reason to believe that form CT41G had in fact been

completed, that it showed that a date of registration existed or that there was in existence a completed tax return document that included the tax reference for the company. As per paragraph 92 of **Rodriguez** the evidential flexibility process instruction 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. As is stated earlier in the paragraph it is to be noted that although there is no limit to the amount of information that can be requested from the applicant, it is immediately qualified by the instruction that requests for information should not be speculative and – as subsequently reiterated – there must be sufficient reasons to believe that any requested evidence existed.

12. I mention at this point that on 15 March 2013 the first appellant was sent a letter referring to the Government announcing changes to the Immigration Rules to take effect from 31 January 2013, which changes were made in response to evidence that some applicants were seeking to abuse the Immigration Rules. The first appellant was told that he would be contacted to advise how the changes would affect his application and what steps (if any) he would need to take before making a decision on the application. It appears he was not contacted. It is not argued that by reason of the contents of that letter alone he should have been contacted if there were shortcomings in the application rendering it insufficient to satisfy the requirements or that it would be unfair in the public law sense for the Secretary of State to go back on the representation made. Such an argument would fail in any event. See paragraphs 96 and 97 of **Rodriguez**.
13. In **Rodriguez** at paragraph 100 it states” Generally, Sullivan LJ in terms said in paragraph 35 of **Alam (Alam & Ors v Secretary of State for the Home Department [2012] EWCA Civ 960)**:

“... the Immigration Rules, the Policy Guidance, and the prescribed application form all made it clear that submission of the specified documents with the application was mandatory: if the specified documents were not produced with the application it would be refused ... Mr Malik referred to the draconian consequences of a failure to supply a specified document but that is an inherent feature of the PBS which puts a premium on predictability and certainty at the expense of discretion”.

Sullivan LJ went on later to say in 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** (paragraph 49) 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 under which he seeks leave. 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 of 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 obligation 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".

Those remarks remain, in my view, and allowing for the terms of the process instruction, apposite to the present three cases."

Conclusions

14. The current appeal before me, for the reasons given, leads me to conclude that the respondent was under no obligation in the particular circumstances to contact the appellants to afford them the opportunity to adduce missing evidence because the Border Agency could not have anticipated that addressing such omissions and errors as there were would lead to a grant. My reasoning for coming to that finding is as set out above.
15. The First-tier Judge also for the reasons set out above did not adequately explain why the respondent should have acted as he found she should have done and therein lay the error.
16. For these reasons the decision of the First-tier Judge is set aside and the appeal under the Rules is dismissed.

The Article 8 ECHR Claim

17. The matter does not end there because the appellants also made an Article 8 claim in the notice of appeal to the First-tier. The judge did not deal with that element of the appeal considering, no doubt, that the fact that the application under paragraph 245DD would be considered afresh there was therefore no need for him to make findings in relation to the human rights claim.
18. On the basis as I have found that the appellants cannot meet the requirements of the Immigration Rules - the second appellant is entirely dependent upon her husband in relation to meeting the requirements of those Rules and therefore fails under them for the same reasons as he does - although they both have private and family lives in the United Kingdom worthy of respect they do not meet the requirements to be met by applicants for leave to remain on the grounds of private life in the

United Kingdom. That much is not in issue. As per paragraph 17 of **Haleemudeen v Secretary of State for the Home Department [2014] EWCA Civ 558:**

17. “.....There is a useful summary of the background to the Rules and the aims of the Home Office in introducing them in the judgment of Sales J in **R (Nagre) v Secretary of State for the Home Department** [2013 EWHC 720 (Admin) at [8] - [10], in which a challenge to the lawfulness of the new Rules was rejected. The summary in **Nagre's** case stated that the Rules were amended to address more explicitly the factors which, according to domestic and Strasbourg case-law, weigh in favour of or against a claim by a foreign national based on ECHR Article 8 to remain in the United Kingdom. They were thus introduced to align more closely the Immigration Rules and the approach under Article 8, and to unify consideration under the Rules of Article 8 and Section 55 of the Borders, Citizenship and Immigration Act 2009 which deals with the welfare of children. The Secretary of State also issued instructions regarding the approach to be applied by officials in deciding to grant leave to remain outside the Rules. Those instructions were that, if the requirements of the Rules are not met, refusal will normally be appropriate but that leave can be granted where exceptional circumstances, in the sense of ‘unjustifiably harsh consequences’ for the individual, would result. Sales J stated (at [36]) that this residual discretion ‘fully accommodated the requirements of Article 8’.”

19. I note from the statement of Mr Khan that he was granted leave to enter the UK on 16 August 2006 as a student until 31 December 2007. He extended his leave subsequently on several occasions and lastly on 8 December 2010 he was granted leave to remain as a Tier 1 (Post-Study Work) Migrant until 8 December 2012. Shortly before his leave was due to expire he made an application for further leave as a Tier 1 (Entrepreneur) Migrant under the PBS and that was the decision that was refused by the respondent and is the subject of this appeal.
20. Mr Khan states that he has established a private and family life in the UK and has invested time and substantial amounts of money in the business which is operating successfully. The UK has stated that it wants to attract “the best and brightest” and he has been awarded a UK degree from a recognised university which shows that he is fit for that category. Apart from stating that he has formed “a very decent private and family life here in the UK” nothing further is given by way of information as to what that constitutes. Mrs Pervin’s statement follows closely that of her husband but she adds that she has created social and community ties here.
21. I have considered the decision of the House of Lords in **Huang v SSHD [2007] UKHL 11** where guidance was given that in assessing proportionality there is no legal test of truly exceptional circumstances and the analysis was reaffirmed that was given in **Razgar, R (on the application of) v SSHD [2004] UKHL 27**. Also reaffirmed was the

importance of continuing reliance on established Strasbourg jurisprudence relating to Article 8. I have considered the step-by-step approach set out in **Razgar**. Although the question of removal has yet to be decided following the ruling that the Section 47 of the Immigration, Asylum and Nationality Act 2006 decision was unlawful the decision under appeal interferes with the appellants' right to respect for their private and family life and engages the operation of Article 8. The interference is in accordance with the law and is in the interests of immigration control which although not a legitimate end in itself is a well-established means of protecting the economic wellbeing of the country.

22. I find that the decision is a proportionate one. The appellants when they arrived in this country would have had no expectation that they would be entitled to remain in the UK absent their being able to comply with the requirements of the Rules. Their private and family life may be enjoyed together elsewhere and presumably in their home country of Bangladesh. They will have built up their private lives here, but I have scant detail about them. There is little detail either about their business and in any event no reasons are shown as to why they would be unable to carry on in business in a different way perhaps in Bangladesh.
23. The circumstances therefore are such that I find that the decision is proportionate to the legitimate public end sought to be achieved and thus these appeals fail under the Immigration Rules and also on human rights grounds also.

Decision

- (i) The First-tier Judge's decision is set aside for the reasons already given.
- (ii) These appeals are dismissed under the Immigration Rules and under Article 8 ECHR.
- (iii) No anonymity direction has been made previously and the circumstances do not appear to warrant one being made now and therefore I do not make such a direction.

Signed

Date

Upper Tribunal Judge Pinkerton