



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

Appeal Number: IA/06814/2014

**THE IMMIGRATION ACTS**

**Heard at Manchester  
On 16<sup>th</sup> April 2015**

**Decision & Reasons Promulgated  
On 1<sup>st</sup> May 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BAIRD**

**Between**

**MR TARUM SAINANI  
(ANONYMITY DIRECTION NOT MADE)**

**Appellant**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the Appellant: Ms Pledger – Legal Representative of Latitude Law  
For the Respondent: Ms C Johnson – Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State for the Home Department against the Determination of First-tier Tribunal Judge De Haney issued on 21<sup>st</sup> July 2014 allowing under the Immigration Rules the appeal of the Appellant against the decision of the Respondent made on 13<sup>th</sup> January 2013 to refuse to vary his leave to remain and to give directions for his removal under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The Appellant had applied for leave to remain as a Tier 1 (Entrepreneur) Migrant under the Points-Based System. The Secretary of State had refused the application because the Appellant had failed to supply a required letter from the financial institution which held the account of the third party who had supplied funds to the Appellant for his business. There was also an issue with evidence to show that the business was actively trading. Judge De Haney said that because the evidence before him was overwhelming, he was satisfied that the Appellant is in business as claimed, that he is trading and has been since 1<sup>st</sup> January 2012 and that he has access to the £50,000 required under the Rules. He accepted that at the date of application the Appellant had been unable to submit the required financial statement in the required format showing that he had access to the £50,000 but an explanation was given for this both in the application and subsequently. He found that the Respondent had failed to exercise her discretion under paragraph 245AA (the flexibility policy) and that if that discretion had been exercised the evidence could have been produced by the Appellant which would have shown that he fulfilled the requirements of the Immigration Rules. He expressed the view that the whole point of the Respondent incorporating the flexibility policy into the Immigration Rules was surely so that genuine applicants like the Appellant “would not be disadvantaged by the complex and stifling minutiae which has been incorporated into all these appendices”. He concluded:

“I see little point in remitting the decision to the Respondent as being ‘unlawful’ because this would simply be a further handicap to the Appellant progressing with his business and put the Respondent to extra expense in an already overburdened and bureaucratic system.”

3. He allowed the appeal under the Immigration Rules.
4. Permission to appeal was granted on 18<sup>th</sup> November 2014 by a Judge of the Upper Tribunal, permission having been refused by a Judge of the First-tier Tribunal on 11<sup>th</sup> August 2014. The First-tier Tribunal had taken the view that the Grounds of Appeal amount only to a disagreement with the Judge’s findings that had the Respondent taken account of the flexibility policy the evidence that could have been produced by the Appellant would have shown that he fulfilled the requirements of the Immigration Rules. The view of the Upper Tribunal was that it is arguable that the Judge erred in his conclusion in relation to the applicability of the evidential flexibility Rule as contended in the grounds seeking permission. Also arguable was the submission that in the alternative, rather than allowing the appeal outright, the matter should have been remitted to the Respondent for a lawful decision to be made.
5. It is submitted in the grounds seeking permission that Judge De Haney erred in failing to properly apply the Immigration Rules and the related flexibility policy. Reliance is placed on the decision of the **Secretary of State for the Home Department v Rodriguez [2014] EWCA Civ 2** in which the Court of Appeal said that requests by the Home Office for information should not be speculative and there must be sufficient reason to believe that any evidence requested exists. It was also

stated that the policy is 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 refusal after substantive consideration. It is submitted that the Secretary of State was not required to contact the Appellant and offer him the opportunity to provide further documentation as there was not sufficient reason to believe that satisfactory documents existed. Paragraph 245AA(b) is then set out in the grounds, the submission being that the deficiencies in the application in this case do not fall within the scope of 245AA. The appeal should have been dismissed.

6. With regard to the decision of the Judge not to remit the case back to the Respondent it is submitted that Judge De Haney wrongly took into account evidence submitted after the decision had been made and this is contrary to Section 85A of the Nationality, Immigration and Asylum Act 2002. The provisions of Section 85A(4) are set out. The application was a Points-Based System application and as such fell within Exception 2 under Section 85A. The Tribunal was only able to consider evidence adduced by the Appellant if it was submitted in support of and at the time of making the application. The Judge erred in failing to properly apply Section 85A.
7. At the hearing before me Ms Pledger submitted that there was only one document missing. The bank statements showed the funds so the Secretary of State had the necessary information although she did not have evidence of it. She said that when the Appellant, with the help of his representative, was submitting the application he made the Secretary of State aware that he did not have the necessary letter but that he and his representatives were trying to get it. The position of Ms Johnson was that the Rules have to be met at the date of application and they were not. Ms Pledger responded that it would not have been a speculative request because the information was there. It was a genuine case - there was just no letter from the bank and the Home Office should have asked for it.
8. I do have some sympathy with the Appellant in this case but I cannot uphold the decision of Judge De Haney because I do not believe it to be correct. It is the case that the Rules are complex, strict and often difficult to understand. That does not mean however that the provisions are unnecessary or indeed overly harsh. The Rules relating to the provision of funds by a third party are of necessity particularly strict. I accept that there was some evidence of funds evidence before the Secretary of State but there was also an acceptance by the Appellant's representatives that the provisions of the Rules could not be met at the date of application and Ms Johnson made the reasonable point that the application should perhaps not have been made until all the documentation could be produced. She said that the timing of the application was crucial and I agree with that. I agree with the comments made in the grounds relative to Section 85A. The question in this case is whether or not the Secretary of State ought to have exercised the flexibility policy. Ms Johnson was not averse to the case being remitted to the Secretary of State so that a lawful decision can be made and said that this could be done reasonably quickly. It seems to me that Judge De Haney did not have jurisdiction to allow the appeal as he did. It was for the Secretary of State to decide whether or not to invoke the flexibility policy not for

a Judge of the First-tier Tribunal to say that it should have been invoked and that had it been, the Secretary of State would have been obliged to allow the appeal.

9. I find that there is a material error of law in the determination of the Judge in allowing the appeal and failing to properly apply Section 85A. In the circumstances I see no point in the appeal being reheard but I shall remit the application to the Secretary of State so that a lawful decision including consideration of the flexibility policy as set out in 245AA can be made.

**Notice of Decision**

The appeal is allowed to the extent that it is remitted to the Secretary of State for reconsideration including a decision on the applicability of the flexibility policy as set out in paragraph 245AA of the Immigration Rules.

Signed

Date: 29<sup>th</sup> April 2015

N A Baird  
Deputy Judge of the Upper Tribunal