



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/17803/2013

THE IMMIGRATION ACTS

Heard at Field House
On 2 October 2014

Decision & Reasons promulgated
On 12 May 2015

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Mohammad Mahabubul Haque Khan
(Anonymity order not made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation

For the Appellant: Ms O Omoh of Counsel instructed by Universal Solicitors.

For the Respondent: Ms J Isherwood, Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Morrison promulgated on 28 November 2013 dismissing the Appellant's appeal against the decision of the Respondent dated 30 April 2014 to refuse to vary leave to remain and to remove him from the UK pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.

Background

2. The Appellant is a national of Bangladesh born on 10 January 1977. His (undisputed) immigration history is set out in the cover sheet to the Respondent's bundle before the First-tier Tribunal, and is also summarised at paragraph 7 of the decision of the First-tier Tribunal: it is unnecessary to reproduce the history again here – I make reference to such matters as is incidental for the purpose of this document.
3. On 30 October 2012 during the currency of his previous leave, the Appellant made an application for leave to remain as a Tier 1 (Entrepreneur) Migrant. The application was refused for reasons set out in a combined 'reasons for refusal' letter and Notice of Immigration Decision dated 8 May 2013, with particular reference to paragraphs 245DD(b) and (d). Essentially the Respondent was not satisfied with regard to the supporting evidence supposedly demonstrating that £200,000 was available to invest in business in the UK: the bank documents relied upon by the Appellant were from banks that appeared on Appendix P of the Rules as being banks that did not satisfactorily verify financial document. Further the Appellant was not named on the bank letter from one of the two banks, and had not signed a third party declaration. Additionally it was stated "*in line with paragraph 245DD(l) of the Immigration Rules, [the Respondent had] not carried out an assessment as detailed in paragraph 245DD(h)*".
4. The Appellant appealed to the IAC.
5. For reasons set out in his determination, the First-tier Tribunal Judge dismissed the Appellant's appeal in respect of the application for variation of leave under the Rules, dismissed the appeal on Article 8 grounds, but allowed the appeal in respect of the section 47 removal decision.
6. The Appellant sought permission to appeal which was granted by First-tier Tribunal Judge Parkes on 16 December 2013.
7. The Respondent has filed a Rule 24 response dated 2 January 2014.
8. Although there has been no cross-appeal in respect of the section 47 decision, and although the Rule 24 response raises no issue in respect of the Judge's decision to allow the appeal in this regard, after discussion it was common ground between the representatives before me that the First-tier Tribunal Judge had erred at paragraph 22 in her assessment of the relevant dates. The amendment to section 47 of the 2006 Act brought about by section 51 of the Crime and Courts Act 2013 had effect *from* 8 May 2013 and accordingly the Judge was in error to determine that the decision made on 8 May 2013 had been made on the last day prior to the amendment: plainly it was made on the day on which the amendment came into effect.

Consideration

9. At the outset of the hearing Ms Isherwood indicated that she accepted that both the Respondent and in turn the First-tier Tribunal Judge had been in error in relying upon the appearance of the Appellant's banks in Appendix P of the Rules in

circumstances where the Appellant's application had predated the introduction of the relevant provisions under the Rules. It was accepted that transitional provisions set out in the Statement of Changes in Immigration Rules (HC 760) indicated that - save in respect of certain specified provisions - applications made prior to 13 December 2012 would be decided in accordance with the Rules in force on 12 December 2012. Accordingly the relevant changes by way of the addition of Table 11 to Appendix P were not applicable to the Appellant's application.

10. In consequence it was also acknowledged that the funds in the Sonali bank account were acceptable for the purpose of satisfying the maintenance requirement of the Rules.
11. In such circumstances Ms Isherwood acknowledged that the only relevant 'live' issue remaining was that of the 'third party declaration'. (The relevant document can be found at pages H1 and H2 of the Respondent's bundle before the First-tier Tribunal.)
12. In this context the Respondent stated in the refusal "*You have also not signed the third party declaration which makes such declaration invalid*". This is a reference to the requirements of paragraph 41-SD(b)(i)(3) of Appendix A of the Immigration Rules.
13. The Judge dealt with this issue at paragraph 18. It was noted that it was accepted that the relevant signature was not on the document, and a submission in respect of a change of rules was rejected given this defect. The Judge also rejected a submission in respect of evidential flexibility for reasons set out at paragraph 19. Essentially the Judge found that the nature of the defect was not covered by the provisions of paragraph 245AA of the Rules, and such provisions superseded the decision in **Rodriguez**. (In this context it is clear that the Judge had in mind the decision of the Upper Tribunal, [2013] UKUT 42 (IAC), and not the decision of the Court of Appeal, [2014] EWCA Civ 2, which was handed down on 20 January 2014 - i.e. after the hearing and decision of the First-tier Tribunal herein.)
14. The Appellant's challenge is rooted in the decision of the Upper Tribunal in **Rodriguez**: see paragraph 4 of the Grounds in support of the application for permission to appeal. Necessarily therefore the challenge encounters the difficulty that the approach of the Upper Tribunal was rejected by the Court of Appeal. Further, in so far as it had been contended that the pre-245AA policy persisted notwithstanding the introduction of paragraph 245AA, Mr Momoh acknowledged the difficulty presented by paragraph 2 of the headnote in **Durrani (Entrepreneurs: bank letters; evidential flexibility)** [2014] [UKUT] 295 (IAC), which states - "*The question of whether the policy exists is one of fact. There is no evidence that some policy on evidential flexibility, independent and free standing of paragraph 245AA, survived the introduction of that paragraph in the immigration rules.*"
15. The Judge - rationally and sustainably in my judgement - identified that the defect in the third party declaration was not of a nature encompassed by the terms of paragraph 245AA(b)(i)-(iii). Mr Momoh, however, argued that there had been an amendment to paragraph 245AA incorporating sub-subparagraph (b)(iv) - "*A document does not contain all of the specified information*" - and the Appellant was

entitled to the benefit of that provision. Ms Isherwood, in turn, pointed out that the amendment dated from 1 October 2013 and accordingly did not have effect at the time of either the Appellant's application or the Respondent's decision.

16. I accept Mr Isherwood's submission in this regard and reject that of Appellant. Accordingly I find that the Appellant's challenge to the Judge's assessment of evidential flexibility fails.
17. In any event I am dubious that the failure to provide the appropriate signatures on a document is equivalent to a document not containing "*specified information*". It seems to me to be a defect of a different sort from the omission of information. Accordingly, even if it were otherwise in respect of the applicability of 245AA(b)(iv), I would not be minded to conclude that the Respondent was thereby under an obligation to consider requesting the correct documents.
18. In all such circumstances, notwithstanding the error of approach on the part of the First-tier Tribunal Judge in respect of Appendix P, with reference to section 12(2)(a) of the Tribunal's, Courts and Enforcement Act 2007, I determine that it would not be appropriate to set aside the decision of the First-tier Tribunal in respect of the Immigration Rules because the sustainable conclusion in respect of the third party declaration is sufficient to defeat the Appellant's appeal under the Rules in any event.
19. However, in light of it being common ground between the parties that the Judge erred in respect of section 47, I do set aside the decision in this regard and remake it, dismissing the appeal in this respect also.

Notice of Decision

20. The decision of the First-tier Tribunal contained no material error of law in respect of the decision under the Immigration Rules, and accordingly the decision stands.
21. However, the First-tier Tribunal did err in respect of the section 47 removal decision. The decision of the First-tier Tribunal is set aside in this regard, and I remake the decision. The removal decision was in accordance with the law and the appeal is dismissed.
22. The First-tier Tribunal's decision in respect of Article 8 is unchallenged, and the appeal remains dismissed in this regard.
23. The appeal of Mr Khan is dismissed on all grounds.

Deputy Judge of the Upper Tribunal I. A. Lewis 6 May 2015